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A Conservative Case Against Originalism: The Problem of the Construction Zone and Its Implications

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The issue with originalism that has generated by far the most scholarly interest and controversy over the years concerns how the original meaning can be recovered with enough confidence in a hard constitutional case to justify the outcome. With the advent of the New Originalism in the 1990s, an equally serious problem concerning this theory of constitutional interpretation arose when originalist scholars like Keith Whittington, Lawrence Solum, and Randy Barnett began to concern themselves with the process of application, in which an originalist judge must bridge the gap between the original meaning of the applicable constitutional provision and the facts of the case to render a decision. These new originalists called attention to two analytically distinct stages in the adjudication process: (1) "interpretation" (delving into the past to recover semantic or linguistic meaning) and (2) "construction" (giving legal effect to the constitutional provision in question through the application of the original meaning to the fact pattern). The former is empirical (or historical), and the latter is normative.

This Article addresses the problem of application of original meaning in the Construction Zone [hereinafter, CZ] and the implications of originalists' failure to explain satisfactorily how construction is sufficiently originalist. While originalists have devoted considerable time to detailing what interpretation entails, by comparison, the CZ remains opaque. Academic originalists differ dramatically over what is supposed to happen there, even more so when a judge renders a decision. As of now, almost all of them accept the existence of the CZ, even though some originalists try to minimize its significance, a move that has not convinced non-originalists and a fair number of originalists as well. It is imperative then that an originalist judge be able to offer a convincing explanation of how her construction is consistent with the original meaning of the constitutional provision whose meaning is being litigated. Otherwise, originalism may too closely resemble living constitutionalism in the CZ, resulting in the conclusion that whether she is an originalist or not ultimately will not make much of a difference in practice. The inability of originalists to articulate an adequate theory of construction would be a devastating blow to any form of originalism.

An account of the precise relationship between interpretation and construction that originalists envisage still has not been articulated beyond vague and not terribly helpful claims that the original meaning must be consistent with the construction. This failure calls into question whether the process of how originalist judges decide important constitutional cases is originalist enough to deserve the appellation when construction seems to do so much work in a typical originalist argument. After all, the original meaning itself, whatever form it takes, is supposed to determine the outcome. Some originalists believe once they have discovered the more or less determinate meaning of a constitutional provision, the hard work is done, but extralegal considerations still play a role too. As it turns out, the process of construction is much more complicated in hard constitutional cases than too many originalists make it out to be. The judge must characterize the legally relevant facts of the fact pattern, which is not a value-neutral enterprise, and rely upon background knowledge that cannot be derived from the original meaning itself.

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Even when the original meaning of the constitutional language in question is about as clear as it could be after the passage of so much time, an originalist judge still has plenty of work to do in the CZ. In showing why this situation is unavoidable, this Article draws on the philosophical work of Aristotle and Immanuel Kant and their thoughts about the nature of practical wisdom when it comes to deciding what to do. An agent who misses the morally salient features of the situation is likely to misapply the applicable rule, even a relatively determinate one. Along similar lines, an originalist judge who fails to size up the legally relevant features of the fact pattern of the case to be decided will not be able to apply even a determinate rule wisely or even competently.

Originalists have had more than enough time to reconcile various kinds of originalist interpretation with construction, which by definition cannot be originalist. If they cannot show that judicial discretion is constrained by an original something at the second stage of the decision-making process, that is a blow from which originalism may not be able to recover. That said, this Article tries to establish that this failure need not have a negative impact on conservative jurisprudence more generally. Indeed, it may be a blessing in disguise for conservatives and libertarians inasmuch as they can direct their attention elsewhere. Freed from preoccupation with elusive original meaning, they will be able to develop their own theories of what the Constitution ought to mean in more depth, not having to defend their interpretations of constitutional provisions based on questionable historical research done mostly by non-professional historians, and convince the country that on the merits, their arguments are better than rival progressive ones.

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"[T]he current Court has shown that an effective way to deliver living constitutionalism is through originalism."[2]

INTRODUCTION

The issue with originalism that has generated by far the most scholarly interest and controversy over the years concerns how the original meaning can be recovered with enough confidence in a hard constitutional case to justify the outcome.[3] With the advent of the New Originalism in the 1990s, an equally serious problem concerning this theory of constitutional interpretation arose when originalist scholars like Keith Whittington, Lawrence Solum, and Randy Barnett began to concern themselves with the process of application, in which an originalist judge must bridge the gap between the original meaning of the applicable constitutional provision and the facts of the case to render a decision. These new originalists called attention to two analytically distinct stages in the adjudication process: (1) "interpretation" (delving into the past to recover semantic or linguistic meaning) and (2) "construction" (giving legal effect to the constitutional provision in question through the application of the original meaning to the fact pattern).[4] The former is empirical (or historical), and the latter is normative.[5]

This Article addresses the problem of the application of the original meaning in the Construction Zone [hereinafter, CZ] and the implications of originalists' failure to explain satisfactorily how construction is sufficiently originalist. While originalists have devoted considerable time to detailing what interpretation entails, by comparison, the CZ remains opaque.[6] Academic originalists differ dramatically over what is supposed to happen there, even more so when a judge renders a decision.[7] As of now, almost all of them accept the existence of the CZ, even though some originalists try to minimize its significance, a move that has not convinced non-originalists and a fair number of originalists as well.[8] It is imperative then that an originalist judge be able to offer a convincing explanation of how her construction is consistent with the original meaning of the constitutional provision whose meaning is being litigated. Otherwise, originalism may too closely resemble living constitutionalism in the CZ, resulting in the conclusion that whether a judge is an originalist or not ultimately will not make much of a difference in practice. The inability of originalists to articulate an adequate theory of construction would be a devastating blow to any form of originalism.[9]

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[2] Jonathan Gienapp, *Constitutionalism, Then and Now: Response to Stoner, McConnell, Terbeek, and Thomas*, 14 AM. POL. THOUGHT 7 (2025).

[3] At present, there are a plurality of originalist approaches to interpretation: original intent, original public meaning, original expected applications, original methods, new original law originalism (embracing the original meaning of the Constitution and methods of legal reasoning, like common law reasoning, that altered the original meaning), and other hybrid approaches. This Article places the dominant form of originalism, original public meaning originalism, front and center. The definition of such meaning is that constitutional provisions mean what they meant to most people (or to a hypothetical reasonable person) when they were ratified, nothing more and nothing less, regardless of what the drafters or ratifiers intended them to mean. Their meaning is frozen in time until the Constitution is formally amended. As Keith Whittington writes, "Originalism regards the discoverable meaning of the Constitution at the time of its adoption, as authoritative for purposes of constitutional interpretation in the present." Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 599 (2004).

[4] With its origins in contract law, this distinction has been around for 150 years. Gregory Klass, *Interpretation and Construction in Contract Law*, 14 Georgetown Law Faculty Publications and Other Works (2018), https://scholarship.law.georgetown.edu/facpub/1947/. By contrast, this distinction in constitutional adjudication is relatively recent.

[5] Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66–70 (2011). However, some legal scholars deny the analytical distinction. *See, e.g.*, Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103–32 (2021). Schauer argues that interpretation, especially of technical legal terms, requires often requires that kinds of considerations that many originalists believe only come in at the construction stage.

[6] Eric Segall, *The Concession that Dooms Originalism*, 88 GEO. WAS. L. REV. ARGUENDO 38 (2020).

[7] LAWRENCE B. SOLUM, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGES OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12–41 (Grant Huscroft & Bradley W. Miller ed., 2011).

[8] The CZ is the space where the originalist judge applies the original meaning to the particulars of the constitutional case to be decided. The CZ varies in size, ranging from very small to very large, depending on the fact pattern and how determinate the original meaning is. In the former, it may be so small that it is not even noticeable.

[9] Some originalists acknowledge the gravity of the problem, like William Baude, Stephen Sachs, John McGinnis and Michael Rappaport. Oddly, most progressive scholars have neglected the problem of the construction zone as well. For exceptions, *see* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 715 (2011); JACK M. BALKIN, LIVING ORIGINALISM 22 (2011).

An account of the precise relationship between interpretation and construction that originalists envisage still has not been articulated beyond vague and not terribly helpful claims that the original meaning must be consistent with the construction. This failure calls into question whether the process of how originalist judges decide important constitutional cases is originalist enough to deserve the appellation when construction seems to do so much work in a typical originalist argument. After all, the original meaning itself, whatever form it takes, is supposed to determine the outcome. Some originalists believe once they have discovered the more or less determinate meaning of a constitutional provision, the hard work is done, but extralegal considerations still play a role too.[10] As it turns out, the process of construction is much more complicated in hard constitutional cases than many originalists make it out to be. At that stage, the task of the judge is normative: to figure out how the original meaning of, say, the Second Amendment should apply to a ban on AR-15s. The judge must characterize the legally relevant facts of the fact pattern, which is not a value-neutral enterprise, and rely upon background knowledge that cannot be derived from the original meaning itself.[11]

Even when the original meaning of the constitutional language in question is about as clear as it could be after the passage of so much time, an originalist judge still has plenty of work to do in the CZ. In showing why this situation is unavoidable, this Article draws on the philosophical work of Aristotle and Immanuel Kant and their thoughts about the nature of practical wisdom when it comes to deciding what to do. An agent who misses the morally salient features of the situation is likely to misapply the applicable rule, even a relatively determinate one. According to Klaus Günther's theory of practical reasoning, "The danger we are exposed to when leaving the act of selecting the relevant features of a situation to chance consists in an incorrect appraisal of, and an inappropriate reaction to, action situations."[12] Along similar lines, an originalist judge who fails to size up the legally relevant features of the fact pattern of the case to be decided will not be able to apply even a determinate rule wisely or even competently. This Article refers to this capacity as "legal judgment" [hereinafter, Judgment].

Originalists have had more than enough time to reconcile various kinds of originalist interpretation with construction, which by definition cannot be originalist. If they cannot show that judicial discretion is constrained by an original something at the second stage of the decision-making process, that is a blow from which originalism may not be able to recover. That is the bad news. That said, this Article tries to establish that this failure need not have a negative impact on conservative jurisprudence more generally. Indeed, it may be a blessing in disguise for conservatives and libertarians [hereinafter "conservatives"] inasmuch as they can direct their attention elsewhere. Freed from preoccupation with elusive original meaning, they will be able to develop their own theories of what the Constitution ought to mean in more depth, not having to defend their interpretations of constitutional provisions based on questionable historical research done mostly by non-professional historians, and convince the country that on the merits, their arguments are better than rival progressive ones.

This Article is divided into six sections. First, it describes the nature and significance of indeterminacy in hard constitutional cases, highlighting the abstractness of important evaluative constitutional language and the extent to which under-determinate principles are incorporated here and there, in contradistinction to more determinate rules. One task of an originalist approach is to render principles more rule-like so that the judge has less discretion in the application process.[13] The Article then elaborates on H.L.A. Hart's famous "penumbra of uncertainty" to describe what judges can (and do) when the implication(s) of a rule is not evident. This discussion lays the groundwork for analysis of the understandable originalist concern with avoidance of judicial super-legislating that living constitutionalism and other non-originalist

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[10] Schauer, *supra* note 5, at 118.

