Originalism as Popular Constitutionalism?: It Depends

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I. Introduction

In this Article, I argue that there is no uniquely originalist answer to the question of whether and/or how originalism is compatible with popular constitutionalism. Stated more formally, there is no necessary analytical connection or disjunction between the two theories. Instead, the conceptual distance between popular constitutionalism and originalism depends on the version of originalism one is utilizing.1 With some versions, the differences between popular constitutionalism and originalism loom large. With others, the similarities emerge prominently.

I argue that whether originalism is related to popular constitutionalism is contingent on the form of originalism in question. I describe five axes upon which originalism pivots toward or away from popular constitutionalism. These five axes are: (1) whether originalism embraces departmentalism in place of judicial interpretative supremacy; (2) whether originalism requires judicial deference to popular interpretative judgments; (3) the extent to which the Constitution’s original meaning permits the popular branches to engage in authoritative constitutional interpretation; (4) the extent to which the popular branches authoritatively construct constitutional meaning when the Constitution is underdetermined; and (5) whether originalism includes a place for nonoriginalist precedent.

My goal in this Article is descriptive: I am not making any claim regarding which way originalism should pivot on any of the axes. Instead, my limited claim is that, given the nuances of contemporary originalist scholarship, one cannot definitively describe the relationship between originalism and popular constitutionalism.

My argument proceeds in two parts. First, I describe popular constitutionalism as a movement in legal academy. Second, I show that originalism’s relationship to popular constitutionalism depends on the version of originalism one adopts.

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1 In this Article, I focus on half of the equation, originalism, and do not explore the varieties of popular constitutionalism and how different forms of popular constitutionalism may make it more or less similar to originalism.
II. The (Recent) Rise of Popular Constitutionalism

Popular constitutionalism is the umbrella label for a family of constitutional theorists. Popular constitutionalism’s central commitment is to a greater popular role in the practice of constitutional interpretation. Correspondingly, popular constitutionalists reject the dominant view—judicial interpretative supremacy—which holds that the Supreme Court’s interpretations of the Constitution are authoritative. This description fits scholars, from Richard Parker, through Bruce Ackerman, Mark Tushnet, Larry Kramer, Reva B. Siegel, Jack Balkin, and most recently Rebecca Zietlow.


3 See Todd E. Pettys, Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?, 86 WASH. U.L. REV. 313, 316 (2008) (characterizing popular constitutionalists as arguing that “it is the People,’ and not federal judges, who hold the ultimate interpretative authority on disputed constitutional questions”); Gewirtzman, supra note 1, at 899 (“[Popular constitutionalists] argue[] that the People and their elected representatives should—and often do—play a substantial role in the creation, interpretation, evolution, and enforcement of constitutional norms.”).

4 Popular constitutionalists are not clear about whether they are challenging judicial interpretative supremacy in toto, or only the supremacy of judicial judgments. See Saikrishna Prakash & John Yoo, Against Interpretative Supremacy, 103 MICH. L. REV. 1539, 1550-51 (2005) (book review) (making this distinction and claim).

5 LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 315-16 (2004); see also Gewirtzman, supra note 1, at 899 (describing popular constitutionalism as rejecting judicial interpretative supremacy).

6 Professor Parker’s 1981 law review article arguably was the first modern call for scholarship in the vein of popular constitutionalism. See Richard Davies Parker, The Past of Constitutional Theory—And Its Future, 42 OHIO ST. L.J. 223 (1981) (“It is open to us . . . to imagine a political life far different—far more democratic.”). Professor Parker’s more mature statement of his popular constitutionalist views is found in RICHARD D. PARKER, “HERE, THE PEOPLE RULE” 95-96, 105, 113-14 (1994).


8 See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS x (1999) (“I attempt here to develop an approach to thinking about the Constitution away from the courts in the service of what I call a populist constitutional law.”); see also MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 79-110 (2008) (arguing that legislatures are constitutionally competent to interpret constitutions).

9 KRAMER, supra note 1, at 8.

10 See Reva Siegel, Dead or Alive: Originalism as Popular Constitutionalism in Heller, 122 HARV. L. REV. 191, 194 (2007) (“These practices of democratic constitutionalism enable mobilized citizens to contest and shape popular beliefs about the Constitution’s original meaning and so confer upon courts the authority to enforce the nation’s foundational commitments in new ways.”); Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 IND.
Judicial interpretative supremacy, in its strongest form—the one most often the target of popular constitutionalists—\(^{13}\) is the claim that the Supreme Court is the authoritative arbiter of constitutional meaning whose interpretations are binding on the other branches of government\(^{14}\) and on the American people.\(^{15}\) Interpretative judicial supremacy is clearly the dominant view on the Supreme Court,\(^{16}\) as it is in the legal academy.\(^{17}\) There is also strong evidence that Americans perceive the Supreme Court as possessing interpretative supremacy, at least in the run-of-the-mill cases.\(^{18}\)

Beyond this consensus, however, popular constitutionalism fragments. Popular constitutionalists diverge primarily on the mechanisms by which nonjudicial constitutional interpretations manifest themselves and

