

ORIGINALISM AS POPULAR  
CONSTITUTIONALISM?: THEORETICAL  
POSSIBILITIES AND PRACTICAL DIFFERENCES

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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.”<sup>1</sup> Supporting this perception is the widely-shared opinion that most advocates for popular constitutionalism are liberal<sup>2</sup> while most originalists are

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1 Saul Cornell, Heller, *New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1103 (2009); see also Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 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.”).

conservative-libertarian.<sup>3</sup> Not only is this the perception, it has a basis in reality. Looking at the names of leading originalists and popular constitutionalists<sup>4</sup> reveals that there is significant overlap between originalism and conservatism-libertarianism, and between popular constitutionalism and liberalism.

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.<sup>5</sup> 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.<sup>6</sup> My description of

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3 See Jack Balkin, *Protestant Constitutionalism: A Series of Footnotes to Sanford Levinson*, BALKINIZATION (Sept. 17, 2010, 11:55 AM), <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."); see also Whittington, *supra* note 2, at 29 ("Originalism as an approach to constitutional theory and constitutional interpretation is often associated with conservative politics.").

4 See *infra* Parts I and II and the scholars discussed in each Part.

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.

6 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.

these five axes shows that, in practice, originalism has failed to converge with 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.

## I. THE (RECENT) RISE OF POPULAR CONSTITUTIONALISM

Popular constitutionalism is the umbrella label for a family of constitutional theorists.<sup>7</sup> Popular constitutionalism's central commitment is to a greater popular role in the practice of constitutional interpretation.<sup>8</sup> Correspondingly, popular constitutionalists reject the dominant view—judicial interpretative supremacy<sup>9</sup>—which holds that the Supreme Court's interpretations of the Constitution are authorita-

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7 See Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 904 (2005) ("The act of unifying a diverse and growing body of scholarship under the 'popular constitutionalism' mantle is something of a stretch."); see also Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. 300 (2011) (describing the Tea Party movement as a popular constitutional movement).

8 See Gewirtzman, *supra* note 7, 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."); 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"); see also Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. (forthcoming 2011) (advocating a greater role for the general populace in constitutional interpretation).

9 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).

tive.<sup>10</sup> This description fits scholars from Richard Parker<sup>11</sup> through Bruce Ackerman,<sup>12</sup> Mark Tushnet,<sup>13</sup> Larry Kramer,<sup>14</sup> Reva B. Siegel and Robert C. Post,<sup>15</sup> Jack Balkin,<sup>16</sup> and Rebecca Zietlow.<sup>17</sup>

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10 See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 139 (2004); see also Gewirtzman, *supra* note 7, at 899 (describing popular constitutionalism as rejecting judicial interpretative supremacy).

11 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, 257 (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 BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* 6–7 (1991); II BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 5 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1805 (2007).

13 See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, at x (1999) [hereinafter TUSHNET, *TAKING THE CONSTITUTION AWAY*] ("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* 79–110 (2008) (arguing that legislatures are institutionally competent to interpret constitutions).

14 See KRAMER, *supra* note 10, at 8.

15 See Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 17–30 (2003) (criticizing the purportedly "juricentric" view of Section Five embraced by the Rehnquist Court); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 194 (2008) ("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.").

16 See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 601 (2009) (rejecting judicial interpretive supremacy). Balkin's place in the popular constitutionalist family is contested. See Leib, *supra* note 1, at 353 (concluding that Balkin's approach is fundamentally inconsistent with living constitutionalism). I believe that Balkin continues to fit in the popular constitutionalist camp because of his embrace of popular interpretative supremacy. See John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007) [hereinafter McGinnis & Rappaport, *Interpretive Principles*] (criticizing aspects of Balkin's theory); see also John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 785 (2009) [hereinafter McGinnis & Rappaport, *Original Methods Originalism*] (finding that Balkin's "theory of constitutional construction . . . gives pride of place to social movements").

17 REBECCA E. ZIETLOW, *ENFORCING EQUALITY* 9 (2006) (setting forth a description of Congress's interpretative role).

Judicial interpretative supremacy, in its strongest form—the one most often the target of popular constitutionalists<sup>18</sup>—is the claim that the Supreme Court is the authoritative arbiter of constitutional meaning whose interpretations are binding on the other branches of government<sup>19</sup> and on the American people.<sup>20</sup> Judicial interpretative supremacy is clearly the dominant view on the Supreme Court,<sup>21</sup> as it is in the legal academy.<sup>22</sup> There is also strong evidence that Americans perceive the Supreme Court as possessing interpretative supremacy, at least in run-of-the-mill cases.<sup>23</sup>

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18 Keith Whittington recently turned the core popular constitutionalist commitments—rejection of judicial interpretative supremacy and advocacy of popular constitutional interpretation—on their head. Whittington argued that judicial interpretative supremacy is itself the product of political—popular—constitutional construction. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 4 (2007); see also Barty Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598 (2003) (summarizing social science research as showing popular support for the Supreme Court and judicial review).

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

20 See *Planned Parenthood of Se. 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.”).

21 See *City of 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.”) (internal citation omitted); *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).

22 See Prakash & Yoo, *supra* note 9, at 1561 (“In terms of academic views, it is probably fair to say that the majority of scholars support judicial supremacy: the Court enjoys interpretive supremacy such that its decisions bind the other branches not just in the case before it but all other similar cases.”).

23 See *The Invisible Court*, PEW RESEARCH CENTER (Aug. 3, 2010), <http://pewresearch.org/pubs/1688/supreme-court-lack-of-public-knowledge-favorability> (showing public favorability of the Supreme Court ratings regularly above sixty percent); see also Friedman, *supra* note 18, at 2598 (summarizing social science research as showing popular support for the Supreme Court and judicial review); Gewirtzman, *supra* note 7, at 922 (describing the Supreme Court’s “comparatively high levels of public support”).

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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> Some of these scholars suggest that social movements are the mechanism by which popular constitutionalism manifests itself.<sup>27</sup> These social movements work through a number of vehicles—political parties, electoral politics, litigation, advocacy groups, judicial appointments—to push their agendas through the elected branches and the courts.<sup>28</sup> Perhaps most provocatively, Dean Kramer argued that popular constitutionalism may occur via direct popular action such as mobbing and petitioning.<sup>29</sup>

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24 See Pettys, *supra* note 8, at 321 (stating that “popular constitutionalists owe their critics a persuasive response” on the question of how “the American people . . . exercise their interpretative power”).

25 See Ackerman, *supra* note 12, at 1752 (stating that the Supreme Court must “crystallize fixed points in our constitutional tradition” created by higher lawmaking); see also Balkin, *supra* note 16, at 562 (describing the courts as ratifying changes wrought by popular movements and institutions).

26 See 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 15, at 3 (questioning the Supreme Court’s *Boerne* limitations on congressional Section Five legislation); Siegel, *supra* note 15, at 192–95 (arguing that the Supreme Court in *Heller* was giving voice to a popular constitutionalist movement advocating individual gun rights).