[11] In the words of Richard Posner, this problem cannot be reduced to the fact that lawmakers did not have "full knowledge of the circumstances in which the rule might be invoked in the future." RICHARD POSNER, *What am I, a Potted Plant? The Case Against Strict Constructionism*, *in* JUDGES ON JUDGING: VIEWS FROM THE BENCH 166 (David M. O'Brien ed., 2004). Rather, fact patterns, even foreseeable ones that were in the mind of the legislature, still must be interpreted, and there are multiple ways to do so.

[12] KLAUS GÜNTHER, THE SENSE OF APPROPRIATENESS: APPLICATION DISCOURSES IN MORALITY AND LAW 3 (1993).

[13] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175–88 (1989).

approaches embody. Second, the Article explains what originalism is (and is not), elaborating upon how original meaning is supposed to constrain judges when they find themselves in the CZ and expounding upon why the respective constitutional constructions of originalist scholars invariably vary. Next, the Article expresses reservations about whether any theory of constitutional construction, even if it were widely accepted, could reduce the size of the CZ to the point where an originalist judge can be said to be following the law (understood as the original meaning). Third, the Article describes the nature of the CZ and provides an overview of different theories about what could take place there, including original methods originalism. The Article also presents what is to be said for originalism if such a constraint was not an all-or-nothing affair but instead a matter of degree. After that, the Article discusses what originalists would have to do to make originalism more plausible, namely elaborating on how constructions could be sufficiently tethered to the original meaning. Fourth, the Article describes the inherent difficulty of the application process in the CZ, even when a constitutional provision is more or less determinate, focusing on the discretion that judges must exercise in characterizing fact patterns, relying on remarks of Aristotle and Immanuel Kant, and using the contemporary example of the constitutionality of race-conscious affirmative action plans. Fifth, the Article offers some thoughts on what could be said for originalism at the end of the day. While many originalist jurists may employ the theory to disguise partisan ends, many originalist scholars are sincerely concerned with keeping unelected judges in their lanes. That is a noble objective but it comes across as terribly naïve when winning is what matters in a hyperpartisan environment in which constitutional law is politics by other means. Last, the Article explores what a post-originalist future could look like by connecting the debate over whether originalist methodologies can restrict judicial discretion to the ongoing debate over the proper scope of judicial power. If a considerable amount of judicial lawmaking inevitably takes place in the CZ, then conservative legal scholars might as well acquiesce to this reality and exert more effort to develop more convincing arguments to advance their own partisan causes the way that progressive legal scholars already do in their non-originalist approaches to constitutional adjudication. That way, judicial decision making in important constitutional cases also would be considerably more transparent.

I. THE PROBLEM OF CONSTITUTIONAL INDETERMINACY

A. Sources of Indeterminacy

The nature of the problem of indeterminacy in constitutional cases usually goes unappreciated by those without legal training, who may be under the impression that judging in the kinds of cases that the United States Supreme Court [hereinafter, the "Court"] is likely to hear is akin to umpiring a baseball game.[14] Rhetorically, given the prominence of judicial review in the American political system, the idea that judges are making rather than following the law strikes many observers as heresy, even in a common law system like our own where judge-made law is supposed to exist. After all, in the division of labor among the three branches of the federal government, judges are supposed to interpret the law, not make it.

However, this Article is about the back end, that is, what happens in the CZ post-interpretation. In the name of charity, the assumption of this Article is that in some hard cases, when the constitutional text is vague or open-textured, the original meaning can be moderately underdeterminate where the "constitutional text rules out some outcomes but does not fully determine which outcome is correct."[15] If the original meaning is usually even more indeterminate than that, on historical grounds, then originalism as a theory of constitutional interpretation

[14] *See Chief Justice Roberts Statement – Nomination Statement*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks/nomination-process/chief-justice-roberts-statement-nomination-process (last visited Dec. 14, 2025).

[15] Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1277 (2019).

is doomed.. The aim of this Article is to show how legal scholars can move the theoretical debate forward, not talk past one another as much as they do, and pay much closer attention to the second stage of the judicial decision-making process: construction. This stage is just as important as the first stage, interpretation, where the judge first determines the original meaning of the constitutional provision implicated in the fact pattern of a given case (and deserves considerably more scholarly attention than it has received so far).

Whereas the proposition that one cannot simply read the constitutional text to answer all constitutional questions would not strike anyone who is informed as particularly controversial, what should be done in such circumstances continues to divide judges, lawyers, legal scholars, and ordinary people. As Frederick Schauer writes, "The text of the Constitution is not, by itself, going to provide answers to hard constitutional questions, and anyone with any sense knows that."[16] The implication of a written Constitution with considerable abstract language is that judges must render it more determinate in one way or another so that they are not free to do what they happen to believe is best. Under the Court's discretionary docket, there are no easy cases where the justices can apply the law in a straightforward manner.[17] For years, legal realists have called attention to how indeterminate the law is in these situations. According to Brian Leiter, "The *combination* of sources of indeterminacy (the open texture of language, and the conflicting canons of interpretation) seems sufficient to move indeterminacy from the margins to the center of cases actually litigated."[18] This indeterminacy has other sources as well, including "legitimate ways of reasoning with legal rules and legally described facts (e.g., -deductive reasoning, reasoning by analogy)."[19] In his view, law is rationally indeterminate when the class of (legal) reasons is insufficient to justify only one outcome in that case.[20] For Leiter, the class of legal reasons that the judge may legitimately rely upon in deciding a case often cannot justify a single result.[21] Legal rules are indeterminate (or too underdeterminate) to determine legal decisions.[22] As a result, lawyers and judges have considerable latitude when they argue for legal conclusions.[23] The other implication is that there may be no legally correct answer at all (or one that is so difficult to ascertain that it might as well not exist for practical purposes).

For instance, the Fourth Amendment prohibits unreasonable searches and seizures.[24] Although a judgment about what is "unreasonable" is not entirely subjective, given how the word is used in the English language in the U.S., some searches presumably would not be unreasonable on the basis of what law enforcement had done and how most people use the adjective. At the same time, in some fact patterns, their reasonableness would turn on the particular features of the case at hand.[25] Thus, in some cases or perhaps many cases, knowledgeable people or even experts are bound to disagree in good faith about what counts as a "unreasonable" search or reasonably disagree about what constitutes a "search" for that matter. After all, the constitutional text does not include definitions nor offer examples that might be covered or might serve as analogues. The Eighth Amendment prohibits "cruel and unusual" punishments.[26] This prohibition would rule out crucifixion, stoning, or Blood Eagles as penal sanctions by the conventional moral standards of 2025. while it leaves open the constitutionality of

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[16] Frederick Schauer, *Easy Cases*, 58 SO. CAL. L. REV. 399, 439 (1985).
[17] *Id.* at 410–11.
[18] BRIAN LEITER, *Legal Realism and Legal Positivism Reconsidered*, *in* NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY, 59, 76 (2007) (emphasis in original).
[19] *Id.* at 9.
[20] *Id.*
[21] *Id.* at 64–65.
[22] *Id.* at 73.
[23] *Id.* at 75–76.
[24] *See* U.S. CONST. amend. IV.
[25] This interpretive problem is not confined to general constitutional language that demands interpretation. For instance, the Constitution stipulates that the President of the United States must be a "natural born citizen," must be at least thirty-five years old, and must have been "fourteen years a resident within the United States." U.S. CONST. art. II, § 1. While these words seem to be unambiguous, the text does not tell us what it means to be a "natural born citizen" or what kind of actions would constitute residency (or whether residency must be uninterrupted). Conceivably, a weird case could arise where it might be unclear whether a presidential candidate had met these requirements.
[26] U.S. CONST. amend VIII.

lethal injection, three strikes laws, or whether a state may identify, on its public website, the residence of a convicted sex offender who is not on parole. The Second Amendment includes the word "arms," but its language does not inform us whether people who have restraining orders against them still must be allowed to purchase firearms,[27] whether bump stocks may be banned after a mass shooting,[28] whether government may regulate ghost guns or impose age restrictions (or background checks) before people may purchase them,[29] whether people may open carry on college campuses, or whether felons or drug users may possess firearms. In the near future, the Court will have to figure out the meaning of the "subject to the jurisdiction thereof" part of the Birthright Citizenship Clause of the Fourteenth Amendment without the help of definitions found in the constitutional text itself.[30] When the most important and divisive questions of political morality take the form of constitutional questions, which they often do in the U.S., and when the Court has the *de facto* final word, the task of determining the meaning of many constitutional provisions takes on a significance that it otherwise would not have.

By itself, mere textualism cannot serve as a full-fledged theory of constitutional adjudication. Rather, it must be supplemented in one way or another, by some kind of originalism or something else. Nor can it answer the most important constitutional questions that deeply divide Americans, such as those involving free speech, religion, guns, abortion, affirmative action, and capital punishment when the underlying disagreement is normative. In Ronald Dworkin's words, a lot of important constitutional language takes the form of "exceedingly abstract moral language."[31] A principled interpreter cannot ignore the text—even though some parts of the Constitution are antiquated—or pretend it means the opposite of what it unequivocally says. That minimal linguistic restriction is not contentious.[32] At most, the text is a starting point that can rule out some or perhaps many implications through its semantic meaning and answer easy cases (which probably will not be litigated in the first place). At the same time, the capacity of textualism to decide real constitutional cases must not be overstated. As Sortirios Barber and James Fleming remark, "The Constitution does not define its terms or give examples of their proper applications."[33] According to Akhil Reed Amar, "Some of what is in the Constitution is implied rather than expressed. Part of the meaning that can be extracted from the document lies between the lines and beneath the words."[34] For Laurence Tribe, "The visible Constitution most of us have come to accept or at least work within certainly doesn't answer very many of the persistent questions about what it means in any particular case and at any particular time."[35] In John Hart Ely's words, "Constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured."[36] Justice Robert Jackson once referred to the Bill of Rights as "majestic generalities."[37]

For these reasons, it is regrettable that too many Americans continue to adhere to the false belief that the constitutional text itself can answer hard constitutional questions according to its plain meaning, as if a more careful reading would solve the problem.[38] A constitution without any standards and principles would lack the flexibility that would be essential to its evolution and therefore, survival over time. In fact, even ostensibly determinate rules may turn

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[27] *See generally* United States v. Rahimi, 602 U.S. 680 (2024).
[28] *See generally* Garland v. Cargill, 602 U.S. 406 (2024).
[29] *See generally* Bondi v. Vanderstok, 604 U.S. 458 (2025).
[30] U.S. CONST. amend XIV.
[31] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (1996) (Dworkin's favorite example is the Equal Protection Clause, which in his view, incorporates a principle of political morality, namely equality. As such, any interpretation of this clause will require a moral judgment on the part of the judge).
[32] W.J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE 39 (2007).
[33] SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 83 (2007).
[34] AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 100 (2012).
[35] LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 7 (2008).
[36] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 13 (1980).
[37] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).
[38] Scott Bomboy, *Surveys: Many Americans Know Little About the Supreme Court*, NAT'L CONST. CTR. (Feb. 17, 2016), https://constitutioncenter.org/blog/surveys-many-americans-know-little-about-the-supreme-court (describing high levels of public ignorance about the U.S. Supreme Court).

out to be not so determinate in certain fact patterns.[39] While some constitutional rules are more determinate, like the eligibility requirements for the presidency, others are considerably less so and thus, subject to reasonable contestation. Even if fewer constitutional provisions were not so abstract, judges still would have to decide borderline cases where there is likely to be intractable, good-faith, reasonable disagreement about what follows from the constitutional language in question. Ultimately, the Constitution may be indeterminate with respect to some, many, or most important constitutional questions in the sense of not yielding a uniquely correct answer.

