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## ORIGINALISM'S PRETENSES

*Eric Berger\**

### ABSTRACT

*When conservatives in the 1980s offered originalism as a constitutional methodology that could limit perceived judicial excesses, they touted its ability to constrain judges to follow the Constitution's fixed, original meaning. Though originalism has changed many times since, its proponents still generally preach these related virtues of fixation and constraint. This symposium contribution reviews recent scholarly developments in originalism and contends that originalism's capacity to fix constitutional meaning and constrain judicial decision making is overstated in both practice and theory.*

*In practice, originalism's many variants provide the ostensibly originalist justice great interpretive flexibility. Originalist justices are methodologically inconsistent, offering an array of arguments rooted in original intentions, understandings, expected applications, and public meanings. The justices also disagree on when originalism should guide outcomes, further adding to its malleability.*

*In theory, the new originalism, which focuses on the text's original public meaning, corrects some of these problems. Nevertheless, it too often falls short of its promises to deliver fixation and constraint. While fixation is possible in some instances, the history and semantic practices surrounding many disputed clauses are too muddled for the interpreter to identify a single, original public meaning. Moreover, many constitutional provisions were framed and ratified during periods of profound intellectual flux, when key constitutional concepts and terms changed shape rapidly. Indeed, the very process of constitution making may have added further indeterminacy, as many members of the Founding and Reconstruction generations understood constitutional language not to provide precise legal guidance but rather open-ended political compromise. As for constraint, many new originalists intelligently concede that their theory constrains only insofar as constitutional construction must not violate the text's original public meaning. However, by requiring such fidelity to the constitutional text, the new originalists, far from cabining judicial discretion, invite justices to revisit settled constitutional precedent. To be fair, other interpretive approaches similarly fail to constrain justices, but originalism's pretense that it captures the Constitution's singular, objective meaning creates an especially misleading illusion of certainty.*

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## INTRODUCTION

When prominent conservatives like Judge Robert Bork and Edwin Meese offered originalism in the 1970s and 1980s as a method of constitutional interpretation that could limit the perceived excesses of the Warren and Burger Courts,<sup>1</sup> they touted its ability to constrain judges to follow the Constitution's fixed, original meaning.<sup>2</sup> Though originalism has changed many times since then, its proponents generally preach these related virtues of "fixation" and "constraint."<sup>3</sup> Indeed, even the "new originalism," which focuses on the original public meaning of the text, as opposed to the subjective intentions of the ratifiers or Framers, often emphasizes these merits.<sup>4</sup> Because originalism *fixes* a constitutional provision's meaning at the moment of its framing or ratification, new originalists argue, judges are *constrained* from supplanting the real Constitution with their own values.<sup>5</sup>

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1 See Keith E. Whittington, *On Pluralism Within Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 70, 72 (Grant Huscroft & Bradley W. Miller eds., 2011) (arguing that when originalist arguments were developed in the 1970s and 1980s, they were "aimed at correcting what critics thought had gone wrong in American constitutional jurisprudence in the postwar period").

2 See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 159 (1990) ("The interpretation of the Constitution according to the original understanding . . . is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people."); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986) (arguing that judicial review is legitimate only when confined to a "jurisprudence of original intention" (emphasis omitted)).

3 See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1372 (2009) ("The core of originalism is the proposition that text and history impose meaningful, binding constraints on interpretive discretion . . ."); Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM*, *supra* note 1, at 12, 36 ("Most originalists agree that courts should view themselves as constrained by original meaning . . .").

4 See Lawrence B. Solum, *We Are All Originalists Now*, in *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1, 4 (Robert W. Bennett & Lawrence B. Solum eds., 2011) (arguing that the fixation thesis and textual constraint thesis "are accepted by almost every originalist thinker").

5 See, e.g., Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 156 (2012) (reviewing JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) and JACK M. BALKIN, *LIVING ORIGINALISM* (2011)) ("The fixation thesis and the constraint principle constitute the core of contemporary originalist thought."). Of course, originalism is also concerned with other facets of constitutional interpretation beyond judges' work. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 17, 279 (2011) (arguing that originalism should also involve interpretations by citizens, executive officials, and members of legislatures). However, because judges in our system ultimately resolve many of our most contentious constitutional disputes, this Article limits its discussion of originalism to judicial decision making.

Originalism has genuine virtue in turning our attention to history and text, and new originalist scholars have developed their theory in a rich and fascinating body of scholarship.<sup>6</sup> Whatever its merits, though, originalism often cannot fulfill its promises of fixation and constraint. Whether fixation and constraint are worthy goals is debatable, of course, but the point here is that originalism, both new and old, fails to attain either. Indeed, the diversity of originalist theories renders originalism very malleable. To be fair, other interpretive approaches similarly fail to constrain the Supreme Court's constitutional decision making, but originalism's pretense that it is different creates an especially misleading illusion of certainty.

This Article reviews recent developments in originalism scholarship with particular attention to the new originalism and its ambitions of fixation and constraint.<sup>7</sup> Part I briefly rehearses problems with originalism generally, as it is practiced, arguing that originalism's malleability undermines its capacity to fix "correct" constitutional meaning and constrain judicial choices. Because justices disagree about how and when to engage in originalist interpretation, we should be skeptical that originalism in practice limits judicial decision making any better than other approaches to constitutional decision making. Part II turns to originalism in theory, focusing on the new originalism. This Part contends that notwithstanding the new originalism's great theoretical sophistication, it too will often fail to fix an objective constitutional meaning that meaningfully constrains judges in most litigation. While fixation is possible in some instances, the history and semantic practices surrounding many disputed clauses are too muddled for the interpreter to identify an objective, original public meaning. Moreover, many constitutional provisions were framed and ratified during periods of profound intellectual flux, when key constitutional concepts and terms changed shape, thus making it difficult or impossible to locate a single semantic meaning. As for constraint, many new originalists intelligently concede that

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<sup>6</sup> I use the term "originalism" to refer generally and collectively to the various strains of the theory. When discussing a single variant of originalism, I specify the particular strand at issue.

<sup>7</sup> Due to obvious space limitations, this Article cannot address all relevant issues here and, instead, focuses on the problems of constraint and fixation. There is a vast literature offering broader critiques of originalism, both old, *see, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985), and new, *see, e.g.*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

their theory constrains only insofar as constitutional construction must not violate the Constitution's original public meaning. However, by requiring such fidelity to the constitutional text, the new originalists, far from cabining judicial discretion, invite judges to revisit seemingly settled constitutional precedent. The new originalism's contributions to our scholarly discourse are considerable, but, like the old originalism, its capacity to accurately fix constitutional meaning and constrain judicial decision making is overstated.

## I. ORIGINALISM'S MALLEABILITY

### A. *Originalism's Variants*

Originalism, in practice, fails to fix an objectively correct constitutional meaning that constrains judges in large part because there is disagreement about what originalist interpretation entails.<sup>8</sup> These variations yield interesting discussions among legal academics, who can debate the relative merits of different approaches. Judges, however, are typically less immersed in the academic literature and are often less theoretically self-conscious about which version of originalism they are applying. As a result, ostensibly originalist judges approach the theory eclectically, drawing on useful historical or textual evidence to support a desired conclusion. Such eclecticism, whether among or within theories of interpretation, is not necessarily bad. Most judges approach constitutional interpretation with a range of interpretive approaches.<sup>9</sup> But, theoretical eclecticism also gives judges leeway to find the approach that best supports a preferred outcome.<sup>10</sup>

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8 See, e.g., Colby & Smith, *supra* note 7, at 244 ("A review of originalist work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.").

9 See, e.g., *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (employing numerous kinds of constitutional arguments); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 751 (1999) (enumerating the various constitutional arguments in *M'Culloch*); Bradley P. Jacob, *Back to Basics: Constitutional Meaning and "Tradition"*, 39 TEX. TECH L. REV. 261, 262 (2007) ("Over more than two centuries of interpreting the United States Constitution, the Supreme Court has developed a mass of tests, standards, interpretations, and levels of scrutiny . . .").

10 See, e.g., Richard Primus, *The Functions of Ethical Originalism*, 88 TEX. L. REV. 79, 79 (2010) ("Supreme Court Justices frequently divide on questions of original meaning, and the divisions have a way of mapping what we might suspect are the Justices' leanings about the merits of cases irrespective of originalist considerations.").

Within the family of originalist theories, judges can consult, among others, original intentions, original understandings, original expected application, and original public meaning.<sup>11</sup> These variants, roughly speaking, share an interest in fixing constitutional meaning based on the relevant historical and/or linguistic evidence, but each variant asks a different question. Though scholars are not entirely consistent when using these terms, generally speaking, original-intentions originalism focuses on the intentions of the Constitution's Framers (or the framers of subsequent amendments, where relevant).<sup>12</sup> Original-understanding originalism, by contrast, cognizant that the Constitution acquired legal legitimacy not in Philadelphia in 1787, but through the ratifying conventions,<sup>13</sup> looks to the understandings of the Constitution's ratifiers.<sup>14</sup> Original-expected-applications originalism, a variant of the first two, asks how Framers or ratifiers would have expected constitutional provisions to be applied to particular issues.<sup>15</sup> Public-meaning originalism differs more sharply from the first three, focusing not on the subjective views of the Framers or ratifiers,<sup>16</sup> but rather on the objective semantic content of the Constitution's text at the moment of ratification.<sup>17</sup>

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11 This list of originalism's variants is hardly exhaustive. See, e.g., James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171, 1174 (2012) (listing varieties of originalism). The list, in fact, continues to grow. See, e.g., BALKIN, *supra* note 5, at 3 (proposing a theory of "framework originalism, which views the Constitution as an initial framework for governance that sets politics in motion, and that Americans must fill out over time through constitutional construction"); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 760 (2009) ("[T]he Constitution should be interpreted in accordance with the interpretive rules that were deemed applicable at the time.").

12 See, e.g., Edwin Meese, III, Attorney Gen., Speech Before the American Bar Association (July 9, 1985), available at <http://www.fed-soc.org/resources/page/the-great-debate-attorney-general-ed-meese-iii-july-9-1985> (urging attention to the "original intention of those who framed" the Constitution).

13 See U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution . . ."); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 54–55 (1998) (explaining that the delegates to the Constitutional Convention exceeded their mandate in drafting the Constitution and that Article VII requiring nine states' ratification violated Article XIII of the Articles of Confederation, which required unanimity for any alteration to the Articles).

14 See Solum, *supra* note 5, at 12, 19.

15 See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296 (2007) ("Original expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art).").

16 See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 100 (2004) (explaining originalism as a "commitment to a written text"); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923,

Of course, despite their differences, these inquiries can help inform each other and will sometimes point towards the same outcome. For example, evidence of the Framers' intentions for a particular clause may help establish that the ratifiers understood the provision to mean the same thing, especially when particular Framers made their case to the people during the ratifying debates.<sup>18</sup> Similarly, evidence of the Framers' intentions or the ratifiers' understanding of a particular provision is a data point that can help discern the provision's original public meaning; the Framers and ratifiers, after all, presumably often relied on public meanings when they used words.<sup>19</sup>

That said, intentions, understandings, meanings, and expected applications are analytically distinct concepts, which can sometimes point towards different outcomes. Though commentators and judges often fail to distinguish between the Framers' intentions and the ratifiers' understandings, the two can diverge. For example, several Framers at the Constitutional Convention suggested that treaties be self-executing (i.e., that treaties would not require statutes implementing them). Many members of the state ratifying conventions apparently did not share that view.<sup>20</sup> The original-intentions and original-understandings originalist, then, may approach this problem differently.

