The Concession that Dooms Originalism: A Response to Professor Lawrence Solum

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Abstract

This essay responds to a recent article by Professor Lawrence Solum in the Northwestern University Law Review, which describes alleged differences between Originalism and Living Constitutionalism. This paper argues that even under Solum's own criteria there is no meaningful difference between these two theories of constitutional interpretation, and this merger is important for current political and legal debates about the proper role for the Supreme Court in our system of government.

The original promise of Originalism was that only by combining strong judicial deference with the search for original intent or meaning could judges be meaningfully constrained when resolving many of our country's most difficult social, political, and legal issues. As more and more Originalists drop the deference aspect of the theory, however, and tell judges to apply the original meaning of the constitutional text differently as relevant facts (and values) change, judicial discretion is maximized. Whereas most Living Constitutionalists concede judges inevitably have that discretion, Originalists today still often claim that only their theory can limit the power of runaway federal judges. That claim, however, is unpersuasive given the wide swath of discretion judges have under current Originalist theory to pick and choose which facts are relevant and which ones have changed since the text at issue was originally ratified.

The only meaningful theory of constitutional interpretation that can, in practice, privilege the Constitution's original meaning is one which includes strong judicial deference to other government officials, but most Originalists no longer advocate such deference.

Introduction

Originalism's critics have argued for decades that the way most modern academics and virtually all judges employ the theory has made Originalism indistinguishable from Living Constitutionalism.[1] This criticism is important for at least two reasons. First, the term "Originalism" has substantial valence in our modern legal and political culture. For example, the President of the United States, along with the Executive Vice President of the Federalist

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[1] *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 306–07 (2009).

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Society who assisted him (while "on leave," from the Federalist Society),[2] pledged to nominate only "Originalist" judges in the mold of the late Justice Scalia to the federal courts.[3] That promise was code for not selecting liberal Living Constitutionalist judges. But if there truly is no difference between the two modes of judging, other than the judges' political priors, then the American people were being duped by these promises.[4]

Second, there is a voluminous amount of academic literature parsing the two major modes of constitutional interpretation. If there is little viable difference between the theories, however, it is well past time for academics to focus their energies on pursuits other than theoretical battles over Originalism and Living Constitutionalism.

Perhaps no American scholar has put more time and effort into describing and evaluating Originalist theory than Professor Larry Solum. He was the only academic to testify in support of Originalism during the Supreme Court confirmation hearing of then-Judge Neil Gorsuch.[5] He recently wrote an essay in the *Northwestern University Law Review* titled "Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate."[6]

I have little argument with Solum's descriptive account of that debate and will present it faithfully.[7] However, at the end of his essay, while talking about my work, Solum makes a concession that is fatal to any Originalist theory that does not also entail strong judicial deference to other political officials.[8] By strong judicial deference, I mean something akin to a clear error rule where judges only invalidate laws when, in the words of Alexander

2 *See* Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-scenes Campaign to Remake the Nation's Courts*, Wash. Post (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/ [https://perma.cc/YH86-HXJN].

3 *See* Ken Klukowski, *White House Adviser Leo: Trump Likely Two More Supreme Court Picks*, BREITBART (June 24, 2018), https://www.breitbart.com/politics/2018/06/24/wh-adviser-leo-trump-likely-two-more-scotus-picks/ [https://perma.cc/D99V-MZBP].

4 *See generally* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 689–90 (2009).

5 *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 730–41 (2017) (statement of Lawrence B. Solum, Carmack Waterhouse Professor of Law, Georgetown University Law Center).

6 Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

7 Solum's essay, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, includes many theoretical, historical, and linguistic arguments about constitutional interpretation that deserve attention but will not be the subject of this essay, which is focused on the one specific aspect that is most relevant to judges deciding actual constitutional cases.

8 *See infra* Part II.

Hamilton, there is an "irreconcilable variance" between the challenged statute and the Constitution.[9]

Since most self-professed academic and judicial Originalists do not believe in that kind of across-the-board deference, Solum's concession means that most Originalist theory, especially the brand currently known as New Originalism, is not meaningfully different in practice than Living Constitutionalism. Both methodologies consider the text's original meaning but also allow judges to override that meaning by looking at relevant societal changes occurring long after the people ratified the text. But before we can see why that is so, and why it is important to current legal and political debates over the proper role of the Supreme Court, we have to first wade into a little background about Originalism and Solum's specific account of that theory.