27 See TUSHNET, *TAKING THE CONSTITUTION AWAY*, *supra* note 13, 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 Randy Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 Nw. U. L. REV. 281, 284–87 (2011) (describing the Tea Party-backed Repeal Amendment as a conservative popular constitutional movement whose goal is to utilize state legislatures as popular checks on federal legislation).

29 See KRAMER, *supra* note 10, at 27–28, 108, 156, 241–48. For an argument that popular constitutionalism fails because it depends on a civics-educated populace, which the United States does not have, see Serota, *supra* note 8.

Popular constitutionalism as a distinct scholarly phenomenon<sup>30</sup> likely began with Sanford Levinson's *Constitutional Faith*, published in 1988.<sup>31</sup> The movement gained steam in the 1990s with a spate of scholarly interest.<sup>32</sup> The culminating work in this genre is Larry Kramer's *The People Themselves: Popular Constitutionalism and Judicial Review*,<sup>33</sup> published in 2004, to much acclaim and criticism.<sup>34</sup>

The historical narrative frequently told by popular constitutionalists, however, argues that popular constitutionalism was *the* initial American form of constitutional interpretation.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

Popular constitutionalists have asserted a variety of normative bases for popular constitutionalism,<sup>38</sup> though the clear favorite is an

30 See Gewirtzman, *supra* note 7, at 897–98, 911–13 (describing the rise of popular constitutionalism as the triumph of the 1960s generation).

31 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.

32 The next big scholarly step in this movement was Bruce Ackerman’s *WE THE PEOPLE*, published in 1991, *supra* note 12.

33 KRAMER, *supra* note 10.

34 A wide-ranging symposium on Dean Kramer’s book was held in the *Chicago-Kent Law Review*. Symposium, *The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006). The most powerful criticism of Kramer’s book is Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (book review).

35 Dean Kramer is most famous for making this claim. See generally KRAMER, *supra* note 10 (arguing that American history reveals that popularly elected officials held control over a not-yet-powerful Court).

36 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).

37 See generally *id.* (discussing events of the Founding era and arguing that contemporary constitutional theory was consistent with the modern theory of popular constitutionalism).

38 See ZIETLOW, *supra* note 17, 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,

appeal to democracy.<sup>39</sup> Popular constitutionalists argue that, by privileging Supreme Court constitutional interpretations, democracy is undermined and the Supreme Court's countermajoritarian position is aggravated.<sup>40</sup> As Larry Kramer summarized: "The Supreme Court is not the highest authority in the land on constitutional law. We are."<sup>41</sup>

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 a conservative political—Republican Party—and religious—evangelical Protestant and traditional Catholic—social movement in the United States.<sup>42</sup>

The second mode of tying originalism to popular constitutionalism is the most interesting, and it is primarily the work of popular constitutionalist Jack Balkin.<sup>43</sup> Professor Balkin has argued that

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*supra* note 7, 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, *TAKING THE CONSTITUTION AWAY*, *supra* note 13, at 153 (arguing that judicial interpretative supremacy is virtually neutral in the good and bad consequences it causes).

39 *See* Ackerman, *supra* note 12, at 1754 ("The aim of interpretation is to understand the constitutional commitments that have actually been made by the American people . . ."); Post & Siegel, *supra* note 15, at 20 (stating that law must be "responsive to political self-determination if it is to retain legitimacy in a democratic state"); *see also* Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 *Nw. U. L. REV.* 288, 291 (2011) (arguing that the Tea Party popular constitutional movement shows that popular constitutionalism is not necessarily democracy-enhancing).

40 *See* Reva B. Siegel, *Heller & Originalism's Dead Hand—in Theory and Practice*, 56 *UCLA 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, *TAKING THE CONSTITUTION AWAY*, *supra* note 13, at 194 (concluding that popular constitutionalism is the means for the people "to reclaim [the Constitution] from the courts"). *But see* Friedman, *supra* note 18, at 2598–99 (arguing that this popular constitutionalist empirical claim is false).

41 KRAMER, *supra* note 10, at 248.

42 *See* Siegel, *supra* note 15, at 217 (identifying originalism with political conservatism); *see also* Balkin, *supra* note 16, at 609–10 (making this claim).

43 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 1, 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 Constitu-

originalism, properly understood, is of-a-piece with living constitutionalism.<sup>44</sup> He calls this the method of “text and principle.”<sup>45</sup>

According to Balkin, fidelity to the Constitution requires interpreters to adhere to its text’s original meaning and the principles underlying that meaning.<sup>46</sup> However, the Constitution’s original meaning and principles will regularly not determine the outcome of constitutional issues,<sup>47</sup> making them subject to constitutional construction.<sup>48</sup> It is in this zone of construction that popular constitutionalism takes over and constructs meaning.<sup>49</sup>

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.<sup>50</sup>

Before proceeding, it is important to note that my description of popular constitutionalism is thin.<sup>51</sup> 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 popu-

tion’s original meaning and, instead, frequently rely heavily upon it. Bruce Ackerman, Larry Kramer, and Rebecca Zietlow are examples of this approach.

44 See Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 Nw. U. L. Rev. 663 (2009) (reviewing Balkin’s attempted synthesis of originalism and living constitutionalism); see also Larry Alexander, *The Method of Text and ?*: *Jack Balkin’s Originalism with No Regrets* (unpublished manuscript) (criticizing Balkin’s attempted synthesis), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1924568](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924568) (visited Oct. 7, 2011).

45 Balkin, *supra* note 16, at 551.

46 See *id.* at 552.

47 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. See *id.* at 553; see also Peter J. Smith, *How Different are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 707 (2011) (arguing that Balkin’s and other new originalists’ utilization of abstract originalist principles has blurred or eliminated any distinction between originalism and living constitutionalism).

48 See Balkin, *supra* note 16, at 553–57.

49 See *id.* at 554.

50 See *id.* at 551–52, 554–55.

51 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. See, e.g., Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011) (providing a thin description of originalism); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2054–59 (2010) (laying out the “core” propositions of popular constitutionalism).

lar constitutionalists, but who are distinct enough not to merit discussion.

For example, Professor John Gardner has recently argued that written constitutions, in principle, must change.<sup>52</sup> Gardner utilized the tenets of legal positivism and argued that, though written constitutions are possible,<sup>53</sup> they degrade very quickly because of the practice of judicial application of the written constitution in cases.<sup>54</sup> 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 applying the original written constitution.<sup>55</sup>

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 accept judicial interpretative supremacy<sup>56</sup> 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.

## II. ORIGINALISM AS POPULAR CONSTITUTIONALISM?

### A. *The Many Originalisms*

Originalism is also a family of theories of constitutional interpretation; it is not monolithic.<sup>57</sup> Originalists have grounded originalism in different normative theories,<sup>58</sup> they have identified different

52 John Gardner, *Can There Be a Written Constitution?*, (May 8, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1401244> (manuscript on file with author).

53 *See id.* at 33.

54 *See id.* at 35.

55 *See id.* at 40.

56 *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").

57 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 47, at 707 (arguing that originalism's evolution has undermined its distinctness).