Even when original intentions, understandings, and expected applications coincide, they can diverge from original public meanings. Justice Antonin Scalia and others have argued sometimes that both the framers and ratifiers of the Fourteenth Amendment expected the Equal Protection Clause to protect against racial discrimination but not sex discrimination.<sup>21</sup> Contemporary Equal Protection Doctrine

933 (2009) (explaining that the core idea of public-meaning originalism is that "the original meaning of the Constitution is the original *public* meaning of the constitutional text").

17 See Lawrence B. Solum, *Semantic Originalism* 23 (Univ. Ill. Coll. Of Law Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008) (arguing that the semantic content of a constitutional provision is fixed at the time of framing and ratification); *infra* Part II.A.

18 See Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 820–23 (2007) (arguing that some "Federalist Papers expressly purport to describe the original intent of the Framers" and that "[e]ven if the Federalist Papers did not influence the ratification debates, the ratification debates may have influenced the Federalist Papers").

19 See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 464 (2013).

20 See Maggs, *supra* note 18, at 806 (arguing that evidence suggests that the Framers at the Constitutional Convention and the participants in the state ratifying conventions disagreed on whether treaties would be self-executing).

21 See, e.g., Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151, 1180–81 (2013) ("Justice Scalia . . . has repeatedly stated that the Court's gender discrim-

clearly extends to sex discrimination, but it is certainly plausible that neither the framers nor the ratifiers of the Fourteenth Amendment understood themselves to be protecting women from sex discrimination, which was widely accepted at the time.<sup>22</sup> A semantic originalist, however, could conclude that the text's original public meaning differed from the framers' and ratifiers' original expected application. The text of the Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>23</sup> Women are plainly "persons," and therefore must be afforded "equal protection of the laws" under either contemporary or 1868 linguistic conventions. One could contend that "equal protection of the laws" is a term of art referring only to racial discrimination, so that all persons—women and men—would be protected against race discrimination, but not sex discrimination. The more persuasive reading, however, as Steven Calabresi and Julia Rickert conclude, is that the Fourteenth Amendment "bans all systems of caste and of class-based lawmaking,"<sup>24</sup> including, of course, sex discrimination. We, thus, have an instance where original expected application likely yields an opposite outcome from original public meaning.<sup>25</sup> Originalism's variants, then, give the ostensibly originalist

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ination doctrine is wrong as an original matter because the Framers of the Fourteenth Amendment clearly did not intend the Equal Protection Clause to protect women from discrimination."); Terry Eastland, Op-Ed., *Proper Interpretation of the Constitution*, N.Y. TIMES, Jan. 9, 1986, at A23 (arguing that "a jurisprudence of original intention" would not permit elevated scrutiny for sex-based classifications). In fairness, Justice Scalia more recently said that "of course" the Fourteenth Amendment covers women. See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 6, 2013, <http://nymag.com/news/features/antonin-scalia-2013-10>.

22 See Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1230 (2000) ("The [Fourteenth] Amendment [during Reconstruction] was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women."); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 31–32 (2003) ("[Sex discrimination law under Section 1 of the Fourteenth Amendment] derived neither from the abstract text of the Equal Protection Clause nor from the original intent of the Framers of the Fourteenth Amendment.").

23 U.S. CONST. amend. XIV, § 1.

24 Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 11 (2011).

25 One could also see the disparity here as a problem of levels of generality. The reasonable observer in 1868 may have understood the Fourteenth Amendment, at a broad level of generality, to eliminate all systems of caste and simultaneously believed, at a narrower level of generality (admittedly paradoxically), that it said nothing about sex discrimination. It is beyond the scope of this Article to explore this complication, but it is worth noting that originalism alone cannot find neutral principles with which to determine the level of generality. See FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 41 (2013)

judge substantial leeway to justify a preferred outcome on originalist grounds.<sup>26</sup>

Of course, were an originalist judge truly committed to employing originalism as a means of self-restraint, she could select a single variant and consistently apply only it.<sup>27</sup> In practice, however, neither the Supreme Court, as an institution, nor individual Justices have sought such consistency. While original-public-meaning originalism has emerged as the favored variant in the academy today,<sup>28</sup> even the judges most committed to originalism have arrived at no such methodological consensus.<sup>29</sup> The result is that even when the Justices pursue an originalist inquiry, there remains disagreement, albeit sometimes unarticulated, about which version to apply.

An oft-cited case pitting different variants of originalism against each other is *District of Columbia v. Heller*.<sup>30</sup> The Second Amendment reads, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>31</sup> The core question in *Heller* was whether that right to bear arms is limited to militia service or rather protects an individual right unconnected with militia service.<sup>32</sup> The Court, in a 5-4 decision, held that the Second Amendment was not limited to militia service, but extended to other traditional lawful purposes, such as self-defense within the home.<sup>33</sup>

Scholars have hailed *Heller* as a “triumph of originalism” because both Justice Scalia’s majority opinion and Justice John Paul Stevens’s dissent engaged in originalist reasoning (and, even Justice Stephen

(arguing that in order to succeed, originalism requires a way to measure the proper level of generality).

26 See Colby & Smith, *supra* note 7, at 292 (arguing that judges who invoke originalism have significant discretion in molding their approach to create results consistent with their own ideologies).

27 See *infra* Part II.A.

28 See Berman, *supra* note 7, at 4 (“[M]any self-described originalists have shifted their allegiance from original intent to original public meaning.”); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 703–04 (2009) (arguing that in originalist circles, the new originalists’ efforts to discover the “objective meaning” of the Constitution have carried the day recently).

29 See Colby & Smith, *supra* note 7, at 293–305 (arguing that three ostensibly originalist judges—Justice Scalia, Justice Thomas, and Judge Bork—all choose the version of originalism in a given case that allows them to reach their desired result).

30 554 U.S. 570 (2008).

31 U.S. CONST. amend. II.

32 *Heller*, 554 U.S. at 577.

33 *Id.* at 635.

Breyer's dissent relied substantially on historical evidence).<sup>34</sup> But, *Heller* also highlights originalism's malleability. Indeed, *Heller* calls attention to the fact that different originalist inquiries can yield dramatically different results. As Lawrence Solum has argued, Justices Scalia and Stevens approach originalism differently in *Heller*.<sup>35</sup> Whereas Justice Scalia's majority opinion purports to be a study of the Second Amendment's original public meaning, focusing on the text's meaning at ratification,<sup>36</sup> Justice Stevens's dissent often focuses on the purposes animating the Second Amendment and the intentions of its drafters.<sup>37</sup> For example, as Professor Solum points out, Justice Stevens emphasized that "[t]he history of the adoption of the Amendment . . . describes an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger."<sup>38</sup> Justice Stevens, here, is examining the Framers' and ratifiers' *intentions* behind the Second Amendment. Justice Scalia, by comparison, closely examines the language of the Second Amendment and eighteenth-century usage, studying, for instance, period dictionaries to contend that the Second Amendment term "keep and bear arms" did not solely connote use of weapons in the military context.<sup>39</sup> While intentions and meaning sometimes coincide, the 5-4 originalist split in *Heller* makes some sense if we recognize that the majority and dissent were simply engaged in different inquiries.

It is also significant, however, that neither Justice Scalia's nor Justice Stevens's originalism is methodologically pure. While Justice Scalia does devote a significant portion of his opinion to public-meaning originalism, his choice of sources sometimes belies that ap-

<sup>34</sup> See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 191 (2008) (citing scholars' celebration of *Heller*'s use of originalism).

<sup>35</sup> See Solum, *supra* note 16, at 957 (arguing that Justice Scalia's opinion focused on the semantic meaning of the operative clause while Justice Stevens's opinion focused on the purpose or teleological meaning of the Second Amendment).

<sup>36</sup> See *Heller*, 554 U.S. at 576 ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

<sup>37</sup> See Solum, *supra* note 16, at 957 (arguing that the disagreement between Justices Scalia and Stevens in *Heller* roughly "corresponds to the difference between original intentions originalism and original meaning originalism").

<sup>38</sup> *Id.* (quoting *Heller*, 554 U.S. at 662 (Stevens, J., dissenting)) (internal quotation marks omitted).

<sup>39</sup> See *Heller*, 554 U.S. at 581-92 (citing, inter alia, Samuel Johnson's dictionary and eighteenth-century statutes and state constitutions); see also Solum, *supra* note 16, at 955-56 (discussing Justice Scalia's *Heller* opinion).

proach. For example, as Professor Saul Cornell argues, though Justice Scalia purports to examine the role of preambles in eighteenth-century legal texts, most of his sources are from the nineteenth century, which treated preambles differently.<sup>40</sup> Justice Scalia also cites post-Civil War legislation and commentary.<sup>41</sup> This evidence may be relevant to the incorporation question that the Court would later confront in *McDonald v. City of Chicago*,<sup>42</sup> but it is, at best, tangential to the Second Amendment's original meaning, unless one assumes (incorrectly) that meanings cannot change over time.<sup>43</sup> Whatever Justice Scalia's motives for selecting this evidence,<sup>44</sup> his apparent willingness to conflate eighteenth- and nineteenth-century legal conventions suggests either an uncharacteristic attention to the evolution of constitutional concepts or a surprising inattention to proper historical sources.

Likewise, though portions of the dissent seem devoted to purpose, rather than meaning, Justice Stevens also includes some original-public-meaning analysis. For example, Justice Stevens examined several state declarations of rights to contend that the operative clause, "keep and bear arms," in eighteenth-century constitutional texts connoted "military uses of firearms."<sup>45</sup> It is true that Justice Stevens sometimes articulates his conclusions in terms of the Framers' "focus," rather than the language's meaning.<sup>46</sup> Such arguably unfortunate phrasing is part of the reason some scholars have characterized his dissent as concerned with purpose, rather than meaning.<sup>47</sup> Nevertheless, this attention to the Framers' "focus" should not hide the fact that, in comparing the language of similar eighteenth-century consti-

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40 See Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 632–33 (2008).

41 *Heller*, 554 U.S. at 614–19.

42 130 S. Ct. 3020 (2010).

43 See Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 613 (2008) (noting changes in the First Amendment's meaning during the early decades of its existence); cf. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 137–294* (1998) (discussing how conceptions of certain rights changed during the Reconstruction period).

44 Cf. Cornell, *supra* note 40, at 63334 (arguing that Justice Scalia's choice of sources in *Heller* was opportunistic).

45 *Heller*, 554 U.S. at 642–43 (Stevens, J., dissenting).

46 See, e.g., *id.* at 643 (citing state declarations of rights to argue "that the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear Arms' was on military uses of firearms").

47 See, e.g., Solum, *supra* note 16, at 957.

tutional texts, Justice Stevens is also examining revolutionary-era linguistic conventions, thereby examining original public meaning.<sup>48</sup>

To this extent, *Heller* demonstrates that Justices can disagree both on originalist methodologies and on the proper interpretation within one methodology, thus raising questions about originalism's capacity to identify the correct Constitution with which to constrain judges. Indeed, *Heller's* 5-4 split suggests that originalism cannot deliver the lost ark of objectivity. From this perspective, far from emerging triumphant in *Heller*, originalism "struck out as an objective methodology."<sup>49</sup>

Indeed, *Heller* offers but one example of this judicial inconsistency. Justice Scalia has been the Court's most vocal champion of original-public-meaning originalism.<sup>50</sup> Nevertheless, he hardly follows that interpretive methodology consistently himself. For example, he has argued that the Eighth Amendment's clause prohibiting "cruel and unusual punishment" binds future generations to society's conceptions of cruelty in 1791,<sup>51</sup> even though the word "unusual" seems to invite a comparative inquiry into contemporary punishment practices.<sup>52</sup> As Jack Balkin has pointed out, Justice Scalia's argument here is rooted not in original public meaning, but in original expected application, suggesting that even Justice Scalia, the new originalism's most prominent judicial advocate, does not always heed the distinctions between its numerous variants.<sup>53</sup>

Justice Scalia has also authored or joined several opinions which hold states immune from suits by their own citizens,<sup>54</sup> even though

48 See, e.g., *Heller*, 554 U.S. at 647 (Stevens, J., dissenting) (citing I S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755)).