L.J. 1, 17-30 (2002) (criticizing the “juricentric” view of Section 5 embraced by the Rehnquist Court).
\(^{13}\) Keith Whittington recently turned the core popular constitutionalist commitments—rejection of judicial interpretative supremacy and advocacy of popular constitutional interpretation—on their head. Whittington argued that judicial interpretative supremacy is itself the product of political—popular—constitutional construction. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007).
\(^{14}\) See Walter F. Murphy, Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter, 48 REV. OF POL. SCI. 401, 407 (1986) (describing judicial interpretative supremacy as the “obligation of coordinate officials not only to obey that [judicial] ruling but to follow its reasoning in future deliberations”).
\(^{15}\) See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 865 (1992) (“The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”).
\(^{16}\) See Boerne v. Flores, 521 U.S. 507, 536 (1997) (“When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including \textit{stare decisis}, and contrary expectations must be disappointed.”); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (claiming that the Supreme Court’s interpretations of the Constitution are the Constitution under the Supremacy Clause).
\(^{17}\) See Prakash & Yoo, supra note \(^{11}\), at 1561 (“In terms of academic views, it is probably fair to say that the majority of scholars support judicial supremacy: the Court enjoys interpretative supremacy such that its decisions bind the other branches not just in the case before it but all other similar cases.”).
the relationship of those interpretations to judicial interpretations. Some popular constitutionalists maintain a significant role for the judiciary and argue that popular movements ultimately manifest their constitutional visions in judicial opinions that “ratify” the movements’ achievements.

Others shunt the courts off to the side and propose that a significant proportion of constitutional interpretation occur in the popular branches and/or in the populace itself. Some of these scholars suggest that social movements are the mechanism by which popular constitutionalism manifests itself. These social movements work through a number of vehicles—political parties, electoral politics, litigation, advocacy groups—to push their agendas through the elected branches and the courts. Perhaps most provocatively, Dean Kramer argued that popular constitutionalism should occur via direct popular action such as mobbing and petitioning.

Popular constitutionalism as a distinct scholarly phenomenon likely began with Sanford Levinson’s Constitutional Faith, published in 1988. The movement gained steam in the 1990s with a spate of scholarly interest. The culminating work in this genre is Larry Kramer’s The People Themselves: Popular Constitutionalism and Judicial Review, published in 2004, to much acclaim and criticism.

19 See Pettys, supra note, at 321 (stating that “popular constitutionalists owe their critics a persuasive response” on the question of how “the American people . . . exercise their interpretative power”).
20 See Ackerman, The Living Constitution, supra note, at 1752 (stating that the Supreme Court must “crystallize fixed points in our constitutional tradition” created by higher lawmaking); see also Balkin, supra note, at 562 (describing the courts as ratifying changes wrought by popular movements and institutions).
21 See Siegel, supra note, at 192-95 (arguing that the Supreme Court in Heller was giving voice to the popular constitutionalism movement advocating individual gun rights); Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, 154 U. PA. L. REV. 927 (2006) (arguing that social movements modify the scope and understanding of constitutional principles); Post & Siegel, supra note, at 3 (questioning the Supreme Court’s Boerne limitations on congressional Section Five legislation).
22 See Tushnet, supra note, at 154 (“Doing away with judicial review would have one clear effect: It would return all constitutional decision-making to the people acting politically.”).
24 See Gewirtzman, supra note, at 897-98, 911-13 (describing the rise of popular constitutionalism as the triumph of the 1960s generation).
25 See Sanford Levinson, Constitutional Faith 46-50 (1988) (“endorsing” the “protestant” view of constitutional law which requires individual interpretative authority). Although Professor Parker’s 1981 law review article is earlier in time, it did not contain the clear call found in Professor Levinson’s book and in Parker’s own 1994 book.
26 The next big scholarly step in this movement was Bruce Ackerman’s We the People: Foundations, published in 1991.
27 Kramer, supra note.
28 A wide-ranging symposium on Dean Kramer’s book was held in the Chicago-Kent Law Review. Symposium, A Symposium on The People Themselves: Popular Constitutionalism and Judicial Review, 81 CHI.-KENT L. REV. 809 (2006). The most powerful criticism of
The historical narrative frequently told by popular constitutionalists, however, argues that popular constitutionalism is the initial American form of constitutional interpretation. They find that popular constitutionalism was America’s method of constitutional interpretation at the Founding, and that it continued in prominence until after the New Deal. Only in the twentieth century, the story goes, did judicial supremacy come to dominate the American legal system. Popular constitutionalists focus on important historical moments in American legal and political history. For example, Dean Kramer reviewed the Founding, the rise of Jacksonian democracy, President Lincoln’s challenge to *Dred Scott*, and the New Deal.

Popular constitutionalists have asserted a variety of normative bases for popular constitutionalism, though the clear favorite is an appeal to democracy. Popular constitutionalists argue that, by privileging Supreme Court constitutional interpretations, democracy is undermined and the Supreme Court’s countermajoritarian position is aggravated. As Larry Kramer summarized: “The Supreme Court is not the highest authority in the land on constitutional law. We are.”