58 *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 109 (2004) (arguing that originalism best protects natural rights); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 110-59 (1999) (grounding originalism in popular sovereignty); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 802-05 (2002) (arguing that originalism is justified because it protects the good consequences that arise from the Constitution's supermajority requirements); Lee J. Strang, *The Clash of Rival and Incompatible Philo-*

sources of constitutional meaning,<sup>59</sup> and originalists have articulated different approaches when the Constitution's original meaning is underdetermined.<sup>60</sup>

### B. *Originalism's Focal Case*

The central meaning, or focal case,<sup>61</sup> of originalism is characterized by two theses: the fixation thesis and the contribution thesis.<sup>62</sup> The fixation thesis states that the Constitution's meaning was fixed when its text was ratified.<sup>63</sup> The contribution thesis holds that the Constitution's meaning contributes to the content of constitutional law.<sup>64</sup> The fixation and contribution theses fit all or nearly all versions of originalism.<sup>65</sup> For example, the theses fit both original intent and original meaning originalism.

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*sophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL'Y 909, 983–97 (2005) (showing that originalism leads to the most human flourishing). Lawrence Solum has also argued that one version of originalism, what he calls Semantic Originalism, is compatible with most normative justifications for originalism. Lawrence B. Solum, *Semantic Originalism*, at 128–34 (Nov. 22, 2008) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244).

59 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. See McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 16, at 751. For a review of the different forms of originalism, see *id.* at 758–65.

60 I describe the various approaches in Part II.C.4, *infra*.

61 For a discussion of the concept of focal case, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 9–11 (2d ed. 2011).

62 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) [hereinafter Solum, *Originalism*]; see also Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* 29–32, in *THE CHALLENGE OF ORIGINALISM* (Grant Huscroft & Bradley W. Miller eds., forthcoming 2011) [hereinafter Solum, *Evolution*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1825543](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1825543) (describing the theses); Barnett, *supra* note 51, at 66 (providing a slightly different statement of originalism's core propositions).

63 See Solum, *Originalism*, *supra* note 62, at 944, 954.

64 See *id.* Constitutional law is the label for the rules of law and legal doctrines articulated in Supreme Court constitutional precedent.

65 See Solum, *Evolution*, *supra* note 62, at 33 (concluding that “[a]ll or almost all originalists agree” with the theses).

The focal case of originalism, embodied in the fixation and contribution theses, is formally consistent with popular constitutionalism.<sup>66</sup> 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 III.

*C. Originalism as Popular Constitutionalism Depends on how  
Originalism Pivots on Five Axes*

Different conceptions 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

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<sup>66</sup> 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.

judicial interpretative supremacy; (2) whether originalism requires judicial deference to popular interpretative judgments; (3) the extent to which the Constitution's original meaning authorizes 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.<sup>67</sup> I label this strain of originalism “original departmentalism.”<sup>68</sup> These originalists fit a core popular constitutionalist tenet.

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67 See WHITTINGTON, *supra* note 18, at 161–65 (describing the politically constructed foundations of judicial interpretative supremacy and its eclipse of departmentalism).

68 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. See Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1421 (1999); John Harrison, *Judicial Interpretive Finality and the Constitutional Text*, 23 CONST. COMMENT. 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 9, at 1541; see also Michael W. McConnell, Comment, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 155 (1997) (arguing for a form of departmentalism in the context of Congress exercising its Section Five powers); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1672–73 (2008) (concluding that the President's power to disregard unconstitutional laws exists independently of federal court determinations on the matter); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 779 (2002) (arguing that defenses of judicial interpretative supremacy “make empirical, analytical, and normative errors”). It also appears that Lawrence Solum, Larry Alexander, Randy Barnett, and Keith Whittington, are not departmentalists. See BARNETT, *supra* note 58, at 254; WHITTINGTON, *supra* note 18, at 4; Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 455–58 (2000); Alexander & Solum, *supra* note 34, at 1628–29.

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<sup>69</sup> that the statute is constitutional,<sup>70</sup> 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.<sup>71</sup>

Within originalism, there are a variety of flavors of departmentalism. The most robust version of original departmentalism is Professor Michael Stokes Paulsen's.<sup>72</sup> Paulsen has argued that each branch of the federal government has interpretative supremacy within its zone of authorized activities.<sup>73</sup> For Paulsen, this entails the presidential power to "refuse to execute . . . judicial decrees that he concludes are contrary to law."<sup>74</sup>

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: each branch of the federal government has interpretative authority within its sphere of power.<sup>75</sup> 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*

69 Absent a presidential veto override.

70 See *INS v. Chadha*, 462 U.S. 919, 945–46 (1983).

71 The Supreme Court struck down Texas' prohibition on desecrating the United States flag in *Texas v. Johnson*, 491 U.S. 397 (1989). In response, Congress passed the Flag Protection Act of 1989, which prohibited flag desecration. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777, (*codified at* 18 U.S.C. § 700 (2010)), *invalidated by* *United States v. Eichman*, 496 U.S. 310 (1990). In doing so, Congress and the President exercised independent judgment.

72 See Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 *GEO. L.J.* 385 (1994); Paulsen, *supra* note 68, at 217; Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 *CARDOZO L. REV.* 81 (1993).

73 Paulsen, *supra* note 68, at 221.

74 *Id.* at 222.

75 See Calabresi, *supra* note 68, at 1422; see also McConnell, *supra* note 68, at 171 ("The congressional power to interpret the Fourteenth Amendment for purposes of passing Section Five enforcement legislation is one instance of the general principle that each branch of government has the authority to interpret the Constitution for itself, within the scope of its own powers.").

binding.<sup>76</sup> 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. The practical result of this judgment-opinion dichotomy is 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.<sup>77</sup> 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.

In its modern infancy,<sup>78</sup> many originalists grounded originalism in "judicial deference" or "judicial restraint." Judicial restraint is the

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76 See Calabresi, *supra* note 68, at 1425.

77 Cf. Pettys, *supra* note 8, at 318–19 (arguing that there is "a tight connection between originalism and judicial supremacy").

78 I use the phrase "modern infancy" because originalism was *the* interpretative methodology until the late-nineteenth and early-twentieth centuries. See JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 12–28 (2005); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 3 (rev. ed. 1994). The period with which I am concerned in this Article is originalism's modern incarnation beginning in the 1970s, with the publication of Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), and RAOUL BERGER, GOVERNMENT BY JUDICI-

idea that judges will strike down only clearly unconstitutional laws.<sup>79</sup> If a law is not clearly unconstitutional, a restrained court will defer to the other branches' constitutional judgments.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup>

Most originalists have moved away from judicial deference, for a variety of reasons. Keith Whittington was central to the originalist move away from judicial restraint as a justification for originalism.<sup>84</sup> Professor Whittington argued that there was no originalist reason for judges to strike down only *clearly* unconstitutional laws.<sup>85</sup> Instead, judges have a constitutional duty to strike down legislation that is, in the judges' judgment, unconstitutional.<sup>86</sup>

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ARY (2d ed. 1997); see also William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (providing an early articulation of originalism).