49 Daniel O. Conkle, *Judicial Activism and Fourteenth Amendment Privacy Claims: The Allure of Originalism and the Unappreciated Promise of Constrained Nonoriginalism*, 14 NEXIS 31, 36 (2009) (internal quotation marks omitted).

50 See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY BY ANTONIN SCALIA 3, 37-38 (Amy Gutmann et al. eds., 1997) (arguing that the Constitution should be interpreted according to the original meaning of the text).

51 See Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 50, at 129, 140; see also *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991) (Scalia, J., majority opinion) (noting that in the Eighth Amendment context, "[t]he actions of the First Congress . . . are of course persuasive evidence of what the Constitution means").

52 See Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 261 (2009) ("[T]he words 'cruel and unusual' invite a comparative inquiry.").

53 See Balkin, *supra* note 15, at 296 ("Scalia's version of 'original meaning' is not original meaning . . . but actually a more limited interpretive principle, what I call *original expected application*.").

54 See, e.g., *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that the suit was barred by the state's Eleventh Amendment immunity); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S.

the text of the Eleventh Amendment limits such immunity to suits “commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>55</sup> One might defend these votes on several grounds, such as the fact that the Eleventh Amendment does not explicitly deny states immunity in suits brought by their own citizens. In light of this textual ambiguity, one could cite original history favoring a broader state sovereign immunity or defer to precedent protecting states against suits prosecuted by their own citizens.<sup>56</sup> These are not crazy arguments, but they are not new-originalist arguments. To the contrary, given what John Manning calls the text’s “carefully drawn alignment of parties,”<sup>57</sup> the better new-originalist reading is that state sovereign immunity (whether newly granted or pre-existing in Article III) only extends to those suits specifically identified by the Amendment’s text.<sup>58</sup>

Of course, judicial inconsistency does not necessarily reflect a flaw in the theory itself.<sup>59</sup> But, the fact that originalism is sufficiently open-ended so as to encompass these (and other) approaches suggests that its ability to constrain is overstated. Given the significant judicial and scholarly attention to originalism during the past few decades, its failure to limit judicial choices in practice should cause us to question whether it can, in fact, achieve such a thing.<sup>60</sup>

### B. *Originalism’s Implementation*

There is also substantial disagreement about how to implement originalism—that is, on when and how originalism should provide a

261, 269 (1997) (same); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (same); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781–82 (1991) (holding that a convention did not surrender the state’s immunity).

<sup>55</sup> U.S. CONST. amend. XI.

<sup>56</sup> *See* *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (“That a State cannot be sued by a citizen of another State, or of a foreign state . . . is clearly established by the decisions of this court in several recent cases.”); *infra* Part II.B.

<sup>57</sup> John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *YALE L.J.* 1663, 1666 (2004).

<sup>58</sup> *See id.* at 1723 (“A venerable maxim of construction holds that when a specific and a general provision address the same subject, the specific governs the general.”).

<sup>59</sup> *See* Lawrence B. Solum, *Living with Originalism, in* CONSTITUTIONAL ORIGINALISM, *supra* note 4, at 143, 163 (noting that objections to particular judges’ applications of originalism is not a sound objection to the theory itself); *infra* Part II.A.

<sup>60</sup> *See generally* CROSS, *supra* note 25, at 73–151; JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 7 (1996) (noting that the terms “meaning,” “intention,” and “understanding” “are often used loosely and synonymously, at some cost to the clarity that [originalism] ostensibly seeks”).

rule of decision. For instance, originalist-minded Justices disagree about whether originalist analysis is appropriate in every case or just some cases.<sup>61</sup> There is similar disagreement about whether originalism should be the sole guide to constitutional decision making or one of many. These disagreements have been explored by other scholars<sup>62</sup> but are worth revisiting briefly to emphasize that even judges committed to originalism do not agree on how or when to apply it.

Justices Scalia and Clarence Thomas are the two current Justices most inclined towards originalism, but they approach the theory quite differently. Their disagreement about the incorporation of the Second Amendment in *McDonald v. City of Chicago*<sup>63</sup> well illustrates the difference. Both Justices agreed with Justice Samuel Alito's majority opinion that the Second Amendment right announced in *Heller* should be incorporated to apply against the states. Justice Thomas, however, wrote a bold concurrence in which he rejected decades of doctrine analyzing incorporation through the Due Process Clause of the Fourteenth Amendment.<sup>64</sup> Instead, he contended, on originalist grounds, that "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."<sup>65</sup> By contrast, Justice Scalia, who once professed to be a "faint-hearted originalist,"<sup>66</sup> concurred separately, writing that "[d]espite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights because it is both long established and narrowly limited."<sup>67</sup> In other words, both Justices disapproved of incorporation through the Due Process Clause, but only one was willing actually to abandon that well-settled doctrine. Even originalists, then, disagree on when originalist

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61 Cf. Berman, *supra* note 7, at 22 ("Originalism proper is strong originalism—the thesis that original meaning either is the *only* proper target of judicial constitutional interpretation or that it has at least lexical priority over any other candidate meanings the text might bear . . .").

62 See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); *infra* notes 81–87.

63 130 S. Ct. 3020 (2010).

64 See *id.* at 3060 (Thomas, J., concurring) ("[T]he reason the Framers codified this right to bear arms in the Second Amendment . . . was the very reason citizens could not enforce it against States through the Fourteenth.").

65 *Id.*

66 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). Justice Scalia recently "repudiated" that self-description, saying that he tries to be a "stouthearted" originalist. See Senior, *supra* note 21.

67 *McDonald*, 130 S. Ct. at 3050. (Scalia, J., concurring) (internal quotation marks omitted).

principles should decide a case.<sup>68</sup> As Professor Michael C. Dorf puts it, “An inconsistent originalism that accommodates change sometimes but not always thereby sacrifices originalism’s claim to constrain judges and its claim to be the exclusive legitimate source of interpretive guidance.”<sup>69</sup>

Another variable is the clarity of the original meaning. Many people would agree that where the constitutional text is very clear, it should presumptively provide a legally binding rule.<sup>70</sup> Hence, there is virtually unanimous agreement that Article II, Section 1, clause 5 requires that the President of the United States be at least thirty-five years old.<sup>71</sup> No reasonable interpretive gloss can disrupt sufficiently that plain meaning so as to alter the Article II rule.<sup>72</sup>

However, even the originalist Justices have failed to explain how the relative clarity of the original meaning should affect the Court’s willingness to rely on originalist analysis. One could take the view that any reasonably clear and precise constitutional text should be treated as a binding rule.<sup>73</sup> Neither the Court nor the originalist Justices, however, have adopted that approach. For example, the Court’s free speech doctrine departs from the First Amendment’s plain text in two significant ways. The First Amendment reads, “Congress shall make *no* law . . . abridging the freedom of speech.”<sup>74</sup> Interpreted strictly, the Amendment forbids all congressional abridge-

68 Cf. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 772 (1988) (“[I]f the Court legitimately may prevent inquiry into original understanding in order to *maintain* transformative change, does this concession also license prospective disregard of original understanding when the Court is satisfied that change is necessary to maintain systemic equilibrium?”).

69 Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2036 (2012) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011) and DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010)).

70 See Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI-KENT L. REV. 211, 221 (1988) (“[Some] interpreters . . . treat the text as the overriding source where it speaks clearly . . .”). *But see infra* notes 195–204 and accompanying text.

71 See U.S. CONST. art. II, § 1, cl. 5 (“[N]either shall any Person be eligible to that Office [of the President] who shall not have attained to the Age of thirty five Years . . .”).

72 See Lee J. Strang, *Originalism and the “Challenge of Change”: Abducted-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 949 (2009) (arguing that this clause is “relatively determinate”). *But see* Robert W. Bennett, *Originalism and the Living American Constitution*, in CONSTITUTIONAL ORIGINALISM, *supra* note 4, at 78, 85–86 (noting that different cultures calculate age differently).

73 See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269 (2005) (“Where a determinate original meaning can be ascertained and is inconsistent with previous judicial decisions, these precedents should be reversed and the original meaning adopted in their place.”).

74 U.S. CONST. amend. I (emphasis added).

ments of speech. Of course, as most law students know, the Court's free speech doctrine is not so absolute, permitting some speech restrictions.<sup>75</sup> Moreover, despite the text's clarity, the doctrine extends beyond "Congress" to the executive branch (and to the state governments through incorporation doctrine).<sup>76</sup> The originalists on the Court have not attempted to reconcile apparently clear textual mandates with contrary precedent.

Another puzzle for implementing originalism in practice is whether to "translate" original meaning to a contemporary world in which circumstances have dramatically changed.<sup>77</sup> How should the faithful originalist apply the Founding generation's views to a radically different world?<sup>78</sup> One might imagine a range of possible approaches.<sup>79</sup> At one extreme, a Justice might try to follow the original intended application of the relevant provision, trying to decide the case today as it would have been decided at the moment of the provision's ratification.<sup>80</sup> An alternative approach, as Lawrence Lessig suggests, would adjust the literal text to preserve its meaning and purpose in light of contextual changes.<sup>81</sup>

For example, our Constitution's balance between state and federal powers is deeply contested, but both sides generally agree that Article I granted some authority to the federal government and left authority over local affairs to state and local governments. The Commerce Clause allocates some of this power, empowering the federal government to "regulate Commerce . . . among the several states."<sup>82</sup> A key question in our federalism is just how much authority the Commerce Clause confers upon Congress. An originalist could explore this question in different ways. One approach would be to limit Congress's commerce authority today to the precise powers it enjoyed when the Constitution was first ratified in 1788, a position Justice

<sup>75</sup> See *infra* notes 72, 195, and accompanying text.

<sup>76</sup> See *Gitlow v. New York*, 268 U.S. 652, 664 (1925) (deciding whether a statute, as applied by state courts, violated the Due Process Clause).

<sup>77</sup> See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 22 (2010) ("This basic problem—what do you do when circumstances change?—can occur whenever someone has an obligation to follow instructions given by another person and cannot communicate with the person who gave the instructions."); Lessig, *supra* note 62, at 1201 ("In trying to find equivalents between two relatively autonomous systems of meaning, the translator—despite her traditional mechanic guise—must *judge* how the gaps will be filled.").

<sup>78</sup> See David E. Strauss, *The Death of Judicial Conservatism*, 4 *DUKE J. CONST. L. & PUB. POL'Y* 1, 3 (2009) (discussing the ways that Justices can interpret the Constitution).

<sup>79</sup> See generally Lessig, *supra* note 62.

<sup>80</sup> See *id.* at 1171 (explaining what strict originalist interpretation entails).

<sup>81</sup> *Id.* at 1174–82.

<sup>82</sup> U.S. CONST. art. I, § 8, cl. 3.