Some popular constitutionalist scholars have also attempted to tie originalism to popular constitutionalism. This occurs in a couple of ways. One is to argue that originalism is itself a form of popular constitutionalism. On this reading, originalism is the legal correspondent to the conservative

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29 Dean Kramer is most famous for making this claim. Kramer, supra note , at 9-226.

30 See id. at 219 (describing the “New Deal settlement” as judicial deference on issues involving grants of power and rigorous judicial review on issues involving individual rights).

31 Id. at 9-226.

32 See Zietlow, supra note , at 1 (“In this book I... question the primacy of federal courts as protectors of individual rights, and present an alternative picture—that of Congress, the majoritarian branch, protecting equality norms.”); Gewirtzman, supra note , at 908 (“On the normative front, popular constitutionalism produces at least two purported benefits: enhanced legitimacy and a greater capacity for self-definition.”); see also Tushnet, supra note , at 153 (arguing that judicial interpretative supremacy is about neutral in the good and bad consequences it causes).

33 See Post & Siegel, supra note , at 20 (stating that law must be “responsive to political self-determination if it is to retain legitimacy in a democratic state”); Ackerman, supra note , at 1754 (“The aim of interpretation is to understand the constitutional commitments that have actually been made by the American people.”).

34 See Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 U.C.L.A. L. REV. 1399, 1401 (2009) (stating that although originalism in theory suffers from the “dead hand” critique, in practice it does not because originalism is itself a current popular constitutionalist movement); Tushnet, supra note , at 194 (concluding that popular constitutionalism is the means for the people “to reclaim [the Constitution] from the courts”).

35 Kramer, supra note , at 248.
political—Republican Party—and religious—evangelical and traditional Catholics—social movement in the United States.\textsuperscript{36}

The second mode of tying originalism to popular constitutionalism is the most interesting, and it is primarily the work of popular constitutionalist Jack Balkin. Professor Balkin has argued that originalism, properly understood, is complimentary to living constitutionalism.\textsuperscript{37} According to Professor Balkin, fidelity to the Constitution requires interpreters to adhere to its original meaning and the principles underlying that meaning.\textsuperscript{38} However, the Constitution’s original meaning and principles will regularly not determine the outcome of constitutional issues, making them subject to constitutional construction.\textsuperscript{39} It is in this zone of construction that popular constitutionalism takes over and constructs meaning.\textsuperscript{40} Balkin claimed that his synthesis incorporates the normative attractiveness of both originalism and popular constitutionalism: it is faithful to the Constitution’s determinate original meaning while at the same time responsive to current democratic popular movements.\textsuperscript{41}

III. Originalism as Popular Constitutionalism?

A. The Many Originalisms

Originalism is a family of theories of constitutional interpretation; it is not monolithic. Originalists have grounded originalism in different normative theories,\textsuperscript{42} they have identified different sources of constitutional

\textsuperscript{36} See Siegel, supra note \( \text{, at 217} \) (identifying originalism with political conservativism); see also Balkin, supra note \( \text{, at 609-10} \) (making this claim).

\textsuperscript{37} See Steven G. Calabresi & Livia Fine, Two Cheers for Professor Balkin’s Originalism, 103 NW. U.L. REV. 663 (2009) (reviewing Balkin’s synthesis of originalism and living constitutionalism).

\textsuperscript{38} Balkin, supra note \( \text{, at 552} \).

\textsuperscript{39} Id. at 553-57.

\textsuperscript{40} Id. at 554.

\textsuperscript{41} Id. at 551-52, 554-55.

meaning, and originalists have identified different approaches when the Constitution’s original meaning is underdetermined.

B. Originalism’s Focal Case

The central meaning, or focal case, of originalism is characterized by two theses: the fixation thesis and the contribution thesis. The fixation thesis states that the Constitution’s meaning was fixed when its text was ratified. The contribution thesis holds that the Constitution’s meaning contributes to the content of constitutional law. The fixation and contribution theses fit all or nearly all versions of originalism. For example, the theses fit both original intent and original meaning originalism.

The focal case of originalism, embodied in the fixation and contribution theses, is formally consistent with popular constitutionalism. First, the Constitution’s fixed meaning may permit or require popular participation in interpretation and/or reduced judicial interpretative supremacy. Second, the Constitution’s fixed meaning may permit or require factors other than or in addition to its fixed original meaning—such as (current) popular interpretations—to contribute to the content of constitutional law. Of course, originalism may also, consistent with these theses, prohibit popular interpretations, require judicial interpretative supremacy, and exclude nonoriginalist factors from constitutional law.

Therefore, originalism’s consistency with popular constitutionalism is—at least at this stage in its development—contingent. It is contingent on at least five axes, described below. Different versions of originalism, as described below, will pivot on these five axes making them more or less like popular constitutionalism.

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43 Originalists are divided into original meaning, original intent, original methods, and original understanding camps. Currently, the most prominent are original meaning originalists Keith Whittington, Randy Barnett, and Lawrence Solum. Original intent is the oldest version of originalism and it appears to be making a comeback. The most prominent original intent originalists are Richard Kay, Larry Alexander, and Saikrishna Prakash. There are few original understanding originalists, the most prominent being Robert Natelson. The newest form of originalism is original methods originalism articulated by Professors McGinnis and Rappaport. 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 (2009). For a review of the different forms of originalism see id. at 758-65.