B. H.L.A. Hart's "Penumbra of Uncertainty"

These concerns about the indeterminacy of legal language more generally are not new, yet they should not be neglected amid political and judicial conflicts about the country's future trajectory. Notwithstanding his critique of legal realism in *The Concept of Law*, H.L.A. Hart acknowledges that words have borderline applications.[40] That is a feature of language, including legal terminology, and no law could be written in such detail as to anticipate all possible future fact patterns that it might cover. As Hart writes, "The open texture of law leaves to courts a law-creating power[.]"[41] In his words, "The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in light of circumstances, between competing interests which vary in weight from case to case."[42] Hart traces the indeterminacy of legal rules to two other sources: (1) "our relative ignorance of fact" in that we cannot foresee all of the possible applications of a rule when we formulate it and (2) "our relative indeterminacy of aim" where unforeseen empirical features can change the aim of the applicable rule.[43] Fact patterns, which are unforeseen and unforeseeable, can become reality.[44]

That said, even in a common law system that relies heavily on precedent, an open-textured text cannot be read without reference to the words, authorial intent, possible legislative purposes, and its context. Some interpretations of a text will have more evidentiary support than others do, and some interpretations can be ruled out, which does not entail that eventually everyone will converge on a single interpretation. According to Hart, general rules may have borderline applications due to the nature of language; words may provide guidance but not answer a concrete question without considerable room for reasonable disagreement.[45] When a decision maker is in Hart's "penumbra of uncertainty," the legal rules have run out; they limit discretion yet do not produce an obviously correct answer.[46] This kind of constraint is very weak. The Constitution is full of principles found in the Free Speech,[47] Religion,[48] Due Process,[49] and Equal Protection Clauses.[50] Indeed, the scope of a determinate constitutional rule still may be reasonably disputed, depending on the fact pattern of the case. For example, nobody knows whether the presidential oath must be taken word-for-word or may be taken more than once.[51] As Frederick Schauer puts it, every application of a rule also calls for interpretation.[52] While some applications will be more straightforward than others, discretion is inescapable.[53]

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[39] FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE 207–28 (1992).
[40] H.L.A. HART, THE CONCEPT OF LAW 124–36 (2d ed. 1994).
[41] *Id.* at 145.
[42] *Id.* at 35.
[43] *Id.* at 125.
[44] Schauer, *supra* note 16, at 421.
[45] HART, *supra* note 40, at 126.
[46] *Id.* 134–36.
[47] U.S. CONST. amend. I.
[48] *Id.*
[49] *See* U.S. CONST. amend V; *see also* U.S. CONST. amend. XIV, § 1.
[50] U.S. CONST. amend XIV, § 1.
[51] This example comes from the presidential inauguration of Barack Obama in 2009. *See* Jessie Kratz, *An Inaugural Blunder*, NAT'L ARCHIVES (July 29, 2014), https://prologue.blogs.archives.gov/2014/07/29/an-inaugural-blunder/; *see also* JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 1–17 (2012).
[52] SCHAUER, *supra* note 39, at 207.
[53] *Id.* at 208–10, 222.

The issue then is how much discretion the judge has in the kind of appellate case she is likely to hear. For a legal realist like Leiter, "[J]udges have this interpretative latitude often enough to inject a considerable degree of indeterminacy into the law."[54]

Schauer distinguishes between the open-texture of language and vagueness.[55] The former refers to the unavoidable possibility that some change in the world or in our knowledge of it might make the most precise terms vague with respect to that unforeseen circumstance; open-texture involves the possibility of future vagueness.[56] As an example, what constituted "arms" in 1791 probably was evident to most people of that era, with few borderline cases, but what might be covered in 2025, due to technological changes, is much less certain. Language never is or can be totally precise.[57] That fact will always be an issue for those who take more textual approaches. Some constitutional clauses are less vague than others are; there is a continuum, ranging from abstract to specific.[58] In a harder constitutional case, where plausible constitutional arguments support opposite conclusions, whatever theory of constitutional interpretation the judge relies upon, it is misleading to describe what she is doing as merely interpreting the Constitution instead of glossing it, that is, giving it meaning that it did not have beforehand.[59] Prior to *Obergefell v. Hodges*, the issue of whether there was a constitutional right to same-sex marriage in the Constitution was unsettled.[60] After the decision, it is implausible to conclude that the Constitution always contained such a right. Such an explanation would make it seem as if it just took a long time for obtuse judges to find it. As an alternative and probably more plausible explanation, the Court used its lawmaking power, establishing a constitutional right to same-sex marriage, when public opinion had changed enough and the political conditions were conducive for a new constitutional meaning (and for better or for worse, depending on one's partisan perspective). Surely, over time, there have been many informal historical changes to the Constitution, even if they are not legitimate, which is why the Equal Protection Clause meant something in *Plessy v. Ferguson* and something else in *Brown v. Board of Education*, fifty-seven years later, when the Court rendered unconstitutional racially segregated public schools. The takeaway is that legal scholars and judges may really disagree not about whether the decision was rooted in a reasonable reading of some part of the constitutional text but rather whether the Court should have informally amended it in that manner when the justices are not elected and have life tenure.

C. Living Constitutionalist Approaches

Normally, non-originalist approaches to constitutional interpretation, including living constitutionalist ones, rely much less on history in trying to answer most constitutional questions. As times have changed, and with more insight into the human condition from natural sciences, social sciences, and the humanities, what made more sense during one moment of American history no longer may make much or any empirical or moral sense in 2025. After all, the world of the founders is a human world but one that differs markedly from ours in many ways.[61] Additionally, there is the danger of presentism, where a judge or scholar imposes contemporary values, norms, and understandings onto the past, thereby allowing her to find what she wants to be there. For Lawrence Lessig, interpretive fidelity requires translation on the part of the interpreter when the context changes over time.[62] In Justice William Brennan's eyes, the Constitution was a document dedicated to protecting human dignity.[63] If that is true, then what

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[54] LEITER, *supra* note 18, at 75.
[55] SCHAUER, *supra* note 39, at 115.
[56] Schauer, *supra* note 16, at 421.
[57] *Id.* at 423.
[58] *Id.* at 430.
[59] POSNER, *supra* note 11, at 165.
[60] 576 U.S. 644, 652 (2015).
[61] *See generally* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1991).
[62] *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1175 (1993).
[63] Justice William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification at Georgetown University (1985), *reprinted in* 19 U.C. DAVIS L. REV. 2–3 (1985).

the protection of human dignity requires in 2025 may differ from what it required in the past, notwithstanding historical understandings. According to living constitutionalists, the constitutional text must be updated either to adjust to changed circumstances or to expand the circle of moral concern, creating a more just country (even though they will have different ideas what this task calls for). This approach to deciding constitutional cases makes constitutional change possible through the exercise of judicial power when political actors may be unable to do so due to the incentive structure that they operate under or because public opinion has not yet caught up to a new moral understanding of what is right. Legal scholars, who advocate such approaches, tend to go to great lengths to deny that the Constitution is all sail and no anchor, refusing to concede that judges are making law when they impart new meaning to the Constitution. In their eyes, the very idea of judicial lawmaking cannot be squared with an overarching commitment to democratic self-rule. Dworkin is notorious for claiming that almost all of the hardest of hard cases have right answers (unless there is a tie), which are supposed to be found in the best arguments of political morality.[64]

Notwithstanding the controversy surrounding his view about the nature of law and his right answer thesis, it seems that to some extent judges probably do make law in hard constitutional cases, in a quasi-legislative, non-trivial way, not only when they have discretion as Hart believed, but when there is no correct legal answer (or at least not one that commands widespread agreement among experts). They may not know a good constitutional argument when they see one. It is certainly possible that the Constitution itself does not answer the most important constitutional questions, even though legal scholars, judges, and many others act if it does. If the constitutional text is not making these choices for her, so to speak, and the same can be said for other widely-recognized sources of law, including history, then the judge is invariably making law, just not in the same manner that an elected representative enacts a law by introducing a bill in a legislative chamber and eventually having it signed by an executive. On top of that, politics cannot be kept out of judicial decision-making and vice versa.[65] Legal scholars who believe that constitutional meaning changes informally may emphasize that this is the way things are, as a matter of constitutional practice, and always will be, regardless of what theory might suggest is possible. Normatively, this state of affairs would matter less in a country, unlike our own, that did not have the institution of strong-style judicial review, where judges have the ultimate responsibility of deciding some of our most important, difficult, and divisive questions of political morality.

D. A Possible Way Forward

In a hard constitutional case, if two or more interpretations are equally plausible but result in different outcomes, then it does not matter much that interpretative rules preclude many interpretations at the outset because they have not ruled out enough of them. A legally correct answer half of the time would not inspire much confidence. When originalist judges must apply abstract constitutional language to real fact patterns, in Hart's "penumbra of uncertainty," they must make choices that are not dictated by original meaning itself.[66] That situation may not be the end of the world. The problem is not indeterminacy per se but how widespread it is (and what can be done about it). In contrast to Legal Realists, for Hart, the indeterminacy of legal language appears on the margins.[67] Different legal scholars exhibit different normative attitudes to the existence of constitutional indeterminacy. It is telling that few of them are indifferent to who has the authority to decide and by implication, the partisan composition of the Court, whereas few baseball fans would care if the home plate umpire were a registered Democrat or Republican.

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[64] DWORKIN, *supra* note 31, at 1–38.
[65] STEPHEN M. GRIFFIN, *Constitutionalism in the United States: From Theory to Politics*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 37, 55–61 (Sanford Levinson ed., 1995).
[66] HART, *supra* note 40, at 134.
[67] LEITER, *supra* note 18, at 74.

For almost all progressive, conservative, and libertarian non-originalist scholars, original meaning, whatever form it takes, cannot be recovered, either because there is no such shared meaning in the first place (and only a plurality of meanings) or the historical evidence is too weak to establish sufficient epistemic confidence in the answer that the originalist judge reaches. Such a position has normative implications when no judge should be deciding cases via such a dubious method unless it is superior to the alternatives and the country wants to retain judicial review. If originalists can rebut or take the sting out of these objections, those who advocate for progressive moral readings, such as Dworkin and James Fleming, will be put on the defensive insofar as they will have to defend most of substantive due process/judicial activism/judicial lawmaking in a democracy like ours where federal judges have little accountability.[68]

Under these circumstances, any non-originalist is going to be forced into the awkward position of denying that their theory of constitutional adjudication permits considerable judicial lawmaking and subsequently attempting to explain away how anti-democratic judicial review appears to be. Dworkin endeavored to show how many legal scholars misunderstand the majoritarian premise, where legislative majorities are supposed to rule.[69] Whereas there are many justifications of judicial review incorporating sophisticated philosophical argumentation, any justification that downplays its anti-democratic aspects is asking for trouble when such elitism, in the form of judicial supremacy, is at odds with the fundamental idea of government of, by, and for the people.