Thomas has suggested.<sup>83</sup> A different approach would be to recognize that the scope of the national economy and interstate commerce has increased dramatically since the eighteenth century and to hold that the scope of Congress's commerce authority necessarily expands in proportion to those changes.<sup>84</sup> In other words, as the markets operating on a national scale grew, so too should the "predicate for federal power."<sup>85</sup>

Both the "original-intended application" and the translated "original-proportion-to-the-national-economy" approach can fairly claim to be originalist, but the Justices have offered no approach for determining which originalism is more legitimate. Indeed, despite over three decades of great judicial and scholarly attention to originalism, the Justices' originalism is badly under-theorized, barely acknowledging these kinds of questions, let alone wrestling with them honestly and systematically.<sup>86</sup> Given the Court's inattention to these basic methodological questions, it is hard to take seriously the contention that originalism in practice fixes the "correct" Constitution and constrains judicial decision making.<sup>87</sup>

## II. THE NEW ORIGINALISM'S SHORTCOMINGS

### A. *The New Originalism Described*

Just because originalism in practice fails to fix an objective constitutional meaning or constrain judicial decision making does not mean that it could not do so were a single variant more faithfully applied. The problems just rehearsed arise from the fact that the Justices do not consistently apply the same version of originalism. These are problems with originalism in practice, not originalism in theory.

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83 See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2677 (2012) (Thomas, J., dissenting) ("[T]he very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." (quoting *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring))).

84 See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 137–54.

85 *Id.* at 140.

86 See Michael C. Dorf, *Tainted Law*, 80 U. CIN. L. REV. 923, 937–38 (2012) ("[D]espite the shift in academic defenses of originalism, judges and others continue to invoke the older, more simple-minded expected-applications version of originalism.").

87 See CROSS, *supra* note 25, at 190 (concluding that Justices' invocation of originalism "is very selective and not particularly constraining on the decisions or opinions of the justices"); Strauss, *supra* note 78, at 3 (arguing that one problem with originalism is "that it is not doable" in practice).

The obvious solution to these inconsistencies would be to select a single version of originalism and always stick to it. The best candidate for this proposal is the new originalism, because it is the most widely accepted today among originalists and the most theoretically sophisticated.<sup>88</sup> While I share John Harrison's skepticism that judges will confine themselves to a single interpretive approach,<sup>89</sup> especially given that their fellow jurists would not be similarly constrained, it is also worth examining the theory on its own terms. Indeed, the new originalist, I imagine, would largely agree with much of what I have said so far. The problem, he would contend, is that Supreme Court Justices have not been faithful, methodologically consistent originalists.<sup>90</sup> Consistent adherence to new originalism would accomplish the goals of fixation and constraint—and more.

Scholars, like Randy Barnett, Lawrence Solum, and Keith Whittington, have developed the new originalism in a rigorous, intelligent literature.<sup>91</sup> Because these new originalists focus on the objective plain meaning of the document, they ostensibly need not worry about weighing the Framers' or ratifiers' subjective views against each other.<sup>92</sup> Instead, they focus on linguistic facts contemporaneous to ratification to discern the language's semantic meaning. As Whittington puts it, the new originalism "urges interpreters to look to the text and what a competent reader of the text at the time would have under-

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<sup>88</sup> See Colby, *supra* note 7, at 724 (arguing that an inquiry into how a reasonable person would have understood the words in the Constitution in 1788 is a more refined and sophisticated form of originalism than original intent or original understanding).

<sup>89</sup> See John Harrison, *On the Hypotheses That Lie at the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL'Y 473, 473–74 (2008) (expressing skepticism about originalism's capacity to constrain judicial activism).

<sup>90</sup> See, e.g., ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 126 (2012) ("Justices Thomas and Scalia have often advocated originalism as their preferred method of constitutional interpretation but neither Justice has any use for that doctrine when it leads to a result they don't favor such as approving affirmative action programs."); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13 (2006) ("Justice Scalia is simply not an originalist."); Lee J. Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 882 (2011) (arguing that Justice Thomas is a less faithful originalist than the conventional wisdom suggests).

<sup>91</sup> Despite much common ground, there are also important variations among the new originalists, see *infra* note 190, but it is beyond the scope of this Article to rehearse all these distinctions.

<sup>92</sup> See Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1162 (2003) ("As a matter of constitutional interpretation, it matters not what any (much less all) of the Ratifiers actually *intended* or *understood*, but what the hypothetical reasonably well-informed Ratifier would have objectively understood the legal text to mean with all of the relevant information in hand.").

stood it to mean.”<sup>93</sup> The result, the new originalists argue, is a more objective and theoretically legitimate originalism.<sup>94</sup>

The new originalism, also known as “semantic originalism” or “original public meaning originalism,”<sup>95</sup> contends “that constitutional law includes rules with content that are fixed by the original public meaning of the text—the conventional semantic meaning of the words and phrases in context.”<sup>96</sup> As Professor Solum explains, new originalists implement this theory in a two-step process consisting, first, of constitutional *interpretation* and, second, of constitutional *construction*.<sup>97</sup> The first step for the semantic originalist is to *interpret* the Constitution by studying how contemporaneous sources of conventional meaning, such as newspapers, diaries, dictionaries, speeches, pamphlets, and legal documents, used particular words and phrases.<sup>98</sup> (In this sense, the search for the original semantic meaning can utilize some of the same sources used to discern the Framers’ intentions and ratifiers’ understandings.) From this evidence, the new originalist gleans the original public meaning of the relevant provision.<sup>99</sup> In some cases, this semantic meaning in context will provide the rule of decision, thereby constraining the interpreter to follow that rule. However, constitutional provisions are often too abstract to provide decisive guidance, and, in those cases when the text “runs out,”<sup>100</sup> the next step requires the judge to *construct* constitutional meaning—that is, to supply content to the legal language to decide the case.<sup>101</sup> During this constitutional construction, judges “must be guided by something other than the semantic content of the constitu-

<sup>93</sup> Whittington, *supra* note 1, at 70, 71–72.

<sup>94</sup> See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 648 (1999) (asserting that the new originalism avoids the objections that have been raised against subjective originalism and provides a structural framework of interpretation).

<sup>95</sup> I use these three terms interchangeably.

<sup>96</sup> Solum, *supra* note 17, at 2.

<sup>97</sup> *Id.* at 67–69.

<sup>98</sup> See Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 915 (2013) (discerning original public meaning by looking at “dictionaries, speeches, newspaper articles, documents, legislative histories, and historical events”).

<sup>99</sup> Solum, *supra* note 17, at 67.

<sup>100</sup> *Id.* at 69.

<sup>101</sup> See Barnett, *supra* note 73, at 264 (“The process of applying general abstract provisions to the facts of particular cases by adopting intermediate doctrines is properly called, not interpretation, but constitutional construction.”); see also Solum, *supra* note 17, at 68–69 (explaining that the practice of supplying content beyond semantic meaning is “constitutional construction”).

tional text”<sup>102</sup> so long as they do not violate the boundaries established by the original semantic meaning.<sup>103</sup>

The new originalism intelligently corrects some of originalism’s earlier variants’ flaws and candidly acknowledges that original public meaning cannot resolve all cases by itself. Indeed, at the construction step, some new originalists abandon the claim that the theory constrains judicial decision making.<sup>104</sup> However, the new originalism still does contend that the original semantic meaning sets the boundaries of constitutional meaning, and many new originalists, following the lead of “old” originalists, insist that the theory does constrain judicial decision making by requiring judges to follow an objective, ascertainable constitutional meaning.<sup>105</sup> This theory helpfully reminds judges and scholars not to forget constitutional text and history, but, to the extent that it purports to fix an objective constitutional meaning and thereby cabin judicial discretion, it cannot deliver what it promises.

### B. Fixation Problems

The new originalism’s effort to fix the correct constitutional meaning assumes that it can accurately discern an objective original constitutional meaning. This may sometimes be possible. However, for many provisions most likely to arise in litigation, the notion of a “right answer” is a legal fiction that fails to appreciate both the practical difficulties of historical inquiry and the relevant history itself. As Mark Tushnet puts it, “[t]he new originalism seeks *the* original public meaning of constitutional terms, but there is (was) no single such meaning . . . at least for interesting constitutional terms.”<sup>106</sup>

First, just like older iterations of originalism, semantic originalism fails to appreciate fully the complexity and contradictions often inherent in the relevant historical evidence.<sup>107</sup> The new originalism purports to correct this evidentiary problem because, unlike searches for the Framers’ or ratifiers’ subjective intentions, semantic originalism does not involve the difficulty of ostensibly uncovering a

102 Solum, *supra* note 17, at 19; *see also* Whittington, *supra* note 1, at 82; discussion *infra* Part II.

103 *See* Barnett, *supra* note 73, at 263–64.

104 *See infra* notes 181–86 and accompanying text.

105 *See* Solum, *supra* note 17, at 2 (“Almost all originalists agree, explicitly or implicitly, that the meaning (or ‘semantic content’) of a given Constitutional provision was fixed at the time the provision was framed and ratified.”); *infra* note 187 (citing arguments that new originalism will constrain judicial decision making).

106 Tushnet, *supra* note 43, at 617.

107 *See, e.g.*, Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1034 (2011) (referring to Clio as “an uncertain, almost whimsical guide”).

collective body's single intention.<sup>108</sup> Instead, new originalists, like Professor Solum, drawing on the linguistic work of Paul Grice and others, seek to find the relevant constitutional provision's "sentence meaning" by identifying objective "meanings that are conventional given relevant linguistic practices" at the time of ratification.<sup>109</sup> Those meanings are "facts determined by the evidence."<sup>110</sup>

Fixation is an understandable impulse, especially given that our Constitution, unlike the English one, is written.<sup>111</sup> However, we cannot always (or even often) accurately discern how "a reasonable speaker of English"<sup>112</sup> would have understood a constitutional provision. To be sure, we sometimes can. As already discussed, Article II, read in accordance with eighteenth- (or twenty-first-) century linguistic conventions, requires that the President be at least thirty-five.<sup>113</sup> But, many constitutional provisions, like the Second Amendment,<sup>114</sup> are contested in part because the evidence surrounding their original meaning is complicated and contradictory. The disagreement between Justices Scalia and Stevens was not solely methodological. It was also based on different interpretations of the kinds of evidence that ostensibly give rise to semantic meaning, such as the way eighteenth-century texts used prefatory clauses and the phrase "keep and bear arms."<sup>115</sup>

The problem for the new originalism's fixation claims is that provisions like the Second Amendment are far more likely to be the subject of dispute and litigation than provisions like Article II, Section 1, clause 5. Contrary to the conflicting opinions' self-assured tones in *Heller*, it is far from clear who was correct.<sup>116</sup> Indeed, the mere fact of

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108 See, e.g., Solum, *supra* note 17, at 42–50 (emphasizing the superiority of constitutional interpretation based on the original semantic meaning of the words, as opposed to the collective intent of the Framers).

109 *Id.* at 35.

110 *Id.* at 36.

111 See BARNETT, *supra* note 16, at 100–09 (emphasizing that the Constitution's "writtenness" "locks in" meaning).

112 Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001).

113 See *supra* notes 70–72 and accompanying text; *infra* notes 177–79 and accompanying text.

114 See *supra* notes 30–49 and accompanying text.

115 See *supra* notes 40–49. Compare *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right . . ."), with *id.* at 643 (Stevens, J., dissenting) ("The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text.").

116 See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 266 (2009) ("If there is a reasonable case for the majority's interpretation of the Se-

the 5-4 split on originalist grounds—and the accompanying scholarly disagreement<sup>117</sup>—suggests that the “correct” answer here will be deeply contested.