I. THE OLD AND NEW ORIGINALISM

Although judges have paid lip service to the Constitution's original meaning or original intent for centuries, Originalism as a separate legal, political, and social movement began as a response to the controversial and liberal Supreme Court decisions of the 1960s and 1970s, especially *Roe v. Wade*[10] and *Miranda v. Arizona*.[11] Outside the courts, Presidents Richard Nixon and Ronald Reagan successfully ran against so-called "activist judges," who allegedly make rather than interpret the law.[12] In the legal academy, Professors Robert Bork and Raoul Berger set the academic stage for the idea that judges should not invalidate laws unless they clearly violate either constitutional text or the original intent behind the text.[13] Eventually, Reagan's Attorney General Ed Meese along with other high-profile members of the Federalist Society in the early and middle 1980s both publicized and further politicized the doctrine.[14]

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9 THE FEDERALIST NO. 78 (Alexander Hamilton).

10 410 U.S. 113 (1973).

11 384 U.S. 436 (1966). For a general discussion of the origins of the Originalism movement, see ERIC SEGALL, ORIGINALISM AS FAITH 56–65 (2018); *see also* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 9 (2009) ("The first wave of contemporary originalists, led in the 1970s by then-Professor Robert Bork and Raoul Berger, reacted against what they viewed as unjustifiable Warren (and Burger) Court activism by advocating that courts focus on the original intent of the framers.").

12 *See generally* Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555 (2010) (describing the judicial nomination platforms of various Republican Presidents).

13 *See* SEGALL, *supra* note 11, at 56–65.

14 *See id.* at 62–65.

At the time, Originalism was strongly connected to substantial judicial deference to other political actors. As I argued in a recent book,[15] and contrary to many other liberal critics of Originalism,[16] this Original Originalism (with strong deference) is both coherent and desirable. But sadly, such an approach to constitutional interpretation is much more fantasy than reality, and that is unlikely to change.[17]

Originalism underwent a major transformation in the 1990s both because of critiques levelled at it by numerous liberal academics such as Professors Paul Brest and Jefferson Powell,[18] and because conservatives gained much more power in the federal judiciary.[19] Originalist academics now needed a theory to justify aggressive (not deferential) judicial review to further conservative and libertarian policy goals.[20] These changes gave rise to the New Originalism espoused by academics such as Professors Randy Barnett, Stephen Calabresi, and Lawrence Solum.[21] These scholars, along with many others, made several critical changes to the Original Originalism in addition to dropping its connection to deference that was the hallmark of the old theory.[22] One change, which isn't particularly relevant to the "great debate" over Originalism and Living Constitutionalism, is that most Originalists moved from searching for the Constitution's original intent to the Constitution's original public meaning.[23] Although this move has substantial consequences for intramural Originalist debates and raises the level of generality of the search for original meaning quite a bit, it is not an important component of the arguments between Originalists and Living Constitutionalists.[24]

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15 *See* SEGALL, *supra* note 11, at 13.

16 *See* Edward Whelan, *The Use and Abuse of Originalism*, ETHICS & PUB. POL'Y CENTER (June 11, 2015), https://eppc.org/publications/the-use-and-abuse-of-originalism/ [https://perma.cc/C235-9HRS].

17 *See* SEGALL, *supra* note 11, at 13.

18 For a brief summary of these critiques by Solum himself, see Lawrence B. Solum, *Legal Theory Lexicon: Originalism*, LEGAL THEORY BLOG (Aug. 11, 2019), https://lsolum.typepad.com/legaltheory/2019/08/legal-theory-lexicon-originalism.html [https://perma.cc/F9UN-2KQP].

19 *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 603, 604 (2004).

20 *See id.* at 604, 609.

21 *See, e.g.,* Greene, *supra* note 4, at 671–72, 713–714 & nn.74, 77 & 314.

22 *See generally* Whittington, *supra* note 19, at 604, 609.

23 *See id.* at 609–10.

24 *See* Eric Segall, *Original Intent, Original Meaning, or Let's Call the Whole Thing Off*, DORF ON LAW (July 29, 2019), http://www.dorfonlaw.org/2019/07/original-intent-original-meaning-or.html [https://perma.cc/8R49-CHTR].