II. THE PROMISE OF ORIGINALISM

A. Overview

As a theory of constitutional interpretation, originalism has been around a long time in this country, but it became much more prominent in the early 1980s. As Josh Blackman writes, "By the end of President Reagan's administration, the originalist revolution was underway."[70] This "revolution" was a response to the Warren Court decisions, with originalists' insistence on neutrality in constitutional adjudication and deference to legislatures.[71] By contrast, these days, with a conservative majority on the Court, less principled, outcome-driven originalists have less reason to advocate any longer for judicial restraint when so much more can be accomplished politically by eschewing such restraint. Nevertheless, to their credit, originalists in the legal academy continue to endeavor to defend originalism, and its permutations, from attacks that do not only come from progressive legal scholars. As a result, invariably, a lot of what they have to say involves historical evidence and the quality of the historical research that they draw upon to defend their constitutional understandings.

At the same time, a substantial body of literature endeavors to show that the historical meaning of the constitutional provisions that are most frequently litigated cannot be recovered with confidence, let alone applied to fact patterns that arise in contemporary circumstances that are far removed from the Eighteenth and Nineteenth centuries. Recently, legal historian Jonathan Gienapp's extremely thoughtful, provocative, and well-researched book demonstrates that originalists fundamentally misunderstand how the founding generation understood

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[68] *See* DWORKIN , *supra* note 31, at 7; *see also* JAMES E. FLEMING, CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS 1–15 (2022) (inspired by Dworkin, Fleming puts forth a moral reading approach of his own predicated not only on the inevitability of moral reading but also their desirability if done in the right way. For him, people's moral readings can be wrong and the judge's responsibility is to reach the morally correct decision in a constitutional case).

[69] DWORKIN, *supra* note 31, at 1–7 (for Dworkin, democracy cannot be reduced to majority rule by mere legislative majorities. Instead, genuine democracy requires that all people be treated with equal concern and respect before majoritarian voting procedures on some issues would be appropriate).

[70] Josh Blackman, *As The Roberts Court Turns 20, The Originalist Revolution Turns 40*, REASON: VOLOKH CONSPIRACY (Oct. 8, 2025, at 08:31 ET), https://reason.com/volokh/2025/10/08/as-the-roberts-court-turns-20-the-originalist-revolution-turns-40/?nab=0.

[71] JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 7 (2005); *see also* Whittington, *supra* note 3, at 600–02.

constitutionalism.[72] Originalists who do not want to abandon or modify their respective positions will have to respond to his critique without minimizing its relevance.

As noted, the purposes of this Article are not to address how fixed the original meaning of various constitutional provisions is, whether it can be fixed in the first place, how an historical investigation could (or should) be conducted to recover its semantic meaning at the time of its adoption, what would count as adequate evidentiary support, who has the burden of proof, and what would qualify as competent historical research (or what Richard Posner derides as "judges' lame efforts to play historian").[73] Although there is a voluminous literature on the rights and wrongs of the historical research that originalists rely upon, as Gienapp puts it, "History is the lifeblood of originalism."[74] As he adds:

> These days, American constitutional law looks obsessively to the past. Interpreters of the U.S. Constitution have always appealed to history to understand what it means, but never to this extent or with these consequences. As the most recent Supreme Court term underscored, in interpreting the U.S. Constitution never before has so much weight been placed on the historical past.[75]

What is noticeable is that originalist scholars frequently rely much less on professional historians' research and much more on other originalist historians' work that supports their conclusions in important constitutional cases. This practice is hardly surprising, particularly when law professors are trained to be advocates, so much is at stake politically, and they often do not separate law and politics as much as scholars in other disciplines, like those in (empirical) political science do, who study judicial behavior. If the original meaning of a particular constitutional provision is indeterminate or cannot be known to be sufficiently determinate, then the CZ will be too large to prevent the originalist judge from doing what she would like to do when she finds herself in that space.

As a theory of judicial decision making in important constitutional cases, originalism has provoked many well-known concerns that have not disappeared. A written text with so much abstract and evaluative language calls for a comprehensive theory of interpretation, generating controversy over what is the best way to supplement its vague meanings in one way or another. The focus of most schools of originalism is on the constitutional text. All of them try to provide a way forward in the face of uncertainty. At first cut, reliance on history appears to be possible without moral judgments on the part of the judge about whether a given constitutional provision is right or wrong, just or unjust, or good or bad. The practice of any historical approach is designed to be value-neutral so that a judge can discern what the law is. All originalists insist that original meaning, whatever form they endorse, is supposed to be historically determined.[76] It is foreseeable then that their non-originalist critics would make so much of the alleged poor quality of much originalist scholarship and its partisan dimensions.[77] As far as

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[72] JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2025); *see also* STANFORD LAW SCHOOL, *History and Originalism: A Troubled Relationship*, YOUTUBE (Feb. 7, 2025), https://www.youtube.com/watch?v=_Bbgz89JuM8.

[73] RICHARD A. POSNER, REFLECTIONS ON JUDGING 353 (2013).

[74] Gienapp, *supra* note 1, at 2.

[75] Jonathan Gienapp, *Why is the Supreme Court Obsessed with Originalism?* YALE UNIV. PRESS (Oct. 21, 2024), https://yalebooks.yale.edu/2024/10/21/why-is-the-supreme-court-obsessed-with-originalism/.

[76] *See* Whittington, *supra* note 3, at 607–10.

[77] As examples: (1) They call into question the extent to which original meaning can be recovered (or exists at all) when the historical evidence is insufficient or disputed. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND THE IDEAS IN THE MAKING OF THE CONSTITUTION (1997). (2) They underscore how originalists misuse such evidence and misunderstand historians' methods. *See* Stephen M. Griffin, *History vs. Originalism: The Bill Comes Due* 39 CONST. COMM. 111–39 (2024). (3) They insist that judges and their clerks are not nearly skilled enough as professional historians to recover past meaning. This is known as the "law office history" objection. (4) They maintain that originalists badly misunderstand the past. *See* Gienapp, *supra* note 1. (5) They claim that original meaning is insufficiently determinate even it could be recovered. *See generally* Richard H. Fallon Jr., *The Chimerical Concept of Original Public Meaning* 107 VA. L. REV. 1421 (2021). (6) They contend that we should not be governed by the "dead hand of the past." Michael J. Klarman, *Antifidelity*, 70 SO. CAL. L. REV. 381, 414 (1997). (7) They allege that originalists wrongly try to make all constitutional provisions more rule-like, when principles are embedded in the Constitution, as well. *See* RONALD DWORKIN, *Comment*, *in* A MATTER OF INTERPRETATION 115–27 (Antonin Scalia ed., 1997). What these critiques have in common is that in one way or another, they use history to establish that originalists cannot do what they set out to do: to ascertain

they are concerned, originalism underdelivers in terms of its promise to constrain judicial behavior as well.[78]

However, it is not evident that any non-originalist approach does better in this regard, that is, in being value-neutral, strictly separating what the law is from what it ought to be. In fact, it seems to be obvious that non-originalist legal scholars have other priorities. In the name of charity, this section will assume good faith on the part of originalist scholars. That way, originalism can be evaluated in its strongest form so that American constitutional theory does not degenerate into a Hobbesian state of nature.[79] As long as judicial review exists in this country, there will always be a lingering worry that judges are making law when it comes to some of the most important issues of public policy, unless they can discover, with adequate justification, the objective meaning of the Constitution and its implications in a variety of cases. If originalism can do a decent job of preventing judges from making the Constitution mean whatever they want it to mean for whichever non-legal reasons happen to strike them as compelling more often than not, then judicial review would be less controversial and might even be defensible, all things considered, inasmuch as it has fewer weaknesses than its rivals. It is not inconceivable that an originalist judge could find the correct answer (if one exists) to a hard constitutional question. Originalism is theoretically ambitious, yet that is part of its appeal; it may be able to address longstanding worries about political influences on judges, acknowledging that some or perhaps many decisions that will impact American society would be better left to the political branches. When originalism functions as a kind of judicial restraint, originalists can point out, as Justice Antonin Scalia used to, that they are not taking sides in culture wars.[80]

All originalist approaches share what Lawrence Solum refers to as the fixation and constraint theses: (1) the original meaning of the constitutional text was fixed when the original Constitution was framed and ratified in 1788 (and that includes subsequent constitutional amendments) and thus, does not change over time; and (2) this meaning should bind judges when they interpret and apply the Constitution.[81] Methodologically, originalists search for evidence of common linguistic practice at the time of the enactment of the constitutional language implicated in the case. Normatively, this theory of constitutional interpretation holds out the possibility that properly motivated judges might be able to interpret the Constitution and discern its implications in real cases well enough, even in the hardest of hard ones, thereby figuring out what it really means, without super-legislating. That may be impossible, yet that cannot be known in advance.

B. Constraint

There are multiple rationales for originalism, chief among them, to prevent judges from imposing their political preferences or values on the rest of us in their decisions.[82] Unelected judges with life tenure are not supposed to be free to shape the Constitution to their liking to achieve their partisan ends.[83] Gienapp observes that originalism is supposed to limit informal

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the original meaning of the constitutional provision in question. People in the 18th century were not fixated on the text (other things, like consequences, also mattered). Early American lawyers debated whether the Constitution should be interpreted according to the methodologies applicable to private (stricter, more text-oriented) and public legislation (interpreted more broadly and pragmatically to effectuate their purposes). Saw what a constitution is differently. *See generally* Saikrishna Prakash, *The Inconvenience Doctrine*, 78 STAN. L. REV. 1 (forthcoming 2026); *see also* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J.. 2 (2020). This might be called "law professor history." On concerns about partisanship, *see* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022). The standard critique of originalism underscores its partisan results or outcomes that would be unfathomable in 2025. *See* Michael McConnell, *Against Bad Originalism*," Stanford L. Sch. Pub. L. Working Paper (Mar. 12, 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5437020.

[78] JAMES B. STAAB, THE LIMITS OF CONSTRAINT: THE ORIGINALIST JURISPRUDENCE OF HUGO BLACK, ANTONIN SCALIA, AND CLARENCE THOMAS 291 (2022).

[79] *See generally* THOMAS HOBBES, LEVIATHAN (1651).

[80] Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting). However, that may not always be the case. As an example, if a justice has the power of judicial review but upholds the law in question, because for political reasons she supports it, then that would be taking sides in a political debate.

[81] SOLUM, *supra* note 7, at 12; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013).

[82] Colby, *supra* note 9, at 714.

