



2019

## Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate

Lawrence B. Solum  
*Georgetown University Law Center, lbs32@law.georgetown.edu*

This paper can be downloaded free of charge from:  
<https://scholarship.law.georgetown.edu/facpub/2230>  
<https://ssrn.com/abstract=3324264>

---

Northwestern University Law Review, Vol. 113, Issue 6, April 2019, 1243.

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.  
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

Part of the [Constitutional Law Commons](#)

## Symposium Essays

### ORIGINALISM VERSUS LIVING CONSTITUTIONALISM: THE CONCEPTUAL STRUCTURE OF THE GREAT DEBATE\*

*Lawrence B. Solum*

**ABSTRACT**—The great debate between originalism and living constitutionalism ought to focus on the merits, including normative arguments for and against various forms of each theory. Frequently, however, discussion turns to disputes about definitions and concepts. This Essay investigates the conceptual structure of the great debate. It lays out a variety of issues that arise when theorists attempt to define “originalism” and “living constitutionalism” and proposes criteria for settling definitional disputes.

**AUTHOR**—Carmack Waterhouse Professor of Law, Georgetown University Law Center.

INTRODUCTION .....	1244
I. MEANINGS: “ORIGINALISM” AND “LIVING CONSTITUTIONALISM” .....	1250
A. The Word “Originalism” .....	1250
B. The Phrase “Living Constitutionalism” .....	1255
II. CONCEPTS: ORIGINALISM AND LIVING CONSTITUTIONALISM .....	1262
A. Originalism as a Concept .....	1262
B. Living Constitutionalism as a Concept .....	1271
C. The Role of the Interpretation–Construction Distinction in Originalism and Living Constitutionalism .....	1277
D. Incompatible but Not Exhaustive .....	1281
III. HYBRID THEORIES .....	1282
A. Living Originalism .....	1282
B. Constitutional Compromises .....	1284
C. Original Law Originalism .....	1286

---

\* © 2019 by the Author. Permission is hereby granted to make copies, including copies in electronic form that are publicly available, for scholarly and educational purposes. The author requests that copies include the name of the author, the title of the article, and a citation to this publication.

## NORTHWESTERN UNIVERSITY LAW REVIEW

IV. IMPLICATIONS OF THE CONCEPTUAL STRUCTURE FOR THE GREAT DEBATE .....	1288
A. <i>The Importance of the Realm of Discourse</i> .....	1288
B. <i>The Importance of Pairwise Comparison</i> .....	1292
C. <i>The Standards for Evaluating Competing Metalinguistic Proposals</i> .....	1293
D. <i>A Summary of the Conceptual Landscape</i> .....	1295
CONCLUSION .....	1296

### INTRODUCTION

This Essay explores the conceptual structure of the great debate about “originalism” and “living constitutionalism.”<sup>1</sup> The core of the great debate is substantive and addresses the normative question: “What is the best theory of constitutional interpretation and construction?” That question leads to others, including questions about the various forms of originalism and living constitutionalism. Originalists argue that the meaning of the constitutional text is fixed and that it should bind constitutional actors. Living constitutionalists contend that constitutional law can and should evolve in response to changing circumstances and values.

---

<sup>1</sup> This Essay is part of a larger project that is in progress. See Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451 (2018); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (2017); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Lawrence B. Solum, *Construction and Constraint: Discussion of Living Originalism*, 7 JERUSALEM REV. LEGAL STUD. 17 (2013); Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147 (2012); Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12 (Grant Huscroft & Bradley W. Miller eds., 2011); Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409 (2009); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009). In addition to the published and forthcoming articles, works-in-progress include Lawrence B. Solum, *The Public Meaning Thesis* (Aug. 20, 2015) (unpublished work-in-progress), and Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Mar. 24, 2017) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215) [<https://perma.cc/D2AE-MVZS>]). The earliest version of the project was developed in a work that is still in progress: Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. L. & Legal Theory Research Papers Series, Paper No. 07-24, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244) [<https://perma.cc/CGF7-7WK2>].

Two published papers aim to present the project in a more accessible but less rigorous form. See Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235 (2018); Lawrence B. Solum, *Statement Presented at the Hearings on the Nomination of Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, 31 DIRITTO PUBBLICO COMPARATO ED EUROPEO ONLINE 575 (2017).

Despite the importance of the dispute between originalists and living constitutionalists, discussions of the two approaches frequently go astray; substantive issues are clouded by disagreements and confusions about the words and concepts that structure the debate. On the one hand, the word “originalism” and the phrase “living constitutionalism” are used differently by different authors. Additional complications arise because the nature of the concepts *originalism* and *living constitutionalism* are disputed as well.<sup>2</sup> But if participants in the debates about originalism and living constitutionalism are talking past one another, it is difficult to identify what is really at stake in the great debate, much less make progress in the clarification and resolution of the issues that are the focus of true substantive disagreements.

The main aim of the Essay is to provide a conceptual vocabulary that clarifies and structures academic discussions of “originalism” and “living constitutionalism.” When “originalism” is used in academic discourse as the name for a constitutional theory without qualification, the word should be used to refer to members of the family of constitutional theories that affirm both the Fixation Thesis (the meaning of the constitutional text is fixed at the time each provision is drafted) and the Constraint Principle (constitutional practice should, at a minimum, be consistent with the original meaning, with

---

<sup>2</sup> I will use quotation marks when I discuss the word “originalism” and the phrase “living constitutionalism” and italics when I discuss the concepts of *originalism* and *living constitutionalism*. For explanation of the difference between words and concepts, see *infra* discussion at the beginning of Section II.A.

a fuller explanation in a footnote<sup>3</sup>), and that offer a reasonable<sup>4</sup> account of original meaning and of the extent of constitutional underdeterminacy, where underdeterminacy is understood as referring to cases and issues with respect to which the communicative content of the constitutional text rules out some outcomes but does not fully determine which outcome is correct.<sup>5</sup> When "living constitutionalism" is used by scholars as the name for a constitutional theory, it should be used to refer to nonoriginalist constitutional theories that affirm the view that constitutional practice can and should change in response to changing circumstances and values. These claims are justified by metalinguistic and conceptual arguments—claims about how we should use the words and about the proper shape of the concepts to which the words refer.

Why are the conceptual and terminological issues important? Consider disagreements about "originalism," the word, and *originalism*, the concept for which the word stands. I was prompted to write this Essay by what seems

---

<sup>3</sup> Here is the current version of Constraint as Consistency as formulated in Solum, *The Constraint Principle*, *supra* note 1, at 20–21:

*Constraint as Consistency.* Constraint as Consistency is the conjunction of three requirements and three qualifications as follows:

*Requirement One:* Constitutional doctrines and the decisions of constitutional cases must be consistent with the "translation set." The translation set consists of the propositions of law that express the communicative content of the constitutional text.

*Requirement Two:* All of the communicative content of the constitutional text and its logical implications must be reflected in the legal content of constitutional doctrine.

*Requirement Three:* All of the content of constitutional doctrine must be fairly traceable to the direct translation set, with traceable content including precisifications, implementation rules, and default rules presupposed (or otherwise supported) by the text.

*Qualification One:* Requirements One, Two, and Three operate only to the extent that the communicative content of the constitutional text is epistemically accessible given appropriate levels of epistemic reasonableness; they are not violated by departures from unknown communicative content.

*Qualification Two:* If Requirements One, Two, and Three are not satisfied, then constitutional practice should be brought into compliance with constraint over time, giving due regard to the effects of constitutional change on the rule of law.

*Qualification Three:* Requirements One, Two, and Three are defeasible in limited and extraordinary circumstances, as specified by the best theory of defeasibility.

<sup>4</sup> The use of "reasonable" is intended to exclude theories that have a radically implausible account of original meaning. For example, a theory that held that the original meaning of the constitutional text is the meaning that the text held for King George III would not count as a member of the originalist family of constitutional theories.

<sup>5</sup> For example, Public Meaning Originalism argues that the original meaning is the public meaning of the constitutional text at the time each provision was framed and ratified. See Solum, *The Public Meaning Thesis*, *supra* note 1. A complete originalist theory will include additional components, including an original methodology, a theory of constitutional construction for cases and issues that are underdetermined by the text, and so forth.

to me a puzzling fact: there is substantial disagreement about what should count as “originalism.” Some of the disagreement seems connected to debates among originalists about the nature of original meaning—Should we look for original intent or original public meaning? Other disagreements have arisen in response to what is sometimes called “the new originalism”<sup>6</sup>—and especially to the suggestion that, at least in some cases, originalism is consistent with certain kinds of constitutional change and that originalism does not lead invariably to outcomes supported by right-wing ideologies. Two distinguished legal scholars have gone so far as to suggest that using the word “originalism” to describe an approach that does not lead to conservative outcomes is Orwellian.<sup>7</sup> Evidently, the meaning of the word “originalism” is disputed.

But “originalism” is just a name for a theory or a set of theories. One might think that it is the substance of the theory that is important—not the name. If the word “originalism” is confusing, use another word—“textualism,” “intentionalism,” or “Theory X.” If there are different versions of originalism, then differentiate—“Original Intentions Originalism,” “living originalism,” “new originalism,” “old originalism”—however many labels it takes to make the differences clear. Or just stipulate: “‘Originalism’ shall be the view that constitutional interpretation should have characteristics A, B, and C.” It is not as if any of these techniques for resolving merely verbal disagreements are a secret. Nevertheless, the arguments about what should count as “originalism” persist.

Similar points could be made about the phrase “living constitutionalism” and the concept, *living constitutionalism*, to which the phrase points. Sometimes constitutional theorists who reject originalism eschew use of “living constitutionalism” altogether—perhaps because they believe that living constitutionalism is a radical doctrine that is too far outside the mainstream to be taken seriously.<sup>8</sup> On other occasions, nonoriginalists may embrace “living constitutionalism” as the name for their

<sup>6</sup> The phrase “new originalism” is used differently by different authors. See Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 467–69 (describing the emergence of talk about the “new originalism”).

<sup>7</sup> Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative*, 64 FLA. L. REV. 1483, 1509 (2012).

<sup>8</sup> Cf. Michael Allan Wolf, *Right Environmentalism: Repurposing Conservative Constitutionalism*, 50 ARIZ. ST. L.J. 651, 665 (2018) (declaring that “living constitutionalism” is “largely dead”); Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 12 n.51 (2018) (“I reject the term ‘living constitutionalism’ as verging on the oxymoronic. ‘Living’ suggests instability and constitutionalism denotes stability. This is a very poor term to describe what I believe to be the most stable theory of constitutional methodology, pluralism.”).

view, but object to characterizations that portray living constitutionalism as authorizing departures from the constitutional text.

The attempt to provide conceptual clarity to the great debate faces many obstacles, many of which are discussed in this Essay. One of the most important difficulties is a tendency to equate "originalism" with the idea that constitutional doctrine should be static and "living constitutionalism" with the contrasting notion that constitutional law is dynamic. There is a kernel of truth in this way of framing the debate, but the contrast between dynamic and static theories fails to capture the issues on a deeper level. It is true that almost all originalists affirm the idea that the meaning of the constitutional text was fixed at the time each provision was framed and ratified.<sup>9</sup> But fixed meaning does not entail static doctrine for at least two reasons. First, the fixed meaning of the text can result in new constitutional doctrines when new facts arise: the doctrinal implementing rules for the First Amendment may change in response to new technologies such as the Internet. Second, at least some constitutional provisions employ terms that are vague or open-textured; these provisions do not provide bright-line rules. Such provisions create a zone of underdeterminacy that allows for doctrinal dynamism consistent with fixed meaning.<sup>10</sup>

This Essay's investigation of the conceptual structure of the debate between originalism and living constitutionalism proceeds in four Parts. The first Part deals with lexicography: Is the answer to debates about what counts as originalism to be found in the definition of the word? The second Part deals with originalism as a concept: What kind of concept is *originalism*? The third Part discusses "hybrid" theories that combine elements of both originalism and living constitutionalism. The fourth Part draws out some of the implications of the terminological and conceptual clarifications and proposals for the substance of the great debate.

This Essay is part of a much larger project that aims to elaborate and defend a fully articulated theory of constitutional originalism. The larger project includes two foundational distinctions:

- The first foundational distinction is between legal content and communicative content—explicated in *Communicative Content and Legal Content*.<sup>11</sup>
- The second foundational distinction is between the activity that discovers the linguistic meaning of the constitutional text (interpretation) and the activity that determines the legal effect

<sup>9</sup> See generally Solum, *The Fixation Thesis*, *supra* note 1.

<sup>10</sup> Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 469–72; *infra* Sections II.A.6, II.C.4.

<sup>11</sup> Solum, *Communicative Content and Legal Content*, *supra* note 1, at 480.

of the text (construction)—as explained in *The Interpretation-Construction Distinction*.<sup>12</sup>

These distinctions frame the case for originalism as a constitutional theory. The full case includes the following eight elements:

- First Element: The claim that the linguistic meaning in context (communicative content) of the constitutional text is fixed at the time each provision is framed and ratified, which is explicated and defended in *The Fixation Thesis*.<sup>13</sup>
- Second Element: The claim that the original meaning should constrain constitutional practice, the subject of *The Constraint Principle*.<sup>14</sup>
- Third Element: The claim that the best understanding of original meaning is the public meaning of the constitutional text, the subject of *The Public Meaning Thesis*.<sup>15</sup>
- Fourth Element: The claim that the original public meaning of the text moderately underdetermines the content of constitutional doctrine, the subject of a planned article tentatively titled *The Fact of Constitutional Underdeterminacy*.<sup>16</sup>
- Fifth Element: A theory of the best originalist approach to the set of cases in which the original meaning underdetermines the legal content of constitutional doctrine, explored in *Originalism and Constitutional Construction*,<sup>17</sup> and a work-in-progress tentatively titled *The Construction Zone*.<sup>18</sup>
- Sixth Element: A methodology that enables the recovery of original meaning, which is briefly outlined in a short article,

<sup>12</sup> Solum, *The Interpretation-Construction Distinction*, *supra* note 1, at 100–08.

<sup>13</sup> Solum, *The Fixation Thesis*, *supra* note 1, at 15–16.

<sup>14</sup> Solum, *The Constraint Principle*, *supra* note 1, at 11–16.

<sup>15</sup> Solum, *The Public Meaning Thesis*, *supra* note 1.

<sup>16</sup> This project is not even halfway between the idea stage and a first draft. The case against strong or radical versions of the indeterminacy thesis and for the claim that the law is only moderately indeterminate is made in Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). “Underdeterminacy” is used to refer to issues or cases with respect to which the communicative content of a legal text may provide limits on legal content without fully determining that content. “Indeterminacy” is used to refer to issues or cases for which the communicative content provides no limits on legal content. “Determinacy” is used to refer to issues or cases with respect to which the communicative content fully determines all of the issues of cases that might arise in connection with the text. Some constitutional provisions, e.g., the specification that each state shall have two Senators, may be fully determinate because they provide bright-line rules. Other provisions, e.g., the “freedom of speech,” may be underdeterminate, because open-textured terms rule out some implementing rules but allow for others. The distinction between underdeterminacy, indeterminacy, and determinacy is discussed in *id.* at 473.