79 Professor Ernest Young helpfully surveyed the various conceptions of judicial restraint and activism, and concluded that judicial restraint means "defer to other sorts of authority at the expense of its own independent judgment about the correct legal outcome." Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1145 (2002); see also RICHARD A. POSNER, THE FEDERAL COURTS 320 (1996) ("[U]nless the court is acting contrary to the will of the other branches of government, it is not being 'activist' in the sense I should like to see become canonical."). Of course, many definitions of judicial restraint have been offered. See, e.g., Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 274–75 (2005) (defining judicial restraint as "judging that produces the fewest surprises" under existing law).

80 For the canonical formulation of this position, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893); see also Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269 (1993) (offering multiple criticisms of Thayer's proposal).

81 See O'NEILL, *supra* note 78, at 129 (stating that early originalism was "majoritarian" and "restraint" oriented).

82 See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166 (1990).

83 *Id.*

84 See WHITTINGTON, *supra* note 58, at 41–44.

85 *Id.*

86 *Id.*; cf. McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 16, at 774–75 (arguing that there is no room in originalist analysis for constitutional con-

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.<sup>87</sup> The reasons for deference, however, are limited to this context.<sup>88</sup>

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

### 3. 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 scope of initial interpretative authority lodged in the elected branches. The Constitution could privilege popular constitutional interpretation in two ways.<sup>89</sup>

First, the Constitution's original meaning could authorize wide scope to popular constitutional interpretation. For example, Section Five of the Fourteenth Amendment *may* grant Congress broad authority both in terms of articulating the interests protected in Section One, and in terms of what counts as "enforce[ment]," or remedial legislation, under Section Five itself. Whether Section Five, in fact, does so is contingent on the historical fact of the text's original meaning.

Second, the Constitution's original meaning may place relatively few "external" limits on popular interpretative activity. External limits are constitutional prohibitions that proscribe governmental activity in areas that the government would otherwise have interpretative authority.<sup>90</sup> Continuing the Fourteenth Amendment example from above:

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struction 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").

87 See McConnell, *supra* note 68, at 184.

88 See *id.* at 185.

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

90 See Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, in 1 *THE RIGHTS RETAINED BY THE PEOPLE* 14 (Randy E. Barnett ed., 1989) (describing the "power-constraint conception of constitutional rights" which holds that "enumerated

states have a broad residual police power to regulate. If Section One does not significantly limit state legislative action, then it is not a robust external limit and states therefore possess substantial initial interpretative authority. Whether Section One 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 interpretative authority and broadly construes external limits.<sup>91</sup> This leads to a relatively limited scope for popular interpretative processes and robust external limits on those processes.<sup>92</sup> The other faction, conservative originalists, more broadly construes popular constitutional authority and narrowly construes external limits.<sup>93</sup>

Focusing on the Necessary and Proper Clause to exemplify the first factor: Libertarian originalists narrowly construe the Clause's grant of power to Congress.<sup>94</sup> By contrast, conservative originalists argue for a broader understanding of the Clause.<sup>95</sup> Under the latter's approach, Congress has greater initial popular 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 Immunities Clause and the Ninth Amendment protect the exercise of natural rights.<sup>96</sup> So, the "external" limits imposed by the Privileges or Immunities Clause and the Ninth Amendment significantly restrict the acknowledged authority of the federal and state governments.

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rights can potentially limit in some manner the exercise of powers delegated by other provisions of the Constitution").

91 For the best libertarian originalist work, see BARNETT, *supra* note 58.

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

93 The most incisive critique of Barnett's RESTORING THE LOST CONSTITUTION, *supra* note 58, is Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081 (2005) (book review).

94 See Randy Barnett, *The Choice Between Madison and FDR*, 31 HARV. J.L. & PUB. POL'Y 1005, 1012 (2008) (arguing for a narrow, "Madisonian" understanding of the Necessary and Proper Clause).

95 See Calabresi & Fine, *supra* note 44, at 665–66; Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991, 991–92 (2008).

96 See BARNETT, *supra* note 58, at 54–68.

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.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup>

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 interpretative 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 authorizing popular constitutional interpretation and narrowing constitutional restrictions on that activity.

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97 See *The Bork Disinformers*, WALL ST. J., Oct. 5, 1987, at 22 (using Bork's (in)famous inkblot analogy regarding the Ninth Amendment); see also BORK, *supra* note 82, at 166 (using the inkblot analogy for the Privileges or Immunities Clause).

98 See *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (“[W]e have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ . . . but also that it be an interest traditionally protected by our society.”); Kurt T. 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.”).

99 See Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431, 1438–39 (2009) (“[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.” (footnote omitted)); see also 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.”); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 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.]”).

#### 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.<sup>100</sup> 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.<sup>101</sup> Though there is an ongoing debate in originalist circles, many originalists accept the distinction between constitutional interpretation and constitutional construction.<sup>102</sup> Interpretation is the process of articulating the Constitution's determinate original meaning.<sup>103</sup> 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.<sup>104</sup>

Construction is the process of creating constitutional doctrine within the bounds set by the Constitution's underdetermined meaning.<sup>105</sup> For instance, the Republican Guarantee Clause likely does not

100 See Barnett, *supra* note 51, at 65–72 (defending originalism's incorporation of construction).

101 For an in-depth discussion of the concept of constitutional construction, see Solum, *supra* note 58, at 19–22, 75–79. For more recent discussions of construction, see Barnett, *supra* note 51; Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39 (2010); Laura A. Cisneros, *The Constitutional Interpretation/Construction Distinction: A Useful Fiction*, 27 CONST. COMMENT. 71 (2010); Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 HARV. J.L. & PUB. POL'Y 99 (2011); Solum, *supra* note 62; Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119 (2010).

102 The most articulate advocates of the non-construction position are Professors John McGinnis and Michael Rappaport. See McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 16, at 783–86 (making a series of arguments against constitutional construction within originalism).

103 See WHITTINGTON, *supra* note 58, at 5 (“[C]onstitutional interpretation is the fairly familiar process of discovering the meaning of the constitutional text.”).

104 See *The Shreveport Rate Case*, 234 U.S. 342 (1914) (upholding federal regulation of railroad rates); *S. Ry. Co. v. United States*, 222 U.S. 20 (1911) (upholding federal railroad safety regulations).

105 See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (describing the concept of underdeterminacy); see also Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134, 138–39 (1990) (providing the first articulation of the distinction between epistemological and metaphysical determinacy of law).

answer the question of whether a state whose statehouse representation varies across districts violates Article IV.<sup>106</sup> It is in cases like this—where the original meaning limits but does not determine the outcome—that constitutional construction occurs. The output of constitutional construction is legal doctrine specifying<sup>107</sup> the norms that govern particular situations.<sup>108</sup>

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,<sup>109</sup> and that the elected branches must respect these constructions.<sup>110</sup> This approach, its proponents claim, maximizes various goods, such as individual liberty.<sup>111</sup>

Others have contended that federal court constructions of constitutional meaning are defeasible in light of contrary constructions by the elected branches.<sup>112</sup> 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

106 See Samuel B. 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).

107 See Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1767 (defining specification as the process of “mak[ing] explicit how the Constitution’s original meaning resolves a particular legal question”).

108 See Solum, *Originalism*, *supra* note 62, at 979–80 (explaining that the process of constitutional construction of the Second Amendment will occur via litigation); see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275 (2006) (explaining the New Doctrinalists’ views which include the idea that constitutional doctrine implements the constitution).