[83] GORDON S. WOOD, THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY 12 (2008).

constitutional change through the judiciary.[84] Past constitutional understandings may be able to circumscribe constitutional interpretation to some degree, if done competently and with the appropriate motivation, when judges attempt to recover the original meaning of the constitutional language in question. In the Old Originalism, originalists underscored the imperative of curbing judicial discretion.[85] Their concern was that justices who abandon the original meaning of the text "invariably end up substituting their own political philosophies for those of the framers."[86] As Solum remarks, constrained by original meaning, "the Justices would no longer be free to impose their own views about controversial issues in the guise of constitutional interpretation."[87] Against the backdrop of the perceived excesses of the Warren Court, it is hardly surprising that conservatives looked for (and developed) a theory of constitutional interpretation that would invalidate some of what they perceived to be its most infamous decisions stemming from the abuse of judicial power.

The focus of this Article is what principled originalists can do under the best of circumstances, though, when they are committed to following original meaning wherever it happens to lead. One could begin to address the objection to the likelihood of judicial lawmaking in constitutional practice—whether coming from the Left or the Right of the American political spectrum—that it need not occur so often (or at all) provided that the justices are acting from the right motives, without a political agenda. From this standpoint, textualism, coupled with originalism, constitutes the only appropriate alternative to allowing judges to supplement the text with their own moral convictions of political morality or other considerations. As an ideal, originalism is attractive and perhaps should be so even to progressive non-originalists in a country that cares about upholding the rule of law. From an impartial standpoint, they too must acknowledge that unchecked judicial power amid partisan divisions may produce bad consequences or constitutionalize injustice, apart from whether its exercise can be justified in a world where many other democratic countries either have weak-style judicial review or leave their most important political choices to the elected political branches.

Equally important, the lack of a sufficiently detailed account of the process of construction puts into doubt the claim that the originalist judge only has limited discretion in the CZ, as well. According to Solum, if the original meaning cannot significantly reduce its size, then ultimately originalism and living constitutionalism may resemble each other too closely.[88] During the construction stage of the application, the original meaning must constrain the originalist judge so that she cannot exercise the kind of discretion that a living constitutionalist judge could exercise when she occupies the same space.[89] The objective must be to reduce the size of the CZ so that it is small enough to prevent unelected federal judges with life tenure from indulging in judicial lawmaking and furthering their partisan aims under the guise of legal reasoning, as if constitutional law were politics by other means. If the CZ turns out to be too large, even when originalist judges are sincerely committed to trying to discover the original meaning and have a moderately underdeterminate constitutional rule derived from the original meaning to follow, they still may be able to draw upon partisan and other non-legal reasons in the CZ to render a decision, thereby defeating the overarching purpose of an originalist approach to constitutional adjudication: reduce judicial discretion in the name of democratic self-rule.

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[84] Gienapp, *supra* note 1, at 5.
[85] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 154–55 (1990).
[86] STEVEN G. CALABRESI, *A Critical Introduction to the Originalism Debate*, *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1, 3 (2007).
[87] Lawrence B. Solum, *Construction and Constraint: Discussion of Living Originalism*, 7 JERUSALEM REV. LEGAL STUD. 17, 18 (2013).
[88] *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. L. REV. 1277, 1280 (2019); *see also* LAWRENCE B. SOLUM, *Living with Originalism: A Response by Lawrence B. Solum*, *in* LAWRENCE B. SOLUM & ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM: 151 (2011).
[89] Although they may have different rationales –to the rule of law, fidelity to the Constitution, separation of powers, predictability, stability, legitimacy, and judicial duty—almost all originalists believe that original public meaning should constrain constitutional construction. LAWRENCE B. SOLUM, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011).

One of the most promising ways to defend any version of originalism is to elaborate on how the aforementioned fixation (the meaning is fixed at the time of its adoption) and constraint (the fixed meaning limits the judge's discretion) theses lower the risk of judicial lawmaking, thereby leaving many constitutional issues to the political process.[90] After all, it seems counterintuitive that a country like ours, which fancies itself as democratic, would almost always let the judiciary have the final word when it comes to the most contentious cases, due to the extraordinarily high improbability of formally amending the Constitution.[91] The challenge would be to constrain unelected judges so that they follow the law, instead of deviating from it, when so much is at stake, politically. The determinacy of the original meaning of any constitutional provision or clause is to a large extent an empirical question (though one which requires theoretical criteria to assess); it cannot be resolved at the level of theory.[92] In Solum's view, there are different kinds of constraint, including minimalist and maximalist versions.[93] As Will Baude astutely points out, what legal scholars mean by "constraint" in debates about originalism calls for further specification:

> There is a question of how *forceful* of a constraint a methodology imposes. Does it impose a single right answer to the legal question at hand? Does it narrow down the range of right answers, but not necessarily to one? Does it provide a process or set of considerations for giving the right answer, even if different people applying the method might legitimately come to different conclusions? And there is the question of the *range* of cases in which the constraint operates. In particular, does it apply in all constitutional cases, or only a subset of them? These different axes suggest that constraint is not a single, scalar variable. One methodology might produce unique right answers in a range of cases and no guidance in another range of cases. Is it less constraining than a methodology that produces a limited range of right answers, but in every single case? We could stipulate either type of constraint to be greater than the other, but ultimately these points suggest that we must define constraint more precisely before joining issue on how much a methodology does it, or whether it is a good thing.[94]

These are exactly the kinds of questions that originalists must ask themselves before trying to convince non-originalists that originalism, at its best, can avoid the contamination of constitutional reasoning that comes with non-historical interpretive approaches. This Article defines "constraint" as internal in the sense that an ideal originalist judge tries to find the correct legal answer by recovering past linguistic practices, as opposed to deciding what the law ought to be. The likelihood is that in each constitutional case, due to its unique fact pattern, the degree of constraint will vary, from quite a bit to not much (or none whatsoever) in an easy one.

Whereas a Dworkinian (originalist) Hercules could discern the original meaning of any constitutional provision and find the right answer, a real originalist judge, whatever version of originalism she adheres to, would attempt to narrow the range of plausible original meanings so that she can select from the remaining options, thereby increasing the odds that she will be right constitutionally. In doing so, she probably will come closer to getting the law right than any non-originalist judge who is not similarly constrained (assuming that there is a constitutionally correct answer in the first place). In this way, the discretion of originalist judges is constrained to figure out where original meaning leads, regardless of the outcome that they prefer on partisan or other extralegal grounds. Such an approach may have unhappy endings

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[90] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxxviii (2012).
[91] JILL LEPORE, WE THE PEOPLE: A HISTORY OF THE U.S. CONSTITUTION 1-31 (2025).
[92] I thank Andrew Coan for this insight. Email from Andrew Coan, Professor of L., James E. Rogers Coll. of L. (Apr. 21, 2025) (on file with author).
[93] Solum, *supra* note 87, at 22.
[94] William Baude, *Originalism as a Constraint on Judges*, U. CHI. L. REV. 2218–19 (2018) (emphasis in original).

(on partisan grounds) at times, yet a principled decision maker should care more about the method than the outcome.

That real originalist judges, like other judges, may care more about results is not very interesting inasmuch as it is almost self-evidently true. Alternatively, for non-originalist progressives, the coup de grace would be to establish that it is highly unlikely—but not necessarily impossible—to show that originalists cannot do what they set out to do most of the time. Empirically, their critics may have a point: the original meaning itself may be so underdetermined (Solum's preferred term) or indeterminate (impossible to recover or no single definitive meaning exists, the term which Leiter favors) that for practical purposes, multiple possible original meanings still exist even when some of them have been ruled out. The remaining concern is that none of them can be singled out as being correct with the kind of confidence that would satisfy skeptics. For originalists, if the recovery of original meaning is possible through careful historical investigation, then there may be an "is," even in some or perhaps many hard cases. In other words, perhaps the Second Amendment really does prevent government from banning assault rifles. When legal reasoning is not deductive and the standard for what counts as a good constitutional argument is not too high, progressive critics may have to concede that the probability that an originalist judge, acting in good faith, can discern what the law is, as a matter of interpretation, or come close to being able to do so, is higher than they imagine. As Whittington remarks, "The point is to understand as well as possible what was said."[95]

Unfortunately, it is not apparent what "as well as possible" means here, how much evidence would suffice, what counts as evidence, and how the evidence ought to be weighed (apart from whether other considerations ought to be brought to bear before a final decision is made, like the importance of following well-established precedents). If the original meaning is more evident in some situations than in others, progressive legal scholars could be less skeptical that their originalist counterparts are acting in good faith, rather than disguising their ulterior motives.. This would make the project more palatable to those who naively believe that the Constitution itself compels the outcomes that originalist judges reach in important constitutional cases.

C. Skepticism About Originalism

As noted, one well-known defense of original meaning involves the imperative of restricting judicial behavior in a democracy.[96] Otherwise, judges would have a significant impact on many important matters of political morality, like abortion, and in effect the final word on some of them, like affirmative action. If originalist judges could follow the law, even in some or most hard cases, they would not be able to do whatever they wanted to do, reducing the risk of judicial lawmaking. That is not to say that they could not be wrong about the original meaning or its implications in a constitutional case, yet the standard of proof need not be beyond a reasonable doubt. Some contemporary originalists care much more about judicial constraint than others do.[97] In the New Originalism, the aim of curbing judicial discretion is no longer the priority that it used to be.[98] This form of originalism, which came into being in the 1990s, was "more concerned with providing the basis for positive constitutional doctrine than the basis for subverting doctrine."[99] The result was less emphasis on the importance of judicial restraint and less deference to legislative majorities.[100] Indeed, some New Originalists part company from the Old Originalists by disavowing any serious claim to judicial constraint.[101] That may be the case because for many originalists, constitutional interpretation is no longer about undoing (in their view) the damage of that the Warren and early Burger Courts inflicted on the country. For

[95] Whittington, *supra* note 3, at 607–10.
[96] John W. Compton, *What is Originalism Good For?* 50 TULSA L. REV. 427, 434 (2015).
[97] Baude, *supra* note 94, at 2214.
[98] Whittington, *supra* note 81, at 392.
[99] Whittington, *supra* note 3, at 608.
[100] *Id.* at 607–10.
[101] Colby, *supra* note 9, at 715.

the foreseeable future, originalist judges now can use it more offensively to entrench new constitutional understandings.

This new state of affairs is unfortunate. All originalists should continue to care quite a bit about the imperative of curbing judicial discretion unless they want to abandon the principled approach that academic originalists have spent so much time developing and defending. It will never be easy for progressive scholars to answer the charge of super-legislating when legal theorists like Dworkin talk about constraint in terms of good legal or constitutional argumentation, as if legal experts always know a good constitutional argument when they see it.[102] In the context of American-style judicial review, such constraint on the part of judges coheres with the importance of democratic self-rule.[103] Originalism is the last best hope for a society that wants to retain the institution of judicial review but does not want a bevy of Platonic guardians ruling the rest of us too often. For years, conservative critics of the Warren Court not only called attention to how much they disagreed with its results, but also never tired of reminding anyone who would listen how such results were lawless. That is why, even today, some conservative political figures and pundits chant the mantra of judicial restraint. Any conception of democracy worthy of our consideration must leave plenty of room for legislative majorities to rule. That is the best normative defense of originalism; it always has been, and it always will be. In American normative constitutional theory, with the questions of the justification and scope of judicial review in the background, it is an awful mistake to depart from this rationale. Decades of constitutional theory literature reveal how much liberals and later, progressives, want to deflect the charges that they are ultimately advocates of elitist judicial lawmaking (which usually they are, despite their denials).