44 I describe the various approaches below.

45 For a discussion of the concept of focal case see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 9-11 (1980).

46 For the most thorough discussion of these theses in print see Lawrence B. Solum, District of Columbia v. Heller and Originalism, 103 NW. U.L. REV. 923, 944, 954 (2009).

47 Id.

48 Id. Constitutional law is the label for the rules of law and legal doctrines articulated in Supreme Court constitutional precedent.
C. Originalism as Popular Constitutionalism Depends on how Originalism Pivots on Five Axes

Different forms of originalism fit more or less well with popular constitutionalism’s central tenet of popular involvement in the practice of constitutional interpretation and its corresponding rejection of judicial interpretative supremacy. The extent to which originalism conforms to or diverges from popular constitutionalism depends on how the particular form of originalism pivots on these five axes: (1) whether originalism embraces departmentalism in place of judicial interpretative supremacy; (2) whether originalism requires judicial deference to popular interpretative judgments; (3) the extent to which the Constitution’s original meaning permits the popular branches to engage in authoritative constitutional interpretation; (4) the extent to which the popular branches authoritatively construct constitutional meaning when the Constitution is underdetermined; and (5) whether originalism includes a place for nonoriginalist precedent. These five axes upon which originalist affinity with popular constitutionalism turns shows that, at least as currently developed, there is no essential relationship between originalism and popular constitutionalism.

1. Axis One: Departmentalism

First, some originalists have adopted departmentalism in place of judicial interpretative supremacy as the governing relationship among the branches of the federal government.49 I label this strain of originalism “original departmentalism.”50 These originalists fit a core popular constitutionalist tenet.

49 See WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, supra note (describing the politically constructed foundations of judicial interpretative supremacy and its eclipse of departmentalism).

50 It is not clear what percentage of originalists are departmentalists. Among the originalist scholars who have written in favor of departmentalism are Michael Stokes Paulsen, Garry Lawson, Steven Calabresi, Saikrishna Prakash, John Yoo, and John Harrison. Steven G. Calabresi, Caesarism, Departmentalism, and Professor Paulsen, 83 MINN. L. REV. 1421, 1421 (1999); John Harrison, Judicial Interpretative Finality and the Constitutional Text, 23 CONST. COMM. 33, 33-34 (2006); Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 IOWA L. REV. 1267, 1270 (1996); Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 GEO. L.J. 217, 221 (1994); Prakash & Yoo, supra note , at 1541; see also Saikrishna Bangalore Prakash, The Executive Duty to Disregard Unconstitutional Laws, 96 GEO. L.J. 1613, 1672-73 (2008) (concluding that the President’s power to disregard unconstitutional laws exists independently of federal court determinations on the matter); Keith E. Whittington, Extrajudicial Constitutional Interpretation: Three Objections and Responses, 80 N.C.L. REV. 773, 779 (2002) (arguing that defenses of judicial interpretative supremacy “make empirical, analytical, and normative errors”).

It also appears that Lawrence Solum and Larry Alexander are not departmentalists. Alexander & Solum, supra note , at 1628-29; Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 CONST. COMM. 455, 455 (2000).
Departmentalism is the idea that each branch of government has interpretative supremacy regarding those subjects and actions within its purview. As an example, the creation of a federal statute involves the judgment of Congress and the President\(^51\) that the statute is constitutional,\(^52\) paradigmatic examples of popular constitutionalism. If the Supreme Court were to declare the statute unconstitutional in an Article III case, the other branches could continue to advance their different constitutional interpretation(s) through many means, including passage of another statute. This pattern occurred, for instance, regarding desecration of the United States Flag.\(^53\)

Within originalism, there are a variety of flavors of departmentalism. The most robust version of original departmentalism is Professor Michal Stokes Paulsen’s.\(^54\) Paulsen has argued that each branch of the federal government has interpretative supremacy within its zone of authorized activities.\(^55\) For Paulsen, this entails the presidential power to “refuse to execute . . . judicial decrees that he concludes are contrary to law.”\(^56\)

Most others in the original departmentalism camp push less strongly against judicial interpretative supremacy. These “moderate” departmentalists agree with Paulsen’s and departmentalism’s core thesis: that each branch of the federal government has interpretative authority within its sphere of power.\(^57\)

However, they diverge from Paulsen by arguing that there is a legitimate form of judicial supremacy. Moderate originalist departmentalists contend that the “judicial Power” federal judges exercise

\(^{51}\) Absent a presidential veto.


\(^{55}\) Paulsen, The Most Dangerous Branch, supra note , at 221.

\(^{56}\) Id. at 222.

\(^{57}\) Calabresi, supra note , at 1422; see also McConnell, supra note , at 171 (“The congressional power to interpret the Fourteenth Amendment for purposes of passing Section Five enforcement legislation is one instance of the general principle that each branch of government has the authority to interpret the Constitution for itself, with the scope of its own powers.”).
makes federal court judgments binding.\textsuperscript{58} Therefore, the President must respect the Supreme Court’s judgment in a particular case by enforcing it.