<sup>17</sup> Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 469–72.

<sup>18</sup> This project is at a very early stage.



*Originalist Methodology*,<sup>19</sup> is more fully elaborated in *Triangulating Public Meaning*,<sup>20</sup> and will be the subject of future work.

- Seventh Element: The claim that constitutional originalism is in the feasible choice set, a topic that is briefly examined in *Constitutional Possibilities*<sup>21</sup> and that will be explored in future work.
- Eighth Element: An account of a reasonable path from the constitutional status quo to the full implementation of originalism, a topic that will be examined in future work.

The aim of this Essay is to investigate the terminology and concepts that frame the elaboration and defense of constitutional originalism.

#### I. MEANINGS: "ORIGINALISM" AND "LIVING CONSTITUTIONALISM"

Begin with the semantic dimension: What are the meanings of the terms "originalism" and "living constitutionalism"?

##### A. The Word "Originalism"

The meaning of the word "originalism" is disputed. The quotation marks around the word "originalism" suggest that this question is merely a matter of semantics. We might try to answer the question by looking the word up in a dictionary: the Oxford English Dictionary (OED) defines originalism as "judicial interpretation of the Constitution which aims to follow closely the original intentions of its drafters."<sup>22</sup> But the OED definition is sadly out-of-date. Original intent fell out of favor among originalists more than thirty years ago. No contemporary originalist of whom I am aware attempts to answer Delphic questions like, "What would Madison do?"<sup>23</sup> Nevertheless, some sophisticated writers continue to believe that

<sup>19</sup> Solum, *Originalist Methodology*, *supra* note 1, at 279–85.

<sup>20</sup> Solum, *Triangulating Public Meaning*, *supra* note 1.

<sup>21</sup> Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 314 (2008).

<sup>22</sup> *Originalism*, OXFORD ENGLISH DICTIONARY (2004). The online Merriam-Webster definition is better: "[A] legal philosophy that the words in documents and especially the U.S. Constitution should be interpreted as they were understood at the time they were written." *Originalism*, MERRIAM-WEBSTER (2019), <https://www.merriam-webster.com/dictionary/originalism> [<https://perma.cc/A2SP-ZSJ4>].

<sup>23</sup> For discussion of this parody of originalism, see Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1190 (2017); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 382 (2013); Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS L. REV. 385, 396 (2009); and Carl T. Rowan, *Equality as a Constitutional Concept*, 47 MD. L. REV. 10, 12 (1987).

contemporary originalism has not changed since the mid-1980s and that it is essentially an inquiry into the original intent of the Framers.<sup>24</sup>

Most contemporary originalists aim to recover the public meaning of the constitutional text at the time each provision was framed and ratified; this has been the dominant form of originalism since the mid-1980s. One might be tempted to revise the OED definition and define “originalism” as “judicial interpretation of the Constitution which aims to recover the original public meaning of the constitutional text.”

But there would be a problem with this revised definition. For one thing, intentionalism has never entirely disappeared<sup>25</sup> and has even developed a sophisticated new form that focuses on the communicative intentions of the individuals who drafted various portions of the constitutional text. We could call this the “new intentionalism.”<sup>26</sup> And there are at least two other theories that are called “originalist.” “Original Methods Originalism” maintains that the original meaning of the text is fixed by the original methods of constitutional interpretation and construction;<sup>27</sup> a related but distinct view emphasizes the original constitutional law as it existed at the time of ratification.<sup>28</sup>

<sup>24</sup> Among the many examples is Linda Greenhouse, lecturer at Yale Law School and former Supreme Court reporter for the *New York Times*. See Linda Greenhouse, *Justice Scalia's Fading Legacy*, N.Y. TIMES (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/opinion/justice-antonin-scalia-legacy.html> [https://perma.cc/YC26-RUN7] (“Justice Scalia's view [was] that the only legitimate basis for interpreting the Constitution is the original intent of its framers . . .”).

<sup>25</sup> See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Larry Alexander & Saikrishna Prakash, “Is That English You're Speaking?” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (2004) (“Full blooded intentionalists consider all available evidence of the actual author's intended meaning.”).

<sup>26</sup> To be more precise, the new intentionalism is the view that the original meaning of the constitutional text is the meaning that the drafters intended to convey to their intended readers via the reader's recognition of the drafters' communicative intentions. This idea is based on the work of Paul Grice. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 3–143 (1989). For a Gricean approach to Original Intentions Originalism, see Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM* 87 (Grant Huscroft & Bradley W. Miller eds., 2011); see also Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 n.7 (2006).

<sup>27</sup> See 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, 765–72 (2009); see also John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1332 (2018) (explicating the language-of-the-law thesis as part of Original Methods Originalism).

<sup>28</sup> William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103, 107–08 (2016); see also Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 874–81 (2015).

Consider another approach. The word "originalism" appears to have been coined by Professor Paul Brest in an article entitled *The Misconceived Quest for the Original Understanding*.<sup>29</sup> Professor Brest stipulated the following definition:

By "originalism" I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.<sup>30</sup>

We might think that Professor Brest's original definition of the word "originalism" should be binding today.<sup>31</sup> But that does not seem quite right. When someone introduces a new theoretical term, they do not acquire ownership rights. A newly coined word can acquire a life of its own—changing meaning over time. This is the well-known phenomenon of linguistic drift or semantic shift.<sup>32</sup> Debates about the meaning of "originalism" are not about the interpretation of Professor Brest's article; they are debates about how we ought to use the word today.

Other definitions of "originalism" have been offered by critics of the theory. For example, Professor Frederick Schauer suggested: "Prescriptive language is to be understood by reference to evidence of the actual, contemporaneous mental states of the inscribers of the language at issue."<sup>33</sup> Professor Schauer's definition would limit the use of "originalism" to "Original Intentions Originalism." Professor Mitchell Berman offered a different definition: "Originalism proper is strong originalism—the thesis that original meaning either is the *only* proper target of judicial constitutional interpretation or that it has at least lexical priority over any other candidate meanings the text might bear (again, contrary judicial precedents possibly excepted)."<sup>34</sup> Professor Berman's definition equates "originalism" with the view that the original meaning of the constitutional text should be the sole determinate of the legal content of constitutional doctrine. Professor

<sup>29</sup> Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) [hereinafter Brest, *The Misconceived Quest*]. Brest reports that he believes he coined the term. E-mail from Paul Brest, Professor Emeritus, Stanford Law School, to author (Dec. 2, 2009, 6:01 PM) (on file with author).

<sup>30</sup> Brest, *The Misconceived Quest*, *supra* note 29, at 204.

<sup>31</sup> I know that there are multiple levels of irony in the sentence accompanying this footnote. Of course, we should use Brest's understanding when we are interpreting Brest's article. This follows from the Fixation Thesis, but that is fully consistent with the possibility that the meaning of "originalism" may change over time.

<sup>32</sup> I use the phrases "linguistic drift" and "semantic shift" to refer to changes in the meaning of words and phrases over time. For examples and explanations, see SOL STEINMETZ, *SEMANTIC ANKERS: HOW AND WHY WORDS CHANGE MEANING*, at vii–xiii (2008).

<sup>33</sup> Frederick Schauer, *Defining Originalism*, 19 HARV. J.L. & PUB. POL'Y 343, 343 (1996).

<sup>34</sup> Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 22 (2009).

Christopher Peters suggests: “Originalism holds that the application of the Constitution to an issue or dispute should be determined, to the extent possible, by its meaning at the time of framing or ratification.”<sup>35</sup> Professor Peters’s definition seems roughly equivalent to the idea that “originalism” involves what I call the Fixation Thesis and the Constraint Principle.

Undoubtedly, we can find many other explicit or implicit definitions of “originalism,” but it seems clear that no single definition commands the assent of constitutional scholars. There is another possible approach. Perhaps, we ought to resolve our semantic disagreements by resorting to corpus lexicography, an application of corpus linguistics, in which large datasets are used as the basis for compiling a dictionary.<sup>36</sup> After all, dictionary definitions are merely secondary evidence of conventional semantic meanings. Corpus lexicography looks to the patterns of usage that actually constitute conventional semantic meanings.<sup>37</sup> For example, we could examine the relevant corpora (e.g., the Corpus of Contemporary American English<sup>38</sup>) and determine which meaning of “originalism” is most frequent and then insist that this is the “ordinary meaning,” departures from which ought to be clearly identified.

However, reliance on patterns of usage to determine the content of “originalism” as a theoretical term is unsatisfying. For one thing, there is something fishy about resolving disputes among constitutional theorists by counting instances of usage: we certainly would not want to resolve disputes about the proper use of the phrase “quantum mechanics” on the basis of the frequency of alternative senses in some database. The most frequent usage might be wrong. The disputes about “originalism” seem to be about something deeper than the conventional semantic meaning of the word.

One problem with the word “originalism” arises from the complex conceptual structure of *originalism*, the family of constitutional theories—the topic of Section II.A below. The theory space could be sliced and diced in various ways, but at the very least it includes: (1) Public Meaning Originalism, (2) Original Intentions Originalism, (3) Original Methods Originalism, and (4) Original Law Originalism. Both Public Meaning Originalism and Original Methods Originalism focus on the original meaning of the constitutional text. Intentionalism has a complex structure,

<sup>35</sup> Christopher J. Peters, *What Lies Beneath: Interpretive Methodology, Constitutional Authority, and the Case of Originalism*, 2013 BYU L. REV. 1251, 1259 (2013).

<sup>36</sup> See, e.g., VINCENT B. Y. OOI, *COMPUTER CORPUS LEXICOGRAPHY* (Tony McEnery & Andrew Wilson eds., 1998).

<sup>37</sup> For discussion, see Solum, *Triangulating Public Meaning*, *supra* note 1, at 1643–45.

<sup>38</sup> CORPUS OF CONTEMPORARY AMERICAN ENGLISH, <https://corpus.byu.edu/coca> [<https://perma.cc/4BGZ-HW8M>].

including a version that focuses on the communicative intentions of the drafters—and hence the meaning of the text—but also including versions that seem to focus on purposes or outcome preferences. Original Law Originalism focuses on the original law (which might or might not be derived from the constitutional text) and those rules of constitutional change that were authorized by the original law—understood as the law that was in effect at the time the Constitution was ratified and put into effect.

Another problem arises from the use of “originalism” as the name for an ideology in political discourse and as the label that designates the actual decisional practices of judges who self-identify as originalists. It seems likely that there is a gap between originalist constitutional theory as articulated by legal scholars and the use of the word “originalism” by politicians and pundits. The gap between judges and scholars may be narrower, but it is significant.<sup>39</sup> If the label “originalism” is applied to the actual decisional practice of self-identified judicial originalists, the content of the theory is likely to diverge from the versions of originalism advocated by legal scholars. An example of this divergence is seen in the context of precedent, where judicial originalists are likely to place greater emphasis on precedent, and constitutional theorists are likely to place more emphasis on the original meaning of the constitutional text.

We can summarize the terminological landscape in the following table:

TABLE 1: REALMS OF ORIGINALIST DISCOURSE

Realm of Discourse	Forms of Originalism	Proposed Terminology
Scholarship	<i>Public Meaning</i> <i>Intentionalism</i> <i>Original Methods</i> <i>Original Law</i>	“Academic Originalism”
Judicial Practice	<i>Eclectic</i>	“Judicial Originalism”
Political	<i>Rhetorical</i>	“Political Originalism”

<sup>39</sup> The relative sophistication of judicial originalists is illustrated by the writings of Justice Antonin Scalia. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997). A gap remains, however. For example, the treatment of the idea of constitutional construction by Justice Scalia and his coauthor Bryan Garner in their *Reading Law: The Interpretation of Legal Texts* displays a relatively shallow understanding of what constitutional theorists mean by “construction.” See Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 483–88 (explicating and critiquing Garner and Scalia on constitutional construction).

The relationship between the realms of originalist discourse are complex. Many of the invocations of the word “originalism” in political discourse are mere rhetorical flourishes, without any theoretical content at all, but some politicians have a sophisticated understanding of contemporary originalist constitutional theory—as illustrated by Senator Mike Lee’s questioning of then-Judge Brett Kavanaugh during confirmation hearings.<sup>40</sup> Some of the uses of “originalism” display very little awareness of originalist scholarship, but some judicial originalists, for example, Justice Scalia, Associate Chief Justice Thomas Lee of the Utah Supreme Court, and Judge Amy Coney Barrett of the United States Court of Appeals for the Seventh Circuit, display a sophisticated command of originalist theory and participate in scholarly debates.<sup>41</sup>

The terminological and conceptual discussion in this Essay is aimed primarily at scholarly discourse and to those aspects of judicial practice and political discourse that interact with the academic debates. It should go without saying that (at least in the short run) the proposals offered here are unlikely to affect the use of the word “originalism” in rough-and-tumble politics or judicial opinions authored by judges who are mostly (or even completely) unfamiliar with the academic debates.

### B. The Phrase “Living Constitutionalism”

The origins of the phrase “living constitutionalism” are obscure. The phrase was used by Representative Hugh Legaré in a speech delivered on the floor of the House as early as 1837. Legaré used the phrase to express the idea that the Constitution is a function of the beliefs and attitudes of citizens and not merely a written document: “[T]he very first pilgrim that set his foot upon the rock of Plymouth, stepped forth a LIVING CONSTITUTION! armed at all points to defend and to perpetuate the liberty to which he had devoted his whole being.”<sup>42</sup> In 1900, Arthur Machen, Jr., wrote what may be the first law review article to use “living” as a modifier of “constitution”:

<sup>40</sup> *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 2*, at 1:56:49, C-SPAN (Sept. 5, 2018), <https://www.c-span.org/video/?449705-10/supremo-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-2&start=6787> [<https://perma.cc/5B5X-HXV5>].

<sup>41</sup> See, e.g., Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017); James C Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 21 (2016); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

<sup>42</sup> Hugh Legaré, U.S. Representative from S.C., Speech on the Bill Imposing Additional Duties as Depositories, in Certain Cases, on Public Officers, Delivered in the House of Representatives 29 (Oct. 1837).