Nevertheless, contemporary originalists are more ambivalent about constraint than their predecessors. The reason why this change in emphasis matters is that the "new" part of the New Originalism remains in dispute, putting into doubt how originalist it really is upon closer inspection. "The new incarnation of originalism," Thomas Colby writes, has "left behind more than just the theoretical flaws of its predecessor. It has also effectively sacrificed the Old Originalism's promise of judicial constraint. The very changes that make the New Originalism theoretically defensible also strip it of any pretense of a power to constrain judges to a meaningful degree."[104] When the expectation is that originalism will constrain judges not only nontrivially but much more often than not, then that standard may be impossible to meet. The fundamental problem is one of historical recovery: how much confidence can one have that the originalist judge or academic, whatever form of originalism they favor, has discerned the original meaning and as such, knows what the Second Amendment really means?

If originalism does not limit judicial discretion or does not do a better job of it than non-originalist alternatives, then originalists could simply engage in conservative perfectionism to make the Constitution reflect contemporary conservative American values like religion, family, law and order, colorblindness, a smaller federal government, bans on abortion, little or no immigration, a strong national defense, lower taxes, free enterprise, and fiscal responsibility. They could openly care more about the results than the process and unapologetically use the judiciary to advance their partisan ends (which is what just about everyone else does anyway in practice). If there is not enough law (original meaning) to follow in hard constitutional cases, in other words, the conversation must turn to judicial lawmaking and how it should be done. For some of them who are principled and understandably want a less politicized Court, a more realistic standard, where originalist judges do not have nearly as much discretion as their non-originalist counterparts, will remain attractive; they are committed to trying to see where the

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[102] For Dworkin, as opposed to rules, principles play an essential role in his theory of judging in constitutional cases and in legal cases more generally. When he refers to fit (what he calls "integrity") and justification, what he has in mind is that some legal interpretations will not cohere with U.S. Supreme Court doctrine. These considerations will restrict the range of plausible understandings of constitutional provisions. As such, the only theoretical constraint is good (or perhaps not bad) argument. A bad argument will fail to fit and justify the outcome of a constitutional case. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 90-98 (1986); Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 165–69 (1982); DWORKIN, *supra* note 31 at 37.

[103] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346–1406 (2006).

[104] Colby, *supra* note 9, at 714–15.

law takes them, notwithstanding the methodological challenges of doing so, to respect the principles of democratic self-rule and the rule of law.[105] As noted, constraint is not absolute.[106]

Non-originalists can acknowledge that it is possible that comparatively, originalism may be superior to other theories of constitutional adjudication when it comes to preventing judges from invalidating laws that they should not invalidate (or upholding laws that they should strike down). The perfect need not be the enemy of the good. No legal theorist needs to choose between the two extremes—either no judicial discretion or complete freedom to do what one pleases—but rather to see what follows from the possibility that originalist judges are more comparatively constrained, as a generalization, than their non-originalist counterparts.

Alternatively, skeptics may be right: there is no original public meaning in most or all hard constitutional cases (or it cannot be recovered after the passage of so much time). The implication is that the range of public meanings, at a particular moment in American history, may be too broad to limit judicial discretion and produce an unequivocally correct answer in most of them or narrow the range of plausible originalist arguments. Even if there were a correct answer, considerable reasonable disagreement about what it is would persist, even controlling for partisan influences. The number of different kinds of original arguments that could be made is not small, even with respect to only original public meaning originalism (which is only one kind of originalism, after all). If Americans were polled now about the meaning of highly abstract and essentially contested political concepts like freedom or equality, they would not agree very much about their implications. A while ago, Justice Scalia pointed out the challenge of applying originalism correctly.[107] Historically, concerning the ratification of the original Constitution in 1788, Antifederalists did not agree with their Federalist proponents about the implications of many constitutional provisions.[108] Alexander Hamilton did not see eye-to-eye with Thomas Jefferson about the meaning of the Constitution and what America should look like in the future. In 1868, Radical Republicans, like Charles Sumner and Thaddeus Stevens, had a different understanding of the scope of the Equal Protection Clause than more conservative and moderate Republicans and some Democrats who also supported its passage.[109]

Originalist scholar and former judge Michael McConnell concludes that the original understanding may not yield a single, correct interpretation, but rather, a "legitimate range of interpretations."[110] In the name of intellectual honesty, all originalists must make this concession. Not only is constitutional language vague and open-textured; its meaning is even more likely to be disputed due to the political consequences of judicial decisions. The word "religion" has borderline applications; it may cover non-theistic religions like some forms of Buddhism, Scientology, or Satanism. For the time being, most Americans are not very interested in whether religion could be defined to be more inclusive, extending to atheism, for example, although the definition bears on Free Exercise and Establishment Clause claims, obviously. By contrast, they care much more about constitutional words and phrases implicated in contemporary constitutional controversies. For instance, a word like "speech" in the First Amendment is bound to engage people's political sensibilities in 2025, and debate rages about what kinds of communication it covers, including artistic expression, symbolic speech, and hate speech.

A lot has been written by non-originalist scholars who deny that a single, correct original meaning that can be ascertained with sufficient epistemic confidence exists. They may be right at the end of the day, but this Article aspires to see what follows from the possibility that

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[105] That is not to say that the dead hand of the past objection is irrelevant here. I am not saying, for example, that invalidating a statute in 2025, even on an agreed-upon interpretation and application of what words written 240+ years ago mean is consistent with a commitment to democracy, especially when our Constitution is the most difficult to amend in the entire world. A commitment to democracy might mean ignoring original understanding constraints and just allowing today's majorities to do as they please. But it is to say that if originalism could deliver on its promise of limiting judicial discretion, then it would not be so easy for an originalist judge, acting in good faith, to reach the constitutional conclusions she prefers on non-legal grounds. I thank Michael Klarman for helping me clarify this point.

[106] SOLUM, *supra* note 89, at 35.

[107] Antonin Scalia, *Originalism: The Lesser Evil*, 57 UNIV. CIN. L. REV. 849, 856 (1989).

[108] Andrew Coan & David S. Schwartz, *Interpreting Ratification*, 1 J. AM. CONST. HIST. 449–538 (2023).

[109] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 55–92 (2019).

[110] Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1093 n.729 (1995).

in some hard constitutional cases, there is a more or less determinate original meaning. In response, originalist scholars maintain that they are not reading tea leaves. Professional historians know enough about certain periods of American history to enable judges to make informed judgments about the original meaning of this or that part of the Constitution. In *Heller*, the majority and dissenting opinions dueled over the original public meaning of the Second Amendment.[111] More recently in *Bruen*, the majority rooted its opinion in the individual right to self-defense found in previous originalist Second Amendment decisions.[112] While professional historians frequently disagree on details, their judgments may converge enough so that the likely original meaning is not indeterminate, but instead is underdetermined to some extent, meaning that the judge must choose among a range of plausible original public meanings, as McConnell believes. In this way, most of them can be ruled out but not all of them. That may be enough to conclude that the original meaning is not intractably indeterminate.

III. THE CONSTRUCTION ZONE

A. The Nature of Constitutional Construction

For most originalists, interpretation and construction are separate stages of the adjudication process, raising difficult questions about their relationship. According to Barnett, originalism is a theory of interpretation, not construction.[113] Alternatively, some legal scholars do not draw such a sharp distinction between them. In Jack Balkin's view, what passes as interpretation really is construction.[114] Several originalists have denied the need for such construction or have tried to minimize it.[115] According to Ilan Wurman, the difference between interpretation and construction is negligible and it does not matter what the CZ is called.[116] That said, most originalists have conceded its existence to their non-originalist critics by recognizing that constitutional constructions are indispensable in judicial decision making in constitutional cases.[117] The application of any constitutional provision to a fact pattern in a constitutional case cannot be reduced to discerning its meaning, original or otherwise.[118] Before the advent of the term "construction" in constitutional theory, Gary Lawson argued that "interpreting the Constitution and applying the Constitution are two different enterprises."[119] For Whittington, Solum, and Barnett, the original meaning itself cannot dictate the outcome; it must be supplemented, and that is where construction comes in (which does not mean that only judges may do it).[120] As an example, referring to restrictions on sound trucks on residential streets and whether they infringe on the right to free speech, Barnett states, "The original meaning of the text does not definitively answer these and many other similar and important questions."[121]

The CZ is the place where originalist judges must apply the constitutional provision at issue to a fact pattern that will never be exactly the same as any past fact pattern (but may be close enough) to reason by analogy.[122] The problem of the CZ is fundamental because even if an originalist judge could recover the original meaning in a constitutional case with certainty, she still must give it legal effect. As Balkin states, "It follows that the original public meaning,

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[111] District of Columbia v. Heller, 554 U.S. 570, 626 (2008).
[112] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 34–71 (2022).
[113] Barnett, *supra* note 5, at 65–67.
[114] BALKIN, *supra* note 9, at 5.
[115] Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a 'Controlled Activism' Alternative*, 64 FLA. L. REV. 1485, 1509 (2012); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 139–53 (2013).
[116] ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 86–87 (2017).
[117] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453–537 (2013).
[118] Not all originalists accept the inevitability of construction. *See* Whittington, *supra* note 81, at 404.
[119] Gary Lawson, *On Reading Recipes—and Constitutions*, 85 GEO. L.J. 1823, 1835 (1997).
[120] Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95–118 (2010); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Barnett, *supra* note 5, at 69.
[121] Barnett, *supra* note 5, at 69.
[122] Solum, *supra* note 117, at 507.

by itself, will significantly underdetermine how to apply the Constitution. Lawyers and judges must also build out doctrines and institutions on top of the basic framework of the Constitution's original public meaning."[123] On the current Court, Justices Clarence Thomas, Amy Coney Barrett, Brett Kavanaugh, and Neil Gorsuch identify as originalists.[124] As such, academic interest in originalism, as a theory of interpretation, coupled with construction, should be more than a matter of theoretical interest to constitutional theorists. With the notable exception of Balkin, originalists tend to be conservatives or libertarians, and this approach to constitutional adjudication produces conservative outcomes for the most part.[125] This Article will not concern itself with results nor impugn the motives of legal scholars who are committed to an originalist methodology. After all, no theory of constitutional adjudication can save a judge who acts in bad faith, lacks self-awareness, or only cares about outcomes. Instead, the assumption in these pages is that they are principled originalists who sincerely want judges to follow the law in trying to discover objective legal meaning, preventing them from legislating from the bench.[126] At their best, it may be possible that originalist judges can operate under self-imposed constraints to some extent in the CZ, allowing original meaning, when it is determinate enough, to shrink its size so that the remaining judicial discretion is tolerable. The most prominent feature of the New Originalism is the centrality of construction in constitutional adjudication.[127]