These moderate originalist departmentalists are at pains to emphasize that judicial supremacy is limited to federal court judgments, not federal court opinions and the interpretative analyses employed in those opinions. This means that the President and Congress can develop independent interpretations of the Constitution while at the same time federal judicial power is preserved.

Regardless of its form, original departmentalism fits closely with popular constitutionalism.\textsuperscript{59} Original departmentalism removes the Supreme Court from a privileged role in matters of constitutional interpretation, and incentivizes the more electorally accountable institutions.

2. Axis Two: Judicial Deference to Popular Interpretative Judgments

The second and third axes are related. These axes focus on the extent to which the Constitution’s original meaning permits popular democratic processes to decide constitutional issues. The Constitution’s original meaning could privilege popular processes in two ways: first, the Constitution could require significant judicial deference to popular democratic processes, commonly referred to as judicial restraint; and, second, the Constitution’s original meaning could authorize wide scope to popular interpretative processes. I will address each axis in turn.

Regarding the second axis, judicial deference, the more judicial deference to popular constitutional judgments mandated by the Constitution, the closer to popular constitutionalism originalism moves. As I explain below, today few originalists subscribe to a broad constitutional requirement of judicial deference.

In its modern infancy,\textsuperscript{60} many originalists grounded originalism in “judicial deference” or “judicial restraint.” Judicial restraint is the idea that

\textsuperscript{58} Calabresi, \textit{supra} note , at 1425.

\textsuperscript{59} \textit{Contra} Pettys, \textit{supra} note , at 318-19 (arguing that there is “a tight connection between originalism and judicial supremacy”).

\textsuperscript{60} I use the phrase “modern infancy” because originalism was \textit{the} interpretative methodology until the late-nineteenth and early-twentieth century. JONATHAN O’NEILL, \textit{ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY} 12-28 (2005); CHRISTOPHER WOLFE, \textit{THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW} 3 (2d ed. 1994). The period with which I am concerned in this Article is originalism’s modern incarnation beginning in the mid-1970s, with the publication of Robert H. Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 \textit{INDIANA L.J.} 1 (1971), and RAOUl BERGER, \textit{GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT} (1977).
judges will strike down only clearly unconstitutional laws. 61 If a law is not clearly unconstitutional, a restrained court will defer to the other branches’ constitutional judgments. Early originalists made the claim that originalist judges would strike down democratically adopted laws less frequently than their nonoriginalist counterparts. 62 Today, many originalists have abandoned that claim. Not all have, however. And for these “deference originalists,” originalism provides a broad scope for popular constitutional activity.

A prominent early proponent of deference originalism was Robert Bork. Bork advocated something like a clear error rule. 63 In The Tempting of America, Bork stated that if a “judge . . . cannot make out the meaning of a provision” the judge does not have a constitutional warrant to rule unconstitutional a governmental act. 64

Most originalists have moved away from judicial deference, for a variety of reasons. Keith Whittington was central in the originalist move away from judicial restraint as a justification for originalism. 65 Professor Whittington argued that there was no originalist reason for judges to strike down only clearly unconstitutional laws. 66 Instead, judges have a constitutional duty to strike down legislation that is, in the judges’ judgment, unconstitutional. 67

There remain, however, originalists who, at least in some limited circumstances, advocate for judicial deference. Professor Michael McConnell, for instance, has argued that the Supreme Court should defer to

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61 Professor Ernest Young helpfully surveyed the various conceptions of judicial restraint and activism, and concluded that judicial restraint means “defer to other sorts of authority at the expense of its own independent judgment about the correct legal outcome.” Earnest A. Young, Judicial Activism and Conservative Politics, 73 U. COLO. L. REV. 1139, 1145 (2002). See also Richard A. Posner, The Federal Courts: Challenge and Reform 320 (1996) (“[U]nless a court is acting contrary to the will of the other branches of government, it is not being ‘activist’ in the sense I should like to see become canonical.”).

62 Of course, many definitions of judicial restraint have been offered. See, e.g., Thomas W. Merrill, Originalism, Stare Decisis and the Promotion of Judicial Restraint, 22 CONST. COMM. 271, 274-75 (2005) (defining judicial restraint as “judging that produces the fewest surprises” under existing law).


64 Id.

65 Whittington, Constitutional Interpretation, supra note , at 41-44.

66 Id.

67 Id.
congressional judgments under Section Five of the Fourteenth Amendment.  

3. Axis Three: Popular Interpretative Authority

The third axis is the extent to which the Constitution’s original meaning permits the popular branches to engage in authoritative constitutional interpretation. The Constitution could privilege popular constitutional processes in two ways. First, the Constitution’s original meaning could authorize wide scope to popular political processes. For example, Section 5 of the Fourteenth Amendment may grant Congress broad authority both in terms of articulating the interests protected in Section 1, and in terms of what counts as “enforce[ment]” or remedial legislation under Section 5 itself. Whether Section 5, in fact, does so is contingent on the historical fact of the text’s original meaning.

Second, the Constitution’s original meaning may place relatively few “external” limits on popular interpretative activity. External limits are constitutional prohibitions that limit governmental activity in areas that the government would otherwise have power. Continuing the Fourteenth Amendment example from above: states have a broad residual police power to regulate. If Section 1 does not significantly limit state legislative action, then it is not a robust external limit and the states therefore have substantial interpretative authority. Whether Section 1 leaves states free to exercise their broad police powers is also a contingent historical question.