"The Constitution, they say, is not dead but living."<sup>43</sup> Roscoe Pound used the phrase in 1908, when he referred to "Marshall's work in giving us a living constitution by judicial interpretation."<sup>44</sup>

The influence of these early uses is unclear, but the phrase "living constitution" was popularized by its use as the title of a book by Howard Lee McBain, *The Living Constitution*, first published in 1927.<sup>45</sup> Discussion in McBain's slim volume ranges across a variety of topics, and it was not intended to be rigorous constitutional theory. The following passage illustrates McBain's notion of a living constitution:

"A word", says Mr. Justice Holmes, "is the skin of an idea." As applied to the words of a living constitution the expression is peculiarly apt; for living skin is elastic, expansile, and is constantly being renewed. The constitution of the United States contains only about six thousand words; but millions of words have been written by the courts in elucidation of the ideas these few words encase.<sup>46</sup>

McBain's title was echoed by R. G. Tugwell in an essay titled *That Living Constitution*, published in *The New Republic* in 1928.<sup>47</sup>

In 1936, Charles Beard again used "living constitution" in the title of an essay published in the *Annals of the American Academy of Political and Social Science*.<sup>48</sup> Beard wrote:

<sup>43</sup> Arthur W. Machen, Jr., *The Elasticity of the Constitution*, 14 HARV. L. REV. 200, 205 (1900). Also, in 1900, George Peck used the phrase to refer to an unwritten constitution. George R. Peck, *The March of the Constitution*, 23 ANN. REP. A.B.A. 251, 251-52 (1900).

<sup>44</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615 (1908).

<sup>45</sup> HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION* (1927).

<sup>46</sup> *Id.* at 33.

<sup>47</sup> R.G. Tugwell, *That Living Constitution*, THE NEW REPUBLIC (June 20, 1928), <https://newrepublic.com/article/122660/living-constitution> [<https://perma.cc/858G-VG6D>]. Tugwell's reliance on McBain's use of "living constitution" is exemplified by the following passage:

The stiffer legal minds of the Supreme Court either still describe industry to themselves in the terms of Adam Smith, or they possess a faith in the benevolence of modern business which we cannot share. Neither the Tyson case nor the present one involved important regulations, but their dicta have consequences which reach across the whole field of industrial policy. They bar the way, as definitely and finally as the Supreme Court can, to encroachments by any governmental regulating power on the field of what has hitherto been regarded as private business. Controls concomitant with the evolution of business are made impossible. The letter, not the spirit of the Constitution dominates these latest opinions. Professor McBain's recent characterization of the Constitution as a living instrument is made to seem somewhat idealistic; it would seem necessary to admit that at least a temporary setback to constitutional growth has been sustained. The injury will not be healed until some important change in personnel occurs.

*Id.*

<sup>48</sup> Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29 (1936).

Since most of the words and phrases dealing with the powers and the limits of government are vague and must in practice be interpreted by human beings, it follows that the Constitution as practice is a living thing. The document can be read at any moment. What the judges and other expounders have said in the past can be discovered in thousands of printed pages. From the records of history we can get some idea of past practices under the instrument. But what the Constitution as practice is today is what citizens, judges, administrators, lawmakers, and those concerned with the execution of the laws do in bringing about changes in the relations of persons and property in the United States, or in preserving existing relations . . . . It is the living word and deed of living persons, positive where positive, and subject to their interpretation where open to variant readings. How could it be otherwise? How could intelligence, as distinguished from sophisticated interest, conceive the document as practice in any other terms?<sup>49</sup>

Another influential formulation was provided by Charles Reich in his 1963 article, *Mr. Justice Black and the Living Constitution*.<sup>50</sup> Reich's idea is captured by the following passage:

[I]n a dynamic society the Bill of Rights must keep changing in its application or lose even its original meaning. There is no such thing as a constitutional provision with a static meaning. If it stays the same while other provisions of the Constitution change and society itself changes, the provision will atrophy. That, indeed, is what has happened to some of the safeguards of the Bill of Rights. A constitutional provision can maintain its integrity only by moving in the same direction and at the same rate as the rest of society. In constitutions, constancy requires change.<sup>51</sup>

The most important formulation from the 1980s was offered by Justice William Brennan:

To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices and must accept the ambiguity inherent in the effort to apply them to modern circumstances. The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours.<sup>52</sup>

<sup>49</sup> *Id.* at 31.

<sup>50</sup> Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

<sup>51</sup> *Id.* at 735–36.

<sup>52</sup> William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986).



The opponents of living constitutionalism offered their own definitions: for example, in 1976, then-Associate Justice William Rehnquist wrote *The Notion of a Living Constitution*, which explicitly criticized living constitutionalism and implicitly endorsed originalism based on the writings of the Framers.<sup>53</sup> Justice Rehnquist distinguished two distinct senses of the phrase "living constitution." The first, which Justice Rehnquist labeled "the Holmes version," was not explicated in a rigorous way. Instead, Justice Rehnquist used the following passage from Justice Holmes to express the idea:

When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.<sup>54</sup>

Justice Rehnquist then added, "The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live."<sup>55</sup>

Justice Rehnquist then introduced a second sense of "living constitutionalism," which he associated with the following passage (from a brief for which he did not provide a citation):

We are asking a great deal of the Court because other branches of government have abdicated their responsibility . . . . Prisoners are like other 'discrete and insular' minorities for whom the Court must spread its protective umbrella because no other branch of government will do so . . . . This Court, as the voice and conscience of contemporary society, as the measure of the modern conception of human dignity, must declare that the [named prison] and all it represents offends the Constitution of the United States and will not be tolerated.<sup>56</sup>

Justice Rehnquist then provided the following gloss:

Here we have a living Constitution with a vengeance. Although the substitution of some other set of values for those which may be derived from the language and intent of the framers is not urged in so many words, that is surely the thrust of the message. Under this brief writer's version of the living Constitution, nonelected members of the federal judiciary may address themselves to a social

<sup>53</sup> William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976).

<sup>54</sup> *Id.* at 694 (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (Holmes, J.)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 695.

problem simply because other branches of government have failed or refused to do so.<sup>57</sup>

Justice Rehnquist emphasized the idea that the second sense of “living constitutionalism” is not tethered to constitutional values that are derived from the constitutional text and the beliefs of the Framers.

Contemporary theorists continue to use the phrase “living constitutionalism” in a variety of ways. Professor Adam Winkler writes:

The pattern—critiquing originalism, insisting that the interpretation of the constitutional text evolve to meet changed conditions in society, and pursuing reform through litigation strategies that made evolution central to judicial reasoning—has come to define modern living constitutionalism.<sup>58</sup>

Professor Nelson Lund characterized “living constitutionalism” as the view that “the scope of a constitutional right is defined largely by judicial perceptions of current social mores[.]”<sup>59</sup> Professor Michael Dorf stated, “[L]iving constitutionalism incorporates contemporary values and attitudes into the judicial ‘understanding’ of the Constitution.”<sup>60</sup> Professor G. Edward White described “living constitutionalism” as the theory that the Constitution is “an adaptive document that responds to changing social and economic conditions through altered judicial interpretations of its central textual provisions.”<sup>61</sup> Professors Nelson Tebbe and Robert Tsai suggested that “living constitutionalism” may not be well-defined except by way of contrast with originalism: “Living constitutionalism is difficult to define; it is often described simply in opposition to originalism.”<sup>62</sup>

Just as the word “originalism” is used in different realms of discourse, so, too, can “living constitutionalism” be used in the realms of scholarship, judicial practice, and politics. Judges have invoked the phrase “living constitution,”<sup>63</sup> but they rarely specify what they mean by the phrase. In a dissent, Judge John Coffey wrote, “Through the analytical vehicle of the ‘living constitution,’ the judiciary has all too frequently permitted the

<sup>57</sup> *Id.*

<sup>58</sup> Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the “Living Constitution,”* 76 N.Y.U.L. REV. 1456, 1458 (2001).

<sup>59</sup> Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1355 (2009).

<sup>60</sup> Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 295 n.46 (2010).

<sup>61</sup> G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 299 (2000).

<sup>62</sup> Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 514 n.240 (2010).

<sup>63</sup> See *La. Debating & Literary Ass’n v. City of New Orleans*, 42 F.3d 1483, 1488 (5th Cir. 1995); *Matavka v. Bd. of Educ.*, No. 15 C 10330, 2016 WL 4119949, at \*2 (N.D. Ill. Aug. 1, 2016); *Plast v. Gardner*, 271 F. Supp. 1, 11 (S.D.N.Y. 1967), *rev’d sub nom. Plast v. Cohen*, 392 U.S. 83 (1968).

NORTHWESTERN UNIVERSITY LAW REVIEW

avored 'rights' of particular individuals and groups to override a legislative majority's expression of the common good."<sup>64</sup> District Judge Peter Messitte was fairly precise when he offered the following definition:

Those who promote the theory of a "Living Constitution" argue that the Constitution must be able to adapt to current needs and attitudes that have changed since the original drafting. In other words, the Constitution does not have one fixed meaning but is a dynamic document the meaning of which can change over time.<sup>65</sup>

Justice Scalia characterized "living constitutionalism" in his dissent in *Kasten v. Saint-Gobain Performance Plastics Corp.*<sup>66</sup> as follows:

Any suggestion that because more recent statutes cover intracompany complaints, a provision adopted in the 1938 Act should be deemed to do so is unacceptable. While the jurisprudence of this Court has sometimes sanctioned a "living Constitution," it has never approved a living United States Code. What Congress enacted in 1938 must be applied according to its terms, and not according to what a modern Congress (or this Court) would deem desirable.<sup>67</sup>

The core idea is that "living constitutionalism" sanctions departure from the constitutional text.

Political invocation of the idea of a living constitution is illustrated by remarks made by Senator Diane Feinstein expressing her opposition to the nomination of Justice Neil Gorsuch:

I find this originalist judicial philosophy to be really troubling. In essence, it means the judges and courts should evaluate our constitutional rights and privileges as they were understood in 1789. However, to do so would not only ignore the intent of the Framers that the Constitution would be a framework on which to build, but [would] severely limit[] the genius of what our Constitution upholds. I firmly believe the American Constitution is a living document, intended to evolve as our country evolves.<sup>68</sup>

It is not clear whether Senator Feinstein understands the living-document approach as sanctioning departures from the constitutional text or as the application of the general and abstract provisions to changing circumstances.

---

<sup>64</sup> *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1105 (7th Cir. 1990) (Coffey, J., dissenting), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

<sup>65</sup> *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 881 n.13 (D. Md. 2018).

<sup>66</sup> 563 U.S. 1 (2011).

<sup>67</sup> *Id.* at 22 (Scalia, J., dissenting).

<sup>68</sup> *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 8 (2017) (statement of Sen. Diane Feinstein).

This lack of clarity is not surprising: we do not expect politicians to formulate their public statements with theoretical precision.

As with “originalism,” the label “living constitutionalism” is used to refer to several distinct theories, ranging from Professor David Strauss’s common law constitutionalism,<sup>69</sup> to various forms of pluralism (including the multiple modalities view associated with Professor Philip Bobbitt<sup>70</sup>), to Professor James Fleming<sup>71</sup> and Professor Ronald Dworkin’s<sup>72</sup> moral readings approach. And we might classify various other views as “living constitutionalism,” including the Thayerian deference approach,<sup>73</sup> and various forms of constitutional antitheory and constitutional rejectionism.<sup>74</sup>

Following the same template as above, we can summarize the terminological landscape as follows:

TABLE 2: REALMS OF LIVING CONSTITUTIONALIST DISCOURSE

Realm of Discourse	Forms of Living Constitutionalism	Proposed Terminology
Scholarship	<i>Constitutional Pluralism</i> <i>Common Law Constitutionalism</i> <i>Moral Readings</i> <i>Super-Legislature</i> <i>Popular Constitutionalism</i> <i>Extranational Constitutionalism</i> <i>Multiple Meanings</i> <i>Thayerian Deference</i> <i>Constitutional Antitheory</i> <i>Constitutional Rejectionism</i>	“Academic Living Constitutionalism”
Judicial Practice	<i>Eclectic</i>	“Judicial Living Constitutionalism”
Political	<i>Rhetorical</i>	“Political Living Constitutionalism”

<sup>69</sup> See David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4–5 (2015); see also DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 43–45 (2010).

<sup>70</sup> See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991).

<sup>71</sup> See James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515, 515 (2014).

<sup>72</sup> See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2–3 (1996).

<sup>73</sup> See *infra* text accompanying notes 116–118.

<sup>74</sup> See *infra* text accompanying notes 125–126.

The forms of “living constitutionalism” that are listed in the table are outlined below.<sup>75</sup> The discussion in the remainder of this Essay is focused on “Academic Living Constitutionalism,” but as with “originalism,” we should acknowledge that the boundaries between the realms of scholarship, judicial practice, and political discourse are sometimes blurry. The advocacy of “living constitutionalism” in the public sphere may have weak connections with academic theories—but ideas of one realm of discourse may influence the notions that are articulated in another realm.

## II. CONCEPTS: *ORIGINALISM* AND *LIVING CONSTITUTIONALISM*

Up to this point, I have been discussing terminology, but underneath the terminological debate is a deeper dispute about the nature of *originalism* and *living constitutionalism* as concepts or ideas.

### A. *Originalism as a Concept*

As a reminder for those who are unfamiliar with the philosophical jargon, we can draw a distinction between words and concepts. Words are used to represent concepts. The easiest way to see the difference between words and concepts is to observe that the same concept may be represented by different words in different languages—and sometimes by multiple words in a single language. Thus, the word “law” in English, when used in the sense that refers to legal norms, is translated by the word “loi” in French, “recht” in German, and “ley” in Spanish. In this Essay, I use italics and quotation marks to make it clear that I am referring to a concept rather than a word. “Originalism” is the word and “living constitutionalism” is the phrase. *Originalism* and *living constitutionalism* are the concepts to which the word and phrase refer.

#### 1. *Conceptual Analysis of Originalism*

Conceptual analysis once attempted to investigate the essential nature of concepts using ordinary language and linguistic intuitions in order to discover the necessary and sufficient elements for a concept to apply.<sup>76</sup> For example, the concept of *knowledge* might be analyzed as justified true belief.<sup>77</sup> Thus, we might engage in conceptual analysis of *originalism*, using

<sup>75</sup> See *infra* Section II.B.1.

<sup>76</sup> See generally David J. Chalmers & Frank Jackson, *Conceptual Analysis and Reductive Explanation*, 110 PHIL. REV. 315 (2001) (discussing conceptual analysis).

<sup>77</sup> Jonathan Jenkins Ichikawa & Matthias Steup, *The Analysis of Knowledge: 1. Knowledge as Justified True Belief*, STANFORD ENCYC. OF PHILOSOPHY (Edward N. Zalta ed., 2017), <https://plato.stanford.edu/entries/knowledge-analysis> [<https://perma.cc/4FPR-Y8HF>].

our intuitions to divine the necessary and sufficient conditions for a constitutional theory to count as originalist.

But there is a problem with this approach. Public meaning theorists argue that the original meaning of a constitutional provision should be understood as its public meaning. Old-fashioned intentionalists argued that the original meaning was the original intent of the Framers. Each position might be framed in terms of a set of necessary and sufficient conditions, with the consequence that public meaning theorists and intentionalists were talking about different concepts—leading us back to the conclusion that the dispute between them about “originalism” results from the confused association of one word, “originalism,” with two different concepts: *Original Public Meaning Originalism* and *Original Intentions Originalism*. There would still be a normative dispute about which concept would be superior if it were implemented: Should legal practice be guided by Public Meaning Originalism or Original Intentions Originalism? But disagreement about *originalism* would simply be confused.

