Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences

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I. Introduction

The common perception is that originalism and popular constitutionalism are incompatible. For example, historian Saul Cornell has recently argued that “[p]opular constitutionalism was, and remains, closer in spirit to modern ideas of a living constitution, and is therefore ultimately incompatible with all forms of originalism.”

Supporting this perception is the widely-shared opinion that most advocates for popular constitutionalism are liberal while most originalists are conservative-libertarian. Not only is this the perception, it has a basis in reality. Looking at the names of leading originalists and popular constitutionalists reveals that there is significant overlap between originalism and conservatism-libertarianism, and between popular constitutionalism and liberalism.

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* Professor of Law, University of Toledo College of Law. Thank you to Randy Barnett, Mark Graber, and Lawrence Solum who participated in the Originalism and Popular Constitutionalism Panel at the 2010 Annual Law & Society Conference, and especially to Rebecca Zietlow for organizing the Panel and prompting this Article. I would also like to thank Lou Mulligan for his characteristically thoughtful suggestions, Garrick Pursley, and the participants at the 2010 Central States Law Schools Association annual conference, the University of Toledo College of Law workshop, and the Ohio Legal Scholarship Workshop for their comments. I would also like to gratefully acknowledge the research support for this Article provided by the University of Toledo College of Law.

1 Saul Cornell, Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss”, 56 U.C.L.A. L. REV. 1095, 1103 (2009); see also Ethan J. Leib, The Perpetual Anxiety of Living Constitutionalism, 24 CONST. COMM. 353, 353 (2007) (admonishing not to “think one can embrace Balkin’s approach and a true living constitutionalism at the same time”); Rory K. Little, Heller and Constitutional Interpretation: Originalism’s Last Gasp, 60 HASTINGS L.J. 1415, 1429 (2009) (“It has recently become fashionable to suggest that originalism and living constitutionalism are not actually so incompatible.”) (emphasis added).

2 By the labels liberal and conservative, I mean the standard set of claims that correspond to the political realm. See Keith E. Whittington, Is Originalism too Conservative?, 34 HARV. J.L. & PUB. POL’Y 29, 33 (2011) (“The meaning of conservatism varies both over time and within contemporary political discourse.”).

3 See Jack Balkin, Protestant Constitutionalism: A Series of Footnotes to Sanford Levinson, available at http://balkin.blogspot.com/2010/09/protestant-constitutionalism-series-of.html (“Thus, the idea of protestant constitutionalism helps us understand both modern liberal living constitutionalism and modern conservative originalism.”) (visited November 16, 2010); see also Whittington, supra note , at 29 (“Originalism as an approach to constitutional theory and constitutional interpretation is often associated with conservative politics.”).

4 See infra Parts II and III and the scholars discussed in each Part.
In this Article, I argue that the common perception that originalism and popular constitutionalism are incompatible is mistaken. Instead, I show that there is no uniquely correct 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, because of the theoretical compatibility of the two methods, the conceptual distance between popular constitutionalism and originalism depends on the conception of originalism one is utilizing. With some conceptions, the differences between popular constitutionalism and originalism loom large. With others, the similarities emerge prominently.

I argue that whether originalism converges with 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 is descriptive: I am not making a claim regarding which way originalism should pivot on 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.

This raises the question, however, of why originalism is identified with conservative constitutional theory and popular constitutionalism with liberal constitutional theory. I therefore offer three reasons why, despite the theoretical compatibility of originalism and popular constitutionalism, they do not converge in perception and practice.

My argument proceeds in three parts. First, I describe popular constitutionalism as a movement in the American legal academy. Second, I show that, despite their theoretical compatibility, in practice, originalism’s relationship to popular constitutionalism depends on the conception of originalism one adopts. Third, I suggest three reasons for the liberal-conservative divide between originalism and popular constitutionalism despite their theoretical compatibility.

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5 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 and Robert C. Post, Jack Balkin, and Rebecca Zietlow.


7 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 6, 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.”).

8 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).

9 See also Gewirtzman, supra note 6, at 899 (describing popular constitutionalism as rejecting judicial interpretative supremacy).

10 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).


12 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 institutionally competent to interpret constitutions).

13 KRAMER, supra note 9, at 8.

14 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—is the claim that the Supreme Court is the authoritative arbiter of constitutional meaning whose interpretations are binding on the other branches of government and on the American people. Judicial interpretative supremacy is clearly the dominant view on the Supreme Court, as it is in the legal academy.

L.J. 1, 17-30 (2002) (criticizing the purportedly “juristic” view of Section 5 embraced by the Rehnquist Court).


See Walter F. Murphy, Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter, 48 REV. OF POL. 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”).

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.”).

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 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).

See Prakash & Yoo, supra note, 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.”).
There is also strong evidence that Americans perceive the Supreme Court as possessing interpretative supremacy, at least in the run-of-the-mill cases.  

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

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23 *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”).

24 *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).

25 *See* Siegel, *supra* note, at 192-95 (arguing that the Supreme Court in *Heller* was giving voice to a popular constitutionalist 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).

26 *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.”).


28 *See* Gewirtzman, *supra* note, at 897-98, 911-13 (describing the rise of popular constitutionalism as the triumph of the 1960s generation).
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.

The historical narrative frequently told by popular constitutionalists, however, argues that popular constitutionalism was the initial American form of constitutional interpretation. They claim 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

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29 See Sanford Levinson, Constitutional Faith 46-50 (1988) (“endorsing” the “protestant” view of constitutional law that 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.

30 The next big scholarly step in this movement was Bruce Ackerman’s *We the People: Foundations*, published in 1991.

31 Kramer, *supra* note .


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

34 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).

35 Id. at 9-226.

36 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).

37 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.”).
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 attempted to explicitly tie originalism to popular constitutionalism. This occurs in a couple of ways. One is to argue that originalism is itself a manifestation of popular constitutionalism. On this reading, originalism is the legal correspondent to the conservative political—Republican Party—and religious—evangelical Protestants and traditional Catholics—social movement in the United States.

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 part-and-parcel with living constitutionalism. He calls this the method of “text and principle.”