109 Barnett argued that this is necessary to ensure or enhance legitimacy. See BARNETT, *supra* note 58, at 126.

110 See *id.* at 118–30.

111 See *id.* at 126.

112 See WHITTINGTON, *supra* note 58, at 5 (describing constitutional construction as involving “the ‘imaginative vision’ of politics”); see also Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS L.J. 48, 70–71 (2005) (arguing that the elected branches have authority to construct); cf. Whittington, *supra* note 101, at 125–29 (concluding that courts play some role in constitutional construction).

underdetermined on the point—and so the default prerogative of democratic legitimacy governs.<sup>113</sup>

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 potentially a significant role for construction.<sup>114</sup> If this is the case, then there are many facets of constitutional law that are open to popular input.<sup>115</sup>

A possible example of this is Congress's Commerce Clause authority over interstate commercial transactions conducted via the Internet.<sup>116</sup> The Clause's original meaning is that Congress has the authority to regulate the commercial transportation of goods and services across state lines.<sup>117</sup> This meaning arguably does not determine the outcome of a case where Congress's regulation of the Internet is challenged.<sup>118</sup> 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.

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113 See WHITTINGTON, *supra* note 58, at 11 (“Constructions claim the fidelity of political actors through their continuing political authority, not through judicial enforcement.”).

114 See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 12 (1999) (listing constitutional constructions); see also Barnett, *supra* note 51, at 69 (“The original meaning of the text does not definitively answer these and many other similar and important questions.”).

115 See Balkin, *supra* note 16, at 559 (describing constitutional construction as the “far larger task” than constitutional interpretation).

116 See Lee J. Strang, *Originalism and the “Challenge of Change”: Abducted-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 *HASTINGS L.J.* 927, 980–81 (2009) (giving this example).

117 See BARNETT, *supra* note 58, at 313.

118 *Cf. Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 172–73 (S.D.N.Y. 1997) (ruling that the Internet was an instrumentality of commerce).

## 5. Axis Five: Nonoriginalist Precedent

Originalism moves toward popular constitutionalism when it incorporates nonoriginalist precedent. Nonoriginalist precedent is federal court precedent that reaches a result inconsistent with the Constitution's determinate original meaning.<sup>119</sup> There is an ongoing debate among originalists on the status of nonoriginalist precedent.

Some originalists including, most powerfully, Professor Gary Lawson, have argued that all (or almost all) nonoriginalist precedent is without legal force.<sup>120</sup> 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.<sup>121</sup>

Other originalists, including myself, have contended that originalism preserves at least some nonoriginalist precedent.<sup>122</sup> These “precedential originalists” base their conclusion on a number of

119 As I explain in more detail in Strang, *supra* note 107, nonoriginalist precedent is constitutional precedent that does not meet the standard of Originalism in Good Faith. Originalism in Good Faith states that a precedent is an originalist precedent only if it is an objectively good faith attempt to articulate and apply the Constitution's original meaning.

120 Gary Lawson was the first originalist scholar to directly and prominently challenge nonoriginalist precedent. See Gary Lawson, *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, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 4 (2007).

121 See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 259 (2005) (“Accepting that judicial precedent can trump original meaning puts judges above the Constitution . . . .”); Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947, 947 (2008) (arguing that the Constitution “is controlling in most constitutional cases”); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 315–16 (2005) (arguing that precedent trumps the original meaning only when all three branches of the federal government have accepted the precedent as “well-settled”); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) (stating that “stare decisis . . . is completely irreconcilable with originalism”).

122 See, e.g., Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006); see also John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 803 (2009) (“[T]he Constitution as a matter of judicial power incorporates a minimal notion of precedent.”).

bases<sup>123</sup> including the original meaning of “judicial Power” in Article III.<sup>124</sup>

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 Amendment, for instance, is the culmination of the women’s suffrage movement.<sup>125</sup>

As many popular constitutionalists have argued, social movements have also frequently embodied their victories in Supreme Court precedent.<sup>126</sup> A prime example is the Progressive movement’s goal of utilizing the administrative state to ameliorate perceived harms caused by industrialization and urbanization.<sup>127</sup> The Supreme Court validated the administrative state in a series of nonoriginalist cases.<sup>128</sup> 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.

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123 See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437 (2007) (arguing that popular sovereignty-based originalism preserves some nonoriginalist precedent); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 184–201 (2006) (arguing for a “neoformalist” conception of constitutional precedent based primarily on its good consequences, such as respect for Rule of Law values).

124 See Strang, *supra* note 122, at 419.

125 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).

126 See Ackerman, *supra* note 12, 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.”).

127 See Balkin, *supra* note 16, at 561 (describing this phenomenon).

128 See, e.g., *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 230 (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 (internal quotation omitted)); *Humphrey’s Ex’r 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).

There is a significant quantity of nonoriginalist precedent.<sup>129</sup> 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 nonoriginalist 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.<sup>130</sup> Other prominent doctrines that are nonoriginalist<sup>131</sup> precedential embodiments of popular constitutional movements may include: the modern women's rights movement that culminated in heightened scrutiny for gender classification under the Equal Protection Clause;<sup>132</sup> the civil rights movement that culminated in cases directly employing the Constitution<sup>133</sup> and validating statutes such as the Voting Rights Act;<sup>134</sup> doctrines placing the Court's imprimatur on changed sexual mores;<sup>135</sup> case law protecting criminal defendant rights;<sup>136</sup> precedent protecting

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129 See Strang, *supra* note 122, at 430 (“[T]he list of nonoriginalist precedents and constitutional law doctrines built on these precedents is long . . .”).

130 See Balkin, *supra* note 16, at 562 (“Landmark precedents like the New Deal decisions became durable precisely because so much of the developing structure of governance depended on their construction of the Constitution.”).

131 Popular constitutionalists argue that the gun rights movement that secured a goal in *District of Columbia v. Heller*, 554 U.S. 570 (2008), presents an example of popular constitutionalism. See Balkin, *supra* note 16, at 594–97. Since *Heller* is an originalist precedent, see Strang, *supra* note 107, at 1731 (describing originalist precedent and its privileged status), it is not included in the list.

132 *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976).

133 *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

134 *E.g.*, *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

135 *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

136 *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *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).

nontraditional “property;”<sup>137</sup> and recent cases utilizing more-than-rational-basis scrutiny for sexual orientation classifications.<sup>138</sup>

### III. 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 then 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 Rehnquist and Roberts Courts 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 has argued that originalism and popular constitutionalism “are two sides of the same coin.”<sup>139</sup>

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.<sup>140</sup> It is here, in construction, that popular constitutional holds sway.<sup>141</sup>

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137 *E.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

138 *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *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”).

139 Balkin, *supra* note 16, at 549.

140 *See id.* at 566. This claim is supported by another proposition: the Constitution’s original meaning is composed of relatively abstract principles. *See id.* at 554–57.