Other provisions are likewise contested. For example, excellent scholars not only disagree on the original meaning of the Commerce Clause, but also defend interpretations that would yield opposite outcomes in most contemporary cases.<sup>118</sup> Similarly, scholars disagree about whether the Supreme Court’s decision in *Bolling v. Sharpe*<sup>119</sup> can be justified on original-public-meaning grounds. *Bolling*, decided the same day as *Brown v. Board of Education*,<sup>120</sup> invalidated federal racial public school segregation in the District of Columbia, notwithstanding the Fourteenth Amendment’s text, which stipulates that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>121</sup> Some scholars have offered creative defenses of *Bolling* on new originalist grounds by contending that the Fourteenth Amendment’s Citizenship Clause foreclosed the federal government from denying United States citizens the rights inherent in federal citizenship, including equal protection of the laws.<sup>122</sup> Others have insisted instead that the Equal Protection Clause means what it says and only applies to state governments.<sup>123</sup> While most commentators ap-

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cond Amendment, there is also a reasonable case for the position taken by the dissenters.”).

117 Compare Saul Cornell, Heller, *New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1111 (2009) (criticizing the new originalism and Heller’s “backwards approach to history”), with Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (defending Heller as the “finest example of . . . ‘original public meaning’ jurisprudence ever adopted by the Supreme Court”).

118 Compare Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 49 (2010) (“The original meaning of the Commerce Clause is consistent with the modern activist state and gives the federal government wide latitude to pass civil rights, employment, consumer protection, health, and environmental laws.”), with Barnett, *supra* note 112, at 146 (“The most persuasive evidence of original meaning . . . strongly supports Justice Thomas’s . . . narrow interpretation of Congress’s [Commerce] power . . .”).

119 347 U.S. 497 (1954).

120 347 U.S. 483 (1954).

121 U.S. CONST. amend. XIV, § 1 (emphasis added).

122 See Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 598 (2013) (“[T]here is a strong basis for concluding that whatever equality rights citizens possess against state governments by virtue of their status as ‘persons’ protected by the Equal Protection Clause are equally enforceable against the federal government by virtue of their status as ‘citizens’ under the Citizenship Clause.”).

123 See BORK, *supra* note 2, at 83 (criticizing *Bolling* as a “clear rewriting of the Constitution by the Warren Court”); Brest, *supra* note 7, at 232–33 (“[A] moderate originalist cannot easily justify the incorporation of principles of equal treatment into the due process clause of the fifth amendment . . .”).

plaud the result in *Bolling*, they disagree about whether it is consistent with the Fourteenth Amendment's original public meaning.<sup>124</sup>

While compelling arguments sometimes can be made in favor of one reading over another, the process of selection almost necessarily involves historical judgments that judges lack both the time and training to make,<sup>125</sup> especially in light of the surrounding historical context, which cannot be quickly gleaned during the few months in which a judge considers a case.<sup>126</sup> Because of these problems, judges are likely to take shortcuts in evaluating the evidence<sup>127</sup> and to fall back on preconceptions about history and language, as well as normative predilections.<sup>128</sup> While it is perfectly natural for judges to be influenced by norms in close cases, it is misleading to say that the resulting decision then rests on the "correct" reading of the original semantic meaning.<sup>129</sup>

To be fair, some new originalists, like Professor Solum, are careful to emphasize the "modesty" of the claim and the fact that, sometimes, we cannot know what the relevant linguistic facts are.<sup>130</sup> For example, Solum acknowledges that evidence is sometimes not accessible to discern the text's original public meaning.<sup>131</sup> The dearth of evidence is a problem, no doubt, but so is too much contradictory evidence.<sup>132</sup> Of

124 It is worth noting that a theory that eviscerated *Bolling* would be, for good reason, morally objectionable to many and therefore extremely difficult to sell.

125 *Cf. Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting) ("The battle of the string citations can have no winner."); *infra* note 220 and accompanying text.

126 *See, e.g.*, Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 580 (2011) (denigrating "law-office history" searching for historical citations to bolster legal arguments).

127 *See, e.g.*, Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1495 (2012) (arguing that judicial analysis of history is "susceptible to manipulation"); Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1232–42 (2012) (detailing how several ostensibly originalist Supreme Court opinions are not).

128 *See generally* HANS-GEORG GADAMER, *TRUTH AND METHOD* 267 (2d ed. 1995) ("A person who is trying to understand a text is always projecting."); *infra* Conclusion.

129 *See, e.g.*, Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1334 (2008) (claiming that when judges are not adept at evaluating judicial evidence, originalism may produce biased decisions); Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1045–46 (2002) (describing the dangers that may occur when a judge is biased in selecting and using interpretive approaches).

130 Solum, *supra* note 17, at 37.

131 *Id.*

132 *See, e.g.*, Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 930 (1998) ("Because the historical evidence is often inadequate and contradictory, the historical record rarely yields any clear answers to the most important questions of constitutional interpretation."); Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers That History Doesn't Provide*, 2004 BYU L. REV. 1617, 1630 ("With regard to our de-

course, there will be instances when the vast majority of the evidence stacks up comfortably on one side of the ledger, and we can be reasonably confident that the hypothetical, well-informed observer in 1788 would have understood a certain clause in a particular manner. But, as *Heller* demonstrates, there are also important instances where the evidence is so complicated that judges divide (roughly) evenly on the proper interpretation.<sup>133</sup> Read modestly, of course, semantic originalism could concede this point,<sup>134</sup> but if it does, it will leave us with a theory that does most of its work in the cases about which we mostly agree anyway.<sup>135</sup>

A second and related problem with the new originalism's efforts to fix objective original meaning is that the inquiry undervalues the intellectual flux that characterized many key constitutional periods.<sup>136</sup> For example, constitutional concepts and terms changed shape frequently during the Founding era.<sup>137</sup> Attempts to "fix" a single meaning to particular terms or provisions miss the age's intellectual ferment. Key constitutional concepts—like sovereignty, bicameralism, federalism, individual rights, and executive power—were vigorously debated and constantly changing during the closing decades of the eighteenth century.<sup>138</sup> The fixation thesis ascribes to the constitutional terms addressing these and other concepts a singular meaning that cannot capture the complexity and multiplicity of meanings that the terms then enjoyed.

Indeed, prominent historians of the American Revolution have spent much of their careers exploring these intellectual transfor-

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termination of what the Constitution means today, the contradictory historical evidence is simply not dispositive.”).

133 Cf. EDWARD HALLETT CARR, *WHAT IS HISTORY?* 10 (1961) (“The belief in a hard core of historical facts existing objectively and independently of the interpretation of the historian is a preposterous fallacy, but one which it is very hard to eradicate.”).

134 See *infra* notes 161–63 and accompanying text.

135 See *infra* Part II.C.

136 It is beyond the scope of this Article to offer detailed historical analysis. For excellent studies examining the difficulty of identifying original meanings during the Founding and Reconstruction periods, respectively, see generally RAKOVE, *supra* note 60; WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

137 See, e.g., Cornell, *supra* note 40, at 631 (noting originalists' inattention to how meanings changed over time); Rakove, *supra* note 126, at 577–78 (arguing that the meanings of constitutional terms change over time).

138 See generally RAKOVE, *supra* note 60 at 3–22 (discussing the perils of originalism); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787* (1969) (detailing a series of intellectual changes in the political culture and belief systems in revolutionary America).

mations.<sup>139</sup> To give just one example, Americans' ideas about the "executive" were in constant flux in the 1780s.<sup>140</sup> Not only did members of the Founding generation disagree on what the Article II executive should look like, but they also disagreed on the meaning of the words "executive" and "president,"<sup>141</sup> relying on accumulated but conflicting experiences under both British rule and state constitutions.<sup>142</sup> The meaning of these words could have profound implications for current debates about the scope of Article II authority, the prerogatives of a unitary executive, the President's removal power,<sup>143</sup> and more. By attempting to fix the meaning of constitutional terms to a date in time—as though the meaning at any given point was static—is to misunderstand the revolutionary era's intellectual motion. As Jack Rakove puts it,

[P]olitical language, like other forms of speech, is necessarily creative, and . . . key words develop and acquire new shades of meaning precisely because they are subjected to the pressures of active controversy. The adopters of the Constitution inhabited a world that was actively concerned with the nature of language, or more to the point, the instability of linguistic meanings, and commentators on the ratification debates have observed the extent to which arguments about the definitions of key words and concepts were themselves central elements of political debate.<sup>144</sup>

Key constitutional terms and ideas were similarly fluid when the Reconstruction amendments were drafted and ratified. As William Nelson has argued, the words "equality" and "liberty" were used in very different ways in antebellum America.<sup>145</sup> The concept of "liberty," for instance, resonated strongly with abolitionists, slaveholders as-

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139 See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 160–229 (1967) (recounting transformations in the Founding generation's conceptions of ideas like representation and consent, constitution and rights, and sovereignty); RAKOVE, *supra* note 60, at 94–338 (discussing the evolution of several important constitutional concepts during the revolutionary period); WOOD, *supra* note 138, at 370–82 (discussing changes in Americans' conceptions of "sovereignty" during the Founding period); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 259 (1991) (noting that though the Anti-federalists "lost the battle over the Constitution," their values continued to shape popular understandings of American government for decades).

140 See RAKOVE, *supra* note 60, at 244–87.

141 See, e.g., *id.* at 245 ("Deriving a single definition of executive power could never be a simple exercise.")

142 One problem was that the word "president" sounded common and weak. Indeed, the more muscular state executives were called not "presidents" but "governors." See AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 133–35 (2005) (discussing controversy over the choice of the word "president" in Article II); see also RAKOVE, *supra* note 60, at 244–87.

143 See RAKOVE, *supra* note 60, at 347–48 (discussing the "removal debate").

144 Rakove, *supra* note 126, at 593.

145 NELSON, *supra* note 136, at 13–39.

serting their own property rights, and state governments trying to resist federal coercion.<sup>146</sup> Similarly, as Nelson argues, Americans in the years immediately after the Civil War agreed upon the rightfulness of “equality” only because their understandings of the word’s meaning differed so dramatically.<sup>147</sup> It is no wonder, then, that the words representing these contexts were highly under-determinate, as the Fourteenth Amendment’s ratifiers and framers debated their “vague, open-ended, and sometimes clashing” meanings.<sup>148</sup> Indeed, these words’ very ambiguities probably helped secure the amendment’s ratification. As Professor Nelson explains, the congressmen and state legislators debating the Fourteenth Amendment “continued to make fuzzy use of the old antebellum ideas [of liberty and equality], in part, perhaps, because the old imprecision . . . enabled them to retain the support of political coalitions whose individual members shared an agreement only about vague ideas, not specific programs.”<sup>149</sup>

It may be linguistically defensible to ascribe to all constitutional terms a single semantic meaning, but, even putting aside almost inevitable evidentiary problems, from a historical standpoint, it is a canard to assume that all these provisions can be so boiled down, given both the contentious debate about the underlying ideas and the fact that these concepts were in the process of radical transformations. Purporting to freeze the terms at a point in history cannot accurately capture one semantic meaning at a given point during a several-decade transformative process. Put simply, it ascribes a singular semantic meaning to terms embodying multiple, evolving, and sometimes contradictory ideas.

In light of these problems, most historians are highly skeptical of attempts to freeze history or meaning.<sup>150</sup> New originalists would counter here that historians are unconcerned with semantic meaning.<sup>151</sup> This is usually correct, but it is unclear that this distinction undermines the historians’ objections. A historian like Rakove may not write explicitly about semantic meaning, but his basic point—that political language evolves during periods of revolutionary change—

146 *Id.* at 21–36.

147 *Id.* at 80.

148 *Id.* at 63.

149 *Id.* at 38–39.

150 See Eric Foner, *The Supreme Court’s Legal History*, 23 RUTGERS L.J. 243, 244 (1992) (“To freeze history at any single moment, such as the spring of 1866, misses the essence of the era, which was continuous and far-reaching change.”).