According to Balkin, fidelity to the Constitution requires interpreters to adhere to its text’s original meaning and the principles underlying that meaning. However, the Constitution’s original meaning and principles will regularly not determine the outcome of constitutional issues, making

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38 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 popular constitutionalist movement); see also Tushnet, supra note , at 194 (concluding that popular constitutionalism is the means for the people “to reclaim [the Constitution] from the courts”); but see Friedman, supra note , at 2598-99 (arguing that this popular constitutionalist empirical claim is false).
39 Kramer, supra note , at 248.
40 See Siegel, supra note , at 217 (identifying originalism with political conservatism); see also Balkin, supra note , at 609-10 (making this claim).
41 There is a scholarly dispute over the extent to which an attempt to synthesize popular constitutionalism and originalism, like Balkin’s, is possible. Ethan Leib has argued that, in principle, the two are irreconcilable because of originalism’s commitment to the exclusive use of history, at least at the “interpretation” stage of constitutional analysis. See Leib, supra note , at 356-57 (arguing that history is determinative for originalist “[f]irst-order constitutional interpretation” while other modalities play a role in living constitutionalism). My reading of the popular constitutionalist literature is that most popular constitutionalists do not exclude reliance on the Constitution’s original meaning and, instead, frequently rely heavily or exclusively upon it. Bruce Ackerman, Larry Kramer, and Rebecca Zietlow are examples of this approach.
43 Balkin, supra note , at 551.
44 Balkin, supra note , at 552.
45 The most common reason for this indeterminacy, at least in Balkin’s writing, is that the Constitution’s textually expressed principles are articulated at such a high level of generality that their application to concrete circumstances is indeterminate. Id. at 553; see also Peter J. Smith, How Different are Originalism and Non-Originalism?, available at
them subject to constitutional construction.\textsuperscript{46} It is in this zone of construction that popular constitutionalism takes over and constructs meaning.\textsuperscript{47}

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{48}

Before proceeding, it is important to note that my description of popular constitutionalism is thin.\textsuperscript{49} It leaves out much of the nuance that populates the literature. Relatedly, I focused on American popular constitutionalists who in turn concentrated on the United States Constitution. Therefore, I have omitted theorists that resemble popular constitutionalists, but who are distinct enough that I have not discussed them.

For example, Professor John Gardner has recently argued that written constitutions, in principle, must change.\textsuperscript{50} Gardner utilized the tenets of legal positivism and argued that though written constitutions are possible,\textsuperscript{51} they degrade very quickly because of the practice of judicial application of the written constitution in cases.\textsuperscript{52} According to Gardner, through judicial interpretations of the original written constitution, constitutional law will inevitably change and come to incorporate as part of the written constitution, the judicial decisions interpreting and apply the original written constitution.\textsuperscript{53}

Gardner’s account of constitutional operation has some affinity to popular constitutionalism because of its strong commitment to constitutional change. However, Gardner’s constitutional theory appears to

\textsuperscript{46} Balkin, \textit{supra} note \textsuperscript{46}, at 553-57.
\textsuperscript{47} \textit{Id.} at 554.
\textsuperscript{48} \textit{Id.} at 551-52, 554-55.
\textsuperscript{49} My descriptions of both popular constitutionalism and originalism are thin in order to evaluate whether they are compatible on those core points upon which the respective theorists agree. This is a common approach. \textit{See, e.g.}, Randy E. Barnett, \textit{Interpretation and Construction}, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011) (providing a thin description of originalism); David Pozen, \textit{Judicial Elections as Popular Constitutionalism}, 110 COLUM. L. REV. 2047, 2054-59 (2010) (laying out the “core” propositions of popular constitutionalism).
\textsuperscript{51} \textit{Id.} at 33.
\textsuperscript{52} \textit{Id.} at 35.
\textsuperscript{53} \textit{Id.} at 40.
accept judicial interpretative supremacy\textsuperscript{54} and, at least at this point in its development, does not address popular interpretative input. Therefore, I do not include Gardner’s work within the family of popular constitutionalism.

III. Originalism as Popular Constitutionalism?

A. The Many Originalisms

Originalism is also a family of theories of constitutional interpretation; it is not monolithic.\textsuperscript{55} Originalists have grounded originalism in different normative theories,\textsuperscript{56} they have identified different sources of constitutional meaning,\textsuperscript{57} and originalists have identified different approaches when the Constitution’s original meaning is underdetermined.\textsuperscript{58}

B. Originalism’s Focal Case

The central meaning, or focal case,\textsuperscript{59} of originalism is characterized by two theses: the fixation thesis and the contribution thesis.\textsuperscript{60} The fixation

\textsuperscript{54} See id. at 36 (stating that contestants in the debate over interpretation of the American Constitution assume that constitutional law “will be developed, and that it will be developed by judges”).

\textsuperscript{55} For an argument that the diversity of originalist approaches has eliminated originalism as a coherent theory see Thomas B. Colby & Peter J. Smith, Living Originalism, 59 DUKE L.J. 239, 239 (2009); Smith, supra note , at 2 (arguing that originalism’s evolution has undermined its distinctness).


\textsuperscript{57} Originalists are divided into original meaning, original intent, original methods, and original understanding camps. Currently, the most prominent are original meaning originalists who include 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. McGinnis & Rappaport, supra note , at 751. For a review of the different forms of originalism see id. at 758-65.

\textsuperscript{58} I describe the various approaches below in Part III.C.4.

\textsuperscript{59} For a discussion of the concept of focal case see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 9-11 (1980).
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 is theoretically compatible with popular constitutionalism, and originalism’s practical 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 conceptions of originalism, as described below, will pivot on these five axes making them more or less like popular constitutionalism.

One last note before proceeding: my description of originalism is, like my account of popular constitutionalism, thin. This thin account permits me to elide the difficult challenges presented by deciding what the best conception of originalism is, and then comparing that conception to popular constitutionalism. My thin account also opens up the question that a thicker account would obscure: since, in principle, originalism and popular constitutionalism are consistent, what accounts for the lack of practical convergence and the corresponding popular perception of divergence. I answer this question in Part IV.

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60 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); see also Randy E. Barnett, Interpretation and Construction, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011) (providing a slightly different statement of originalism’s core propositions).

61 Id.

62 Id. Constitutional law is the label for the rules of law and legal doctrines articulated in Supreme Court constitutional precedent.

63 I earlier noted some theorists whose positions have a resemblance to popular constitutionalism, such as John Gardner. Gardner’s conclusion that constitutions, including written constitutions such as our own, must change, means that his theory is inconsistent with the fixation thesis which states that the Constitution’s meaning is fixed, and remains so.
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. There is also no necessary estrangement between them.

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. I label this strain of originalism “original departmentalism.” These originalists fit a core popular constitutionalist tenet.

64 See Whittington, Political Foundations of Judicial Supremacy, supra note (describing the politically constructed foundations of judicial interpretative supremacy and its eclipse of departmentalism).

65 It is not clear what percentage of originalists are departmentalists. Among the originalist scholars who have written in favor of some form 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 1, 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”).
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 judgments of Congress and the President\textsuperscript{66} that the statute is constitutional,\textsuperscript{67} paradigmatic examples of popular constitutionalism. If the Supreme Court declared 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 an identical statute. This pattern occurred, for instance, regarding desecration of the United States Flag.\textsuperscript{68}

Within originalism, there are a variety of flavors of departmentalism. The most robust version of original departmentalism is Professor Michael Stokes Paulsen’s.\textsuperscript{69} Paulsen has argued that each branch of the federal government has interpretative supremacy within its zone of authorized activities.\textsuperscript{70} For Paulsen, this entails the presidential power to “refuse to execute . . . judicial decrees that he concludes are contrary to law.”\textsuperscript{71}

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.\textsuperscript{72} 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 makes federal court judgments binding.\textsuperscript{73} 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. Original departmentalism removes the Supreme Court from a privileged role in matters of constitutional interpretation and incentivizes the more electorally accountable institutions. A number of originalists fall into this camp.