In the New Originalism, originalists severed the process of discerning original meaning from that of application. As Colby writes, "The recognition that the Constitution often enacts broad principles, rather than narrow rules of decision, has fostered another significant development in originalist thought: the emergence of a distinction between 'constitutional interpretation' and 'constitutional construction.'"[128] In Solum's words, "*Construction resolves vagueness* . . . At that point, what we need is a construction that allows us to draw a line (making the vague provision more specific) or that gives us a decision procedure (allowing case-by-case resolution of the vagueness) . . . We still need to engage in construction (giving the text legal effect) in order to apply the text to a particular case. Interpretation and construction are two moments (or stages) in legal practice."[129] As Baude explains, "many versions of originalism acknowledge substantial 'construction zones' in which "the meaning of 'the constitutional text' does not provide determinate answers to constitutional questions."[130] As Barnett frankly admits, "Unless there is something in the text that favors one construction over the other, it is not originalism that is doing the work when one selects a theory of construction to employ when original meaning runs out, but one's underlying normative commitments."[131]

That is a crucial admission on his part, and what he means by "something in the text" is left unspecified. The need for construction becomes most apparent in the most challenging constitutional cases, if a judge wants to try to figure out, say, whether the police's placement of a GPS device under a car constitutes a "search" under the Fourth Amendment.[132] At the application stage, judges are always in the CZ whether they realize it or not. At times it may seem to be invisible, because the application of the original meaning is so straightforward that it feels as if no construction is taking place. The CZ varies in size, depending on the reliability of the historical evidence and the uniqueness of the fact pattern in a constitutional case. When

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[123] Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 80–81 (2016).
[124] Justice Alito also now self-identifies as an originalist. *See, e.g.*, J. Joel Alicea, *The Originalist Jurisprudence of Samuel Alito*, 46 HARV. J.L. & PUB. POL'Y PER CURIAM 653 (2023) (noting that there are now "*five* self-identified originalists" on the Court) (emphasis added).
[125] BALKIN, *supra* note 9 (Balkin is a rare progressive legal scholar who describes his theory of constitutional interpretation as originalism, combining the "living" part of living constitutionalism with originalism to create a hybrid approach. For him, the original meaning of abstract constitutional principles serve as a starting point in the adjudication process but their implications are not fixed, unlike, say, original expected applications, originalism).
[126] Whittington, *supra* note 3, at 602–03.
[127] *Id.* at 611–12.
[128] Colby, *supra* note 9, at 731.
[129] Solum, *supra* note 87, at 23–24 (emphasis in original).
[130] Baude, *supra* note 93, at 2221–22.
[131] Barnett, *supra* note 5, at 70.
[132] *See generally* United States v. Jones, 565 U.S. 400 (2012).

the original public meaning is determinate enough, there will not be much need for extensive construction.[133] In easy cases, "strict construction" is applicable.[134]

But the Court does not hear and decide only easy cases. . While conceding that originalism might be able to do some of the work that its proponents claim it can do, that is, internally constraining judges who are appropriately motivated better than non-originalist approaches, the primary concern about constraint lies within the CZ, where the judge must apply the original meaning to the facts.[135] As Baude and Stephen Sachs remark:

> One can't blame folks for worrying that "construction zones" are catastrophic gaps in the law where anything might happen. If construction is the product of "normative considerations" (because the text, by assumption, is silent on these questions), there might be libertarian constructions, Dworkian constructions, Thayerian constructions, and so on. Professor Jack Balkin, for example, would restrict interpretation only to "areas of likely and *overwhelming* agreement" on the original meaning. Whenever there's any real dispute, our interpretive shackles fall off, and we're free to invoke "all available modalities of argument"—including "precedent, inter-branch convention, structure, and consequences"—to serve "as sources of wisdom or insight" in the conversation process. With friends like these, no wonder construction has enemies. We don't think most of construction's proponents intend it to be a free-for-all. But if it isn't, we need something more to settle it."[136]

Both of them deserve credit for inquiring into what exactly originalists mean by "constraint" (and by implication, how much constraint is enough). The risk is that a concession either that original meaning itself is indeterminate (or too underdetermined), or that judges are not meaningfully constrained in the CZ, may lead conservatives to give up on originalism and adopt some form of non-originalist conservative perfectionism.

One problem with originalist understandings of the construction stage in constitutional adjudication concerns exactly what originalists envision when they maintain that the original meaning must be consistent with the construction in a given case.[137] As Barnett writes, "a construction is *improper* if it contradicts or undercuts what this Constitution *does* say."[138] In his eyes, the original meaning must only be consistent with the construction. At times, no doubt, it will be evident that a construction does not cohere with the original meaning. The trouble is what he means by "inconsistency" is open to interpretation and the real issue is likely to involve a number of constructions, none of which are inconsistent with the original meaning (or known to be so beyond a reasonable doubt). There are multiple ways that a construction could be in tension with or inconsistent with the original meaning in a particular case. And here, there is no shared criterion to determine when one construction is more "consistent" with the original meaning than a rival construction. For this reason, originalists need to formulate a more comprehensive theory of such construction, specifying how the original meaning will rule out most constructions and leave, at most, only a few to choose from.

Even when constitutional interpretation is sufficiently constrained, construction may fall well short of what people normally mean by constraint. It would be cold comfort to be told that even when such a constraint is in place, the originalist judge retains considerable discretion, just not quite as much as a living constitutionalist judge would have in the same circumstances. Ultimately, people may not care much about the difference between considerable discretion and moderate discretion when no bright line exists. Originalists not only vehemently disagree

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[133] Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971, 1000–03 (2024).
[134] Solum, *supra* note 117, at 458.
[135] Barnett, *supra* note 5, at 65–72.
[136] William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1129 (2017) (citations omitted).
[137] Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39-69 (2010).
[138] Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 420 (2013) (emphasis in original).

about how construction ought to be done,[139] they also do not agree on who should be doing the construction.[140] A libertarian originalist like Barnett believes that the Commerce Clause does not permit the federal government to regulate marijuana grown in one's backyard for personal consumption, whereas Justice Scalia takes the opposite view, adhering to a more expansive conception of federal power to regulate interstate commerce due to the indirect effects of such cultivation.[141]

Minimal internal constraint does not appear to be what originalists are (or ought to be) shooting for. The lack of specificity on their part when it comes to construction is not an oversight. They still do not have anything like a theory of construction in common. Rather, like everyone else, they may end up putting forth different normative theories about what the law should be, which reflect their deepest convictions of political morality. As Fleming correctly points out, for the new originalists, construction plays a central role in deciding hard constitutional cases.[142] At one time, Barnett proposed a libertarian (presumption of liberty) approach to constitutional construction.[143] In his view, the construction must only be consistent with the original public meaning. That is not much of a constraint on judicial discretion in hard constitutional cases when so much depends on which theory of construction the judge happens to adopt and what "consistent" means in the context of particulars of the case to be decided. The debate is not about logical contradictions, after all. As noted, in a particular case, multiple constructions could be more or less consistent with the original meaning, especially when the latter is in dispute.

The originalist rejoinder could be that construction may be limited to some extent, which is superior to the "anything goes" approach found in different kinds of living originalism. In terms of the original meaning of the Equal Protection Clause, for instance, it does not seem as if white persons were meant to be covered in 1868, despite what Justice Thomas wrote in his concurrence in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*[144] Whether they are now, though, turns on how one constructs it to give it legal effect (or if an originalist turns to the Privileges and Immunities Clause for a better result or interprets "equal protection" at a high level of generality without speculating about original expected applications). The construction stage could provide a convenient way for originalists to avoid unpalatable results that would be out-of-sync with contemporary popular and academic understandings of certain constitutional provisions. Historically, the legal conclusion would be more straightforward if the legislative classification were to involve African Americans. An originalist could respond that compared with any non-originalist or living constitutionalist judge, an originalist judge acting in good faith is comparatively constrained. Constraint is a matter of degree. The more constraint, the better, when one cares about following the law and in doing so, avoiding judicial lawmaking. As Baude puts it, "Originalism can provide a sort of procedural constraint by pushing aside some arguably illegitimate considerations from the judge's mind; and it can provide an internal substantive constraint by helping judges see their way toward the right answers."[145]

B. New Constructions

A recent effort to reduce the size of the CZ is found in Randy Barnett and Evan Bernick's original function or purpose (spirit) approach to constitutional construction, where the judge has a duty to find the function of the constitutional language in question when the original

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[139] Lee J. Strang, *The Challenge of, and the Challenge to, Originalism*, 29 CONST. COMMENT. 111, 117 n.21 (2013); Barnett, *supra* note 5, at 70; SOLUM, *supra* note 89, at 69–71.
[140] *See*, *e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1995).
[141] *See generally* Gonzales v. Raich, 545 U.S. 1 (2005).
[142] James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 439 (2013).
[143] Barnett, *supra* note 5, at 34–35.
[144] U.S. 181, 233–52 (2023) (Thomas, J., concurring).
[145] Baude, *supra* note 94, at 2226.

meaning is underdetermined.[146] They write, "To formulate a rule with reference to the function—or functions—that a relevant provision is designed to perform is not a matter of making the law 'the best it can be' but giving effect *to* the law as best one can. A judge who decided a case on the basis of a reason that cannot be grounded in original functions—however normatively appealing that rationale might seem—would be departing from the law entirely."[147] For them, original functions are objectively identifiable.[148]

Their attempt to derive a theory of construction from the original meaning may count as progress in the sense that Barnett and Bernick address the most fundamental issue whose importance cannot be ignored or minimized. However, the "best one can" is vague; the phrase suggests not only that the bar has not been set very high but comes across as if the effort is what ought to matter when an originalist judge cannot know whether their decision is correct. Additionally, different constitutional provisions will have different functions—it is unlikely that the structure of the Constitution yields a single function—and even if professional historians can preclude many functions, they cannot rule out all but one of them most likely. Inevitably, in the CZ, judges in good faith will reasonably disagree about functions. Such functions may reduce indeterminacy but not eliminate it, as originalist judges try to operationalize the original meaning in real constitutional cases. At best, then, something like moderate underdeterminacy will remain. As a practical matter, the distinction between indeterminacy and underdeterminacy may be a distinction without much of a difference.[149]

Philip Munoz also advances a new approach to construction, relying upon a natural rights construction of the religion clauses, which he calls "design originalism," where judges identify ends and purposes of constitutional provisions in historical context.[150] This approach to constitutional construction is worthy of consideration to the extent that reliance on natural rights might constitute another kind of original methods approach, which may keep constructions from straying too far from original meaning.[151] The original meaning of the underlying principle can guide an originalist judge when it comes to construction. For example, according to Munoz, the original meaning of the principle of free exercise of religion did not include constitutionally mandated exemptions from generally applicable laws that incidentally burden religion.[152] In terms of constraint, assuming that the original meaning of the principle at issue is sufficiently determinate, then the resulting construction in a particular case is less likely to conflict with the original meaning. As Munoz points out, though, discerning the original meaning of the principle found in the Establishment Clause is trickier.[153]

Like Barnett and Bernick, Munoz accepts the inevitability of constitutional constructions while simultaneously trying to ensure that as much as possible, constructions cohere with original meaning. The most serious objection to his approach to construction is that natural rights are so indeterminate and so controversial, metaphysically, morally, and politically, which is not to say that other normative approaches fare any better. As a method of construction, no doubt Munoz's approach will appeal a lot more to certain Roman Catholic theorists who rely on Aquinas or perhaps to those who favor Lockean or Nozickian arguments. He has not solved the problem of judicial constraint in CZ but instead has identified a line of argument, like that of Barnett and Bernick, which amounts to yet another failed attempt to reconcile original meaning with construction, even if some or many people in the past made such appeals to natural rights. The latter is normative and even if an "ought" can be derived from an "is," in a constitutional case, where issues of political morality are at stake, legal and political theorists are bound to disagree deeply about which construction is superior. It may not even matter whether there is an objectively correct answer amid so much disagreement with no agreed-upon means

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[146] Randy E. Barnett & Evan Bernick, *The Letter and Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1–55 (2018).
[147] *Id.* at 32 (emphasis in original).
[148] *Id.*
[149] LEITER, *supra* note 18, at 9 n.2.
[150] VINCENT PHILIP MUNOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING 217–52 (2022).
[151] *Id.* at 225.
[152] *Id.* at 184.
[153] *Id.* at 288.

of settling it.[154] The more general the principle incorporated into a theory of construction, the more indeterminate it will be, resulting in reasonable disagreement about its legal effect. In fact, the former is one of the purposes of putting abstract principles in a constitution in the first place so that future generations can adapt it to their own times (which again, does not necessarily mean that judges should be the ones doing so).