141 *See id.*

Balkin's attempted fusion of originalism and popular constitutionalism, regardless of its success,<sup>142</sup> 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."<sup>143</sup> My arguments below 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<sup>144</sup> 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.<sup>145</sup> Liberal legal thought has its origin in the Progressive Movement.<sup>146</sup> Beginning in the late-nineteenth and early-twentieth centuries, progressive legal thought

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142 For criticism of Balkin's claims from an originalist perspective, see McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 16, at 785–86; McGinnis & Rappaport, *Interpretive Principles*, *supra* note 16, at 371. For criticism from a living constitutionalist perspective, see generally Leib, *supra* note 1.

143 Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 428 (2007).

144 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 respectively.

145 By "modern" liberal legal thought I am distinguishing post-Progressive Era liberal legal thought from its predecessor. See RICHARD HUDELSON, 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 55 (2009) (arguing that foundational American political views in the late-nineteenth century were "dead or dying"); Gerald Gaus & Shane D. Courtland, *Liberalism*, at §2, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2010), available at <http://plato.stanford.edu/entries/liberalism> (distinguishing "classical" from "new liberalism"); see also BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END 60–61 (2006) (stating that the "close of the nineteenth century and the opening of the twentieth was a period of great intellectual ferment" that "fed the Progressive political movement").

146 See WATSON, *supra* note 145, at 194 (stating that there has occurred an "evolution of progressivism into liberalism"); see also Balkin, *supra* note 16, 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").

was the legal manifestation of the social and political Progressive Movement.<sup>147</sup> A central tenet of progressive legal thought was its commitment to popular interpretative supremacy.<sup>148</sup>

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<sup>149</sup> judicial excesses of the *Lochner* Court, the Supreme Court consciously sought to limit conflict or tension with popular constitutional interpretation. It did this in two primary ways: first, the New Deal Court deferred to popular constitutional judgments in the elected branches, for instance, by deferring to Congress's economic judgments in the Commerce Clause context,<sup>150</sup> and second, it instantiated New Deal popular interpretative judgments,<sup>151</sup> such as limits on contract rights, in its precedent.<sup>152</sup>

147 See WATSON, *supra* note 145, at 194 (tying liberal legal theory to Progressivism).

148 See O'NEILL, *supra* note 78, at 30 (describing claims for judicial updating of the Constitution); WATSON, *supra* note 145, at 10, 15 (arguing that the Supreme Court, beginning in the Progressive Era, adopted an interpretative methodology that was flexible so as to respond to historically conditioned circumstances); WOLFE, *supra* note 78, at 205–16 (describing Woodrow Wilson's claims regarding the Constitution).

149 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 *Lochner* Court significantly restricted the ability of the federal and state governments to enact salutary legislation that responded to changing social conditions. See, e.g., *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, *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 *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.”); see also David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L. Q. 1469, 1470–71 (2005) (“According to the prevailing myth propagated by Progressives and New Dealers—and widely accepted even today—Supreme Court Justices of the *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.” (footnotes omitted)). In reality, the Supreme Court's jurisprudence was generally favorable to federal and state legislation. See MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY* 31–32, 55 (2001).

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

151 See Balkin, *supra* note 16, at 561–62.

152 E.g., *Home Bldg. & Loan Ass'n*, 290 U.S. at 442–43.

At this point, because of its early-New Deal rulings,<sup>153</sup> the Supreme Court had suffered considerable harm to its institutional prestige and authority.<sup>154</sup> Despite this, the Supreme Court issued promissory notes of greater judicial intervention that came due during the Warren Court.<sup>155</sup> Most famously, the New Deal Court articulated the basis for more rigorous judicial review in *Carolene Products* Footnote Four.<sup>156</sup>

Liberal legal thought maintained its commitment to popular constitutionalism throughout the twentieth century though, as I describe below, during the Warren Court era,<sup>157</sup> this commitment was submerged. The principle post-war manifestation of liberal legal thought's popular constitutionalism was found in the Legal Process School.<sup>158</sup> Legal Process had its principal home at Harvard Law School,<sup>159</sup> though it had prominent adherents on the Court<sup>160</sup> and throughout the academy.<sup>161</sup>

For purposes of this Article, I will focus on one of Legal Process's key tenets, institutional settlement.<sup>162</sup> Institutional settlement is the

153 See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industry Recovery Act).

154 See ACKERMAN, TRANSFORMATIONS, *supra* note 12, at 119–20 (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”).

155 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 the aftermath of the Civil War . . . and redirected in New Deal opinions like *Carolene Products*”).

156 *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); see also ACKERMAN, TRANSFORMATIONS, *supra* note 12, at 119–29 (describing how Footnote Four is a Supreme Court attempt to synthesize the New Deal with prior constitutional commitments).

157 I include the early Burger Court in this label because neither the Court's membership nor its jurisprudential views changed immediately upon Chief Justice Burger's appointment. See O'NEILL, *supra* note 78, 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 TAMANAHA, *supra* note 145, at 88 (“[T]he Burger Court was *more* activist than the Warren Court.”).

158 See TAMANAHA, *supra* note 145, at 108 (stating that “most” Legal Process proponents “were liberals”).

159 The most well-known proponents of Legal Process were Justice Frankfurter, Henry Hart, Albert Sacks, and Lon Fuller. See TAMANAHA, *supra* note 145, at 102.

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

161 Herbert Wechsler, for instance.

162 See TAMANAHA, *supra* note 145, at 104 (describing the principle of institutional settlement).

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.<sup>163</sup>

The practical impact of this commitment is that the Supreme Court should regularly defer to popular interpretative judgments.<sup>164</sup> In fact, this is a major reason why Legal Process's influence waned.<sup>165</sup> As it became more difficult for Legal Process advocates<sup>166</sup> to justify the Warren Court's cases,<sup>167</sup> liberal legal academics abandoned it<sup>168</sup> and the deference to popular interpretative judgments that went with it.<sup>169</sup>

The Warren Court, in an unprecedented<sup>170</sup> host of areas, rejected one of the two aspects of the New Deal Court's respect for

163 See Ernest Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1150 (2005).

164 See TAMANAHA, *supra* note 145, at 104 ("Legal process thought thus accorded priority to legislatures, designating courts and administrative agencies as . . . subordinate institutions . . .").

165 Legal Process's influence decreased precipitously in the mid-to-late-1960s, though its influence was challenged beginning in the 1950s. See *id.* at 108–17.

166 This result was not through a lack of effort on the part of Legal Process adherents. The most heroic example is Alexander Bickel. Bickel attempted to preserve the core insights of Legal Process while at the same time justifying the Warren Court's jurisprudence. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 24 (2d ed. 1986) (describing the goals of his book explicitly in Legal Process terms).

167 The Warren Court's negative impact on Legal Process thinking is exemplified by Bickel's later criticism of the Court. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

168 See TAMANAHA, *supra* note 145, at 108 ("[T]he reformist decisions of the Warren Court could not be squared with basic legal process tenets. This conflict was all the more painful for legal process theorists because most were liberals who shared in the substantive aims of the Court.").

169 See *id.* at 112 (describing the Harvard Law Review editors' dedication of the first issue of the eighty-third volume to Chief Justice Warren who "led a reform of the law while the other branches of government delayed" (internal quotation omitted)).