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 interpretative 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 themselves. I will address each axis in turn.

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

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74 *Contra* Pettys, supra note , at 318-19 (arguing that there is “a tight connection between originalism and judicial supremacy”).
In its modern infancy, many originalists grounded originalism in “judicial deference” or “judicial restraint.” Judicial restraint is the idea that judges will strike down only clearly unconstitutional laws. If a law is not clearly unconstitutional, a restrained court will defer to the other branches’ constitutional judgments. Early originalists made the claim that originalism was better than nonoriginalism because restrained originalist judges would strike down democratically adopted laws less frequently than their nonoriginalist counterparts. Today, most originalists have abandoned that normative 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. 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 a governmental act unconstitutional.

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.\textsuperscript{81} Professor Whittington argued that there was no originalist reason for judges to strike down only \textit{clearly} unconstitutional laws.\textsuperscript{82} Instead, judges have a constitutional duty to strike down legislation that is, in the judges’ judgment, unconstitutional.\textsuperscript{83}

There remain, however, originalists who, at least in some limited circumstances, advocate judicial deference. Professor Michael McConnell, for instance, has argued that the Supreme Court should defer to congressional judgments under Section Five of the Fourteenth Amendment.\textsuperscript{84} The reasons for deference, however, are limited to this context.\textsuperscript{85}

In principle, originalism is compatible with living constitutionalism on this axis. In practice, however, originalism and popular constitutionalism have diverged as originalists have abandoned an earlier overarching commitment to judicial deference to popular interpretative judgments.

3. \textbf{Axis Three: Popular Interpretative Authority}

The third axis is the extent to which the Constitution’s original meaning authorizes the popular branches to engage in authoritative constitutional interpretation. Stated differently, this axis focuses on the extent of initial interpretative authority lodged in the elected branches. The Constitution could privilege popular constitutional interpretation in two ways.\textsuperscript{86}

First, the Constitution’s original meaning could authorize wide scope to popular political interpretation. For example, Section 5 of the Fourteenth Amendment \textit{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.

\textsuperscript{81} WHITTINGTON, CONSTITUTIONAL INTERPRETATION, \textit{supra} note 8, at 41-44.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.; compare} McGinnis & Rappaport, \textit{supra} note 8, at 774-75 (arguing that there is no room in originalist analysis for constitutional construction because “[w]hen the interpretation of language was unclear, the interpreter would consider the relevant originalist evidence—evidence based on text, structure, history, and intent—and select the interpretation that was supported more strongly by the evidence”).
\textsuperscript{85} \textit{Id.}, at 185.
\textsuperscript{86} These divergent approaches apply to the popular political processes of both the federal and state governments.
Second, the Constitution’s original meaning may place relatively few “external” limits on popular interpretative activity. External limits are constitutional prohibitions that proscribe governmental activity in areas that the government would otherwise have interpretative authority. 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 states therefore have substantial initial 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 construes popular constitutional interpretative authority and narrowly construes external limits.

Focusing on the Necessary and Proper Clause to exemplify the first factor: Libertarian originalists narrowly construe the Clause’s grant of power to Congress. By contrast, conservative originalists argue for a broader understanding of the Clause. Under the latter’s approach, Congress has greater initial interpretative authority.

Second, much of the debate between these camps centers on whether, and to what extent, the Constitution limits popular interpretative processes otherwise within the scope of governmental powers. For libertarian originalists such as Randy Barnett, both the Privileges or

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

89 For criticism of libertarian originalism see Andrew C. Spiropoulos, Rights Done Right: A Critique of Libertarian Originalism, 78 UMKC L. REV. 661 (2010).


Immunities Clause and the Ninth Amendment protect the exercise of natural rights. 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 and state governments.

Conservative originalists take a different approach. They sometimes argue that the Privileges or Immunities Clause and the Ninth Amendment do not authorize judicially enforceable rights protection. 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. 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.

Similar debates over the scope of the Constitution’s power conferring provisions occur regarding other constitutional 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.

93 BARNETT, supra note , at 54-68.
94 See Robert H. Bork, The Bork Disinformers, WALL ST. J., Oct. 5, 1987, at 22 (using his (in)famous inkblot analogy regarding the Ninth Amendment); see also BORK, supra note , at 166 (using the inkblot analogy for the Privileges or Immunities Clause).
95 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, The Inescapable Federalism of the Ninth Amendment, 93 IOWA L. REV. 801, 807 (2008) (“[T]he 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.”).
96 See Calabresi, supra note , 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.”); see also McConnell, The Right to Die and the Jurisprudence of Tradition, supra note , 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.]”); Kurt T. Lash, The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art, 98 GEO. L.J. 1241, 1299 (2010) (“[T]he phrase “privileges and immunities of citizens of the United States” was consistently used as a reference to federally conferred rights and privileges such as those listed in the Bill of Rights as well as certain guarantees in Articles I, III, and IV.”).
4. **Axis Four: Popular Constitutional Constructions**

The fourth axis is the extent to which the Constitution’s original meaning empowers the popular branches to authoritatively construct constitutional meaning. Many originalists’ articulation of originalism includes the concept of constitutional construction.\(^{97}\) These originalists diverge on which branch has the authority to authoritatively construct the Constitution’s meaning.

Before specifically addressing this axis in more detail, let me step back and briefly describe the concept of constitutional construction.\(^{98}\) Though there is an ongoing debate in originalist circles, many originalists accept the distinction between constitutional interpretation and constitutional construction.\(^{99}\) Interpretation is the process of articulating the Constitution’s determinate original meaning.\(^{100}\) 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.\(^{101}\)

Construction is the process of creating constitutional doctrine within the bounds set by the Constitution’s underdetermined meaning.\(^{102}\) For instance, the Republican Guarantee Clause likely does not answer the question of whether a state whose statehouse representation varies across districts violates Article IV.\(^{103}\) It is in cases like this—where the original meaning limits but does not determine the outcome—that constitutional

\(^{97}\) See Barnett, supra note , at 65-72 (defending originalism’s incorporation of construction).

\(^{98}\) For an in-depth discussion of the concept of constitutional construction see Solum, *Semantic Originalism*, supra note , at 19-22, 75-79.

\(^{99}\) The most articulate advocates of the non-construction position are Professors John McGinnis and Michael Rappaport. See McGinnis & Rappaport, *supra* note , at 783-86 (making a series of arguments against constitutional construction within originalism).

\(^{100}\) Whittington, *supra* note , at 5 (“[C]onstitutional interpretation is the fairly familiar process of discovering the meaning of the constitutional text.”).