Two other aspects of New Originalism are more important. According to Solum, virtually all Originalists now share two core premises: the meaning of the Constitution is fixed at the time of ratification, and that fixed meaning, if ascertainable, is binding on today's judges. Here is how he puts it:

> [A]lmost all contemporary forms of originalist constitutional theory endorse two central ideas. The first idea is the Fixation Thesis: the original meaning of the constitutional text was fixed at the time each provision was framed, ratified, and made public. The second idea is the Constraint Principle: constitutional practice should be constrained by this fixed original meaning. Originalists disagree among themselves about the nature of original meaning, the extent of constitutional underdeterminacy, and about how originalism is best justified, but they agree about fixation and constraint.[25]

According to Solum, the doctrines of fixation and constraint are largely where Originalism and Living Constitutionalism diverge. He says that whereas Originalists believe the Constitution's meaning is fixed, those who advocate for a Living Constitution are "united by the idea of constitutional change."[26] We will return to this alleged difference after discussing one more aspect of New Originalist theory.

Solum argues that most New Originalists agree there is a difference between constitutional interpretation and constitutional construction. As Solum has said elsewhere, "[i]nterpretation is the activity that aims to recover the linguistic meaning (or semantic content) of a legal text. Construction is the activity that aims to produce juridical meaning (or legal content) that is authorized by a legal text."[27] In other words, to recover the Constitution's original meaning, we must first discover its nonlegal, semantic meaning, then we must use constitutional construction to apply that meaning in a legal context to a particular set of facts.[28] Sometimes that task is easy, as is the case with the constitutional commands that all states have two senators[29] or the President must be thirty-five.[30] Sometimes constitutional construction is quite difficult, such as with the requirements that no state shall deny to any person the "equal protection of the laws," or

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25 *See* Solum, *supra* note 6, at 1265–66.

26 *Id*. at 1271.

27 Lawrence B. Solum, *Graber on the Interpretation-Construction Distinction Panel at the AALS*, LEGAL THEORY BLOG (Jan. 13, 2010), https://lsolum.typepad.com/legaltheory/2010/01/graber-on-the-interpretationconstruction-distinction-panel-at-the-aals.html [https://perma.cc/57V4-KXYS].

28 *See id.*

29 *See* U.S. CONST. art. I, § 3, cl. 1.

30 *See id.* art. II § 1, cl. 5.

"due process of law."[31] The Original Originalists argued that in such difficult cases judges should defer to the elected branches, but most modern Originalists adopt a more aggressive judicial approach.

When the semantic meaning of the text is difficult to apply in a legal setting, New Originalists argue that there is a construction zone where judges have to construct legal doctrines to decide cases. Solum says that "[w]hen the constitutional text is vague in a way that is relevant to the resolution of a case presented to a court, then judicial construction (the development of constitutional doctrine) will be required."[32] While not all Originalists accept the interpretation-construction distinction, the concept is a key aspect of New Originalism.

The most confusing aspect of New Originalism is the nature of this so-called "construction zone." It is confusing because New Originalists accept that constitutional change is often required in that zone. Here is how Solum describes the consistency between Originalism and constitutional change:

> [I]n *Bradwell v. Illinois*, the Supreme Court upheld Myra Bradwell's exclusion from the Illinois bar on the basis of gender. . . . *Bradwell* could have been understood as consistent with the [Privileges and Immunities Clause] by Justices who believed that women were intellectually incapable of functioning as competent lawyers. The opposite result would be required [today] given true beliefs about women's intellectual capacities. *Fixed original public meaning can give rise to different outcomes given changing beliefs about facts. The Constraint Principle does not require constitutional actors to adhere to false factual beliefs held by the drafters, Framers, ratifiers, or the public*.[33]

In sum, Solum's characterization of the core beliefs held by New Originalists includes the following: they believe that the meaning of the Constitution is fixed at ratification, that this meaning is binding on legal actors, but that the original meaning may not be enough to decide some constitutional cases. When original meaning is underdetermined, judges must construct legal doctrines, which may evolve from the original meaning of the text as we learn that the Framers, ratifiers, or the public held erroneous factual beliefs or even "changing beliefs about facts."[34]

Now we can turn to Solum's discussion of my work and the concession that dooms Originalism as a separate theory from Living Constitutionalism unless it also includes strong judicial deference. However, most current

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31 *See id.* amend. XIV, cl. 1.