But this diagnosis seems incorrect, since arguments among originalists about the nature of *originalism* seem to be real disagreements about what *originalism* is and not mere confusions. Similarly, nonoriginalists who dispute the meaning of “originalism” do not seem to be confused: their complaint is about how the word “originalism” should be used—and this implies that they are contesting the concept of *originalism*.

## 2. Originalism as a Functional Kind with an Essence

Consider another possibility: *originalism* might have an essence. Famously, Professors Saul Kripke and Hilary Putnam argued that terms like “gold” or “oxygen” refer to natural kinds that have an essential structure revealed by natural science.<sup>78</sup> Natural kind terms refer to the same kind of things in all possible worlds: thus, if we imagine a possible world that has a water-like substance which is not H<sub>2</sub>O, that substance is not *water* and is not properly called “water,” no matter how similar it is to H<sub>2</sub>O in various respects.

Professor Michael Moore has argued that this idea can be extended to ideas employed by the law, which he calls “functional kinds” and might also be called “moral kinds.”<sup>79</sup> Likewise, it might be argued that “originalism” or “original meaning” has an essence. This view implies that either public meaning originalists or intentionalists are mistaken about the true nature of

<sup>78</sup> See generally SAUL A. KRIPKE, NAMING AND NECESSITY 116–19 (1980); 2 HILARY PUTNAM, MIND, LANGUAGE AND REALITY: PHILOSOPHICAL PAPERS 215–71 (1975).

<sup>79</sup> See Michael S. Moore, *Law as a Functional Kind*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 188 (Robert P. George ed., 1992).

original meaning. The side that is right is entitled to the label “original meaning” and the other side should abandon the use of the term.

Professor Stephen Sachs may have argued that the essence of *originalism* is very thin. Any view that calls for a return to something “original” is *originalism*.<sup>80</sup> Thus, if there were a society in which there was no written constitution, but some set of original oral traditions, then a call to return to the oral traditions counts as “originalism.”<sup>81</sup> Likewise, if some society originally had a written constitution but allowed for constitutional practice that violated the legal rules that would follow from the text, then in that society, what we call “living constitutionalism” would actually be a form of *originalism*.<sup>82</sup>

There are deep questions here—issues that I cannot explore adequately in this Essay. Instead, I will simply note that I am skeptical about the functional kind approach in general and its application to *originalism* in particular. One can accept that natural kinds have true essences but reject the idea that every concept has a proper essence. “Originalism” and “living constitutionalism” function in academic discourse as the names for various theories. It is not clear that the families of originalist and living constitutionalist theories are unified by an essence.

### 3. Originalism as a Family Resemblance Concept

This leads to yet another possibility. Perhaps *originalism* is what philosophers call a “family resemblance” concept.<sup>83</sup> Wittgenstein famously suggested that the concept of a game could be analogized to a family. Imagine a large family, with grandparents, children, and grandchildren. Tom looks like his brother Bill; both are tall like their father Herbert and have their mother Helga’s blond hair and blue eyes. Their sister Sally is shorter like their mother and has their father’s brown hair and hazel eyes. Sally’s daughter Jill has her hazel eyes but has red hair and large ears, like Sally’s

<sup>80</sup> Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 158 (2017) (“All of these theories have something in common. They treat the content of American constitutional law as properly resting on its *origins*—on features of our legal Founding that remain legally operative today.”).

<sup>81</sup> *Id.* at 159.

<sup>82</sup> It is not clear to me whether Sachs is committed to something like the view that originalism is a functional kind with an essence. His use of a thought experiment in which there is originalism without text, *id.* at 159, suggests that he believes that the *concept* of originalism must range across all possible worlds. And if that is his belief, it would seem to commit him implicitly to the idea that the shape of the concept *originalism* has an essence. For readers who are unfamiliar with the philosophical notions of “possible worlds” and related ideas, an introduction is provided in Solum, *Constitutional Possibilities*, *supra* note 21. A full discussion is beyond the scope of this Essay.

<sup>83</sup> See Anat Biletzki & Anat Matar, *Ludwig Wittgenstein*, STANFORD ENCYC. OF PHILOSOPHY (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/entries/wittgenstein/#LangGameFamiRese> [<https://perma.cc/Y3LY-XM2V>].

husband Jim, Bill's son Otis has the curly hair of Bill's wife Leticia but is tall like his father, Jill looks nothing like Otis, but Otis resembles Bill, Bill resembles Helga, Helga resembles Sally, and Sally resembles Jill. While there is family resemblance, no one set of characteristics is shared by all the members of the family.

Is *originalism* a family resemblance concept? Perhaps *originalism* has evolved in such a way that there is no common element among originalist theories. Maybe, there was some common ground between early original intent theorizing and the early ideas about public meaning. And early ideas about public meaning share ideas with later versions that embraced the interpretation–construction distinction and the notion of constitutional underdeterminacy—the so-called “new originalism.” And those theories have something in common with what Professor Jack Balkin calls “Living Originalism” (which is actually a hybrid of *living constitutionalism* and *originalism*).<sup>84</sup> But it might turn out that “Living Originalism” has nothing in common with old-fashioned “original intent originalism.”<sup>85</sup>

This story about *originalism* as a family resemblance concept itself resembles the critique of *originalism* offered by Professors Thomas Colby and Peter Smith. They contend that *originalism* is like Oakland<sup>86</sup>; there is no “there there,” to use Gertrude Stein’s felicitous phrase.<sup>87</sup> Notice that even if *originalism* is a family resemblance concept, it does not follow that we cannot talk in a meaningful way about *originalism*. It is just that it would be a mistake to police the boundaries of *originalism* by appealing to a set of necessary and sufficient conditions or an essence. The word “originalism” would then be open-textured; there would be cases for which the extension of the term would be underdetermined by concept. Usage might settle these cases over time, but there would be no a priori conceptual answer to the question whether a theory at the margins was truly a form of *originalism* or not.

#### 4. Originalism as a Family of Constitutional Theories Unified by the Fixation Thesis and the Constraint Principle

But the notion that “originalism” is a family resemblance concept is not quite correct. I have argued that originalism does have a core: almost all contemporary forms of originalist constitutional theory endorse two central ideas. The first idea is the Fixation Thesis: the original meaning of the

<sup>84</sup> See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (arguing that originalism and living constitutionalism are compatible theories).

<sup>85</sup> See *infra* Section III.A.

<sup>86</sup> Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 269–72 (2009).

<sup>87</sup> GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY* 298 (1992).



constitutional text was fixed at the time each provision was framed, ratified, and made public.<sup>88</sup> The second idea is the Constraint Principle: constitutional practice should be constrained by this fixed original meaning.<sup>89</sup> Originalists disagree among themselves about the nature of original meaning, the extent of constitutional underdeterminacy, and about how originalism is best justified, but they agree about fixation and constraint.

The claim that “originalism” is used to describe a family of theories unified by fixation and constraint does not require us to accept the more controversial claim that “originalism” designates a functional kind concept with an essence that holds across all possible worlds. We can accept a more modest claim, which is that in the actual world, in which the United States has a written constitution, there is a family of views holding that the fixed meaning of that constitution is binding. The modest claim captures the way we talk about *originalism*, without making the extravagant claim that *originalism* is a functional kind term with an essence that fixes its reference.

##### 5. *Contested Concepts and Metalinguistic Negotiation*

Consider yet another angle on the problem. John Rawls famously deployed a distinction between concepts and conceptions,<sup>90</sup> drawing on *Essentially Contested Concepts*, a paper published by the philosopher William Gallie in 1956.<sup>91</sup> Gallie was concerned with a feature of moral terms like “good,” “just,” and “right.” These moral terms seem to have a common or shared meaning, despite theoretical differences about the criteria for their application. Benthamites and Aristotelians have radically different understandings of moral goodness.<sup>92</sup> A life of pleasure (“good” for Bentham) might not be a flourishing life (“good” for Aristotle). If Aristotle’s conception of good is different from Bentham’s, then we might think that they are talking about two different things. But that is not right, because it

<sup>88</sup> See Solum, *The Fixation Thesis*, *supra* note 1, at 1.

<sup>89</sup> See Solum, *The Constraint Principle*, *supra* note 1, at 3.

<sup>90</sup> John Rawls, *The Idea of an Overlapping Consensus*, in *COLLECTED PAPERS* 421, 423 (Samuel Freeman ed., 1999).

<sup>91</sup> W. B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC’Y* 167, 194–95 (1956).

<sup>92</sup> For Aristotelians, moral goodness is *eudaimonia*, or human flourishing. See Richard Kraut, *Aristotle’s Ethics*, *STANFORD ENCYC. OF PHILOSOPHY* (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/entries/aristotle-ethics> [<https://perma.cc/65G5-55EB>]. For Benthamites, moral goodness is the maximization of utility, understood hedonistically as the balance of pleasures and pains. See Julia Driver, *The History of Utilitarianism*, *STANFORD ENCYC. OF PHILOSOPHY* (Edward N. Zalta ed., 2014), <https://plato.stanford.edu/entries/utilitarianism-history/#JerBen> [<https://perma.cc/3ZG8-67F3>]. Both Aristotle and Bentham have conceptions of *good*, but their conceptions yield different criteria for application.

does not capture the fact that Aristotelians and Benthamites disagree about the nature of moral goodness.

The core of Gallie's response to these disagreements about moral terms and concepts was the idea that certain moral concepts are "essentially contested." Aristotelians and Benthamites disagree about the nature of moral goodness. They share a concept but have different and competing conceptions of that concept. If a concept is *essentially* contested, then it is part of the nature of the concept that there is disagreement about its proper shape or structure.

John Rawls used the concept-conception distinction in *A Theory of Justice*, distinguishing between the concept of justice and particular conceptions of justice.<sup>93</sup> Rawls argued that his theory, called "justice as fairness," is the best conception of justice. Notice that as used by Rawls, the concept-conception distinction does not imply that the concept of justice is essentially contested. It might be the case that we would eventually come to agreement on the criteria for a just society. It may be the case that not all contested concepts are essentially contested concepts.

Likewise, it might be the case that *original meaning* is a contested concept. Public meaning theorists have one conception of *original meaning*; intentionalists have a competing conception. If something like this view were true, then *originalism* might have conceptual content upon which all originalists could agree, and the different versions of originalism would be competing conceptions of originalism. The trick would then be to give an account of the concept of *originalism* that would account for the nature of disagreement among the competing conceptions. For example, the concept might include the idea that original meaning is binding, but different conceptions would give competing accounts of what original meaning is.

Related to the notion that there can be different conceptions of contested concepts is the idea of metalinguistic negotiation.<sup>94</sup> A metalinguistic negotiation involves a dispute over a term and its associated context. A familiar example is the dispute over an *ESPN* list of the hundred greatest athletes that included Secretariat, a racehorse, raising the question of whether

<sup>93</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 5 (1971).

<sup>94</sup> See David Plunkett & Tim Sundell, *Antipositivist Arguments from Legal Thought and Talk: The Metalinguistic Response*, in *PRAGMATISM, LAW, AND LANGUAGE* 56–75 (Graham Hubbs & Douglas Lind eds., 2014); David Plunkett & Tim Sundell, *Disagreement and the Semantics of Normative and Evaluative Terms*, 13 *PHILOSOPHERS' IMPRINT* 1, 3 (2013); David Plunkett & Timothy Sundell, *Dworkin's Interpretivism and the Pragmatics of Legal Disputes*, 19 *LEGAL THEORY* 242, 248 (2013); see also Lawrence B. Solum, *Legal Theory Lexicon 075: Metalinguistic Negotiation*, *LEGAL THEORY LEXICON* (Apr. 30, 2017), [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2017/04/legal-theory-lexicon-075-metalinguistic-negotiation.html](https://lsolum.typepad.com/legal_theory_lexicon/2017/04/legal-theory-lexicon-075-metalinguistic-negotiation.html) [<https://perma.cc/77C7-6AX2>].

there can be nonhuman “athletes.”<sup>95</sup> There was no disagreement about the underlying facts—undoubtedly Secretariat was an amazing racehorse. The dispute was about the meaning of the word “athlete” and the shape of the associated concept.<sup>96</sup>

In the case of the arguments about the nature of *originalism*, scholars and others are involved in contestation of the conceptual territory. Such disputes may or may not be resolved. One way to move forward in the process of metalinguistic negotiation is to agree on standards of conceptual ethics. For example, we might agree that *originalism* and *living constitutionalism* should be understood in a way that respects the theoretical commitments of self-identified originalists and living constitutionalists and preserves the two families of theories as competing or mutually exclusive views.

#### 6. Originalism as a Thick Political Concept

Some critics of *originalism* resist an interlocking series of moves within contemporary originalist theory. These moves include: (1) the move from original intentions to original public meaning; (2) the idea that original public meaning of the constitutional text is not controlled by the application beliefs of the drafters, Framers, or public at the time the text was adopted; (3) the claim that some provisions of the constitutional text are moderately underdeterminate with the consequence that the original meaning does not resolve every constitutional issue or case, creating construction zones; and (4) the claim that the political and ideological implications of *originalism* are mixed, including some results that would be supported by progressives and liberals. These four moves combine to support the conclusion that constitutional doctrine may change over time, particularly with respect to issues where the original application expectations were produced by false beliefs about important constitutional facts or where the relevant constitutional circumstances have changed.

For example, in *Bradwell v. Illinois*,<sup>97</sup> the Supreme Court upheld Myra Bradwell’s exclusion from the Illinois bar on the basis of gender. I have argued that *Bradwell v. Illinois* was inconsistent with the original public meaning of the Privileges or Immunities Clause because the right to pursue a lawful occupation is one of the basic rights protected by the Clause. However, *Bradwell* could have been understood as consistent with the

<sup>95</sup> See Greg Hengler, *Secretariat: Why He’s One of ESPN’s Greatest Athletes of All Time*, TOWNHALL (Oct. 5, 2010, 6:14 PM), <https://townhall.com/tipsheet/greghengler/2010/10/05/secretariat-why-hes-one-of-espn-s-greatest-athletes-of-all-time-n662012> [https://perma.cc/U3GD-N7E6].

<sup>96</sup> See David Plunkett, *Which Concepts Should We Use?: Metalinguistic Negotiations and the Methodology of Philosophy*, 58 INQUIRY 828, 840–42 (2015).

<sup>97</sup> 83 U.S. (16 Wall.) 130 (1873).

Clause by Justices who believed that women were intellectually incapable of functioning as competent lawyers. The opposite result would be required given true beliefs about women's intellectual capacities.<sup>98</sup> Fixed original public meaning can give rise to different outcomes given changing beliefs about facts. The Constraint Principle does not require constitutional actors to adhere to false factual beliefs held by the drafters, Framers, ratifiers, or the public.