\(^{101}\) See The Shreveport Rate Case, 234 U.S. 342 (1914) (upholding federal regulation of railroad rates); Southern Ry. Co. v. United States, 222 U.S. 20 (1911) (upholding federal railroad safety regulations).


\(^{103}\) 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, 48 U.S. (7 How.) 1, 36 (1849).
construction occurs. The output of constitutional construction is legal doctrine specifying\textsuperscript{104} the norms that govern particular situations.\textsuperscript{105}

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,\textsuperscript{106} and that the elected branches must respect these constructions.\textsuperscript{107} This approach, its proponents claim, maximizes various goods, such as individual liberty.\textsuperscript{108}

Others have contended that federal court constructions of constitutional meaning are defeasible in light of contrary constructions by the elected branches.\textsuperscript{109} 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.\textsuperscript{110}

This second form of originalism—which privileges elected branch constructions—moves originalism 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

\textsuperscript{104} See Lee J. Strang, \textit{An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent}, 2010 B.Y.U. L. REV. \_ \_ (forthcoming) (defining specification as the process of “mak[ing] explicit how the Constitution’s original meaning resolves a particular legal question”).

\textsuperscript{105} See Lawrence B. Solum, District of Columbia v. Heller and Originalism, 103 NW. U. L. REV. 923, 979-80 (2009) (explaining that the process of constitutional construction of the Second Amendment will occur via litigation); Lee J. Strang, \textit{An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent}, 2010 BYU L. REV. \_ \_ (forthcoming) (describing this process); see also Richard H. Fallon, Jr., \textit{Judicially Manageable Standards and Constitutional Meaning}, 119 HARV. L. REV. 1274 (2006) (explaining the New Doctrinalists’ views which include the idea that constitutional doctrine implements the constitution).

\textsuperscript{106} Barnett argued that this is necessary to ensure or enhance legitimacy. \textsc{Barnett, supra note } , at 126.

\textsuperscript{107} \textit{Id.} at 118-30.

\textsuperscript{108} \textit{Id.} at 126.

\textsuperscript{109} \textsc{Whittington, Constitutional Interpretation, supra note } , at 5 (describing constitutional construction as involving “the ‘imaginative vision’ of politics”); see also Lee J. Strang, \textit{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).

\textsuperscript{110} See \textsc{Whittington, Constitutional Interpretation, supra note } , at 11 (“Constructions claim the fidelity of political actors through their continuing political authority, not through judicial enforcement.”).
potentially a significant role for 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 transactions conducted via the internet. The Clause’s original meaning is that Congress has the authority to regulate the commercial transportation of goods and services across state lines. This meaning arguably does not determine the outcome of a case where Congress’ 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.

In sum, to the extent originalism incorporates constitutional construction, coupled with a commitment to authoritative elected branch constructions, it moves closer to popular constitutionalism. Originalists are currently divided on the existence of construction and on which branch’s constructions are authoritative.

5. Axis Five: Nonoriginlist Precedent

Originalism moves toward popular constitutionalism when it incorporates nonoriginlist precedent. Nonoriginlist 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 nonoriginlist precedent.

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111 See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 12 (1999) (listing constitutional constructions); see also Barnett, supra note , at 69 (“The original meaning of the text does not definitively answer these and many other similar and important questions.”).
112 See Balkin, supra note , at 560 (describing constitutional construction as the “far larger task” than constitutional interpretation).
114 BARNETT, supra note , at 313.
116 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), nonoriginlist 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.
Some originalists including, most powerfully, Professor Gary Lawson, have argued that all (or almost all) nonoriginalist precedent is without legal force.\textsuperscript{117} 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.\textsuperscript{118}

Other originalists, including myself, have contended that originalism preserves at least some nonoriginalist precedent.\textsuperscript{119} These “precedential originalists” base their conclusion on a number of bases\textsuperscript{120} including the original meaning of “judicial Power” in Article III.\textsuperscript{121}

Precedential originalists come closer to popular constitutionalism because nonoriginalist precedent is frequently the product of popular social movements. Popular movements aiming toward constitutional change sometimes embody their gains in constitutional text. The Nineteenth

\textsuperscript{117} Gary Lawson was the first originalist scholar to directly and prominently challenge nonoriginalist precedent. Gary Lawson, \textit{The Constitutional Case Against Precedent}, 17 HARV. J.L. & PUB. POL’y 23 (1994). Lawson later altered his conclusion slightly by finding that “[a] court may properly use precedent if, but only if, the precedent is the best available evidence of the right answer to constitutional questions.” Gary Lawson, \textit{Mostly Unconstitutional: The Case Against Precedent Revisited}, 5 AVE MARIA L. REV. 1, 4 (2007).


\textsuperscript{121} Strang, supra note , at 419.
Amendment, for instance, is the culmination of the women’s suffrage movement.\textsuperscript{122}

As many popular constitutionalists have argued, social movements have embodied their victories in Supreme Court precedent.\textsuperscript{123} A prime example is the Progressive movement’s goal of utilizing the administrative state to ameliorate perceived harms caused by industrialization and urbanization.\textsuperscript{124} The Supreme Court validated the administrative state in a series of nonoriginalist cases.\textsuperscript{125} Consequently, to the extent that nonoriginalist precedent embodies the results of social movements in this way, precedential originalism preserves the policies of these social movements.

There is a significant amount of nonoriginalist precedent.\textsuperscript{126} It is not clear what proportion of nonoriginalist precedent preserves the work of social movements. There are indications, however, that many nonoriginalist doctrines originated in social movements. For instance, to the extent one characterizes the New Deal Court’s nonoriginalist work as embodying the New Deal’s constitutional vision, 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{127} Other prominent doctrines that are nonoriginalist\textsuperscript{128} precedential embodiments of popular

\textsuperscript{122} See Paul Johnson, A History of the American People 656-59 (1997) (describing the gradual embrace of women’s suffrage by Americans); see also Akhil Reed Amar, America’s Constitution 419-26 (2005) (summarizing the legal and social changes that led to the Nineteenth Amendment); Lee J. Strang, Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?, 111 Penn. St. L. Rev. 413, 421-23 (2006) (describing invocation of the Declaration of Independence by suffragettes).

\textsuperscript{123} 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.”).

\textsuperscript{124} See Balkin, supra note , at 561 (describing this phenomenon).

\textsuperscript{125} 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 the Article I nondelegation doctrine); 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).

\textsuperscript{126} Strang, supra note , at 430 (“[T]he list of nonoriginalist precedents and constitutional law doctrines built on these precedents is long.”).

\textsuperscript{127} See Balkin, supra note , 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.”).