32 Solum, *supra* note 27; *see* Solum, *supra* note 6, at 1278–79.

33 Solum, *supra* note 6, at 1268–69 (emphasis added).

34 *Id.* at 1269.

forms of Originalism, not just New Originalism, do not advocate for this kind of deference.[35]

II. THE CONSTRUCTION ZONE ENABLES LIVING CONSTITUTIONALISM

As I mentioned at the outset, critics of New Originalism have long argued that on the ground there is little difference between New Originalism and Living Constitutionalism. The basic argument is that the construction zone is so large that the search for the Constitution's original meaning does little or no work in real constitutional cases, and judges end up simply using pluralistic methods of constitutional interpretation to resolve such cases based largely on their values and experiences, and prior Supreme Court cases.[36] For the purposes of this argument, the precise contours of Living Constitutionalism do not matter other than the shared belief among its advocates that original meaning plays only a minor role in judicial resolution of most constitutional disputes because it cannot privilege outcomes in most cases.[37]

Solum begins his discussion of this problem by saying that it could be argued that

> any theory that permits changes in constitutional doctrine is, by definition, a form of 'living constitutionalism.' If accepted, this proposal would have very substantial consequences for the conceptual structure of the great debate. Almost all of the theories supported by self-identified originalists would be reclassified as forms of living constitutionalism.[38]

He continues by saying that this "consequence is obvious in the case of so-called 'New Originalist' theories that embrace the interpretation–construction distinction and moderate underdeterminacy of the constitutional text . . . ."[39] Moreover, even if some Originalists disagree with or could cure the underdeterminacy problem, such theories "would still allow for the development of new implementing rules in response to changing circumstances—for example, in the application of the First Amendment freedom of speech to oral communication via the Internet."[40]

35 *See*, *e.g.*, Mike Rappaport, *Debating Original Methods Originalism*, LAW & LIBERTY (Nov. 21, 2018), https://www.lawliberty.org/2018/11/21/debating-original-methods-originalism/ [https://perma.cc/H82Y-U4CV].

36 *See* Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. 1, 11–12 (2017).

37 Solum, *supra* note 6, at 1276.

38 *Id.* at 1293.

39 *Id.* at 1293–94.

40 *Id.* at 1294.

After recognizing this potential conflict, Solum quotes an argument I made in response to Professor Randy Barnett's New Originalism, which for these purposes is indistinguishable from Solum's approach to constitutional interpretation. Solum quoted me as follows:

> The problem with Barnett's originalism is that constitutional litigation almost always involves "vague constitutional provisions" that have uncertain meanings in the context of our ever-changing society. When is the last time someone litigated the requirements that there be two Senators from every state, that the President be at least thirty-five, or that jury trials are required if more than twenty dollars are at stake? Most cases that end up in front of judges implicate vague phrases like 'equal protection,' 'due process,' 'establishment of religion,' and 'cruel and unusual punishment.'[41]

Solum then says that from "this premise," Segall argues that Originalism and Living Constitutionalism are largely indistinguishable,[42] but Solum does not give full shrift to my arguments. Under the New Originalist approach, and in the construction zone, judges have discretion to bring an endless array of postratification facts and changed cultural values into consideration when resolving constitutional cases, diluting any meaningful constraining effect of the text's original meaning. As Professor Andrew Coan has argued, the New Originalism with its interpretation-construction distinction "licenses free-wheeling constitutional construction of open-ended constitutional text without reference to original meaning. It also severs . . . contemporary constitutional law from the democratic will of those who ratified it, whose expectations and intentions New Originalist judges are fully permitted to ignore."[43]

Coan is right because what New Originalists label as changes in facts are often indistinguishable from changes in values. For example, Solum believes that the ratifiers of the 1868 Reconstruction Amendments and the public at the time might have falsely believed that women did not have the requisite temperaments and skills to be lawyers, but judges today should not be bound by those erroneous facts and beliefs.[44] The proper role for women in our society, however, could just as easily be labelled by judges a values question, and what really changed was, thankfully, society's values. But any theory of constitutional interpretation that allows judges to apply the original meaning of the constitutional text differently today than when ratified

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41 *Id.* (quoting Eric J. Segall, *Originalism as Faith*, 102 CORNELL L. REV. ONLINE 37, 41–42 (2016)).