Some critics of *originalism* have argued that originalists who disavow the binding effect of application expectations and affirm underdeterminacy are actually "living constitutionalists." Put the other way around, the idea is that for "originalism" to be *originalism*, it must lead to conservative outcomes that accord with dated ideas about race, gender, and a variety of other matters. The intuition is that *originalism* must be conservative to be "true" *originalism*. This move is clearly a form of metalinguistic contestation: the critics of originalism are demanding that the word and concept be confined to theories with an overwhelmingly conservative ideological valence.<sup>99</sup>

Consider the following proposal for theorizing this intuitive reaction, using Bernard Williams's notion of a "thick moral concept"<sup>100</sup> in which descriptive and evaluative content are entwined. Similarly, it is possible that some critics of originalism believe that *originalism* is a thick ideological concept. The idea would be that the concept *originalism* combines ideological and descriptive-theoretical elements. To put it more plainly, *originalism* necessarily involves right-wing ideology—if it is not conservative, it is not *originalism*. Similarly, one might think that *living constitutionalism* is inherently liberal or progressive.

Many originalists disagree with this understanding of "originalism" as that term operates in the realm of scholarly discourse. Quite obviously, political progressives who are also originalists do not believe that their own views are conceptually incoherent. Moreover, my impression is that most conservatives and libertarian originalists believe that *originalism* is ideologically neutral, and that *originalism* leads to a mix of liberal, progressive, conservative, and libertarian results. For example, the original public meaning of the Privileges or Immunities Clause may support gender

<sup>98</sup> See Solum, *Surprising Originalism*, *supra* note 1, at 253–54.

<sup>99</sup> Cf. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 965–66 (2018) (associating living constitutionalism with the Democratic Party and originalism with the Republican Party).

<sup>100</sup> BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 143–45 (1985). For additional commentary, see the essays collected in *THICK CONCEPTS* (Simon Kirchin ed., 2013).

equality rights (as discussed above).<sup>101</sup> Originalism is arguably inconsistent with sovereign immunity doctrines that are viewed as conservative.<sup>102</sup> Moreover, the doctrine of birthright citizenship is supported by the original public meaning of the Citizenship Clause of Section One of the Fourteenth Amendment.<sup>103</sup> And originalism likely leads to conservative results as well: for example, the original meaning of the Commerce Clause likely leads to a restrictive understanding of national legislative power.<sup>104</sup>

Most originalist scholars would reject the view that *originalism* is a thick ideological concept. Outside the realm of scholarly discourse things may be different. For example, political rhetoric or propaganda might deploy a thick ideological conception of *originalism*, with conservatives selling “originalism” to their base on the basis that it leads to conservative results, and progressives criticizing originalist judges on the basis of the very same assumption. Again, identifying the domain of discourse is important to a clear understanding of *originalism* as a concept.

7. *Conclusion: Originalism Is Best Understood as a Family of Constitutional Theories, Almost All of Which Affirm the Constraint Principle and the Fixation Thesis and Advance a Theory of the Nature of Original Meaning*

Before we turn to *living constitutionalism*, it may be helpful to summarize. The word “originalism” points to a concept of *originalism* that represents a family of constitutional theories. Although there may be penumbral cases of *originalism*, the core of originalist constitutional theory consists of the set of theories that satisfy the following criteria: (1) they affirm the Fixation Thesis; (2) they affirm some reasonable version of the Constraint Principle that is at least as restrictive as “Constraint as Consistency”;<sup>105</sup> (3) they offer some account of the nature of original meaning (such as public meaning, original communicative intentions, or the meaning produced by application of the original methods); and (4) they affirm (or at least do not deny) the plausibility of such other theses as are

<sup>101</sup> See *supra* text accompanying notes 95–96.

<sup>102</sup> See generally William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017) (discussing sovereign immunity and the meaning of the constitutional text).

<sup>103</sup> See Dan McLaughlin, *Constitutional Originalism Requires Birthright Citizenship*, NAT’L REV. (Sept. 9, 2018), <https://www.nationalreview.com/corner/constitutional-originalism-requires-birthright-citizenship/> [<https://perma.cc/LE8W-BJWV>].

<sup>104</sup> See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001).

<sup>105</sup> “Constraint as Consistency” is the name for the requirement that the decision of constitutional cases and the specification of constitutional doctrine must be consistent with and fairly traceable to the communicative content of the constitutional text. See Solum, *The Constraint Principle*, *supra* note 1, at 21.

required to render originalism plausible, including theories that (a) the constitutional text is not radically indeterminate; (b) there is an originalist methodology that permits the recovery of the original meaning; and (c) it is possible for constitutional actors to comply with the Constraint Principle given reasonable assumptions about human psychology and other relevant social sciences.

There may be other members of the originalist family that depart from one or more of these criteria, but nonetheless resemble *originalism* in important respects. For example, “original purposes originalism” might dispense with the original meaning of the constitutional text and substitute the original purposes of the Framers and ratifiers. So long as the original purposes are fixed and constraining, it seems reasonable to view this theory as a form of *originalism*.

### B. *Living Constitutionalism as a Concept*

The originalist family of constitutional theories is united by the ideas of fixation and constraint. These two ideas limit the options for originalists: all of the important members of the originalist family (public meaning, intentionalism, and original methods) converge on the ideas that the meaning of the text is fixed at the time it is written and that this fixed original meaning is binding. Living constitutionalism is united by the idea of constitutional change, but there are many different ways that constitutional change can be accomplished. We can begin our investigation of *living constitutionalism* by identifying the range of views within the living constitutionalist family of constitutional theories (and antitheories).

#### 1. *The Forms of Living Constitutionalism*

Because there are many variations of *living constitutionalism*, I can only offer a brief description of the most important forms. Here is the list, with a brief description of the view and identification of scholars who either affirm the view described or a similar view:

**Constitutional Pluralism:** This is the view that law is a complex argumentative practice with plural forms of constitutional argument. Professors Philip Bobbitt, Stephen Griffin, and Richard Fallon have all advanced versions of pluralism.<sup>106</sup>

<sup>106</sup> See BOBBITT, *supra* note 70, at 12–13 (discussing multiple modalities through which legal propositions may be characterized); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994) (“Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution.”). See generally Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739 (2013) (discussing a pluralistic, nonoriginalist conception of constitutional law); Richard H. Fallon, Jr., *A*

*Moral Readings:* This is the view that the constitutional law is the outcome of that constructive interpretation of the legal materials that makes the law the best that it can be. This view originates in the work of Ronald Dworkin and is now associated with Professor James Fleming.<sup>107</sup>

*Common Law Constitutionalism:* This is the view that the content of constitutional law should be determined by a common law process. This theory is associated with Professor David Strauss.<sup>108</sup>

*Popular Constitutionalism:* This is the view that "We the People" can legitimately change the Constitution through processes such as transformative appointments that do not formally amend the text. Different versions of this theory are associated with Professors Bruce Ackerman, Barry Friedman, and Larry Kramer.<sup>109</sup>

*Extranational Constitutionalism:* This family of theories holds that constitutional norms outside of a national legal system permit judges to adopt constitutional norms that invalidate, alter, or supplement a national constitution. Members of the family include the following:

Transnational Constitutionalism is the view that transnational constitutional norms, discovered via comparative constitutionalism and from international law norms, should inform the interpretation of the Constitution.<sup>110</sup>

---

*Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (discussing a theory of interconnectivity of constitutional arguments that allows for constructivist coherence).

<sup>107</sup> See Dworkin, *Freedom's Law*, *supra* note 72, at 2–3. The Moral Readings theory is now strongly associated with James Fleming's Dworkinian theory of constitutional interpretation and construction. See James B. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515, 515 (2014).

<sup>108</sup> See Strauss, *Foreword: Does the Constitution Mean What It Says?*, *supra* note 69, at 4–5 (2015); see also STRAUSS, *THE LIVING CONSTITUTION*, *supra* note 69, at 43–45.

<sup>109</sup> See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (viewing the Constitution as a result of popular sovereignty); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (discussing the relationship between the public opinion and the decisions of the Supreme Court); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (discussing popular constitutionalism and the historical role of ordinary citizens in interpreting the Constitution).

<sup>110</sup> See Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015) (recommending that courts ground decisions applying the doctrine of unconstitutional constitutional amendments in transnational norms).

Global Constitutionalism is the view that a global unwritten constitution can be enforced by domestic courts.<sup>111</sup>

Treaty Constitutionalism is the view that international treaties are superior in the hierarchy of authority to the United States Constitution and that such treaties authorize domestic courts to engage in living constitutionalism.<sup>112</sup>

*Multiple Meanings*: This is the view that the constitutional text has multiple linguistic meanings and that constitutional practice should choose between these meanings on a case-by-case basis. Versions of this idea can be found in the work of Professors Richard Fallon and Cass Sunstein.<sup>113</sup>

*Super-Legislature*: This is the view that the Supreme Court should act as an ongoing constitutional convention with the power to adopt amending constructions of the constitutional text on the basis of the same kinds of reasons that would be admissible in a constitutional convention. Hardly anyone owns up to this theory, but Professor Brian Leiter has explicitly endorsed this view.<sup>114</sup>

*Thayerianism*: This is a family of views that require courts to defer to Congress, with three variants:

Constrained Thayerianism is the view that courts should defer to Congress, but that Congress itself should be constrained by the original meaning of the constitutional text.<sup>115</sup>

---

<sup>111</sup> See Christine Schwöbel, *The Appeal of the Project of Global Constitutionalism to Public International Lawyers*, 13 GER. L.J. 1 (2012) (discussing the various dimensions of global constitutionalism and how lawyers relate to them).

<sup>112</sup> So far as I know, this view has no adherents who endorse it explicitly, but it may be implicit in the idea that international human rights articulated in various treaties should shape domestic constitutional law.

<sup>113</sup> See Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1303–07 (2015); Cass R. Sunstein, *Formalism in Constitutional Theory*, 32 CONST. COMMENT. 27, 27–29 (2017).

<sup>114</sup> See Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015) (discussing how the Supreme Court operates as a super-legislature by making decisions based on the moral and political values of the Justices).

<sup>115</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893).



Unconstrained Thayerianism is the view that courts should defer to Congress and that Congress should have the constitutional power to revise the constitutional text, either by adopting amending legislation or by creating implicit amendments through ordinary statutes.<sup>116</sup>

Representation Reinforcement Thayerianism is the view that courts should defer to Congress except when judicial review is necessary to preserve democracy, including protection of discrete and insular minorities and protection of democratic processes.<sup>117</sup>

*Constitutional Antitheory*: There are four views that are “antitheoretical”<sup>118</sup> in the sense that they deny that constitutional practice should be guided by any normative theory, whether that theory be originalist or nonoriginalist:

Particularism is the view that constitutional practice should be guided by salient situation-specific normative considerations in particular constitutional situations.<sup>119</sup>

Pragmatism is the similar view, associated with Judge Richard Posner<sup>120</sup> (and in a different form with Professors Daniel Farber and Suzanna Sherry<sup>121</sup>) that constitutional decisions should be made pragmatically on the basis of various normative considerations.

Eclecticism is the view that different judges should embrace different approaches to constitutional interpretation and construction,

---

<sup>116</sup> It is unclear to me whether this view has been endorsed explicitly.

<sup>117</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>118</sup> See *ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM* (Stanley G. Clarke & Evan Simpson eds., 1989); *INTUITION, THEORY, AND ANTI-THEORY IN ETHICS* (Sophie Grace Chappell ed., 2015); NICK FOTTON, *THEORY VS. ANTI-THEORY IN ETHICS: A MISCONCEIVED CONFLICT* (2014).

<sup>119</sup> For an introduction, see Jonathan Dancy, *Moral Particularism*, *STANFORD ENCYC. OF PHILOSOPHY* (Edward N. Zalta ed., 2017), <http://plato.stanford.edu/entries/moral-particularism> [<https://perma.cc/T335-4EVW>]; see also JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* 7 (2004); Brad Hooker, *Moral Particularism: Wrong and Bad*, in *MORAL PARTICULARISM* 1–2 (Brad Hooker & Margaret Olivia Little eds., 2000).

<sup>120</sup> Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 683 (2004) (“The ultimate criterion of pragmatic adjudication is reasonableness.”).

<sup>121</sup> DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 3 (2002).

and that even a single judge should adopt different approaches on different occasions.<sup>122</sup>

Opportunism is the view that theoretical stances should be deployed strategically to achieve ideological or partisan goals.<sup>123</sup>

Constitutional Rejectionism: These views reject the United States Constitution as an authoritative source of law;

Anticonstitutionalism is the view that the communicative content of constitutions in general should play no role in constitutional practice.<sup>124</sup>

Constitutional Replacement theories would allow the text of a normatively attractive replacement constitution to play a role in constitutional practice but reject any constraining role for the current Constitution of the United States.<sup>125</sup>

These ten forms of *living constitutionalism* all reject the Constraint Principle. There is an eleventh version of *living constitutionalism* that accepts constraint but rejects the Fixation Thesis:

Contemporary Ratification Theory: The contemporary meaning of the constitutional text should constrain constitutional practice, because it is this meaning that is legitimate because it is supported by contemporary majorities. Changes in meaning produced by linguistic drift or successful judicial alteration of meaning should constrain constitutional actors, even if these linguistic changes are inconsistent with original meaning.<sup>126</sup>

---

<sup>122</sup> Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 135 (2016).

<sup>123</sup> So far as I know, no one owns up to being an opportunist.

<sup>124</sup> LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

<sup>125</sup> SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

<sup>126</sup> See Tom W. Bell, *The Constitution as If Consent Mattered*, 16 CHAP. L. REV. 269, 283–85 (2013). Hillel Levin has developed a Contemporary Meaning Theory of statutory interpretation. See Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1105.

There may be additional forms of nonoriginalism of which I am unaware, but I believe that this list of eleven forms of *living constitutionalism* captures all or almost all of the major rivals to *originalism*.

The theoretical diversity of *living constitutionalism* is important to the conceptual structure of the great debate. Comparing Public Meaning Originalism to generic living constitutionalism is difficult or impossible, because differences among the particular forms of living constitutionalism are fundamental and radical. For example, Thayerianism is just as opposed to common law constitutionalism as it is to *originalism*.

## 2. *A Metalinguistic Proposal for the Conceptual Shape of Living Constitutionalism*

What features do the various forms of living constitutionalism have in common? My proposal is that the phrase "living constitutionalism" and the associated concept *living constitutionalism* should be understood to be unified by two features, one positive and one negative:

*The Positive Feature:* A theory is a form of "living constitutionalism" only if it accepts the proposition that constitutional practice can and should change in response to changing circumstances and values.

*The Negative Feature:* A theory is a form of "living constitutionalism" only if it rejects one of the two unifying ideas of originalism, the Fixation Thesis and the Constraint Principle, and adopts an understanding of the nature of original meaning that is sufficiently thick to provide meaningful constraint (e.g., a degree of underdeterminacy that is moderate or minimal). Most versions of living constitutionalism reject constraint, but at least one version, the Contemporary Ratification Theory, accepts constraint but rejects the Fixation Thesis.<sup>127</sup> Some hybrid views (as discussed below) accept constraint and fixation, but adopt a thin view of original meaning.<sup>128</sup>

*Conjunction of the Positive and Negative Features:* A theory is a form of "living constitutionalism" if and only if it possesses both the positive and the negative features.