\textsuperscript{128} Popular constitutionalists argue that the gun rights movement that secured its goal in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), presents an example of popular constitutionalism. Balkin, supra note , at 594-97. Since Heller is an originalist precedent,
IV. Explaining the Divergence Between Theory and Practice

A. Introduction

Up to this point I have argued, in the face of the common assumption that originalism and popular constitutionalism are incompatible, that there is no theoretical support for the assumption. I also argued that, despite their theoretical congruence, for each of the five axes, originalism did not converge with popular constitutionalism. In this part, I offer three explanations for this divergence between theory and practice: (1) conservative and liberal legal thought have their natural homes in originalism and popular constitutionalism respectively (the “Historical Explanation”); (2) the ideological makeup of the legal academy, combined with originalism’s perceived conservative ties, pushed liberal legal scholars unhappy with the Supreme Court to avoid originalism and articulate popular constitutionalism (the “Sociological Explanation”); and (3) the conservative-libertarian ideological commitments of originalists have caused a practical divergence on five axes away from popular constitutionalism (the “Realist Explanation”).

Before describing the three causes in more detail, let me pause to note that Jack Balkin’s recent work exemplifies and supports my claim. Balkin’s recent scholarship explicitly attempts to build a bridge between originalism and popular constitutionalism. Over a series of articles, Balkin see Lee J. Strang, 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.

133 Gideon v. Wainwright, 372 U.S. 335 (1963); see also William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 MICH. L. REV. 2062, 2194-2225 (2002) (describing the Supreme Court’s criminal procedure protections as the product of a social movement).
134 Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); see also G. Edward White, Historicizing Judicial Scrutiny, 57 S.C.L. REV. 1, 3 (2005) (noting that scholars have identified “as many as six levels of scrutiny”).
has argued that originalism and popular constitutionalism “are two sides of the same coin.”

Balkin’s key move is to argue that originalism, properly understood, limits the role of interpretation to articulating the Constitution’s determinate original meaning, while issues about application of that meaning are the province of constitutional construction. It is here, in construction, that popular constitutional holds sway.

Balkin’s attempted fusion of originalism and popular constitutionalism, regardless of its success, indicates that he believes he bears a burden of persuasion. Balkin’s burden is to show that, contrary to popular perception, originalism and popular constitutionalism really are compatible. Indeed, Balkin acknowledges that his synthesis “may seem strange to some readers.” My arguments in Part III above raise the question of why this popular perception exists: why theory does not fit practice.

B. The “Historical Explanation”

Returning to the three causes of the divergence between theory and practice, the first explanation is that conservative and liberal legal thought have natural homes in originalism and popular constitutionalism respectively. The modern revival of popular constitutionalism is, therefore, the return of liberal legal thought to its roots.

From its inception, modern liberal legal thought has contained a strong strain of popular constitutionalism. Liberal legal thought has its

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135 Balkin, supra note , at 549.
136 Balkin, supra note , at 566. This claim is supported by another proposition: that the Constitution’s original meaning is composed of relatively abstract principles. Id. at 554-57.
137 Id.
139 Balkin, supra note , at 429.
140 By conservative and liberal legal thought, I mean legal thought that advocates for substantive legal norms and forms of analysis popularly considered consistent with political conservative and liberal thought.
141 By “modern” liberal legal thought I am distinguishing post-Progressive Era liberal legal thought from its predecessor. See Richard Hudeelson, Modern Political Philosophy 37 (1999) (“It is important not to confuse this classical liberalism with the political ideology known as ‘liberalism’ in the United States in the twentieth century.”); Bradley C.S. Watson, Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence 55 (2009) (arguing that foundational American political views in the late nineteenth century were “dead or dying”); Gerald Gaus & Shane D. Courtland,
origin in the Progressive Movement.\textsuperscript{142} Beginning in the late-nineteenth and early-twentieth centuries, progressive legal thought was the legal manifestation of the social and political Progressive Movement.\textsuperscript{143} A central tenet of progressive legal thought during this era was its commitment to popular interpretative supremacy.\textsuperscript{144}

Liberal legal thought reached its apotheosis in the New Deal Court’s deference to and incorporation of popular legislative judgments. Backing away from the perceived\textsuperscript{145} judicial excesses of the \textit{Lochner} Court, the Supreme Court consciously sought to limit conflict or tension with popular constitutional interpretation. It did this in two ways: first, the New Deal Court deferred to popular constitutional judgments in the elected branches, for instance, by deferring to Congress’ economic judgments in the


\textsuperscript{142} See \textit{WATSON}, supra note \textsuperscript{144}, at 194 (2009) (stating that there has occurred an “evolution of progressivism into liberalism”); \textit{see also} Balkin, supra note \textsuperscript{144}, at 561 (arguing that popular constitutionalism “arose in the early twentieth century due to innovations by Congress and by state and local governments in constructing early versions of the regulatory state”).

\textit{WOLFE}, supra note \textsuperscript{144}, at 205-16 (describing Woodrow Wilson’s claims regarding the Constitution).

\textsuperscript{145} There are strong reasons to believe that the traditional narrative told about the pre-New Deal Court is misleading. The traditional narrative is that the \textit{Lochner} Court significantly restricted the ability of the federal and state governments to enact salutary legislation that responded to changing social conditions. \textit{See, e.g.}, \textit{Home Bldg. & Loan Ass’n v. Blaisdell}, 290 U.S. 398, 442-43 (1934) (claiming that societal changes mandated a re-evaluation of constitutional values); John Hart Ely, \textit{The Wages of Crying Wolf: A Comment on Roe v. Wade}, 82 YALE L.J. 920, 937 (1973) (“[T]he received learning has it, this sort of thing did happen before, repeatedly. From its 1905 decision in \textit{Lochner v. New York} into the 1930’s the Court, frequently though not always under the rubric of ‘liberty of contract,’ employed the Due Process Clauses of the Fourteenth and Fifth Amendments to invalidate a good deal of legislation.”); \textit{see also} David E. Bernstein, \textit{Lochner v. New York: A Centennial Retrospective}, 83 WASH. U.L. Q. 1469, 1470 (2005) (“According to the prevailing myth propagated by Progressives and New Dealers—and widely accepted even today—Supreme Court Justices of the \textit{Lochner} period, influenced by pernicious Social Darwinist ideology, sought to impose their laissez-faire views on the American polity through a tendentious interpretation of the Due Process Clause of the Fourteenth Amendment.”). In reality, the Supreme Court’s jurisprudence was generally favorable to federal and state legislation. MICHAEL J. PHILLIPS, \textit{THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S} (2000).
 Commerce Clause context; and second, it instantiated New Deal popular interpretative judgments, such as limits on contract rights, in its precedent.

At this point, because of its early-New Deal rulings, the Supreme Court had suffered considerable harm to its institutional prestige and authority. Despite this, the Supreme Court issued promissory notes of greater judicial intervention that came due during the Warren Court. Most famously, the New Deal Court articulated the basis for more rigorous judicial review in *Carolene Products* Footnote Four.

Liberal legal thought maintained its commitment to popular constitutionalism throughout the twentieth century though, as I describe below, during the Warren Court era, this commitment was submerged. The principle post-war manifestation of liberal legal thought’s popular constitutionalism was found in the Legal Process School. Legal Process had its principal home at Harvard Law School, though it had prominent adherents on the Court and throughout the academy.