42 *Id.*

43 Andrew Coan, *Living Constitutional Theory*, 66 DUKE L.J. ONLINE 99, 110 (2017).

44 *See supra* note 33 and accompanying text.

because the public's values changed sounds a lot more like Living Constitutionalism than Originalism. As Originalist Professors Will Baude and Stephen Sachs have said about how judges decide cases in the construction zone: "what these normative considerations are, and hence what's supposed to happen in these construction zones, can seem awfully indeterminate."[45]

In his essay, Solum says that the

> key to understanding Professor Segall's metalinguistic argument is identification of his crucial premise—which is that all, or almost all, constitutional issues that are actually litigated involve indeterminate constitutional provisions. *If it were true that the original public meaning of the constitutional text was radically indeterminate in all litigated cases, then it would follow that the Constraint Principle would have no constraining force, hence originalism and living constitutionalism would not be meaningfully different*.[46]

As Solum recognizes, my point is not that the text is radically indeterminate in all places and for all purposes. Rather, my thesis is that original meaning does not and will not lead to persuasive choices among various plausible outcomes in most litigated cases (at least absent strong judicial deference to the political branches).

Solum suggests that the question of whether the "communicative content" of the Constitution's text is indeterminate in most constitutional cases is an "empirical" one that requires a "rigorous" Originalist analysis, work that neither "Professor Segall nor any other critic of originalism of whom I am aware has done."[47] But if the indeterminacy claim is correct, Solum concedes that "would almost surely result in the disappearance of 'originalism' as anything more than a theoretical option. The great debate would then be reconfigured as a debate among living constitutionalists of different stripes."[48]

It is uncertain what Solum means when he refers to the empirical work necessary to sustain the indeterminacy thesis, but what is clear is that under the rules of constitutional interpretation and construction adopted by most New Originalists themselves, constitutional law will be constructed by judges separately from original meaning in any serious sense of the term "original meaning." That is why the critics of New Originalism argue there

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45 William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1128 (2017).

46 Solum, *supra* note 6, at 1294 (emphasis added).

47 *Id.*

48 *Id.* at 1295.

is no meaningful difference between most modern Originalist theory and Living Constitutionalism.

Under Solum's approach, the original meaning of imprecise constitutional text as applied to new problems that actually get litigated will not lead to enough clarity to prevent judges from choosing outcomes that are consistent with their value preferences.[49] This thesis can be easily shown with reference to both real and hypothetical cases and by using the rules of interpretation and construction that most Originalists embrace. Contrary to Solum's assertion, this thesis does not require an empirical analysis of the original meaning of all the imprecise constitutional text that is likely to be the subject of litigation (an impossible task in any event given that constitutional law usually involves applying unclear text to unanticipated facts) but rather just an on-the-ground realistic perspective of the history and current practice of constitutional law.

Let us start with the case that virtually all Originalists point to as an example of Originalist methodology, *District of Columbia v. Heller*.[50] Justice Scalia, writing for the five conservatives on the Court, held that the Second Amendment prohibited the District of Columbia's ban on handguns, including having them operable in the home for self-defense.[51] The liberals argued in opinions by Justices Stevens and Breyer that the Second Amendment only protects gun rights in the context of militias, and in any event, the law should have been upheld under a proper balancing test even if people have an individual right to own guns.[52]

I will assume for sake of argument that the Second Amendment in some contexts protects an individual right to own guns even though that conclusion is in no way dictated by original meaning.[53] Using New Originalism methodology, how should judges resolve the myriad legal issues that have plagued lowed courts since *Heller* was decided? Where are people allowed to possess guns; how many guns may one person own; are all guns protected or just some guns; can states impose rigorous licensing schemes on gun ownership; and can automatic weapons be regulated differently than other

49 Lower courts are bound by Supreme Court precedent, so in that sense they will be constrained. But that precedent itself is not constrained by original meaning, as the discussion in this section will show. Lower court judges who use any method of Originalism other than one that embraces strong deference similarly will also not be constrained by original meaning in cases of first impression.

50 554 U.S. 570 (2008).

51 *Id.* at 635.

52 *Id.* at 637–38 (Stevens, J., dissenting); *id.* at 681, 689 (Breyer, J., dissenting).

53 *See* Saul Cornell, *Guns Have Always Been Regulated*, THE ATLANTIC (Dec. 17, 2015), https://www.theatlantic.com/politics/archive/2015/12/guns-have-always-been-regulated/420531/ [https://perma.cc/RFN6-FLE8].

guns? All of these questions and many more implicate facts that have changed dramatically since the founding and for which the ratifiers of the Second Amendment, and the public at large, could not have expressed *any* meaning, much less a fixed meaning more persuasive than others. The technology involving guns in 1787 and 1868 was completely different from the relevant technology today, as guns are much more powerful now. What does it even mean to suggest that the meaning of the Second Amendment is *fixed* with regard to issues no one at the time could possibly have contemplated? And if the original meaning isn't fixed, how can it possibly *constrain* judges?