---

<sup>127</sup> Some theorists may object to the negative and argue that living constitutionalism is fully consistent with originalism. This position is discussed below. See *infra* Section III.A. Because the terminology and concepts are contested, my view is that forms of living constitutionalism that nonetheless accept constraint and fixation are best understood as hybrid views and should be identified as such.

<sup>128</sup> See *infra* Part III.

Together, the positive and negative features provide the necessary and sufficient conditions for a constitutional theory to be classified as a form of “living constitutionalism.” This way of thinking preserves originalism and living constitutionalism as opposing views but allows for a capacious understanding of each theory that is capable of allowing theoretical diversity within the two categories.

The second feature of this metalinguistic proposal seems likely to be controversial. Resistance could come from one of two directions. The first direction of resistance might come from what can be called “moderate living constitutionalism.” Some constitutional theorists who prefer to identify with the label “living constitutionalism” might accept fixation and constraint and argue that the real dividing line between originalism and living constitutionalism is provided by a different understanding of the nature of *originalism*; for example, it might be argued that originalists must accept “original expected applications” (the application beliefs of the Framers, ratifiers, or the public), which must be affirmed as binding for a theory to properly be called originalist. The difficulty with this metalinguistic counterproposal is that almost all originalists reject this understanding of the nature of *originalism*.

A second direction of resistance might come from originalists who wish to affirm the conceptual compatibility of *originalism* and *living constitutionalism*. I am sympathetic to this form of resistance, but I have come to believe the failure to draw a line between originalism and living constitutionalism engenders conceptual confusion and strong metalinguistic resistance. For better or worse, most constitutional theorists seem to understand *originalism* and *living constitutionalism* as opponents. Because the issue is metalinguistic and because usage is not consistent, there are no facts that can settle the metalinguistic dispute. The best that we can do is to advance metalinguistic proposals that will provide conceptual clarity in debates over constitutional theory. Including the negative feature in *living constitutionalism* draws a clear line between originalism and living constitutionalism and thereby contributes to conceptual and linguistic clarity in a way that captures the very common belief that these two theories compete with each other.

### C. *The Role of the Interpretation–Construction Distinction in Originalism and Living Constitutionalism*

Recent debates about *originalism* and *living constitutionalism* have included substantial discussion of the interpretation–construction distinction, an old idea in American legal theory that fell out of favor and then was

reintroduced into contemporary constitutional theory by the writings of Professors Keith Whittington, Randy Barnett, and others.<sup>129</sup>

1. *The Interpretation–Construction Distinction*

The interpretation–construction distinction<sup>130</sup> itself can be stated in the context of constitutional theory as follows:

*Constitutional Interpretation* is stipulated to be the activity that discerns the meaning (understood as communicative content conveyed by linguistic meaning in context) of the constitutional text.

*Constitutional Construction* is stipulated to be the activity that determines the legal effect (including the decision of constitutional cases and the specification of constitutional doctrines) given to the constitutional text.

Originalist constitutional practice always involves both interpretation and construction. A simple rational reconstruction of the process would involve two steps: (1) interpretation (discover the meaning) and (2) construction (give the meaning legal effect).<sup>131</sup> In some cases, the constitutional text will fully determine legal effect; in those cases, construction is mechanical—do what the text says. We might say that cases and issues of this kind are in the “interpretation zone”: constitutional interpretation does all the important work. What about cases and issues with respect to which the constitutional text is underdeterminate? These cases fall outside the interpretation zone.

<sup>129</sup> For the history of the interpretation–construction distinction, see Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 487; see also Greg Klass, *Interpretation and Construction 1: Francis Lieber*, NEW PRIV. L. (Nov. 19, 2015), <http://blogs.harvard.edu/nplblog/2015/11/19/interpretation-and-construction-1-francis-lieber-greg-klass> [<https://perma.cc/U5SE-7K8H>]; Greg Klass, *Interpretation and Construction 2: Samuel Williston*, NEW PRIV. L. (Nov. 23, 2015), <https://blogs.harvard.edu/nplblog/2015/11/23/interpretation-and-construction-2-samuel-williston-greg-klass> [<https://perma.cc/AK4W-WEFN>]; Greg Klass, *Interpretation and Construction 3: Arthur Linton Corbin*, NEW PRIV. L. (Nov. 25, 2015), <http://blogs.harvard.edu/nplblog/2015/11/25/interpretation-and-construction-3-arthur-linton-corbin-greg-klass> [<https://perma.cc/329M-9VJV>]; Ralf Poscher, *The Hermeneutic Character of Legal Construction*, in LAW’S HERMENEUTICS: OTHER INVESTIGATIONS 217–20 (Simone Glauert & Fabien Girard eds., 2017).

<sup>130</sup> For more discussion of the interpretation–construction distinction, see Solum, *The Interpretation–Construction Distinction*, *supra* note 1, and Solum, *Originalism and Constitutional Construction*, *supra* note 1.

<sup>131</sup> This simple picture does not fully capture the actual process. Judges may begin with construction and then check their view of what the law should be against the text. And as a theoretical matter, the decision as to what meaning (e.g., public meaning versus drafter’s intent) should be recovered must precede interpretation. I am grateful to Gregory Klass for emphasizing the importance of this point.

## 2. *The Idea of a Construction Zone*

This leads to the idea of a “construction zone”<sup>132</sup>—the set of issues and cases with respect to which the original meaning of the constitutional text is underdeterminate. Some originalists resist this idea. One line of opposition attacks the distinction itself. Justice Antonin Scalia and Professor Bryan Garner argued unsuccessfully that the conceptual distinction between meaning and legal effect rests on a linguistic mistake.<sup>133</sup> A more plausible line of opposition maintains that the constitutional text is never, or almost never, substantially underdeterminate. The idea is that once we recover the full communicative content of the text, that content is sufficiently rich and precise to answer all of our constitutional questions. Professors Michael Rappaport and John McGinnis have argued that Original Methods Originalism eliminates (or almost eliminates) the construction zone because the substitution of the original methods of constitutional interpretation for the public meaning of the constitutional text eliminates vagueness, open texture, and irreducible ambiguity.<sup>134</sup> For the purposes of this Essay, we can simply note the disagreement between originalists who affirm the existence of underdeterminacy and those who deny it.

## 3. *Originalist Methods of Constitutional Construction*

Even if there is moderate constitutional underdeterminacy and hence substantial construction zones, it does not follow that originalists must accept some form of freewheeling living constitutionalism in the construction zone. Various approaches to constitutional construction can reduce the role of discretion and the ideology of judges in cases where the constitutional text is not fully determinate. The following list suggests some of the approaches to constitutional construction that would meaningfully restrain, constrain, or confine discretion:

- *Default Rules:* Constitutional construction might be structured by a set of default rules, e.g., defer to Congress, then the President, then state legislatures, and then state executives.

<sup>132</sup> Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 569 (2010).

<sup>133</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 13–15 (2012). Justice Scalia and Professor Garner argued that the interpretation–construction distinction was based on confusion between the verbs “to construe” and “to construct,” both of which share “construction” as their noun form. *Id.* This is a bald assertion, and I have found no support in the history of the distinction that supports their claim. Justice Scalia and Professor Garner seem to equate “construction” with the idea that judges are authorized to depart from statutory or constitutional text, but that equation is mistaken. For textualists and originalists, construction is constrained by the text. Justice Scalia and Professor Garner do not consider the role of construction in cases of vague or open-textured statutory or constitutional provisions. For discussion of their argument, see Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 483–88.

<sup>134</sup> McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 27, at 772–73.

This approach approximates *Thayerian* living constitutionalism, but only within the construction zone, and is inspired by the work of Professors Gary Lawson and Michael Paulsen.<sup>135</sup>

- *Original Functions and Purposes*: Construction could be guided by the original function, which the underdeterminate constitutional provision was designed to serve.<sup>136</sup>
- *Strict Stare Decisis*: The process of constitutional construction might proceed via a common law method that incorporates a very strict doctrine of horizontal stare decisis and hence eliminates the underdeterminacy generated by a discretionary power to overrule prior cases in the construction zone.<sup>137</sup>

All of these approaches to constitutional construction are confining: they do not permit judges to adopt constitutional constructions on the basis of their moral beliefs or political ideologies. If the interpretation–construction distinction and the existence of construction zones led to the conclusion that constitutional practice cannot be meaningfully constrained by original meaning, that would call into question the originalist claim that originalism provides a distinct view of constitutional theory that is substantially different than the view offered by living constitutionalism. But this is not the case. The original meaning of the constitutional text is not radically indeterminate—although this cannot be shown in this Essay. And to the extent that the text is moderately underdeterminate, there are plausible theories of constitutional construction that limit or eliminate discretion in the construction zone.

#### 4. *The Construction Zone and Conceptual Structure*

The existence of a construction zone has important implications for the conceptual structure of the great debate. If the communicative content of the constitutional text fully determined the legal content of constitutional doctrine, there would be an easy way to tell whether a given approach to constitutional theory were *originalist* or *living constitutionalist*. We would simply ask whether the theory permitted changes in legal content. Theories that permitted change would be living constitutionalist; theories that forbade change would be originalist.

But this approach is fundamentally incorrect. Every plausible version of *originalism* has some account of legitimate constitutional change. For

<sup>135</sup> See Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 511–16.

<sup>136</sup> See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *Geo. L.J.* 1, 32–36 (2018).

<sup>137</sup> See 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, 208 (2006).

example, every originalist believes that the legal content of constitutional doctrine should change in response to constitutional amendments. Once we focus on the fact that the communicative content of the constitutional text is underdeterminate, it becomes clear that originalists can accept constitutional change in the construction zone. Constitutional implementing rules might change in response to changing circumstances. In addition, it is possible that First Amendment free speech doctrine would need new implementing rules in response to new communications technologies such as the Internet. Speech via the Internet may require implementation rules that are different from those that apply to speech in public parks.

For this reason, *originalism* and *living constitutionalism* cannot be differentiated on the basis of the distinction between static and dynamic constitutional doctrine. The real question concerns the limits that each approach imposes on constitutional change.

#### D. Incompatible but Not Exhaustive

My proposal for the conceptual structure of *living constitutionalism* assumes what we can call “incompatibilism”—the view that *living constitutionalism* is inconsistent with *originalism*. The Negative Feature of *living constitutionalism* is that living constitutionalist theories reject either the Fixation Thesis or the Constraint Principle. This feature of the conceptual proposal advanced above<sup>138</sup> captures an important feature of the mainstream of constitutional discourse: *living constitutionalism* and *originalism* are seen as oppositional.<sup>139</sup>

But conceiving *originalism* and *living constitutionalism* as incompatible does not entail the further conclusion that the two theories fill the space of constitutional theory. There may be alternatives that combine elements of originalism and living constitutionalism. If we divide conceptual space in this way, understanding living constitutionalism and originalism as incompatible but not mutually exhaustive, then conceptual space is opened for what we can call “hybrid theories,” and they are our next topic.

<sup>138</sup> See *supra* Section II.B.2.

<sup>139</sup> See, e.g., Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 808 (2017) (describing originalism and living constitutionalism as “competing” interpretive theories); M. Frances Rooney, *The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination*, 15 GEO. J.L. & PUB. POL’Y 737, 742 (2017) (referring to “the debate over originalism and its rival, living constitutionalism . . .”); Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1913 (2017) (“There is often a debate about originalism versus living constitutionalism.”); Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 788 (2017) (using “living constitutionalists” and “non-originalists” interchangeably).



## III. HYBRID THEORIES

I have proposed that the conceptual structure of *originalism* and *living constitutionalism* be understood as mutually exclusive (incompatible): if a theory is originalist, then it is not living constitutionalist, and vice versa. Related to this first proposal is the suggestion that these concepts not be regarded as exhaustive: that is, there are hybrid views that should neither be called "originalism" nor labeled as "living constitutionalism." Three such views are explored here, although there may be others: (1) Living Originalism, (2) Constitutional Compromise, and (3) Original Law Originalism.

A. *Living Originalism*

The difficulties of drawing a line between *originalism* and *living constitutionalism* that preserves the idea that these two families of constitutional theories are mutually exclusive, but that originalism allows for constitutional change, is brought into focus by considering Framework Originalism, the version of so-called New Originalism that was advanced by Professor Jack Balkin in his book, *Living Originalism*.<sup>140</sup> On the surface, it seems as if Framework Originalism is clearly a member of the originalist family of constitutional theories.<sup>141</sup> Professor Balkin incorporates a principle of fidelity to what he calls the original public meaning of the constitutional text, thus incorporating a version of both the Fixation Thesis and the Constraint Principle.<sup>142</sup> But in *Living Originalism*, Professor Balkin argues that most of the living constitutionalist jurisprudence of the Warren and Burger Courts is correct from the perspective of Framework Originalism: Framework Originalism, Professor Balkin contends, squares unlimited congressional power under the Commerce and Necessary and Proper Clauses, and *Roe v. Wade*,<sup>143</sup> with the original public meaning of the constitutional text—conclusions that are contrary to those reached by many originalist scholars.

How can Professor Balkin affirm fixation and constraint and nonetheless reach the conclusion that the New Deal, Warren, and Burger Court decisions—usually classified as paradigm cases of *living constitutionalism*—are supported by *originalism*? Like others who are

<sup>140</sup> BALKIN, *supra* note 84, at 3.

<sup>141</sup> For an extended discussion of Professor Balkin's approach, see Solum, *Faith and Fidelity*, *supra* note 1 (discussing whether Balkin's progressive theory can be consistent with the core premises of originalism), and Solum, *Construction and Constraint*, *supra* note 1 (examining Balkin's theory in relation to the problem of constraint in the context of originalist constitutional theory).

<sup>142</sup> Solum, *Construction and Constraint*, *supra* note 1, at 22–23.

<sup>143</sup> 410 U.S. 113 (1973).

sometimes classified as “New Originalists,” Professor Balkin accepts the existence of “Construction Zones,” but there is a key difference between Professor Balkin’s view and the views of other theorists who agree that the constitutional text is not fully determinate: Professor Balkin’s account of original meaning is “thin”—he believes that the original meaning of the constitutional text consists of its literal or semantic meaning as disambiguated by context.<sup>144</sup> On this account, the meaning of the text is very sparse indeed, leading to construction zones that are quite large. In addition, Professor Balkin’s substantive views about the meaning of particular constitutional provisions seems to favor the most abstract and general meaning, where other originalists find a narrower and more particular meaning. Thus, Professor Balkin endorses a view of the Commerce Clause that reaches all social interaction, rather than the more conventional originalist view that “commerce” encompasses trade in goods and the means by which such trade is accomplished, including transportation. The thinner the meaning, the larger the construction zone.