These two factors—the scope of constitutional authorization, and external limits—are roughly captured by the divergence between libertarian and conservative originalists. One camp, the libertarian originalists, narrowly construes popular constitutional interpretative authority and broadly construes external limits. This leads to a relatively limited scope for popular interpretative processes and robust external limits on those processes. The other faction, conservative originalists, more broadly

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69 These divergent approaches apply to the popular political processes of both the federal and state governments.


71 Of course, my labeling a scholar conservative or libertarian is not meant to indicate that they fit those labels as understood in contemporary political discourse.

72 The best libertarian originalist work is Professor Barnett’s *Restoring the Lost Constitution*.

construes popular constitutional interpretative authority and narrowly construes external limits.\textsuperscript{74}

I will focus on the Fourteenth Amendment to exemplify the first factor. First, libertarian originalists broadly construe the underlying limits in Section 1.\textsuperscript{75} For example, Professor Randy Barnett has claimed that the Privileges or Immunities Clause in Section 1 protects natural rights.\textsuperscript{76} Conservative originalists, by contrast, have argued that Section 1 is narrower in scope. Some argue that Section 1 does not protect unenumerated rights.\textsuperscript{77} Some claim that, if unenumerated rights are protected, only those rights deeply rooted in American history and tradition, are covered.\textsuperscript{78}

Second, much of the debate between these camps centers on whether, and to what extent, the Constitution limits popular processes otherwise within the scope of granted powers. For libertarian originalists such as Randy Barnett, both the Privileges or Immunities Clause and the Ninth Amendment protect the exercise of natural rights.\textsuperscript{79} So, the “external” limits imposed by the Privileges or Immunities Clause and the Ninth Amendment will restrict laws passed within the acknowledged authority of the federal or state governments.

Conservative originalists take a different approach. They sometimes argue that the Privileges or Immunities Clause and the Ninth Amendment

\textsuperscript{74} The most incisive critique of Restoring the Lost Constitution is Steven G. Calabresi, The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett, 103 Mich. L. Rev. 1081 (2005) (book review).

\textsuperscript{75} Or, the scope of Congress’ remedial power under Section 5, or both. Professor Michael Lawrence has claimed that Section 5 gives Congress wide latitude to construct constitutional meaning to enforce the rights-protecting clauses in Section 1. See Michael Anthony Lawrence, Government as Liberty’s Servant: The “Reasonable Time, Place, and Manner” Standard of Review for all Government Restrictions on Liberty Interests, 68 U. of L. L. Rev. 33 n.103, 44 n.131 (2007) (arguing that the Supreme Court’s current Section Five jurisprudence is not broad enough in scope).

\textsuperscript{76} Barnett, supra note , at 60-68 (arguing that the Clause protects “background, natural, or inherent rights”).

\textsuperscript{77} Bork, supra note , at 118.


Conservative originalists also contend that Section 5 limits Congress to something like the Boerne Court’s congruence and proportionality test. Steven G. Calabresi, On Section 5 of the Fourteenth Amendment, 11 U. Pa. J. Const. L. 1431, 1443 (2009); see also McConnell, Institutions and Interpretation, supra note , at 184 (arguing that Congress has independent interpretative authority under Section Five, subject to reasonableness review by the Supreme Court).

\textsuperscript{79} Barnett, supra note , at 54-68.
do not authorize judicially enforceable rights protection.\textsuperscript{80} More frequently, however, conservative originalists claim that the Clause and Amendment do provide judicially enforceable limits on the popular branches, though of a less robust sort than envisioned by libertarian originalists.\textsuperscript{81} Professor Steven Calabresi has argued in this vein that the rights protected by the Privileges or Immunities Clause are only those deeply rooted in American history and tradition.\textsuperscript{82}

Similar debates over the scope of the Constitution’s power conferring provisions occurs regarding all of the Constitution’s text. The greater the power conferred by the Constitution, the fuller the scope of popular constitutional processes. Likewise, the less robust the limits on government exercise of conferred powers, the closer originalism approaches to popular constitutionalism.

Though there are a fair number of both types of originalists populating the academy, conservative originalism comes closest to popular constitutionalism. It does so by privileging popular constitutional interpretation and limiting constitutional restrictions on that activity.