The same problems accompany virtually all litigated cases. Whether or not the original meaning of the Equal Protection Clause, ratified in 1868, bars the use by public universities of racial preferences is a nonsensical question because no one alive at the time could have foreseen a century of racial apartheid in this country, sanctioned by the Supreme Court in *Plessy v. Ferguson*[54] and other cases. Facts about racial equality and the values underlying those facts have changed dramatically since 1868. Which changed facts matter and which do not? There is no way to uncover and then apply the original meaning of words written as imprecisely as "equal protection" to a world so different than the one that existed when the words were written.

If we allow constitutional law to evolve as facts change, and to my knowledge no Originalist has persuasively set forth a way to distinguish facts from values, then we can always pick and choose new facts (or values) to alter whatever original meaning (if any) we think is part of the Constitution. And that is exactly what New Originalism allows and how judges behave. In the words of Professor Ilan Wurman, "Originalists recognize that original meaning often *requires* that the application of the text evolve as modern circumstances evolve."[55]

Of course, that is exactly what Living Constitutionalists believe as well, so the key word in Wurman's sentence is "often." Are there litigated constitutional law cases where the text's original meaning points decisively to specific outcomes? The answer is no for several reasons. First, as Professor Jonathan Gienapp has recently shown, the Framers and the public were not of one mind on most important questions they actually discussed, much less unanticipated issues they could not possibly have thought about.[56]

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54 163 U.S. 537 (1896).

55 ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 8 (2017).

56 *See generally* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE SECOND ERA (2018).

Second, there will always be changed or unanticipated facts that come between the worlds of 1787 (or 1868) and today. Whether we are talking about the internet, or transgender issues, or the President's war powers, or how broadly Congress may delegate authority to federal agencies, our society has changed culturally, politically, technologically, legally, and in innumerable other ways since 1787 and 1868. Therefore, modern circumstances can always justify judges updating the meaning of the imprecise constitutional text that leads to constitutional litigation. To further complicate matters, fitting non-Originalist, long-standing Supreme Court decisions into Originalist theories creates substantial challenges for advocates of Originalism as a dominant theory of constitutional interpretation.

There is one way out of this equivalence between Originalism and Living Constitutionalism. Extremely weak and deferential judicial review could satisfy the fixation and constraint principles. Our legal system could place on plaintiffs a heavy burden of proof to show that whatever law they are challenging is clearly inconsistent with the Constitution's original meaning. If they could not meet that burden because that meaning is unclear or for any other reason, they would lose. This strong burden of proof would shift power away from the courts and towards other governmental officials. Such a system, similar to the one advocated by the Original Originalists like Judge Bork (at least for much of his career) and Raoul Berger,[57] could drain much of the discretion away from judges deciding constitutional cases, just as the clearly erroneous rule for appellate review of lower court factual findings constrains appellate judges.

The problem is that few Originalists today advocate such a deferential model of judicial review. Instead, they suggest that Originalism and evolving constitutional meanings are consistent with each other. For example, Originalist Ilya Somin conceded that even though gender discrimination laws (like statutes preventing women from being lawyers) were deemed constitutional by most people when the 14th Amendment was ratified,[58] such laws should nevertheless be struck down by *Originalist* judges today, because

> [a]s nearly all originalists recognize, that methodology is entirely consistent with *updating* the application of its fixed principles in light of new factual information. Indeed, such updating is often not only permitted, but *actually required* by the theory. Otherwise, it will often be impossible to enforce the original meaning under

57 *See infra* note 13 and accompanying text.

58 *See infra* notes 33, 44and accompanying text.

> conditions different from those envisioned by the generation that framed and ratified the relevant provision of the Constitution.[59]

Again, this is exactly how a Living Constitutionalist would analyze the problem. Also, notice Professor Somin's use of the word "often" in his description of Originalism and the judiciary's need to "update" the Constitution's meaning.