151 See Solum, *supra* note 17, at 112–15 (arguing that many historians do not seek semantic meaning).

applies to “semantic meaning” as much as it does to history in the looser sense. Because conceptions of the executive were evolving in the 1780s, so too were the public meanings of the words “executive” and “president” in flux.<sup>152</sup>

To some extent, the disagreement between new-originalist legal scholars, on the one hand, and historians, on the other, reflects a disagreement about judges’ (and scholars’) ability to locate objective truths about our Constitution. This difference should not be overstated. I concede that some provisions have objective meanings (the President must be at least thirty-five), and some new originalists concede that some original public meanings are unknowable.<sup>153</sup> The disagreement, then, boils down to the number of instances in which the new originalism actually can provide an objective semantic meaning that sufficiently constrains judicial choices in actual cases likely to arise. Whereas the new originalists apparently believe that the theory will identify some objective original semantic meanings that will bind interpreters in real cases, I believe that in most cases that we care about, the evidence will not be so clear. Perhaps in some of those cases, the evidence will tend to favor one reading over another, but then, semantic originalism would be basing its interpretation on probabilities, not certainty. This is not to say that language does not communicate and text has no meaning. Of course, such an extreme position is confused,<sup>154</sup> but that is not the objection. The objections, instead, are that sometimes, reasonable hypothetical observers would have divided along roughly even lines on the correct meaning of a constitutional provision, and oftentimes, the evidence will be too complicated for us to know how such observers would have understood the language.

It is not entirely clear how the new originalist should proceed with complicated, inconclusive historical evidence yielding no clearly correct, objective original semantic meaning. One possibility would be for the judge to take the more likely reading and treat it as the original semantic meaning, essentially treating a probably correct reading as a definitely correct one. It would be a legal fiction to assign probabilities to the correctness of semantic meanings based on the relevant evidence, but let us assume that we can. It seems relatively un-

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152 See RAKOVE, *supra* note 60, at 252–53 (noting that 1770s’ state constitutions established extremely weak executives but that in the 1780s some states began to revitalize the executive); *supra* notes 140–44 and accompanying text.

153 See Solum, *supra* note 17, at 37 (conceding that some public historical meanings may be unknowable).

154 See *id.* at 119–20 (rejecting various semantic skeptics).

problematic for the new-originalist judge to treat a reading that is ninety-nine-percent likely correct as the original semantic meaning and proceed with the constitutional analysis as though such semantic meaning has been uncovered and thereby fixed. By contrast, it is more problematic for the judge to do so when she is only fifty-one-percent sure that she is correct. The new originalism, by its own terms, rests on the primacy of the objective constitutional text,<sup>155</sup> so if that textual foundation is shaky, it is dangerous to build a legal doctrine atop it. This does not mean that we must require absolute certainty for the original public meaning to be binding, but a substantial degree of uncertainty weakens the textual foundation upon which the entire theory rests.

Of course, other constitutional methodologies do permit judges to make decisions based on uncertain judgments; a judge, for instance, may not be certain that she has construed a confusing precedent correctly. But, typical common-law constitutional decision making usually rests on multiple factors, such as precedent, reason, structure, past practice, history, text, policy, and more. This hodge-podge of factors may render it unpredictable and worthy of criticism, but it also means that an incorrect judgment on any single factor will not undermine the whole foundation to the same extent. In other words, if common-law constitutional adjudication is like a cable that will remain intact if any thread is severed, then the new originalism is more like a lone strand of thread. If the thread is cut, then the whole theory fails to work.

Moreover, the new originalism precariously stakes its legitimacy on especially problematic evidence. For all its flaws, precedent is easy to find and limited in scope. It is also a source with which judges are very familiar. By contrast, the historical evidence needed to identify semantic meanings is often difficult to find and even harder to interpret, especially for judges, who usually lack training in historical methods.<sup>156</sup> It is also less limited, in that one can never be certain that one has found all the relevant sources. Accordingly, we should be more confident of judges' ability to construe precedent "correctly" than to construe the kinds of evidence relevant to original public meanings. Of course, this concern may dissipate in those instances where the judge is more confident in the correctness of her reading

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155 See Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POLY 65, 66 (2011) (stressing that "the activity of determining semantic meaning at the time of enactment . . . is *empirical*" and hinges on the "objective social meaning" of the Constitution's words).

156 See *infra* note 220 and accompanying text.

of the original public meaning than of the precedent, but given the difficulties with the primary sources, those cases would probably be relatively infrequent.<sup>157</sup> Moreover, given their lack of familiarity with the historical evidence, many judges may be prone to misread original materials without even realizing it.

In light of these problems, the new-originalist judge confronting contradictory evidence may instead conclude, from any substantial degree of uncertainty, that the text is under-determinate (whether due to vagueness, ambiguities, gaps, or contradictions) and proceed onto step two, constitutional construction.<sup>158</sup> Under this approach, the judge need not worry about definitively resolving the meanings of “executive” in the 1780s or “equality” and “liberty” in the 1860s<sup>159</sup> because the words are still simply under-determinate.<sup>160</sup> Because the judge turns from interpretation to construction, originalism more or less falls out of play,<sup>161</sup> and she may turn to other modalities to resolve the case, provided that her decision falls within the range of ambiguity created by the alternative plausible semantic meanings.<sup>162</sup> The problem with this approach is that the new-originalist theory is likely doing little work in most cases, except taking the judge through a difficult, time-consuming investigation only to end up where she started, at step one.

The dispute between the new originalists and their critics partially reflects a tension between law professors’ disciplinary allegiances outside the law, especially between linguistics and philosophy on the one hand, and history on the other. To someone like Professor Solum, who is deeply versed in philosophy and linguistic theory, texts have objective, semantic meanings, and constitutional interpreters should

157 See *supra* notes 107–35 and accompanying text.

158 See Solum, *supra* note 17, at 69 (arguing that the role of constitutional construction begins when the inquiry into meaning has been exhausted); cf. Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 595 (2006) (“[I]t seems not only acceptable but desirable that we should account for the fact that one doctrine is more likely correct than the other.”); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 896 (1992) (“Why is it important that courts always be able to give definitive interpretations of the law?”).

159 See *supra* notes 145–49 and accompanying text.

160 See NELSON, *supra* note 136, at 62–63 (noting that Reconstruction debates left the Fourteenth Amendment’s conflicting meanings to courts to reconcile); RAKOVE, *supra* note 60, at 279–87 (noting that ratification debates about the executive speak in generalities but “say remarkably little about the specific constitutional arrangements”).

161 See Solum, *supra* note 17, at 67–75 (“Constitutional construction begins when the meaning discovered by constitutional interpretation runs out.”); *infra* Part II.C.

162 See generally PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991) (describing six different constitutional modalities: historical, textual, structural, doctrinal, ethical and prudential).

seek out the original semantic meanings of constitutional provisions. Historians, he contends, have different concerns because they are not after “*semantic meanings*.”<sup>163</sup> Historians, in return, profess little interest “in ascertaining the original meaning of a clause for its own sake, or in attempting to freeze or distill its true, unadulterated meaning at some pristine moment of constitutional understanding.”<sup>164</sup> Rather than fixing a single meaning in terms, historians prefer to “revel in—the ambiguities of the evidentiary record, recognizing that behind the textual brevity of any clause there once lay a spectrum of complex views and different shadings of opinion.”<sup>165</sup>

Solum recognizes that lawyers, philosophers, linguists, and historians make mistakes when venturing beyond their disciplinary boundaries and politely chides historians for not understanding the philosophy of language.<sup>166</sup> But, in contending that texts have objective semantic meanings which can yield better constitutional decision making, the new originalists sometimes undervalue historians’ repeated claims that, oftentimes, the evidentiary problems run too deep and the relevant periods are too intellectually unstable for anyone to identify a single “correct” constitutional meaning. Indeed, well-informed observers during the relevant periods may have resisted the notion that key constitutional terms enjoyed fixed meanings. As Rakove points out, James Madison, relying on John Locke, discussed the indeterminacy of words and the fallibility of language in *The Federalist Papers*.<sup>167</sup> While certainly one excerpt from *The Federalist Papers* is determinative of nothing, the Founding generation’s views on language and meaning were likely more in line with Locke than Grice.<sup>168</sup> Accordingly, one wonders if the attempt to locate core, singular meanings in those same people’s understandings of language, however philosophically justifiable, may rest on an historical anachronism

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163 See Solum, *supra* note 17, at 115 (“When historians are after the meaning of legal texts, they are frequently after something quite different; they are searching for the purpose or reasons for which the text was written. Such purposes are not *semantic meanings*.”).

164 RAKOVE, *supra* note 60, at 9.

165 *Id.* at 9–10.

166 See Solum, *supra* note 17, at 115 (“[F]ew historians . . . have basic competency in the philosophy of language . . .”).

167 See THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 1961) (“[N]o language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that . . . the definition of [words] may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.”); see also Rakove, *supra* note 126, at 594 (discussing Locke’s influence on Madison’s views on language).

168 See Rakove, *supra* note 126, at 588 n.33, 600 (arguing that Locke’s philosophy on language influenced Madison’s perspective on language).

that compromises the very enterprise. The new originalists might counter that the meaning of “meaning” does not hinge on how different cultures perceive “meaning,”<sup>169</sup> but if the Founding generation’s use and understanding of words included an implicit recognition of those words’ indeterminacy, that understanding would add yet another layer of complexity and indeterminacy to an already complicated historical record.

Relatedly, the new originalists underestimate the extent to which constitution-making sometimes renders language more unstable than it would be in more ordinary circumstances. Even the most ardent originalists seem to recognize that the Constitution was itself a rough political compromise whose meanings were deeply contested.<sup>170</sup> Nevertheless, many still cling to the view that the language brokering this rough compromise should strictly bind judges. Many members of the Founding generation, however, understood the Constitution’s text differently, insisting that its meanings would need to be “liquidated” over the generations through “discussions and adjudications.”<sup>171</sup> Similarly, national leaders during Reconstruction likened the Fourteenth Amendment’s language to “a sign on a highway with different inscriptions on each side, so that people approaching the sign from opposite directions necessarily read it differently.”<sup>172</sup> This is not to say that judges should never take constitutional text seriously, but, ironically, the new originalists’ supreme elevation of the constitutional text over all other interpretive factors may misunderstand the way the Founding and Reconstruction generations thought about constitutional language.<sup>173</sup>

Indeed, as Professor Nelson argues, the people who framed the Fourteenth Amendment “were acting primarily as statesmen and po-

169 See Solum, *supra* note 17, at 115 (distinguishing “semantic meaning” from other sorts of “meaning”).

170 See, e.g., Scalia, *supra* note 66, at 861 (“[T]he Constitution . . . was a political compromise that did not pretend to create a perfect society . . .”).

171 See THE FEDERALIST NO. 37, *supra* note 167, at 225 (discussing the Constitution as “more or less obscure and equivocal, until [its] meaning be liquidated and ascertained by a series of particular discussions and adjudications” (emphasis omitted)); see also Mark R. Killenbeck, *Madison, M’Culloch, and Matters of Judicial Cognizance: Some Thoughts on the Nature and Scope of Judicial Review*, 55 ARK. L. REV. 901, 914 (2003) (arguing that many of the influential members of the Founding generation believed that the interpretation and implementation of the Constitution “was ongoing and contextual”).