170 Literally. The Warren Court had the highest rate of overturning precedent of any Supreme Court. See Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 264 (1992) (finding that the Warren Court had the highest rate of overturning of any court); see also PHILIP KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 90–91 (1970) ("The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook."); Lee J. Strang & Bryce G. Poole, *The Historical (In)Accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C. L. Rev. 969, 979–80 (2008) (describing the increased rate of Supreme Court overrulings after 1932).

popular judgments.<sup>171</sup> The Warren Court, in the area of “fundamental” rights,<sup>172</sup> rejected deference to popular constitutional judgments. Instead, following hints from *Carolene Products* Footnote Four<sup>173</sup> and the example of its Free Speech Clause jurisprudence,<sup>174</sup> 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.<sup>175</sup> 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*.<sup>176</sup>

Liberal legal academics, especially those associated with the Legal Process School, initially expressed significant misgivings about the Court’s assertions of judicial power.<sup>177</sup> As the century progressed, however, most liberal legal academics defended the Warren Court’s rulings,<sup>178</sup> though frequently with apologies for the Court’s own weak justifications.<sup>179</sup> This was in large measure because liberal legal aca-

171 Most of these moves raised significant controversy, see TAMANAHA, *supra* note 145, at 108, though a few found welcome public reaction, such as the voting rights cases that articulated the one-man-one-vote rule. See *Reynolds v. Sims*, 377 U.S. 533, 560–61 (1964).

172 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).

173 *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

174 See WOLFE, *supra* note 78, at 184–99 (describing how the Court’s free speech jurisprudence was the first area where the Court utilized stricter judicial review).

175 See *Reynolds*, 377 U.S. at 555 (“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.”).

176 JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

177 Perhaps the most famous example of this was Herbert Wechsler’s criticism of *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); see also O’NEILL, *supra* note 78, 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.”).

178 See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 124–30 (1977) (describing how *Roe* fits Dworkin’s conception of law as integrity).

179 See JED RUBENFELD, *FREEDOM AND TIME* 222 (2001) (describing attempts to defend *Roe* as “merely reemphasiz[ing] the embarrassing sense of artifice, of post-hoc

demics saw the Warren Court's pursuit of liberal substantive policies worth defending.<sup>180</sup> Both 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 so<sup>181</sup> for the foreseeable future.<sup>182</sup> This caused liberal legal academics to seriously question the claims of judicial power accepted since the Warren Court. As a result, many liberal legal academics have returned to their intellectual home in the form of popular constitutionalism.<sup>183</sup>

Professor Richard Parker was liberal legal theory's John the Baptist.<sup>184</sup> In his seminal 1980 article, *The Past of Constitutional Theory—And its Future*,<sup>185</sup> Parker “appeal[ed] to [his] generation” to reject then-regnant justifications for judicial review<sup>186</sup> and, in their place, create “a political life far different—far more democratic—than the one we know now.”<sup>187</sup> Today, numerous liberal legal academics have taken up Parker's appeal. Professor Rebecca Zietlow echoes Parker almost thirty years later:

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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”); Ely, *supra* note 149, at 922–26 (repeatedly stating agreement with *Roe*'s result, while severely criticizing the Court's claims).

180 See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373 (2007) (“Progressive confidence in constitutional adjudication peaked during the Warren Court and its immediate aftermath.”).

181 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.

182 See Post & Siegel, *supra* note 180, at 373 (“[P]rogressive attitudes toward constitutional adjudication have recently begun to splinter and diverge.”); see also Friedman, *supra* note 18, at 2603 (“[P]rogressives and conservatives tend to switch sides depending on what courts are doing.”).

183 See KRAMER, *supra* note 10, at 225 (arguing that a conservative Supreme Court, beginning in the 1980s, broadened judicial interpretative supremacy).

184 John the Baptist called the Jewish people to repentance and thereby prepared the way for Jesus' public ministry. See *Matthew* 3:6 (“And were baptized by him in the Jordan, confessing their sins.”).

185 Parker, *supra* note 11.

186 *Id.* at 223.

187 *Id.* at 257.

[A]t 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 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.<sup>188</sup>

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<sup>189</sup> because both have the purpose to preserve and instantiate traditional—social and legal—norms.<sup>190</sup> Modern American conservative thought, as a coherent intellectual movement, originated in the late-1940s.<sup>191</sup> Conservative thought was composed of a number of strands,<sup>192</sup> and the movement found voice in its seminal statement,

188 ZIETLOW, *supra* note 17, at 168.

189 See Whittington, *supra* note 2, at 30 (“[C]onservatives are generally more likely than liberals to find originalism a normatively attractive approach to constitutional interpretation.”).

190 See, e.g., RUSSELL KIRK, *THE CONSERVATIVE CONSTITUTION* 4, 19–33 (1990) (arguing that the Constitution embodied the conservative principles of the American Revolution).

191 See GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA* 3 (1998) (placing the birth of the modern conservative intellectual movement in 1945 with the publication of Friedrich Hayek's *The Road to Serfdom*); see also GODFREY HODGSON, *THE WORLD TURNED RIGHT SIDE UP* 23 (1996) (using the mid-1940s as the birth date).

192 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. See HODGSON, *supra* note 191, at 17–18; see also Whittington, *supra* note 2, at 32 (describing conservatism as containing libertarians, religious conservatives, national security hawks, business conservatives, and neoconservatives).

Russell Kirk's, *The Conservative Mind*, in 1953.<sup>193</sup> Conservative thought manifested itself in many areas of American life including the legal realm.<sup>194</sup> In the legal academy, conservative legal thought struggled.<sup>195</sup>

Two of the conservative intellectual movement's central commitments make originalism its most compatible theory of constitutional interpretation.<sup>196</sup> First, modern conservative thought focuses on *preserving* traditional norms of human conduct.<sup>197</sup> The America that created the 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.<sup>198</sup>

Second, conservative thought prescribes norms for individuals and society that generally fall under the label conservative.<sup>199</sup> Originalism, applied to the American Constitution, regularly results in conservative outputs.<sup>200</sup> For example, Americans in 1791 strongly

193 RUSSELL KIRK, *THE CONSERVATIVE MIND* (7th rev. ed. 2001).

194 In the political realm, the conservative intellectual movement's first major impact was Barry Goldwater's presidential campaign. See HODGSON, *supra* note 191, at 91–92. In the media, William F. Buckley founded *National Review*, America's most prominent conservative media outlet, in 1955. See *id.* at 78.

195 See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 41–46 (2008); see also Mark Tushnet, *What Consequences Do Ideas Have?*, 87 TEX. L. REV. 447 (2008) (reviewing Teles' book and describing three mechanisms that the conservative legal movement utilized to challenge liberal legal thought's institutional hegemony).

196 Keith Whittington has argued that originalism and conservatism are not necessarily related, and that other ways of interpreting the Constitution may better suit conservatives. See Whittington, *supra* note 2, 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 that originalism and conservatism in fact overlap when he notes that "[o]ther jurisprudential theories *could* provide a better fit with conservati[sm]." *Id.* (emphasis added).