4. \textbf{Axis Four: Popular Constitutional Constructions}

The fourth axis is the extent to which the popular branches authoritatively construct constitutional meaning. Many originalists’ articulation of originalism includes the concept of constitutional construction. These originalists diverge on which branch has the authority to authoritatively construct the Constitution’s meaning.

\begin{itemize}
  \item \textsuperscript{80} See Robert H. Bork, \textit{The Bork Disinformers}, WALL ST. J., Oct. 5, 1987, at 22 (using his famous inkblot analogy regarding the Ninth Amendment); \textit{see also} BORK, supra note \textsuperscript{17}, at 166 (using the inkblot analogy for the Privileges or Immunities Clause).
  \item \textsuperscript{81} See Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (“[W]e have insisted that the interest denominated as a ‘liberty’ be ‘fundamental’ . . . but also that it be an interest traditionally protected by our society.”); Kurt Lash, \textit{The Inescapable Federalism of the Ninth Amendment}, 93 IOWA L. REV. 801, 807 (2008) (“the Ninth Amendment forbids reading the Privileges or Immunities Clause as negating the general police powers of the state. Thus, if my reading of the Ninth Amendment is correct, it would significantly undermine Barnett’s theory of a libertarian Constitution.”).
  \item \textsuperscript{82} See Calabresi, supra note \textsuperscript{17}, at 1438-39 (“[Constitutionally protected] unenumerated rights are . . . rights that are deeply rooted in American history and tradition and that can be overcome by the police power when the State enacts general laws for the good of the whole people.”); \textit{see also} McConnell, \textit{The Right to Die and the Jurisprudence of Tradition}, supra note \textsuperscript{17}, at 692 (“If there is any textually and historically plausible authorization for the protection of unenumerated rights, it is to be found in [the Privileges or Immunities] Clause.”).
\end{itemize}
Before specifically addressing this divergence, let me step back and briefly describe the concept of constitutional construction. Though there is an ongoing debate in originalist circles, many originalists accept the distinction between constitutional interpretation and constitutional construction. Interpretation is the process of articulating the Constitution’s determinate original meaning. These are situations where the original meaning provides one right answer to legal questions. For example, the Commerce Clause determinatively grants Congress the authority to regulate the commercial transportation of goods in trains across state lines.

Construction is the process of creating constitutional doctrine within the bounds set by the Constitution’s underdetermined meaning. For instance, the Republican Guarantee Clause likely does not answer the question of whether a state whose state house representation varies across the districts violates Article IV. It is in cases like this—where the original meaning limits but does not determine the outcome—that constitutional construction occurs. The output of constitutional construction is legal doctrine specifying the norms that govern particular situations.

85 WHITTINGTON, supra note , at 5 (“[C]onstitutional interpretation is the fairly familiar process of discovering the meaning of the constitutional text.”).
88 See Samuel Johnson, *The District of Columbia and the Republican Form of Government Guarantee*, 37 How. L.J. 333, 358-63 (1994) (reviewing the history and jurisprudence of the Republican Guarantee Clause). It is this indeterminacy that led the Supreme Court to rule that Republican Guarantee Clause cases are nonjusticiable political questions. Luther v. Borden 1, 36 (1849).
Some originalists who accept the concept of construction have argued that the Supreme Court has the authority to conclusively construct the Constitution’s meaning. For example, Randy Barnett claimed that in situations of constitutional underdeterminacy, federal courts must construct meaning using a presumption of liberty, and that the elected branches must respect these constructions. This approach, its proponents claim, maximizes various goods, such as individual liberty.

Others have contended that federal court constructions of constitutional meaning are defeasible in light of contrary constructions by the elected branches. One of the primary arguments for this position is that judicial enforcement of constructions has no warrant in the Constitution—because, by definition, the Constitution is underdetermined on the point—and so the default prerogative of democratic legitimacy governs.

This second form of originalism moves originalism significantly in the direction of popular constitutionalism. The extent to which originalism moves in that direction depends on how many instances of construction exist. Most originalists (who have adopted the concept of construction) agree that there is a sizeable amount of construction. If this is the case, then there are many facets of constitutional interpretation that are open to popular input.

A possible example of this is Congress’ Commerce Clause authority over interstate commercial transaction conducted via the internet. The Clause’s original meaning is that Congress has the authority to regulate the transportation of goods and services across state lines. This meaning arguably does not determine the outcome of a case where Congress’

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90 Barnett argued that this is necessary to ensure or enhance legitimacy. Barnett, supra note , at 126.
91 Id. at 118-30.
92 Id. at 126.
93 Whittington, Constitutional Interpretation, supra note , at 5 (describing constitutional construction as involving “the ‘imaginative vision’ of politics”); see also Lee J. Strang, The Role of the Common Good in Legal and Constitutional Interpretation, 3 U. St. Thomas L.J. 48, 70-71 (2005) (arguing that the elected branches have authority to construct).
94 See Whittington, Constitutional Interpretation, supra note , at 11 (“Constructions claim the fidelity of political actors through their continuing political authority, not through judicial enforcement.”).
96 See Balkin, supra note , at 560 (describing constitutional construction as the “far larger task” then constitutional interpretation).
98 Barnett, supra note , at 313.
regulation of the internet is challenged. In this case, Congress would have the authority to construct the Clause’s meaning to either include or exclude regulation of the internet. And, any contrary court constructions would have to give way. So, if the Supreme Court had previously constructed the Commerce Clause to exclude congressional regulation of some class of internet transactions, a later—contrary—federal statute would control.

5. **Axis Five: Nonoriginlist Precedent**

Fifth, originalism moves toward popular constitutionalism when it incorporates nonoriginalist precedent. Nonoriginalist precedent is federal court precedent that reaches a result inconsistent with the Constitution’s determinate original meaning. There is an ongoing debate among originalists on the status of nonoriginalist precedent.