One rare Originalist who does believe in strong judicial deference to other political officials has summarized how Originalism without deference is not really Originalism at all:

> Non-originalists all along maintained that judges are constrained by the words of the Constitution—the *original* words—but may depart from the enactors' understandings of what those words meant. Originalists now insist that judges are constrained by the *meanings* of the words, but may depart from the enactors' understanding of what those meanings would entail or require.
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> How much practical difference is there, honestly, between these accounts?[60]

Now, we can return to Solum's concession in his essay about the "great debate." He said that

> the claim that the communicative content of all the actually litigated clauses is radically indeterminate is an empirical one. . . . There are good reasons to suspect that 'armchair originalism' (speculation about original meaning on the basis of the contemporary linguistic intuitions) does not reliably yield the actual communicative content of the constitutional text.[61]

My claim is not that the Constitution's original meaning is "radically indeterminate" in all imaginable ways and for all purposes. My argument is that when the text is imprecise (virtually all constitutional cases) and in a world where judges are allowed, or even required, to consider changed factual circumstances since 1787 and 1868, original meaning is neither fixed nor constraining. Another way of saying this is that most Originalists now argue that even if we know how the people living at the time expected the text's original meaning to be applied to anticipated issues, judges still are not bound by those expectations if the people at the time were mistaken about

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59 Ilya Somin, *William Eskridge on Originalism and Same-Sex Marriage*, WASH. POST (Jan. 23, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/23/william-eskridge-on-originalism-and-same-sex-marriage/ [https://perma.cc/JP5H-65K3] (emphasis added).

60 Steven D. Smith, *Meanings or Decisions? Getting Originalism Back on Track*, L. & LIBERTY (Dec. 2, 2014), https://lawliberty.org/forum/meanings-or-decisions-getting-originalism-back-on-track/ [https://perma.cc/L7HD-EFKH].

61 Solum, *supra* note 6, at 1294–95.

their factual assumptions. Such arguments can be made in just about every litigated case, demonstrating that the original meaning of the Constitution cannot yield even modestly clear outcomes—establishing, under Solum's own analysis, that there is little meaningful difference between Originalism and Living Constitutionalism.

III. WHY IT MATTERS

At the end of his essay, Solum suggests that those of us who argue that there is no real difference between Originalism and Living Constitutionalism have not demonstrated any "clear conceptual advantage to talking in the new way."[62] This is an odd claim both because it is actually New Originalists like Solum who are talking in a new way, and because as legal academics who study constitutional law, we have a duty to describe with accuracy both how the Supreme Court actually decides cases and how we think the Court should decide cases. If Originalism is, as I and many others have argued, just a misleading label or an article of faith or, even worse, a dodge to hide political value judgments, there would be much to gain by discarding the misleading rhetoric. If it turns out that the main difference between the decisions of so-called Originalist Justices like Justice Scalia and Justice Thomas and so-called Living Constitutionalist Justices like Justice Brennan and Justice Ginsburg is not about original meaning versus a "Living Constitution," but about modern values and politics, surely that is something important for academics to point out.

Additionally, the original promise of Originalism was that only by combining strong judicial deference with the search for original intent or meaning could judges be meaningfully constrained when resolving many of our country's most difficult social, political, and legal issues.[63] As more and more Originalists drop the deference aspect of the theory, however, and tell judges to apply the original meaning of the constitutional text differently as relevant facts (and values) change, then judicial discretion will be maximized. Whereas most Living Constitutionalists concede judges inevitably have that discretion, Originalists today still often claim that only their theory can limit the power of runaway federal judges.[64] That claim, however, is simply false given the wide swath of discretion judges have

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62 *Id.* at 1295.

63 *See* SEGALL, *supra* note 11, at 56–65.

64 Colby & Smith, *supra* note 1, at 243 ("[O]riginalists further contend that the determinacy provided by reliance on constitutional text, or at least on some objective guidepost for the fixed meaning of the constitutional text, is essential to constraining judges' ability to impose their own views under the guise of constitutional interpretation.").

under current Originalist theory to pick and choose which facts are relevant and which ones have changed since the text at issue was originally ratified.

What constitutional theory needs the most right now is to recognize that any method of interpretation that does not contain a strongly deferential component will lead to judicial imposition of modern value judgments.[65] Therefore, we should avoid the distraction of a spent and unnecessary "great debate" over interpretative theories that are not materially different from each other and instead focus directly on the value judgments themselves, at least in the absence of a new and strongly deferential system of judicial review.

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65 *See* ERIC SEGALL, SUPREME MYTHS 5–6 (2012).