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

198 See Whittington, *supra* note 2, at 40 (describing originalism as "backward looking").

199 See KIRK, *supra* note 193, 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).

200 See Lee J. Strang, *Originalism and the "Challenge of Change": Abducted-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 935 (2009); see also THE HERITAGE GUIDE TO THE CONSTITUTION (Edwin Meese III et al. eds., 2005) (providing a clause-by-clause analysis of the Constitution's original meaning).

embraced widespread gun ownership,<sup>201</sup> a position generally considered conservative today.<sup>202</sup> As another example, the Establishment Clause's original meaning permits significant interaction between religion and the state,<sup>203</sup> a position solidly within today's conservative mainstream.<sup>204</sup> This conclusion is also bolstered by the claims made by Progressives that the Constitution's original meaning was outdated.<sup>205</sup> These reasons for conservatism's embrace of originalism are borne out by the practical reality that most prominent originalists are conservative.<sup>206</sup>

In sum, the primary reason popular constitutionalism and originalism have failed to converge in practice is that liberal legal academics and conservative legal academics make their homes in the respective theories. On this reading, popular constitutionalism is liberal legal thought's return to its natural intellectual home after wandering during the Warren Court era. This explanation accounts for the accurate perception that popular constitutionalists tend toward liberalism while originalists tend toward conservatism.

### C. *The "Sociological Explanation"*

The second of the three causes of the divergence between theory and practice is 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 incarna-

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201 See *Staples v. United States*, 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, 1778 (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) (“Household gun ownership in early America was more widespread than today . . .”).

202 See *2008 Republican Platform* 51, <http://www.gop.com/2008Platform/2008platform.pdf> [hereinafter *2008 Republican Platform*] (last visited Sept. 12, 2011) (stating the party's commitment to an individual right to keep and bear arms).

203 The best book-length analyses on the Clause's original meaning are ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE* (1982); DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* (2010); and PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002).

204 See *2008 Republican Platform*, *supra* note 202, at 53 (criticizing “judicial rulings which attempt to drive faith out of the public arena”); see also RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* (2d ed. 1986) (arguing for a robust role for religiously-informed voices in the public square).

205 See WOLFE, *supra* note 78, at 205–16.

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

tion arose as a critique of the Warren and Burger Courts.<sup>207</sup> One goal of this critique was to undermine and overturn the Courts' liberal rulings,<sup>208</sup> a goal amenable to legal conservatives.<sup>209</sup> 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."<sup>210</sup> Originalism was simply "conservatism's legal guise."<sup>211</sup> If one wished to be a successful member of the legal academy, one did not advocate originalism.

Since liberal legal thought dominated<sup>212</sup> 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 somewhere other than originalism. Popular constitutionalism is just such a home. For instance, Rebecca Zietlow explained that her move toward popular constitutionalism was the result of recent Supreme Court rulings that seemed to limit civil rights protection, which prompted her to look to the federal and state legislatures as "protectors of rights."<sup>213</sup>

#### D. *The "Realist Explanation"*

Third, originalism diverges from popular constitutionalism, despite the theoretical possibility of its affinity, because of the political

207 See O'NEILL, *supra* note 78, 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."); see also Solum, *Evolution*, *supra* note 62, at 6–8 (describing the early work of Robert Bork and then-Justice Rehnquist).

208 See O'NEILL, *supra* note 78, at 94–95, 107.

209 See Whittington, *supra* note 2, at 29 (describing originalism's "modern form" as "a response to the liberal constitutional decisions of the Warren and Burger Courts").

210 See O'NEILL, *supra* note 78, at 123–29 (describing the legal academy's hostile reception to Raoul Berger's, *Government by the Judiciary*).

211 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 . . .").

212 And continues to dominate. See John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1170 (2005) (finding that of politically active law professors at the nation's top-twenty law schools, "81% of law faculty members in the study who make political contributions contribute wholly or predominately to Democrats"); 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 . . ."); Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. 288, 299 (2011) (acknowledging the force of the claim that "liberal law professors . . . have been the principal proponents" of popular constitutionalism).

213 ZIETLOW, *supra* note 17, at ix.

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.<sup>214</sup> The most prominent originalist interpretation of the Commerce Clause's original meaning is found in Randy Barnett's work. Over a series of articles<sup>215</sup> and in a book,<sup>216</sup> 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."<sup>217</sup> On the other hand, nonoriginalists have generally argued that *Wickard v. Filburn*'s<sup>218</sup> capacious interpretation is correct.<sup>219</sup>

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214 A concrete example of this phenomenon is that challengers to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), have utilized this interpretation of the Commerce Clause, see Memorandum in Opposition to Motion to Dismiss at 22–26, *Virginia v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010) (No. 3:10cv188) (making originalist arguments regarding the Commerce Clause's meaning); Randy Barnett, *Is Health Insurance Mandate Constitutional?*, THE VOLOKH CONSPIRACY (Dec. 9, 2009, 10:45 AM), <http://volokh.com/2009/12/09/conspirators-at-heritage-today> (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 Memorandum in Support of Defendant's Motion to Dismiss at 20–23, *Sebelius*, 702 F. Supp. 2d 598 (No. 3:10cv188) (making nonoriginalist arguments regarding the Commerce Clause's meaning).

215 See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

216 See BARNETT, *supra* note 58, at 313.

217 *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.").

218 317 U.S. 111 (1942).

219 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 Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 1, 34 (2010) (using his "text and principle" method of interpretation to conclude that "*Wickard* is a fairly easy case").

Another piece of evidence that originalists tend toward conservatism is provided by the recent influx of “new” originalists. Over the past decade, originalism has seen an influx of new proponents along with a host of proposed refinements.<sup>220</sup> Many originalists have resisted both the influx and the refinements at least in part because they may result in the liberal reorientation of originalism.<sup>221</sup> This resistance by “old” originalists suggests that originalism has, until very recently, tended toward conservative constitutional interpretations.<sup>222</sup>

Second, and relatedly, originalists in practice have tended to pivot on the five axes away from popular constitutionalists. I described in Part II.B how originalism is theoretically compatible with popular constitutionalism. However, in Part II.C, I showed that originalism, as currently articulated by scholars, has failed to converge with 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 constitutionalism in practice. On one axis, originalism has clearly moved away from popular constitutionalism; there are few originalists who counsel judicial deference to popular interpretative judgments.

With the other four axes, though there is no obvious majority position, the axes clearly do not pivot toward popular constitutionalism. There is no originalist consensus on departmentalism, 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 con-

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220 The most-cited telling of this story is found at Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 603–12 (2004). More recently, Professor Peter J. Smith has described originalism’s 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?*, 62 HASTINGS L.J. 707, 725–30 (2011).

221 See Smith, *supra* note 220, at 707; see also Steven D. Smith, *That Old-Time Originalism* 10–15 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 08-028, 2008), available at <http://ssrn.com/abstract=1150447> (arguing that the influx of new originalists may cause originalism to disintegrate).

222 See Smith, *supra* note 220, at 710 (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”).

servative 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.”<sup>223</sup>

#### 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 conception of originalism is correct.

Then, in Part III, 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.

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223 Whittington, *supra* note 2, at 38–39.