Some originalists including, most powerfully, Professor Gary Lawson, have argued that all (or almost all) nonoriginalist precedent is without legal force. These “get-rid-of-it-all” originalists rest their conclusion on the Supremacy Clause which states that the Constitution—and not what the Supreme Court says about it—is the supreme law of the land.

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100 As I explain in more detail in Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. ___ (forthcoming), nonoriginalist precedent is constitutional precedent that does not meet the standard of Originalism in Good Faith. Originalism in Good faith states that a precedent is an originalist precedent only if it is an objectively good faith attempt to articulate and apply the Constitution’s original meaning.
Other originalists, including myself, have contended that originalism preserves at least some nonoriginalist precedent. These “precedential originalists” base their conclusion on a number of bases including the original meaning of “judicial Power” in Article III.

Precedential originalists come closer to popular constitutionalism because nonoriginalist precedent is frequently the result of popular social movements. Popular movements aiming toward constitutional change sometimes embody their gains in constitutional text. The Nineteenth Amendment, for instance, is the culmination of the women’s suffrage movement.

As many popular constitutionalists have argued, however, social movements have also embodied their victories in Supreme Court precedent. A prime example is the Progressive movement’s goal of utilizing the administrative state to ameliorate perceived harms caused by industrialization and urbanization. The Supreme Court validated the administrative state in a series of nonoriginalist cases. Consequently, to the extent that nonoriginalist precedent embodies the results of social movements in this way, precedential originalism preserves the role of these social movements.

There is a significant amount of nonoriginalist precedent. It is not clear what proportion of nonoriginalist precedent preserves the work of social movements. There are indications, however, that many of the more

105 Strang, supra note , at 419.
106 See Ackerman, The Living Constitution, supra note , at 1742 (“It is judicial revolution, not formal amendment, that serves as one of the great pathways for fundamental change marked out by the living Constitution.”).
107 See Balkin, supra note , at 561 (describing this phenomenon).
108 See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (holding that the delegation to the FCC to grant broadcast licenses “if public convenience, interest, or necessity will be served thereby” did not violate Article I); Humphrey’s Executor v. United States, 295 U.S. 602 (1935) (validating independent agencies as not violating Article II); Crowell v. Benson, 285 U.S. 22 (1932) (ruling that Article I courts’ jurisdiction over public rights was consistent with Article III).
109 Strang, supra note , at 430 (“[T]he list of nonoriginalist precedents and constitutional law doctrines built on these precedents is long.”).
prominent nonoriginalist doctrines originated in social movements. To the extent one characterizes the New Deal Court’s nonoriginalist work as embodying the New Deal, and to the extent one believes that the New Deal was the political manifestation of a popular constitutional movement, then preserving the case law grounding the administrative state, broad Commerce Clause authority, broad Spending Clause power, and other prominent components of the New Deal edifice, moves originalism toward popular constitutionalism.\textsuperscript{110} Other prominent doctrines that are nonoriginalist\textsuperscript{111} precedential embodiments of popular constitutional movements may include: the modern women’s rights movement that culminated in heightened scrutiny for gender classification under the Equal Protection Clause\textsuperscript{112}; the civil rights movement that culminated in cases employing the Constitution directly\textsuperscript{113} and validating statutes such as the Voting Rights Act\textsuperscript{114}; doctrines placing the Court’s imprimatur on changed sexual mores\textsuperscript{115}; and recent cases utilizing more-than-rational-basis scrutiny for sexual orientation classifications.\textsuperscript{116}

IV. Conclusion

In this Article, I argued that originalism and popular constitutionalism are not, in principle, friends or enemies. Instead, since originalism’s focal case leaves the question open, it depends on how originalism pivots on the five axes I identified. I described how various versions of originalism pivot toward or away from popular constitutionalism. In the end, one cannot say definitively whether originalism and popular constitutionalism are similar until one determines which form of originalism is correct.

\begin{itemize}
\item \textsuperscript{110} See Balkin, \textit{supra} note \textsuperscript{,} at 562 (“Landmark precedents like New Deal decisions became durable precisely because so much of the developing structure of government depended on their construction of the Constitution.”).
\item \textsuperscript{111} Popular constitutionalists argue that the gun rights movement that secured its goal in \textit{District of Columbia v. Heller}, 128 S. Ct. 2783 (2008), presents an example of popular constitutionalism. Balkin, \textit{supra} note \textsuperscript{,} at 594-97. Since \textit{Heller} is an originalist precedent, see Lee J. Strang, \textit{An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent}, 2010 BYU L. REV. __ (forthcoming) (describing originalist precedent and its privileged status), it is not included in the list.
\item \textsuperscript{112} Craig v. Boren, 429 U.S. 190 (1976).
\item \textsuperscript{113} Brown v. Board of Education, 347 U.S. 483 (1954).
\item \textsuperscript{114} Katzenbach v. Morgan, 384 U.S. 641 (1966).
\item \textsuperscript{115} Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).
\item \textsuperscript{116} Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); \textit{see also} G. Edward White, \textit{Historicizing Judicial Scrutiny}, 57 S.C.L. REV. 1, 3 (2005) (noting that scholars have identified “as many as six levels of scrutiny”).
\end{itemize}