Moreover, Professor Balkin’s approach to constitutional construction, which emphasizes constitutional principles, is reminiscent of Professor Philip Bobbitt’s multiple modalities approach to constitutional interpretation and construction<sup>145</sup>—allowing a very capacious set of concerns to enter into the process of determining the legal content of constitutional doctrine.<sup>146</sup> Combined with a thin theory of meaning and a substantive endorsement of general and abstract interpretations, Professor Balkin’s view seems to combine elements of both *originalism* and *living constitutionalism*, reflected in his own label for the theory, “Living Originalism.”

We should understand the conceptual structure of *originalism* and *living constitutionalism* as mutually exclusive but not exhaustive categories. Theories that contain elements of both should be understood as “hybrid theories.” Professor Balkin’s Framework Originalism is a hybrid theory that should be called neither pure “originalism” nor pure “living constitutionalism”—it is “Living Originalism,” to use Professor Balkin’s own phrase.

This way of talking about Living Originalism acknowledges that both “originalism” and “living constitutionalism” play important roles in Professor Balkin’s theory. Professor Balkin himself might resist the idea that his theory should be classified as a hybrid view, suggesting instead that we

<sup>144</sup> Solum, *Construction and Constraint*, *supra* note 1, at 28; see also Jack M. Balkin, *Must We Be Faithful to Original Meaning?*, 7 JERUSALEM REV. LEGAL STUD. 57, 60–62 (2013); Jack M. Balkin, *History, Rights, and the Moral Reading*, 96 B.U. L. REV. 1425, 1432–33 (2016).

<sup>145</sup> See BOBBITT, *supra* note 70, at 12–13.

<sup>146</sup> Solum, *Construction and Constraint*, *supra* note 1, at 32.

reject the negative feature of living constitutionalism (as either a concept or a theoretical term) or reject the idea that a reasonably thick account of original meaning is a defining feature of *originalism*.<sup>147</sup> So long as Professor Balkin is clear, we can understand his alternative terminology. The view that *living constitutionalism* and *originalism* are compatible is reasonable. Indeed, it is a view that I formerly held. But at the end of the day, I am convinced that this way of talking engenders confusion and metalinguistic resistance. Classifying Professor Balkin's "Living Originalism" as a hybrid view captures the widely shared sense that Professor Balkin's form of *originalism* is closer to nonoriginalist *living constitutionalism* than any other theory that calls itself "originalist." Because *living constitutionalism* and *originalism* can be viewed as mutually exclusive but not exhaustive, we can accommodate the conflicting intuitions about its status by classifying "Living Originalism" as a hybrid view.

#### B. Constitutional Compromises

A second example of a hybrid view might be called "Constitutional Compromise," a family of related views that apply originalism to some constitutional issues but endorse living constitutionalism as to others. There are many possible variations of Constitutional Compromise, but the following three seem particularly salient:

*Originalism for the Hard-Wired Constitution Only, Living Constitutionalism for Everything Else:* One possible hybrid view would endorse originalism for what is sometimes called the "hard-wired constitution," e.g., the provisions creating a House and Senate and specifying the composition of each. The original meaning of these hard-wired provisions would be binding on constitutional actors, but the rest of the constitution would be handled by some version of living constitutionalism.

*Living Constitutionalism for Canonical Cases, Originalism for Everything Else:* Another possibility would be to identify a set of canonical cases (e.g., *Brown v. Board of Education*<sup>148</sup>). These living constitutionalist cases would be allowed to stand, even if they could not

<sup>147</sup> See Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 150 (2018) ("[O]riginalism and living constitutionalism are two sides of the same coin.").

<sup>148</sup> 347 U.S. 483 (1954).

be provided originalist foundations,<sup>149</sup> but originalism would govern all other constitutional issues.

*Frozen Living Constitutionalism for Issues Governed by Settled Law, Originalism for Everything Else:* Finally, we could imagine a hybrid view that “grandfathers in” all of the “settled law” (including longstanding precedents and entrenched historical practice) but allows originalism to govern constitutional issues that pose novel questions, which are currently unsettled.

Each of these three theories can be seen as constitutional compromises, adopting *originalism* for one domain of constitutional issues and *living constitutionalism* for issues that are not within that domain.

The notion of constitutional compromises that explicitly combine elements of originalism and living constitutionalism is new, and so far as I know, there are no explicit advocates of these views as they are formulated here. Nonetheless, there are reasons to think that hybrid theories might be attractive, and they may be implicitly endorsed by some constitutional theorists.

Each of the constitutional compromises suggested above has features that might render it attractive. For example, one might be drawn to an originalist approach to the hard-wired constitution because the basic structural provisions (e.g., bicameralism and presentment) are clear and determinate. And it could be argued that there is an especially strong argument that these provisions should not be “up for grabs,” because of the need for stability and certainty regarding basic institutional arrangements.

Likewise, there are strong arguments for a constitutional compromise that “grandfathers in” canonical cases<sup>150</sup> like *Brown v. Board of Education*. These cases are cemented in the fabric of American constitutional law and supported by a wide and deep consensus of public opinion. Uprooting them is arguably inconsistent with the rule of law and democratic legitimacy concerns that form a large part of the case for *originalism*.<sup>151</sup>

<sup>149</sup> I am not suggesting that *Brown v. Board of Education* cannot be supported by Public Meaning Originalism. For a brief discussion, see Solum, *Surprising Originalism*, *supra* note 1, at 259–66.

<sup>150</sup> For discussion of the idea of a canonical case, see Lawrence B. Solum, *Legal Theory Lexicon 085: Canonical and Anti-Canonical Cases*, LEGAL THEORY LEXICON (Jan. 20, 2019), [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2019/01/legal-theory-lexicon-canonical-and-anticanonical-cases.html](https://lsolum.typepad.com/legal_theory_lexicon/2019/01/legal-theory-lexicon-canonical-and-anticanonical-cases.html) [<https://perma.cc/AV9D-8KB2>].

<sup>151</sup> Questions about the relationship of the rule of law, legitimacy, and nonoriginalist precedent are complex and beyond the scope of this Essay. For discussion, see Solum, *Originalist Theory and Precedent*, *supra* note 1.

Similarly, it might be argued that *originalism* should be confined to issues that have not been addressed by the Supreme Court. Grandfathering would be extended beyond the canonical cases to all issues that have already been resolved by the Supreme Court. This version of constitutional compromise is related to what Justice Scalia called “faint-hearted originalism.”<sup>152</sup> This version of constitutional compromise might be attractive to those who prioritize the stability of the law over fidelity to the constitutional text.

### C. Original Law Originalism

One way of understanding the concept of *originalism* is as a family of constitutional theories unified by the Fixation Thesis and the Constraint Principle. There are different theories about the original meaning of the constitutional text, but they all agree that the original meaning of the text is fixed and binding. Although this claim has been widely accepted, it has recently been challenged by Professor Stephen Sachs in an essay entitled *Originalism Without Text*,<sup>153</sup> along with Professor William Baude, Professor Sachs has developed a theory called “original-law originalism”<sup>154</sup> that incorporates a legal positivist theory of what counts as “original law”<sup>155</sup> and constitutional change.<sup>156</sup>

The key idea of Original Law Originalism is that the original law remains in force unless it has been legally changed.<sup>157</sup> On a Hartian understanding<sup>158</sup> of the original law, this would mean that the content of the original law would be identified by the rule of recognition in force as of the time the current regime started (perhaps 1791).<sup>159</sup> The law identified by the rule of recognition would include secondary rules of constitutional change, including the Article V amendment process, but perhaps other mechanisms as well. It might be the case that the change mechanisms that were part of

<sup>152</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (using the phrase “faint-hearted originalist”); see also Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006) (critiquing Justice Scalia's theory of originalism).

<sup>153</sup> See Sachs, *supra* note 80, at 157.

<sup>154</sup> Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 874 (2015).

<sup>155</sup> William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 n.16 (2015).

<sup>156</sup> Sachs, *Originalism as a Theory of Legal Change*, *supra* note 154, at 820.

<sup>157</sup> *Id.* at 818 (“[T]he law stays the same until it's lawfully changed.”).

<sup>158</sup> See generally H. L. A. HART, *THE CONCEPT OF LAW* (3d ed. 2012) (promoting a theory of legal positivism—meaning there is no connection between law and morality).

<sup>159</sup> The precise relationship of Original Law Originalism to Hart's theory is not fully explored by either Professors Baude or Sachs. See Baude, *Is Originalism Our Law?*, *supra* note 155, at 2371–72 (2015) (discussing Hart). The discussion that follows in text is based on my understanding of the implications of Hart's view for Original Law Originalism.

the original law have authorized additional secondary rules that in turn authorize additional mechanisms. To determine whether a doctrine or practice is constitutional, we look to its pedigree. If it is authorized by the original law or by a change mechanism that itself is authorized by the original law (understood iteratively<sup>160</sup>), then the doctrine or practice is part of our constitutional law. But if the doctrine is not so authorized, then it is not legally binding.

Should Original Law Originalism be classified as a member of the originalist family of constitutional theories? To the extent that the original law affirmed fixation and constraint, this is any easy question: if Original Law Originalism required adherence to the original meaning of the constitutional text, then it is "originalism." The same conclusion follows if the "original law" required adherence to original intent or original methods and that requirement has not been overridden by a legally authorized method of constitutional change.

The question becomes more difficult when we consider two other possibilities. One is the (perhaps far-fetched) possibility that the original law was some form of contemporary living constitutionalism.<sup>161</sup> Less far-fetched is the possibility that the original law authorized courts to alter the legal doctrines governing constitutional construction in ways that permitted a gradual transition from *originalism* to *living constitutionalism*. For example, suppose that the original law permitted the New Deal Supreme Court to adopt constitutional constructions that expanded the power of the Court to depart from the original meaning of the constitutional court. If this were so, then Original Law Originalism would now be a form of *living constitutionalism*—even though it might have been a form of *originalism* at an earlier point in our constitutional history.

Unlike other hybrid views, Original Law Originalism does not "take a stand" that commits it to elements of both *originalism* and *living constitutionalism*. Rather, its hybrid nature results from the fact that the content of the original law is not specified by Original Law Originalism's theoretical structure. This feature is brought out by Professor Jonathan

<sup>160</sup> On the iterative understanding, a change mechanism authorized by the original law could itself authorize a new change mechanism, which in turn could recognize additional change mechanisms. It is this feature of Original Law Originalism that creates the possibility that even if the original law was a form of *originalism*, an iterative process would transform the original law into a form of *living constitutionalism*.

<sup>161</sup> The question whether the original law was a form of living constitutionalism is a very complex question. Because there are so many different forms of living constitutionalism, a complete answer to the question would require that each version of living constitutionalism be compared to the original law. Since no account of the original law has been offered by original law originalists, this question has no clear answer.

Gienapp's recent monograph, *The Second Creation*.<sup>162</sup> Simplifying a complex argument, Professor Gienapp's thesis seems to be that the role of the constitutional text in the determination of the content of constitutional law was unsettled during the period that begins with the Philadelphia Convention and continues through the late eighteenth century. One way of understanding Professor Gienapp's thesis is that the rule of recognition was unsettled during this early phase of our constitutional history. If Professor Gienapp is right, then Original Law Originalism would need to take this into account in determining the content of the original law and identifying the change rules that it includes.<sup>163</sup>

#### IV. IMPLICATIONS OF THE CONCEPTUAL STRUCTURE FOR THE GREAT DEBATE

Up to this point, my aim has been to clarify our understanding of the great debate by laying out the conceptual structure of the issues and advancing metalinguistic proposals for how we should use the terms "originalism" and "living constitutionalism" and for the shape of the corresponding concepts. In what follows, I draw out some of the implications of the conceptual work for the substance of the great debate.

In the discussion that follows, I will not make substantive arguments for or against *originalism* and *living constitutionalism*; that is, I will not be advancing first-order reasons. Rather, I will be making arguments about the kinds of first-order reasons that are salient and the ways in which those reasons bear on the great debate; in other words, I will be advancing second-order reasons.<sup>164</sup>

##### A. *The Importance of the Realm of Discourse*

*Originalism* and *living constitutionalism* are academic theories that figure in discourse among scholars. Sometimes, the academic theories are deployed in judicial practice that is discussed in judicial opinions. More rarely, academic ideas about originalism may appear in popular political discourse. The reverse occurs as well. Judicial originalism is discussed in academic writing, as is the use of originalism in political rhetoric. There is overlap between the three realms of discourse, but the concepts used in these

<sup>162</sup> JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018).

<sup>163</sup> For Professor Baude's thoughts about Professor Gienapp's argument, see William Baude, *Were the Framers Originalists (And Does It Matter)?*, BALKINIZATION (Oct. 24, 2018, 9:00 AM), <https://balkin.blogspot.com/2018/10/were-framers-originalists-and-does-it.html> [<https://perma.cc/8HSG-VTEV>].

<sup>164</sup> "Second-order reasons," as I am using that phrase, are reasons that bear on first-order reasons.

different realms sometimes have very different shapes. Thus, popular criticism of “originalism” sometimes is focused on a “theory” maintaining that the Constitution should remain exactly as it was in 1789 and that its meaning is limited to applications from that time. Thus, “originalism” is tainted because the Thirteenth Amendment was not in effect in 1789. Similarly, criticism of “living constitutionalism” may be aimed at a simplistic version of the “super-legislature” view. But it would be a mistake to attribute these unsophisticated views to academic or judicial versions of “originalism” or “living constitutionalism.” The use of the terms “originalism” and “living constitutionalism” in popular discourse sometimes has very little to do with the same terms as used by scholars and judges.

The relationship between academic discourse and judicial practice is more complex, but there are still substantial differences. One way to get at the important ways in which the two realms of discourse differ is via the distinction between ideal and nonideal theory that was developed by John Rawls.<sup>165</sup> By “ideal theory,” Rawls means to refer to a moral or political theory that satisfies a condition of “full compliance” or “strict compliance.”<sup>166</sup> In the constitutional context, ideal theory addresses the following question: What constitution ought a society adopt for the purposes of designing its basic legal structure on the condition that all of the institutions in society conform to the constitution? In other words, we can ask what constitution we ought to adopt, assuming perfect compliance—each branch of government always respecting the limits on its power and the rights (if any) that the constitution confers on individuals. By way of contrast, we can ask questions of nonideal constitutional theory: What constitution ought a society to adopt for the purposes of designing its basic legal structure on the condition that the institutions of society will violate the constitution to the extent, and under the circumstances, that are predicted on the best understandings of human psychology and political science, given the current beliefs and motivations of the relevant constitutional actors? That is, we might assume that constitutional actors will sometimes fail to comply with their constitutional duties by exceeding their allocated powers or violating the constitutional rights of individuals. Of course, the conditions for departure from perfect compliance can themselves be varied by making different assumptions about human psychology and institutional behavior or in some other way. Nonideal constitutional theory deals with the

<sup>165</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 7–8, 215–16, 308–09 (rev. ed. 1999); see also Michael Phillips, *Reflections on the Transition from Ideal to Non-Ideal Theory*, 19 *NOÛS* 551 (1985).