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146 For example, in its Commerce Clause case law, the New Deal Court deferred to Congress’ judgments on the impact of a class of intrastate activity on interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).


149 See ACKERMAN, *supra* note , at 119 (arguing that the New Deal Court had to “reassure the still-suspicious President, Congress, and electorate that the Justices had fully accepted the constitutional legitimacy of the New Deal”); *see also id.* at 131 (describing the “New Deal Court confronting the shattering consequences of the Roosevelt revolution”).

151 *See id.* at 132 (finding that the Warren Court is “best underst[oo]d . . . as a continuation of the project of synthetic interpretation begun . . . in New Deal opinions like *Carolene Products*”).

152 United States v. *Carolene Products*, 304 U.S. 144, 152 n.4 (1938); *see also ACKERMAN, supra* note , at 119-29 (describing how Footnote Four is a Supreme Court attempt to synthesize the New Deal with prior constitutional commitments).

153 I include the early Burger Court in this label because neither its membership nor its jurisprudential views changed immediately upon Chief Justice Burger’s appointment. *See O’NEILL, supra* note , at 97 (“The Burger Court’s bussing, abortion, and death penalty decisions made it clear that there had been no ‘counterrevolution’ against the liberal activism of the Warren Court.”); *see also TAMANAH, supra* note , at 88 (“[T]he Burger Court was more activist than the Warren Court.”).

154 *See TAMANAH, supra* note , at 108 (stating that “most” Legal Process proponents “were liberals”).

155 The most well-known proponents of Legal Process were Justice Frankfurter, Henry Hart, Albert Sacks, and Lon Fuller. *TAMANAH, supra* note , at 102.

156 Justice Frankfurter was both an advocate of the School and a vehicle of its creation because many of his proteges went on to become prominent advocates.

157 Herbert Wechsler, for instance.
For purposes of this Article, I will focus on one of Legal Process’ key tenets, known as institutional settlement. Institutional settlement is the idea that legal systems should distribute decision-making authority for particular legal issues to those institutions best suited to make the best decisions, and other legal institutions should treat those decisions as authoritative.

The practical impact of this commitment is that the Supreme Court regularly defers to popular interpretative judgments. In fact, this is a major reason why Legal Process’ influence waned. As it became more difficult for Legal Process advocates to justify the Warren Court’s cases, liberal legal academics abandoned it and the deference to popular interpretative judgments that went with it.

The Warren Court, in an unprecedented host of areas, rejected one of the two aspects of the New Deal Court’s respect for popular judgments.
The Warren Court, in the area of “fundamental” rights, rejected deference to popular constitutional judgments. Instead, following hints from *Caroline Products* Footnote 4 and the example of its Free Speech Clause jurisprudence, the Supreme Court subjected an increasing array of governmental restrictions on fundamental rights to strict scrutiny.

To say that liberal legal thought’s popular constitutionalism was submerged during the Warren Court is not to say that it was absent. Indeed, the Warren Court’s most popular opinions, then and now, are those that facilitated popular processes. For instance, the Court’s voting rights cases rested on the claim that the results were dictated by democratic principles. This line of cases formed the core of the Legal Process school’s most mature statement, found in John Hart Ely’s, *Democracy and Distrust*.

Liberal legal academics, especially those associated with the Legal Process School, initially expressed significant misgivings about the Court’s assertions of judicial power. As the 1950s progressed, however, most liberal legal academics defended the Warren Court’s rulings, though frequently with apologies for the Court’s own weak justifications. This was in large measure because liberal legal academics saw the Warren Court’s pursuit of liberal substantive policies worth defending. Both

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167 Most of these moves raised significant controversy, TAMANAH,A, supra note , at 108, though a few found welcome public reaction, such as the voting rights cases that articulated the one-man-one-vote rule. Reynolds v. Simms 377 U.S. 533, 560-61 (1964).
168 The Supreme Court’s fundamental rights doctrine was/is that some rights are protected by the Constitution against infringement absent a compelling state interest. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (describing the origin and function of strict scrutiny).
170 See WOLFE, supra note , at 184-99 (describing how the Court’s free speech jurisprudence was the first area where the Court utilized stricter judicial review).
171 See Reynolds v. Sims, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).
172 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
173 Perhaps the most famous example of this was Herbert Wechsler’s criticism of Brown. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 H ARV. L. REV. 1 (1959); see also O’NEILL, supra note , at 93 (“Unable to restrain the Court on its own terms, the troubled process tradition left the way open for others who were more concerned about the role of history in Supreme Court decision-making.”).
174 See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 124-30 (1977) (describing how Roe fits Dworkin’s conception of law as integrity).
175 See RUBENFELD, supra note , at 222 (describing attempts to defend Roe as “merely reemphasiz[ing] the embarrassing sense of artifice, of post-hoc rationalization, that has accompanied the right of privacy since the Supreme Court first discerned it in the ‘penumbras’ and ‘emanations’ of the Bill of Rights”); John Hart Ely, The Wage of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 922-26 (1973) (repeatedly stating agreement with Roe’s result, while severely criticizing the Court’s claims).
176 See Post & Siegel, supra note , at 373 (“Progressive confidence in constitutional adjudication peaked during the Warren Court and its immediate aftermath.”).
liberal legal thought’s initial refusal to embrace the Warren Court’s assertion of judicial power, and its eventual reluctant defense of judicial supremacy, indicate that liberal legal thought was uneasy with Warren Court assertions of power.

Beginning with the Burger Court, and more earnestly with the Rehnquist Court, the perception arose among liberal legal academics that the Supreme Court was conservative and was likely to remain so177 for the foreseeable future. This caused liberal legal academics to seriously question, for the first time since the 1960s, the claims of judicial power accepted since the Warren Court. As a result, many liberal legal academics have returned to their home in the form of popular constitutionalism.179

Professor Richard Parker is liberal legal theory’s John the Baptist.180 In his seminal 1980 article, The Past of Constitutional Theory—And its Future,181 Parker “appeal[ed] to [his] generation” to reject then-regnant justifications for judicial review182 and, in their place, create “a political life far different—far more democratic—than the one we know now.”183 Today, numerous liberal legal academics have taken up Parker’s appeal. Professor Rebecca Zietlow echoes Parker almost thirty years later:

[At] the turn of the twenty-first century, legal reformers seem to underappreciate the value of participation and democracy to defining and expanding our national community. For the past generation, too many legal reformers have focused primarily on the litigation process, favoring test cases over political action, despite the fact that appointments by conservative presidents have made the federal courts increasingly hostile to rights of belonging over recent years. Meanwhile, a decreasing proportion of our voting population participates in elections because many people feel that the issues that concern them the most simply