172 NELSON, *supra* note 136, at 143 (citing Charles Sumner’s views of the Amendment).

173 See, e.g., NELSON, *supra* note 136, at 8 (“Those who adopted the Fourteenth Amendment did not design it to provide judges with a determinative text for resolving . . . conflict[s] in a narrow doctrinal fashion.”).

litical leaders, not as legal draftsmen.”<sup>174</sup> Their contemporaries, then, likely understood the words not to offer legal guidance, but rather political compromise, through the acceptance of extremely broad principles. The new originalists might respond that words have semantic content regardless of the speakers’ intentions. Accepting *arguendo* this theory of language, we must still wrestle with the distinct possibility that the reasonably informed citizen would have understood that the Fourteenth Amendment’s words would mean different things to different people. On this view, the original public meaning of many key phrases may have been under-determinate, even at the time. Perhaps in a different context, these same words might have communicated something more precise, but in the context of constitution-making following the Civil War, they did not. Phrased somewhat differently, if the reasonable observer in 1868 would have understood Section 1’s capacious language to offer not legal guidance but a largely undefined political compromise, then attempts to interpret those words to mean something more precise may actually pervert the clause’s original public meaning. To be sure, the new-originalist judge in this instance could conclude that the text is under-determinate and, therefore, turn to constitutional construction, but given that much constitutional language from 1787 and 1868 embodied such rough political compromises, originalism under this approach would not do much work.

Of course, even where the original public meaning is arguably more determinate, there still remains the serious problem of figuring out what the words mean. As Gordon S. Wood has written, “It may be a necessary fiction for lawyers and jurists to believe in a ‘correct’ or ‘true’ interpretation of the Constitution in order to carry on their business, but we historians have different obligations and aims,” such as identifying the Constitution’s contrasting meanings.<sup>175</sup> Perhaps most historians (and, for that matter, law professors) do not understand the philosophy of Wittgenstein and Grice,<sup>176</sup> but any account of constitutional meaning must rely upon historical evidence. If judges do not sufficiently appreciate the nuances within the relevant texts and the broader intellectual climate surrounding those texts, then their account is likely to be tainted, no matter how sophisticated their

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174 *Id.* at 143.

175 Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 632–33 (1987).

176 *See Solum, supra* note 17, at 112–15 (examining a canonical history article that analyzes Wittgensteinian and Gricean philosophies).

philosophical theory. Fixation, in short, rests upon an objectivity that is more often mythical than real.

### C. Constraint Problems

The conclusion that it will often be difficult or impossible to ascertain the original semantic meaning is an indication that the new originalism's capacity to constrain is also limited. Of course, there are some provisions for which the original public meaning is clear and precise.<sup>177</sup> In such cases, this meaning will often presumptively govern and, thus, constrain. But, these kinds of clauses are rarely the provisions subject to litigation, so it is not clear that the new originalism would constrain very much in actual cases. It is true, of course, that the original public meaning of the term "domestic violence" in Article IV, Section 4 referred to riots and insurrections, rather than spousal abuse, and the new originalism intelligently reminds us that it is the original, rather than the contemporary, meaning of the words that must govern.<sup>178</sup> But, no informed observer would interpret the Domestic Violence Clause to apply to spousal abuse, so it is unclear that the new originalism actually adds constraints that did not already exist.<sup>179</sup> Instead, litigation that actually turns on a provision's original public meaning is more likely to involve provisions like the Second Amendment, about whose original semantic meaning reasonable people can and do differ.<sup>180</sup>

To their credit, many new originalists recognize that constitutional text cannot decide all cases.<sup>181</sup> Indeed, it is precisely those cases in which the constitutional text is under-determinate that judges must turn from interpretation to construction.<sup>182</sup> In such instances, after interpreting the text to find an under-determinate original semantic

177 See *supra* notes 70–72 and accompanying text.

178 See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 101 (2010) (discussing the phrase "domestic violence" in the Constitution).

179 See Colby, *supra* note 7, at 753 (arguing that new originalists' constraint arguments do not have any substance).

180 See *supra* notes 30–49 and accompanying text; cf. Solum, *supra* note 59, at 143, 145 (arguing that the fact that constitutional litigation involves issues in construction should not obscure the fact that the constitutional text provides guidance in many cases that are never litigated).

181 See Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69 (2011) ("The text of the Constitution may say a lot, but it does not say everything one needs to know to resolve all possible cases and controversies."); *supra* note 100 and accompanying text.

182 See Solum, *supra* note 17, at 69 ("It must be the case that meaning does run out before providing sufficient content to determine the outcome of issues faced in constitutional practice.").

meaning, the judge's constitutional construction "must be guided by something other than original meaning,"<sup>183</sup> so that "other forms of constitutional argumentation may be given relatively free rein."<sup>184</sup> As Professor Barnett explains, "Unless there is something in the text that favors one construction over the other, it is not originalism that is doing the work when one selects a theory of construction to employ when original meaning runs out, but one's underlying normative commitments."<sup>185</sup>

This candid assessment concedes that at the construction stage, the new originalism does not constrain judicial choices, except insofar as the constitutional construction must not violate the text.<sup>186</sup> Nevertheless, curiously, some originalists still maintain that this new originalism does constrain in important ways.<sup>187</sup> Judge Douglas Ginsburg goes so far as to argue that new originalism is more constraining than earlier variants because it is "more objective."<sup>188</sup> Given that some of semantic originalism's most prominent advocates have explained that judges may consult the full panoply of interpretive methodologies during the "construction" phase,<sup>189</sup> it seems doubtful that at least these iterations of the new originalism significantly constrain judicial decision making.<sup>190</sup> Nevertheless, as Judge Ginsburg's comment indicates, the myth of constraint persists.

183 Solum, *supra* note 16, at 934.

184 Whittington, *supra* note 1, at 82.

185 Barnett, *supra* note 181, at 70.

186 See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 645 (1999) (arguing that constitutional interpretation must be distinguished from constitutional construction, the latter of which should be used when meaning is under-determinate); Solum, *supra* note 19, at 495 (arguing that "[c]onstruction is ubiquitous").

187 See, e.g., Colby, *supra* note 7, at 750 (arguing that most new originalists still promise that their methodology will constrain judicial decision making); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004) (arguing that the new originalism "requires judges to uphold the original Constitution—nothing more, but also nothing less").

188 Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 237 (2010).

189 See *supra* notes 183–85 and accompanying text.

190 Admittedly, some new originalists offer variations that constrain judges more. For example, Gary Lawson contends that originalists can avoid constitutional construction by adopting constitutional default rules, which would apply when the text's meaning is uncertain. See Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1234 (2012) ("In the event that there is any uncertainty about what this Constitution means in any specific application, resolve the uncertainty *against* the existence of federal power and *in favor* of the existence of state power."); see also Solum, *supra* note 19, at 512–14 (discussing Lawson's argument that constitutional interpretation can eliminate the need for constitutional construction by creating default rules). This approach would limit judicial discretion insofar as it would provide judges with instructions for resolving cases when constitutional meaning runs out. At least one other scholar makes a related point. See

Of course, this is not to argue that the new originalism does not constrain at all. The new originalism does forbid constitutional constructions from violating the original semantic meaning of the constitutional provision in question.<sup>191</sup> However, in emphasizing constraint as one of originalism's selling points,<sup>192</sup> originalists are implying that their methodology constrains more successfully than alternative methodologies. This implication is dubious. A judge who has already found that the relevant provision is under-determinate enough to trigger a move from interpretation to construction is unlikely to find that same provision very constraining at the construction stage.

In reality, the new originalism, at the construction stage, is similar to the status quo in constitutional interpretation, in that the judge is given wide leeway. For instance, a judge could, consistent with new originalism, decide that when the text's semantic meaning runs out, she will defer to the legislature or, alternatively, adopt a presumption of liberty.<sup>193</sup> These approaches would be consistent with many variants of the new originalism but would yield opposite results in most cases. To this extent, constitutional construction is potentially even less constraining than common law constitutional interpretation seeking to follow precedent, which most Justices do anyway.<sup>194</sup>

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Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 878 (2009) (disputing that when the text is indeterminate, "an interpreter therefore has interpretive license to fill the gaps with whatever content the interpreter desires"). However, many other versions of new originalism do not build in such constraining canons of construction. See BALKIN, *supra* note 5, at 3; Barnett, *supra* note 181, at 70; Solum, *supra* note 17, at 18–19.

In all events, the variety of new originalism theories creates a similar problem of malleability that was characteristic of the old originalism. See *supra* Part I.A. While this variety reflects the richness of the scholarly landscape, it also belies the notion that a universal turn to this method of interpretation will place all judges on the same page. Of course, this objection does not undermine the constraining capacity of any particular variant of new originalism. Nevertheless, if constitutional theory is to constrain judges, it must get them to agree on common ground, and the absence of such common ground, even among self-described new originalists, suggests that it will be hard to agree on a universal approach. In some instances, these theoretical differences may not yield significant practical differences, but in some instances, they certainly would. See, e.g., Barnett, *supra* note 181, at 70; *infra* note 193 and accompanying text.

191 See Solum, *supra* note 5, at 154 (noting that originalists believe that "original meaning should have binding or constraining force").

192 See *supra* notes 3–5 and accompanying text.

193 See Barnett, *supra* note 181, at 70 ("So, just as originalists need a normative theory to explain why we today should adhere to the original meaning of the Constitution, they also need a normative theory for how to construe a constitution when its meaning runs out."). But see Lawson, *supra* note 190, at 1234 (adopting such a presumption against the constitutionality of federal legislation).

194 See STRAUSS, *supra* note 77, at 44 ("The common law approach is what we actually do.").

Indeed, far from constraining judges, a turn to new originalism could liberate judges from the shackles of current constitutional doctrine. Because the Constitution is short and vague, its text has been less presumptively decisive than more prolix statutes.<sup>195</sup> Constitutional text, in other words, has generally taken a back seat in constitutional interpretation through the generations.<sup>196</sup> Accordingly, a shift to the new originalism, away from common-law interpretive practices, would yield great legal uncertainty, as it would reopen long-accepted precedents for reexamination on the grounds that those precedents are inconsistent with original public meaning.<sup>197</sup> For example, we have a complex body of free speech doctrine permitting certain abridgements of expression, including, among others, incitements to violence, fighting words, and child pornography.<sup>198</sup> However, as noted above, the First Amendment's language speaks in absolutes, stipulating that "Congress shall make *no* law . . . abridging the freedom of speech."<sup>199</sup> Some prominent thinkers, including Justice Hugo Black, have insisted that the First Amendment's "emphatic command" forbids any abridgement of speech,<sup>200</sup> but a move in that direction today would unsettle decades of precedent.<sup>201</sup> (Such textual devotion would also need to justify First Amendment prohibitions on *executive* abridgements of speech, given that the text is directed solely at "Con-

195 See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is *a constitution* we are expounding."); STRAUSS, *supra* note 7, at 34–35 (explaining that in our system, constitutional precedent representing "two centuries of experience grappling with the fundamental issues" typically takes precedence over the Constitution's short text).

196 See David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1726 (2003) ("[Constitutional] text plays essentially no operative role in deciding the most controversial constitutional questions (about discrimination, fundamental rights, and freedom of expression, for example) . . ."). In addition to the new originalists, Professor Nicholas Rosenkranz has also recently emphasized the importance of the Constitution's text. See generally Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005 (2011); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010).

197 See Robert W. Bennett, *Originalism and the Living American Constitution*, in CONSTITUTIONAL ORIGINALISM, *supra* note 4, at 78, 115 (exploring challenges of overturning precedent that does not conform with originalist interpretation).

198 See, e.g., *New York v. Ferber*, 458 U.S. 747, 776 (1982) ("This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children . . ."); *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (allowing for abridgements of speech that incite "imminent lawless action"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (discussing classes of speech that can be restricted without offending First Amendment speech rights).