<sup>166</sup> For discussion of Rawls’s ideas, see Phillips, *supra* note 165; see also Solum, *The Constraint Principle*, *supra* note 1.



unconstitutional; the institution of judicial review might be seen as a paradigmatic topic for nonideal constitutional theory.<sup>167</sup>

Debates about constitutional theory usually sit at the boundary of ideal and nonideal theories. We can call such theories "partially ideal." Constitutional theory is not in the realm of fully ideal theory. This is because violations of the Constitution are one of the most important topics in constitutional theory; the institution of judicial review and many other topics assume less-than-full compliance. But constitutional theory does not operate in the realm of what we might call "constitutional determinism"—if we ask what will happen in the future of the actual world, given all the causal forces that affect constitutional practice, normative constitutional theory becomes irrelevant. Constitutional theory requires that we assume (perhaps counterfactually) that constitutional agents are open to rational persuasion on the basis of argument. Constitutional theory assumes a conception of constitutional possibility.<sup>168</sup>

These distinctions enable us to make sense of some of the confusions generated by the argument that "originalist" judges (such as Justices Scalia and Thomas) are not consistently "originalist" or that they practice "bad originalism." If these charges were true, there might be indictments of the individual judges or Justices, but what relevance do the charges have as applied to originalist constitutional theory? If the argument boils down to the following, it is clearly invalid:

Premise 1: Justice P calls himself an "originalist."

Premise 2: Justice P's decisions are sometimes inconsistent with the actual requirements of originalism, and frequently are consistent with a conservative political ideology.

Conclusion: Therefore, originalism is a bad theory.

Obviously, the conclusion does not follow from the premises. What seems to be going on in arguments of this kind is a confusion between *originalism*

<sup>167</sup> Of course, other institutions (such as congressional committees or executive offices) may deal with unconstitutionality outside the courts. See generally James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215 (2000) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999), which discusses making constitutional interpretation less court-centered); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (discussing the judicial underenforcement of constitutional norms).

<sup>168</sup> A full discussion of these issues is beyond the scope of this Essay. For a preliminary discussion, see Solum, *Constitutional Possibilities*, *supra* note 21.

as a theory in the realm of academic discourse and the decisions of judges who purport to affirm originalist ideas. Of course, it is fair to ask whether a theory would work in practice if implemented in good faith, but this version of the objection assumes that bad faith implementation is inevitable, without producing a convincing argument that this must be the case.

Another variation of this objection is based on the “No True Scotsman” fallacy,<sup>169</sup> which involves ad hoc alterations in the definitions of a category in order to avoid objections to an argument. But this objection simply has no application to a serious defense of “academic originalism” that maintains a consistent position on the meaning of “originalism” and the shape of the associated concept. If the thrust of the objection is that the judges who are called “originalists” are not consistently originalist in practice (because of the weight they give to precedent), then the problem is with the conceptual mismatch between academic and judicial originalism. Indeed, the same point could be made about most academic forms of living constitutionalism: for example, real-world judges do not invoke “multiple modalities” or “moral readings.”<sup>170</sup>

Moreover, the objection that *originalism* has not been applied consistently in practice ignores some obvious facts about the realities of judicial originalism. The implementation of *originalism* must take into account the nature of collegial courts. For most of the history of “originalism” (understood as a distinct constitutional theory that self-identifies as such), there have only been one or two originalist Justices on the Supreme Court. In these circumstances, the opportunities of an originalist Justice to write majority originalist opinions will be few and far between—mostly arising in the rare cases where a constitutional provision has no (or almost no) prior history of judicial interpretation—*District of Columbia v. Heller*<sup>171</sup> being an obvious example. Under these conditions, consistent implementation of originalism is simply impossible—and originalist judges will be required to write nonoriginalist opinions in order to act as functional members of a collegial court. A judge who consistently refused to write or join nonoriginalist opinions would concur or dissent in almost every constitutional case—and thereby take themselves “out of the game.”

<sup>169</sup> Bradley Dowden, *Fallacies: No True Scotsman*, INTERNET ENCYC. OF PHILOSOPHY, <https://www.iep.utm.edu/fallacy/#NoTrueScotsman> [<https://perma.cc/5ZF3-BDCW>].

<sup>170</sup> The search string “advanced: (‘multiple modalities’ OR ‘moral readings’)” in Westlaw and Alcasas yields zero hits on “multiple modalities” in the constitutional context and only one occurrence of “moral readings” in an article title. See *Ex parte A.A.R.*, CC-2008-1010, 2013 WL 692863 (P.R. Feb. 20, 2013).

<sup>171</sup> 554 U.S. 570, 576–77 (2008).

Moreover, the Justices have a limited ability to decide on the basis of original meaning if the parties fail to raise originalist arguments in the lower courts and in their briefs. Given the nature of our adversarial system, originalist judges might reasonably conclude that they should not decide on the basis of originalist arguments without input from the parties and that such arguments should be presented to and considered by the lower courts before they are addressed by the Supreme Court. It seems likely that originalist arguments are rarely pursued by advocates at the trial court and intermediate appellate court level, because of the perception that these courts will decide on the basis of precedent; this problem is compounded by the fact that the vast majority of lower court and intermediate appellate judges are nonoriginalists.<sup>172</sup>

A meaningful test of judicial originalism can only come when there is a critical mass of originalist Justices on the Supreme Court. One or two Justices is clearly insufficient. With three or four originalist Justices on the Court, it becomes more likely that originalist reasoning will play a substantial role in influencing outcomes and the reasoning of the Court. But quite obviously, the real test of originalism would only arise when a majority of the Justices are originalists—something that has not occurred in the modern era.

#### B. *The Importance of Pairwise Comparison*

One of the important consequences of delineating the conceptual structure of the great debate is that it reveals the importance of comparing particular versions of *originalism* with specific forms of *living constitutionalism* or hybrid views. In the realm of scholarly discourse, the question is: "What theory of constitutional interpretation and construction is best?" The only meaningful way to approach that question is to compare the alternatives to each other via the method of pairwise comparison.<sup>173</sup> Thus, we could compare Public Meaning Originalism with Common Law Constitutionalism, then Constitutional Pluralism, and so forth. A version of this point was made by Justice Scalia, in his famous essay, *Originalism: The Lesser Evil*,<sup>174</sup> when he observed that it takes a theory to beat a theory.

<sup>172</sup> There is, so far as I know, no data on this question. My impression is that there are more originalists on the federal bench today than there were ten years ago, but I believe that originalists are not a majority in any district or circuit of the federal system.

<sup>173</sup> By pairwise comparison, I mean the comparison of a specific version of *originalism* with a specific version of *living constitutionalism*. Pairwise comparison is suggested as an alternative to the comparison of generic *originalism* with generic *living constitutionalism*.

<sup>174</sup> Scalia, *supra* note 41, at 855.

Once we begin the process of pairwise comparison, it becomes apparent that the cases for and against originalism will differ considerably, depending on which theory of originalism is being compared. Consider the following examples of this point:

- The argument that originalism should be rejected because it does not support *Roe v. Wade* (or some other important decision endorsed by the critic of originalism) might favor Common Law Constitutionalism over originalism, but it would not favor Thayerianism, which does not support judicial enforcement of a constitutional right to choice.
- The objection that Public Meaning Originalism is not feasible, because judges cannot reliably discover the original public meaning of the constitutional text, is not relevant to pairwise comparison with any theory that embraces a role for original public meaning, including, for example, some versions of constitutional pluralism and almost all hybrid theories (such as Living Originalism and various forms of Constitutional Compromise).
- The argument that originalism is supported by the value of democratic legitimacy favors originalism over the Common Law Constitutionalism and the Moral Readings Theory, but it would favor Thayerianism and Popular Constitutionalism over originalism.

The examples suggest that at some point in the great debate, the opponents of *originalism* are obligated to specify the form of *living constitutionalism* or the specific hybrid view that they favor.

### C. *The Standards for Evaluating Competing Metalinguistic Proposals*

This Essay has advanced a metalinguistic proposal for understanding the terms “originalism” and “living constitutionalism” and the concepts associated with those terms. But it seems likely that some participants in the debate may reject the proposal and instead engage in metalinguistic contestation.

For example, it might be argued that “originalism” the word and the associated concept should be limited to theories that tie original meaning to the application beliefs of the relevant actors (either the public or the Framers). Or it might be argued that any theory that permits changes in constitutional doctrine is, by definition, a form of “living constitutionalism.” If accepted, this proposal would have very substantial consequences for the conceptual structure of the great debate. Almost all of the theories supported by self-identified originalists would be reclassified as forms of living constitutionalism. This consequence is obvious in the case of so-called “New

Originalist" theories that embrace the interpretation–construction distinction and moderate underdeterminacy of the constitutional text, but it would apply to other forms of what is now called "originalism" as well. For example, even if we assume that Original Methods Originalism eliminates almost all underdeterminacy, it would still allow for the development of new implementing rules in response to changing circumstances—for example, in the application of the First Amendment freedom of speech to oral communication via the Internet. To name names, this metalinguistic proposal would likely result in scholars like Professors Randy Barnett, Kurt Lash, John McGinnis, Michael Rappaport, and myself, as well as judges like Justices Neil Gorsuch, Antonin Scalia, and Clarence Thomas, all being classified as living constitutionalists—an odd result indeed.

Professor Eric Segall advances a version of this argument in the following passage addressing Professor Barnett's version of Public Meaning Originalism:

The problem with Barnett's originalism is that constitutional litigation almost always involves "vague constitutional provisions" that have uncertain meanings in the context of our ever-changing society. When is the last time someone litigated the requirements that there be two Senators from every state, that the President be at least thirty-five, or that jury trials are required if more than twenty dollars are at stake? Most cases that end up in front of judges implicate vague phrases like "equal protection," "due process," "establishment of religion," and "cruel and unusual punishment."<sup>175</sup>

From this premise, Professor Segall draws the conclusion that "originalism" may be "indistinguishable from 'living constitutionalism.'"<sup>176</sup> The key to understanding Professor Segall's metalinguistic argument is identification of his crucial premise—which is that all, or almost all, constitutional issues that are actually litigated involve indeterminate constitutional provisions. If it were true that the original public meaning of the constitutional text was radically indeterminate in all litigated cases, then it would follow that the Constraint Principle would have no constraining force, hence originalism and living constitutionalism would not be meaningfully different.

Of course, the claim that the communicative content of all the actually litigated clauses is radically indeterminate is an empirical one. Redeeming that claim would require actual originalist work, employing a rigorous originalist methodology—something that neither Professor Segall nor any other critic of originalism of whom I am aware has done. There are good

<sup>175</sup> Eric J. Segall, *Originalism as Faith*, 102 CORNELL L. REV. ONLINE 37, 41–42 (2016).

<sup>176</sup> *Id.* at 40.

reasons to suspect that “armchair originalism” (speculation about original meaning on the basis of the contemporary linguistic intuitions) does not reliably yield the actual communicative content of the constitutional text. At this point, Professor Segall’s argument is a speculative hypothesis at best.

The acceptance of Professor Segall’s metalinguistic proposal would almost surely result in the disappearance of “originalism” as anything more than a theoretical option. The great debate would then be reconfigured as a debate among living constitutionalists of different stripes. On one side of the newly configured debate would be the living constitutionalists who accepted the Fixation Thesis and the Constraint Principle; the other side would include all of the various theories that reject one or both of those ideas. The substance of the debate would be virtually identical to the current disputes between originalists and living constitutionalists, but the labels would have changed in a way that would render the long history of debate about “originalism” and “living constitutionalism” nonsensical.

Would anything be gained by talking in this new way? Or would something be lost? One feature of this proposed revision in the use of the word “originalism” is that it does not respect the way the great debate is understood by self-identified originalists. But surely this is very odd. The advocates of metalinguistic revisionism need to put forward reasons for their proposals. Mere assertions are not reasons.

At a minimum, any attempt to define reasonable versions of originalism as living constitutionalism in disguise must demonstrate some clear conceptual advantage to talking in the new way. The alternative would be to demonstrate that the metalinguistic proposal better fits existing linguistic practice—perhaps because self-identified originalists are a linguistic minority, and therefore, their understanding of “originalism” is deviant. In my experience, most of the discussion of the meaning of “originalism” is theoretically shallow, in the sense that the participants rarely defend a position in conceptual ethics and almost never advance criteria for resolving metalinguistic disputes.

#### *D. A Summary of the Conceptual Landscape*

We are now in a position to provide a summary of the metalinguistic proposal offered in this Essay. That proposal divides conceptual space into three categories: (1) the originalist family of constitutional theories; (2) living constitutionalist theories that reject originalism; and (3) hybrid theories that combine elements of *originalism* and *living constitutionalism*. This picture is presented in Table 3.

TABLE 3: THE CONCEPTUAL LANDSCAPE

Originalism	Hybrid Theories	Living Constitutionalism
<i>Public Meaning</i>	<i>Living Originalism</i>	<i>Constitutional Pluralism</i>
<i>Intentionalism</i>	<i>Constitutional Compromise</i>	<i>Common Law Constitutionalism</i>
<i>Original Methods</i>	<i>Original Law Originalism</i>	<i>Moral Readings</i>
<i>Original Law</i>		<i>Super-Legislature</i>
		<i>Popular Constitutionalism</i>
		<i>Extranational Constitutionalism</i>
		<i>Multiple Meanings</i>
		<i>Thayerian Deference</i>
		<i>Constitutional Antitheory</i>
		<i>Constitutional Rejectionism</i>

Note that it is possible for a theory to move from one category to another if the content of the theory is specified in a particular way. Thus, Original Law Originalism could be classified as a form of originalism if that theory were to incorporate the thesis that the original law itself was committed to something like fixation and constraint. It seems unlikely, but it is theoretically possible that Original Methods Originalism would become a form of living constitutionalism if it turned out that the original methods approximated something like Common Law Constitutionalism. Living Originalism could become a form of originalism if it were modified to adopt a thicker (and hence more constraining) theory of original meaning. The position of a theory in conceptual space depends on both the abstract theoretical content of the theory and facts about text and history that are relevant to fixation and constraint.

#### CONCLUSION

Words and concepts matter, and not because conceptual clarity is more important than normative substance. In fact, quite the opposite is true. Words and concepts matter because conceptual clarity brings normative substance to the fore. The most important normative issues in the great debate arise from the originalist case for the Constraint Principle and the living constitutionalist arguments for its rejection. These issues are many and varied, in large part because there are so many different forms of living constitutionalism. Making progress on the important questions of political morality raised by the great debate between *originalism* and *living constitutionalism* is difficult, even if we clearly understand the conceptual structure of the debate. But if the meaning of "originalism" and "living constitutionalism" is unstable or obscure, it seems likely that progress will be all but impossible.