177 Two factors played prominent roles in this re-evaluation by liberal legal academics: (1) the relatively more conservative rulings by the Supreme Court; and (2) the frequency of Republican presidencies and those Presidents’ relatively conservative judicial appointments.
178 See Robert Post & Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 HARV. C.R.-C.L. L. REV. 373, 373 (2007) (“But progressive attitudes toward constitutional adjudication have recently begun to splinter and diverge.”); see also Barry Friedman, Mediated Popular Constitutionalism, 101 MICH. L. REV. 2596, 2603 (2003) (“[P]rogressives and conservatives tend to switch sides depending on what courts are doing.”).
179 See KRAMER, supra note , at 225 (arguing that a conservative Supreme Court, beginning in the 1980s, broadened judicial interpretative supremacy).
180 John the Baptist called the Jewish people to repentance for their sins and thereby prepared the way for Jesus’ public ministry. See THE HOLY BIBLE, Matt. 3:6 (“And were baptized by him in the Jordan, confessing their sins.”).
181 Parker, supra note .
182 Id. at 223.
183 Id. at 257.
are not addressed within the political process. While the political process is far from perfect, democracy retains its potential for providing an effective forum of debate over the issues that are the most meaningful to our lives.\textsuperscript{184}

In sum, liberal legal thought’s traditional home is popular constitutionalism. Liberal legal thought, though enamored of the Warren Court’s substantive results, backed away from judicial supremacy once the Supreme Court ceased to deliver predictable liberal policies. Popular constitutionalism is today’s manifestation of liberal legal thought’s traditional commitments.

On the other hand, conservative legal thought’s natural home is originalism\textsuperscript{185} because both have the purpose to preserve and instantiate traditional—social and legal—norms.\textsuperscript{186} Modern American conservative thought, as a coherent intellectual movement, originated in the late-1940s.\textsuperscript{187} Conservative thought was composed of a number of strands,\textsuperscript{188} and the movement’s seminal statement found voice in Russell Kirk’s \textit{The Conservative Mind} in 1953.\textsuperscript{189} Conservative thought manifested itself in many areas of American life including the legal realm.\textsuperscript{190} In the legal academy, conservative legal thought struggled.\textsuperscript{191}

\textsuperscript{184} ZIELOW, supra note , at 168.
\textsuperscript{185} See Whittington, supra note , at 30 (“\textit{C}onservatives are generally more likely than liberals to find originalism a normatively attractive approach to constitutional interpretation.”).
\textsuperscript{186} See e.g., RUSSELL KIRK, THE CONSERVATIVE CONSTITUTION 4, 19-33 (1990) (arguing that the Constitution embodied the conservative principles of the American Revolution).
\textsuperscript{187} See GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945, at 3 (1998) (placing the birth of the modern conservative intellectual movement in 1945 with the publication of Friedrich Hayek’s, \textit{The Road to Serfdom}); see also GODFREY HODGSON, THE WORLD TURNED RIGHT SIDE UP: A HISTORY OF THE CONSERVATIVE ASCENDANCY IN AMERICA 23 (1996) (using the mid-1940s as the birth date).
\textsuperscript{188} The conservative intellectual movement’s strands included: (1) anti-communism that arose following the advent of the Cold War; (2) those who argued for traditional religious beliefs, including advocacy of natural law; and (3) advocates of classical liberalism. HODGSON, supra note , at 17-18. See also Whittington, supra note , at 32 (describing conservatism as containing libertarians, religious conservatives, national security hawks, business conservatives, and neoconservatives).
\textsuperscript{189} RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT (7th rev. ed. 2001).
\textsuperscript{190} In the political realm, the conservative intellectual movement’s first major impact was Barry Goldwater’s presidential campaign. HODGSON, supra note , at 91-92. In the media, William F. Buckley founded \textit{National Review}, America’s most prominent conservative media outlet, in 1955. \textit{Id}. at 78.
Two of the conservative intellectual movement’s central commitments make originalism its most compatible theory of constitutional interpretation. First, modern conservative thought focuses on preserving traditional norms of human conduct. The America that created the original Constitution is the standard of what is “traditional” in the United States. Originalism, by making authoritative the norms early-American society embedded in the Constitution, does just this. It preserves and the norms it preserves are traditional.

Second, conservative thought prescribes norms for individuals and society that generally fall under the label conservative. Originalism, applied to the American Constitution, regularly results in conservative outputs. For example, 1791 America strongly embraced widespread gun ownership, a position generally considered conservative today. As another example, the Establishment Clause’s original meaning permits significant interaction between religion and the state, a position solidly

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192 Keith Whittington has argued that originalism and conservatism are not necessarily related, and that other ways of interpreting the Constitution may better suit conservatives. Whittington, supra note, at 33-34. However, Whittington acknowledges that “many conservative legal scholars have at least rhetorically embraced some form of originalism.” Id. at 33. Furthermore, he seems to concede the that originalism and conservatism in fact overlap when he notes that “[o]ther jurisprudential theories could provide a better fit” with conservatism.” Id. (emphasis added).

193 See KIRK, supra note, at 9 (“Custom, convention, and old prescription are checks both upon man’s anarchic impulse and upon the innovator’s lust for power.”).

194 See Whittington, supra note, at 40 (describing originalism as “backward looking”).

195 See KIRK, supra note, at 8-9 (describing the tenets of conservatism which include a commitment to natural law, subsidiarity, natural ordering, private property, tradition, and resistance to change).


197 See Staples v. U.S., 511 U.S. 600, 610 (1994) (“[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country.”); James Lindgren & Justin L. Heather, Counting Guns in Early America, 43 WM. & MARY L. REV. 1777 (2002) (describing original research that led the authors to conclude that rates of gun ownership in Founding America were “particularly high”); James Lindgren, Fall From Grace: Arming America and the Bellesiles Scandal, 111 YALE L.J. 2195, 2197 (2002) (reviewing the literature and concluding that, in the nineteenth century, “household gun ownership in early America was more widespread than today”).


199 The best book-length analyses on the Clause’s original meaning are ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004); and DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT (2010).
within today’s conservative mainstream. This conclusion is also bolstered by the claims made by Progressives that the Constitution’s original meaning was outdated. These reasons for conservatism’s embrace of originalism are borne out by the practical reality that most prominent originalists are conservative.

C. The “Sociological Explanation”

The second of the three causes of the divergence between theory and practice are sociological factors. This explanation builds on my previous claim that popular constitutionalists tend to be liberal while originalists tend to be conservative. Originalism’s modern incarnation arose as a critique of the Warren and Burger Courts. One goal of this critique was to undermine and overturn the Courts’ liberal rulings, a goal amenable to legal conservatives. Consequently, originalists were outsiders in a legal academy that favored the Warren and Burger Courts’ decisions.

One result of this estrangement between originalists and the legal academy was that originalism “got a bad name.” Originalism was simply “conservatism’s legal guise.” If one wished to be a successful member of the legal academy, one did not advocate originalism.