199 U.S. CONST. amend. I (emphasis added).

200 *N.Y. Times Co. v. United States*, 403 U.S. 713, 718 (1971) (Black, J., concurring).

201 See *supra* notes 74–76 and accompanying text.

gress.”) Similarly, the complex body of Eleventh Amendment doctrine would be, at a minimum, revisited were the Court to adopt the new originalism as its sole method of constitutional interpretation.<sup>202</sup> And, even decades of incorporation doctrine, under which most of the Bill of Rights is applied against the states, would also be revisited, as it is hardly clear that the original public meaning of the Fourteenth Amendment disrupted the settled practice of applying those rights only against the federal government.<sup>203</sup> From this perspective, the adoption of a constitutional methodology that reopens many seemingly decided issues could hardly be *less* constraining.<sup>204</sup> If anything, because originalism, unlike some other constitutional methodologies, purports to lock in constitutional meaning forever, the new originalism may invite justices to aggrandize their own power by selecting a single (contestable) original meaning to displace settled law and serve as binding precedent in all future cases.

Constitutional theories’ capacity to constrain, in short, cannot be judged solely in a vacuum but must be weighed in light of the culture of interpretation already accumulated. Of course, as Professor Solum argues, originalists need not be committed to “irrational absolutism” and could follow even non-originalist precedent if it would be too disruptive not to do so.<sup>205</sup> This is an important and sensible concession rendering the new originalism more palatable in practice. However, given how much constitutional precedent is not originalist,<sup>206</sup> this concession also risks gutting the theory, except in rare cases in which there is little relevant precedent, such as (arguably) *Heller*.<sup>207</sup>

Given the great flexibility deliberately built into constitutional construction, the only way in which the new originalism can meaningfully constrain judges is at the interpretation stage—that is, by arguing that constitutional text is determinate enough to settle many a

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202 See *supra* notes 54–58 and accompanying text.

203 See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949) (“In his contention that Section I was intended and understood to impose Amendments I to VIII upon the states, the record of history is overwhelmingly against [Justice Black].”); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 365 (2009) (“Viewed through the lens of original public meaning, the historical case for incorporation is therefore problematic.”).

204 See Rakove, *supra* note 126, at 578 (noting that public meaning originalism “can be enormously liberating . . . because it allows courts to ignore well-grounded precedent in the pursuit of a vision of original constitutional meaning”).

205 See Solum, *supra* note 59, at 143, 158–59.

206 See STRAUSS, *supra* note 77, at 34–35.

207 But see Solum, *supra* note 59, at 143, 159 (discussing the virtues of a “slow and steady advance” of originalist jurisprudence).

case.<sup>208</sup> But, that argument takes us full circle, back to the problem of fixation and the reality that the constitutional provisions most likely to end up in litigation are those that lack discernible, determinate meaning.<sup>209</sup> Indeed, even determining which sources count as sufficiently contemporaneous to inform the “original semantic meaning” is a difficult judgment call that offers judges great latitude. (Is ten years before or after ratification sufficiently contemporaneous? Twenty?) At best, these inquiries may point to a range of possible meanings or eliminate some potential interpretations.<sup>210</sup> At the end of the day, then, the new originalism, just like the old, fails to constrain judicial decision making any better than other methods of constitutional interpretation.<sup>211</sup>

### CONCLUSION

The historian Rakove once observed that law professors and judges think like foxes rather than hedgehogs in that they dabble in history (and other disciplines) and then move on.<sup>212</sup> Rakove, of course, was referencing Isaiah Berlin’s famous distinction between two types of intellectuals: the hedgehog, who knows one thing, and the fox, who knows many.<sup>213</sup> As Berlin put it,

there exists a great chasm between those, on one side, who relate everything to a single central vision, one system less or more coherent and articulate . . . and, on the other side, those who pursue many ends, often

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208 See Colby, *supra* note 7, at 773 (“[S]ome originalists seek to avoid the consequences of the New Originalism by insisting that the objective, original public meaning of the Constitution’s major rights clauses is much less abstract.”).

209 See *supra* Part II.B.

210 See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1093, 1093 n.729 (1995) (noting that a particular argument is interpretation “within the legitimate range of interpretations of the Amendment on originalist grounds”); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 690 (1987) (“History sometimes reveals a range of ‘original understandings.’”).

211 See Tushnet, *supra* note 43, at 617 (“The new originalism, like the old, fails to deliver on its claim about eliminating judicial subjectivity, judgment, and choice.”). Interestingly, other countries seeking to constrain judges usually reject American-style originalism as a viable option. See generally Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 2–4 (2009).

212 See Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191, 213 (1999) (reviewing 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) and AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998)) (discussing Berlin’s metaphor of the hedgehog and the fox).

213 See ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX* 1 (1966) (building on Archilochus’s observation).

unrelated and even contradictory, connected, if at all, only in some *de facto* way.<sup>214</sup>

Rakove's point was that lawyers are fox-like in their capacity to hunt for helpful theories and evidence, in their adventurous forays outside their own disciplinary boundaries, and in their propensity, over the course of their careers, to make an argument in one case entirely contrary to an argument in another.

With due respect to Rakove, I would submit that we can also think of many judges, lawyers, and even law professors as hedgehogs, rather than foxes—and, for reasons Rakove might find convincing. Judges and lawyers are, by training, advocates, and they are highly skilled at marshaling evidence zealously in favor of a certain outcome.<sup>215</sup> In this regard, the advocate and advocate-turned judge (or law professor) sometimes proceeds like a hedgehog, viewing evidence through a single-minded lens to build a convincing case.<sup>216</sup> All evidence bolsters the central argument, whether presented in a lawyer's brief, a judge's opinion, or a professor's scholarly agenda.

In fairness, most judges do not have much choice. It may be true, as the Reconstruction historian Eric Foner has written, that most historians would not say that there is a single, universally accepted original meaning of the Fourteenth Amendment (or many other constitutional provisions),<sup>217</sup> but the judge often does not have the luxury of

214 *Id.*

215 See Timothy P. O'Neill, *Law and "The Argumentative Theory,"* 90 OR. L. REV. 837, 848 (2012) ("When a judicial opinion—especially a U.S. Supreme Court majority opinion in a five-to-four case—is couched in completely unequivocal language, its message to the other side is: 'You're wrong. And, by the way, you are stupid and perhaps dishonest, too.'"); Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 85 (1998) ("Repeated exposure to adversaries' arguments, set up as opposing poles, establish a habit of mind for judges who in turn write opinions as though they present a preordained correct answer, which embraces by necessity only one position or viewpoint.").

216 Although there are great advantages in having accomplished lawyers ascend to the bench, it is worth noting that some countries have lay judges or professional judges who have never practiced as lawyers. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 103–04 (3d ed. 2007) (noting that in some countries, high court judges will have served their entire careers as judges and, never having practiced, "will see the law solely from the judge's point of view"); John D. Jackson & Nikolay P. Kovalev, *Lay Adjudication and Human Rights in Europe*, 13 COLUM. J. EUR. L. 83, 93–100 (2006) (discussing lay judges). Whatever their disadvantages, these judges may not be as prone to some lawyers' professional biases. See Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1586–91 (2007) (arguing that lawyers are prone to distinctive professional biases).

217 See Eric Foner, *The Original Intent of the Fourteenth Amendment: A Conversation with Eric Foner*, 6 NEV. L.J. 425, 427 (2006) ("I don't think any historian would say there was a single meaning that was universally accepted in the Fourteenth Amendment.").

concluding that the law is unclear. To the extent that judges must decide a constitutional case one way or another (at least when they do not dispose of it on other grounds), they gain little from illustrating the maddening historical and linguistic complexities of a question.

Most judges, I believe, honestly and earnestly try to reach the “right” outcome,<sup>218</sup> but originalism often makes it harder, not easier, for them to do so. If applied consistently, as a sole method of constitutional interpretation today, originalism of any stripe would reopen countless areas of constitutional doctrine, creating great uncertainty in the law. It, moreover, would force judges to place great weight on a complex body of obscure evidence with which they have minimal training, thus heightening the danger that the judge will make honest mistakes or take interpretive liberties. By contrast, the traditional common-law approach to constitutional interpretation, for all its flaws, presents judges with a generally accepted common ground and a limited range of plausible answers.<sup>219</sup>

Moreover, the historical evidence often does not clearly indicate a correct semantic meaning, so it is misleading for judges to pretend otherwise. Indeed, judicial opinions as a genre are not good vehicles for careful historical or historically based linguistic analyses. This is not just because judges lack the training to do history well (although that is true),<sup>220</sup> but also because judges’ and historians’ temperaments and objectives differ. Whereas the historian can spend years researching a nuanced book that acknowledges the contradictions of an era, the judge must justify, in less time and fewer words, why her resolution of a case is “correct.” Historians can account for paradox and tension; lawyers and judges must justify outcomes.<sup>221</sup> This is not to say that historians are more fair-minded than lawyers or judges;

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218 Cf. Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 530–32 (2013) (noting that there are many talented, earnest judges who work to resolve constitutional issues in accordance with constitutional principles).

219 See Strauss, *supra* note 196, at 1729–31 (discussing the merits of the common law approach to constitutional interpretation).

220 See Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479, 526 (2008) (“[J]udges are not trained in the methods of professional historians.”); Jack N. Rakove, *Fidelity Through History (or to It)*, 65 FORDHAM L. REV. 1587, 1588 (1997) (“[T]here is good historical evidence that jurists rarely make good historians . . .”).

221 See Jack N. Rakove, *Confessions of an Ambivalent Originalist*, 78 N.Y.U. L. REV. 1346, 1347 (2003) (“Unlike lawyers, we [historians] are not trained to speak with the voice of the advocate or the adversary. . . . The nuance, subtlety, and respect for ambiguity that we [historians] cherish and relish in our research cannot easily be translated into urgent political discussion.”).

historians, too, build arguments shaped by their own biases.<sup>222</sup> The difference, however, is that the historians' end-product can—and should—admit, and even highlight, paradox, whereas the judge's opinion must defend her holding against contrary views.

In fairness, judges applying other constitutional methodologies can also find evidence and build arguments to justify a preferred outcome.<sup>223</sup> This is especially so in close cases where reasonable people can disagree and where even the most fair-minded person may find it difficult to eliminate normative bias from legal analysis.<sup>224</sup> Originalism, then, is hardly the only methodology that fails to constrain judicial decision making. Originalism is particularly worthy of criticism, however, because of its pretense that it is different—that it captures the Constitution's singular meaning and that it uniquely “fixes” that “correct” meaning and, thereby, constrains judges' choices. In this regard, originalism creates an especially misleading illusion of certainty. It may be comforting to think that clear, original meanings constrain judicial decision making, but in most real cases, this is a false comfort. As Oliver Wendell Holmes, Jr. observed, “[C]ertainty generally is illusion, and repose is not the destiny of man.”<sup>225</sup>

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<sup>222</sup> See CROSS, *supra* note 25, at 109 (citing various historians).

<sup>223</sup> See Harrison, *supra* note 89, at 481 (“[Judges] will formulate the goal of the Fourteenth Amendment differently, and come to different conclusions about the effects of legal rules, or both.”).

<sup>224</sup> See Eric Berger, Lawrence’s *Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 818 (2013) (“However impartial they try to be, judges, as human beings, cannot wholly divorce their own values from their rulings, especially in close cases about which reasonable people can differ on the correct legal outcome.”); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324, 34553 (1990) (arguing that judges cannot convincingly exclude current values from their interpretations and that decisions often involve conformity to contemporary circumstances and values).

<sup>225</sup> Oliver W. Holmes, Jr., *The Path of the Law*, Address at the dedication of a new hall at the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 466 (1897).