Since liberal legal thought dominated the legal academy, and with originalism so closely identified with conservatism, liberal legal academics unhappy with the direction of the Supreme Court were forced to look for jurisprudential solace elsewhere. Popular constitutionalism is just such a home. For instance, Rebecca Zietlow explained that her move toward popular constitutionalism was the result of two factors: recent Supreme

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201 Wolfe, supra note , at 205-16.

202 Using the label conservative capaciously to include conservatives and libertarians.

203 See O’Neill, supra note , at 95 (“By the mid-1970s recurrence to original constitutional meaning was a notable feature of work critical of recent liberal reformist uses of modern judicial power.”).

204 Id. at 94-95, 107.

205 See Whittington, supra note , at 29 (describing originalism’s “modern form” as “a response to the liberal constitutional decisions of the Warren and Burger Courts”).

206 See id. at 123-29 (describing the legal academy’s hostile reception to Roul Berger’s, Government by the Judiciary).

207 See id. at 134 (“[C]ritics sometimes dismissed originalism as nothing more than a partisan ploy to advance the immediate policy goals of the conservative coalition.”).

208 And continues to dominate. [cite surveys] see also Edward Rubin, Curricular Stress, 60 J. Legal Educ. 110, 112 (2010) (“To be sure, many law professors--probably a substantial majority--have liberal rather than conservative political views.”).
Court rulings that seemed to limit civil rights protection, which prompted her to look to the federal and state legislatures as “protectors of rights.”

D. The “Realist Explanation”

Third, originalism diverges from popular constitutionalism, despite the theoretical possibility of its affinity, because of the political orientation of its proponents. Originalism and popular constitutionalism have tended to diverge on two points: first, originalists have argued for relatively conservative interpretations of the Constitution; and, second, originalists have moved away from popular constitutionalism on the five axes.

Although it is difficult to quantify the relative political position of originalism, one way to measure this is by looking at originalists’ concrete interpretative conclusions. Using the contentious area of the Commerce Clause as a test case reveals relatively conservative interpretations. The most prominent originalist interpretation of the Commerce Clause’s original meaning is found in Randy Barnett’s work. Over a series of articles and in a book, Professor Barnett maintained that the Commerce Clause authorizes Congress “to specify how a rightful activity may be transacted[,] and the power to prohibit wrongful acts” in “the trade or exchange of goods[,] including the means of transporting them[,] . . . between persons of one state and another.” On the other hand, nonoriginalists have generally argued that Wickard v. Filburn’s capacious interpretation is correct.

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209 ZIETLOW, supra note , at ix.

210 A concrete example of this phenomenon is that challengers to the Patient Protection and Affordable Care Act, Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, have utilized this interpretation of the Commerce Clause, see State of Virginia, Memorandum in Opposition to Motion to Dismiss, at 22-26, Virginia v. Sebelius (E.D. Va. June 7, 2010) (making originalist arguments regarding the Commerce Clause’s meaning); Randy Barnett, Is Health Insurance Mandate Constitution?, The Volokh Conspiracy, at http://volokh.com/2009/12/09/conspirators-at-heritage-today/ (visited Dec. 21, 2010) (stating that the individual mandate is “quite obviously, beyond the original public meaning of the enumerated powers scheme”), while supporters have advocated for other interpretations. See Kathleen Sebelius, Memorandum in Support of Defendant’s Motion to Dismiss, at 20-23, Virginia v. Sebelius (E.D. Va. May 24 , 2010) (making nonoriginalist arguments regarding the Commerce Clause’s meaning).


212 See Barnett, supra note , at 313.

213 Id.; see also Robert G. Natelson & David Kopel, Commentary, Commerce in the Commerce Clause: A Response to Jack Balkin, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 56 (2010) (“There is little question that the ordinary and common meaning of ‘commerce’ . . . was mercantile trade and traditionally associated activities.”).


215 See generally Grant S. Nelson & Robert J. Pushaw, Jr., Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues, 85 IOWA L. REV. 1, 7-8 (1999) (describing three nonoriginalist approaches to interpreting the Commerce Clause following Lopez); see also
Another piece of evidence that originalists tend toward conservativism is provided by the recent influx of “new” originalists. Over the past decade, originalism has seen an influx of new proponents along with a flourish of proposed refinements. Many originalists have resisted both the influx and the refinements at least in part because they appear to result in the liberal reorientation of originalism. This resistance by “old” originalists suggests that originalism has, until very recently, tended toward conservative constitutional interpretations.

Second, and relatedly, originalists in practice have tended to pivot on the five axes away from popular constitutionalists. I described in Part III.B how originalism is theoretically compatible with popular constitutionalism. However, in Part III.C, I showed that originalism as currently articulated by scholars has moved away from popular constitutionalism.

In none of the axes identified above have a majority of originalists pivoted toward popular constitutionalism. This fact decisively prevents originalism from aligning with popular constitutional in practice. On two axes, originalism has clearly moved away from popular constitutionalism. For example, there are few originalists who advocate for departmentalism and even fewer that counsel judicial deference to popular interpretative judgments.

With the other three axes, though there is no clear majority position, the axes clearly do not pivot toward popular constitutionalism. There is no originalist consensus on the extent to which the Constitution’s original meaning permits the popular branches to engage in authoritative constitutional interpretation, the extent to which the popular branches authoritatively construct constitutional meaning, and whether originalism includes a place for nonoriginalist precedent.

As a result, popular constitutionalism and originalism have diverged because, in specifying originalism, originalists have moved it away from popular constitutionalism. This has taken the form of conservative


The most-cited telling of this story is found at Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol’y 599 (2004). More recently, Professor Peter J. Smith has described originalism’s further modification and argued that these changes have diminished if not eliminated remaining distinctions between originalism and nonoriginalism. Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, __ Hastings L.J. __ (forthcoming 2011).

Smith, supra note __, at 2-3.

See id. at 3 (arguing that “old” originalists’ “rejection of the new . . . originalists’ claims” shows that they are committed to “an approach to constitutional interpretation that usually produces substantively conservative results”).
constitutional interpretations along with movement on the five axes away from popular constitutionalism.

This ideological divergence between liberals and conservatives, and popular constitutionalism and originalism, is not necessarily unprincipled. Instead, as Keith Whittington has argued, “many political liberals are likely to balk at the philosophical foundations of originalism while many conservatives will likely find those foundations to be compatible with their broader philosophical beliefs.”

V. 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.

Then, in Part IV, I offered three explanations for what would otherwise be an odd situation: originalism and popular constitutionalism are theoretically compatible, but are widely-regarded as incompatible, and in fact have not converged in practice. My first explanation was that conservative and liberal legal thought have natural homes in originalism and popular constitutionalism respectively. The second cause of the divergence is sociological factors in the legal academy. Third, in practice, originalism diverges from popular constitutionalism in its substantive interpretations and its practical specification because of its proponents’ ideological orientation.