As of now, originalists scholars have not come close to converging on a single approach to construction, delighting their progressive non-originalist critics, who understandably want to know why the CZ is characterized by so much diversity in originalist scholarship. Any proposed theory of constitution construction requires a comprehensive normative argument that explains why construction should be done in one way, and not in another, amid so many alternatives. Invariably, almost all originalist judges, just like other judges, will be influenced by their deeper beliefs of political morality when they not only have to choose a theory of constitutional construction but also apply it in the CZ, which would help to explain why originalist judges, with conservative political commitments, also usually reach conservative results in real constitutional cases. It is hardly a coincidence that Barnett used to employ an approach at the construction stage with a presumption of liberty given his libertarianism. The issue with the CZ, then, is that in a hard case, the law is too underdetermined or indeterminate; it does not rule out enough constructions so that anyone can be confident that the originalist judge reached the constitutionally correct answer. As long as one construction supports one constitutional conclusion—e.g., the law in question is constitutional—and another construction supports the opposite conclusion, and both constructions are equally compatible with the original meaning, the problem of indeterminacy may be intractable. Even if only two constructions remain, then, the choice between them appears to be arbitrary.

If an originalist judge wanted to engage in moral readings in the CZ, she could choose from first-order ethical theories like consequentialism, deontology, and virtue ethics or religious options. For Barnett and Bernick, a theory of constitutional construction need not be originalist.[155] As noted, for many originalists, by definition, such a theory cannot be so. But it is not too much to ask them to explain exactly what the nature of the relationship is between originalism as a theory of interpretation and construction. It is incumbent for Barnett, Bernick, and other originalists who do not deny the existence of the CZ to show how a theory of constitutional construction could be "originalist" enough as they develop a complete theory of judging that solves the problem of application as much as it can be solved. The point is not that due to the inevitability of constitutional construction**,** original meaning could never curb judicial discretion in any conceivable situation. Constraint is a matter of degree and is contingent on the size of the CZ, varying case-by-case. At times, a determinate original meaning might be able to constrain a judge in the CZ, not perfectly but well enough to reduce the risk of judicial lawmaking to some extent. Non-originalist critics of originalism ought to be able to entertain that possibility. Nonetheless, originalists probably will have to acquiesce to the existence of considerable discretion in the CZ in many important constitutional cases.

Originalism is supposed to serve as a standard for determining the correctness of a constitutional answer to a given case as well.[156] Due to so much current disagreement about the nature of construction and how underdeveloped the critical idea is compared with the rest of originalist scholarship, it is virtually impossible to know whether a given constitutional construction is legally right or wrong in a hard case, again assuming that it could be right or wrong at all (and known to be so) according to widely accepted criteria (unless originalists want to concede that judges that share their views are, to some degree, making law in that space). What one can say about any construction with more confidence is that she likes or dislikes the result from her ideological commitments. Originalists must be more willing to acknowledge the possibility that their methodology may not be able to answer many important constitutional questions with sufficient epistemic justification. At present, there is no complete originalist theory

[154] JEREMY WALDRON, LAW AND DISAGREEMENT 164–87 (2001).
[155] Barnett & Bernick, *supra* note 146, at 5.
[156] Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 778–79 (2022).

of judging (interpretation plus constitutional construction with a clear explanation of their relationship) and there most likely never will be. In any hard constitutional case, originalists could make mistakes about the original meaning (interpretation) or the legal effect (construction) or both. Most of them already have acknowledged that the CZ may be large from time to time. They pin their hopes on the possibility that in some of these hard cases, it will be small enough to narrow the range of plausible meanings, increasing the probability that the judge can reach the correct answer.

That rejoinder may be unsatisfactory to those who expect that an originalist approach will not lead in so many different directions so often. If an originalist approach to constitutional adjudication cannot achieve its purposes most of the time, that is, to meaningfully curb judicial discretion and identify correct legal answers, then either judicial restraint, another default rule, or the abolition of judicial review may be called for. Judicial restraint would be more democratic in the sense of respecting the will of state and federal legislative majorities; another default rule may simply call for judicial restraint; and the abolition of judicial review would preclude judicial lawmaking in constitutional cases by depriving judges of their power to shape the meaning of the Constitution to their own liking. As an alternative, according to Fleming, "The debate, under the guise of arguments about fidelity to original public meaning, is a debate among competing moral readings of the Constitution."[157] In the CZ, few non-originalists will be convinced that original meaning can provide sufficient guidance to lead the judge to the correct legal conclusion. Even if she was appropriately motivated, there are too many places where she could make mistakes or not be confident in the choices she has made. After all, she must be correct about both the original meaning and subsequent construction. An intellectually honest originalist not only should be able to acknowledge that originalism (and construction) generates certain problems. The real issue, then, is their severity, and what can be done about them.

C. Original Methods Originalism

Another interesting and relatively recent move in the debate over construction is to deny the necessity of construction in the first place. This view appears in John McGinnis and Michael Rappaport's scholarship.[158] They maintain that they have a more plausible alternative to construction, their own "original methods approach," where judges are supposed to discern the implications of the original meaning by employing the interpretive methods utilized at the time the constitutional provision at issue was ratified.[159] For them, there are two problems with construction. First, the drafters and ratifiers did not intend for construction to be part of the process of deciding real constitutional cases. As they write, "The enactors would have expected such matters to be interpreted based on the original interpretive rules."[160] The founders did not mention or discuss construction.[161] In their eyes, an interpretive rule is *not* a construction rule, and interpretive rules, based on original methods, are part of the original meaning. This leads to the second problem: that original meaning does not run out when constitutional language is vague or ambiguous.[162] Initially, they saw the entire process of judicial decision making as interpretive. If there is no CZ, then the only issue is how well a judge can recover the original meaning of the constitutional text in each case, which surely makes the process of judging less complicated.

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[157] James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539, 556 (2012).
[158] MCGINNIS & RAPPAPORT, *supra* note 115, at 139–53.
[159] *Id.* at 141.
[160] *Id.* at 140.
[161] *Id.* at 141–45.
[162] *Id.* at 140.

They also allege that Justice Scalia did not have a theory of constitutional construction.[163] In fact, he seemed to be convinced that most constitutional cases were easy.[164] However, it does not follow from the fact that Justice Scalia did not use the term "construction" that he did not have a rudimentary understanding of the concept or that he never engaged in the process when deciding real constitutional cases. For Balkin, Scalia's method of construction was original expected applications.[165] Another scholar describes Scalia's approach to judging as "text and tradition."[166] Here, what Scalia thought he was doing (or not doing) is beside the point. After all, he may not have been mindful of the extent to which he was supplementing the original meaning by applying it to fact patterns that the founders never would have foreseen or closely following academic debates about the New Originalism in the 1990s. In *Kyllo v. United States*, the original meaning of the Fourth Amendment does not tell us whether the police's use of a thermal-imaging device to detect heat inside a home constitutes an unreasonable search.[167] The 5-4 decision in *Heller* could be explained by the fact that the justices in the majority acted differently in the CZ than those in the dissent acted.[168]

Ultimately, McGinnis and Rappaport put forth something like an originalist methods right answer thesis. Unless two conflicting interpretations are tied, there is a correct answer.[169] Neither of these responses works, however, for two reasons. First, it is irrelevant. Advocates of construction do not have to produce historical evidence for their view (which begs the question). They are making a philosophical point. That someone does not understand what an inference is does not mean that she never makes inferences. Nor does someone's instructing someone else not to make inferences mean that she can avoid them. Second, it is false because constitutional construction is not optional. As Solum observes, "Once we are in the realm of constitutional principle, we are in the CZ. It is just the nature of principles that they are not rules; they guide the process of construction but do not determine its outcome."[170] Constructions must fill in gaps.[171] While Justice Scalia did not explicitly acknowledge that the application of the original meaning required construction, he conceded that there could be disagreement about how such meaning applied to "new and unforeseen phenomena," calling for judgment.[172]

All of that said, original methods, as a theory of such construction, could be better than the alternatives, yet it must be defended as such; this approach may produce the best consequences, depending on the meaning of "best" in this context.[173] Or it could be more faithful to the original meaning and thus, do a better job reducing the size of the CZ to curb judicial discretion. For McGinnis and Rappaport, to be binding on future generations, original meaning cannot be plural or diverse; it must be unitary or significantly bounded.[174] They recognize that "A dichotomy between interpretation and construction . . . allows extraconstitutional norms . . . to undermine the stability of constitutional meaning."[175] To their credit, like non-originalist critics of originalism, both of them appreciate why the very idea of the CZ is so problematic. The trouble is that they conclude that their original methods originalism is not a kind of construction, thereby conflating interpretation and construction. It is revealing that Baude and Sachs suggest that such a rule could be called a rule of interpretation or a rule of construction.[176] While McGinnis and Rappaport are right about the implications of the existence of the CZ, they

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[163] ANTONIN SCALIA, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts*, *in* A MATTER OF INTERPRETATION 1, 3–4 (2018).
[164] AARON TANG, SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT—AND HOW WE CAN FIX IT (2023).
[165] BALKIN, *supra* note 9, at 6.
[166] RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 27–51 (2006).
[167] *See* 533 U.S. 27, 40 (2001).
[168] *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008).
[169] MCGINNIS & RAPPAPORT, *supra* note 115, at 142–43.
[170] SOLUM, *supra* note 89, at 32.
[171] Whittington, *supra* note 3, at 403.
[172] ANTONIN SCALIA, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 45 (Amy Gutmann ed., 1997).
[173] BALKIN, *supra* note 9, at, 71–98.
[174] MCGINNIS & RAPPAPORT, *supra* note 115, at 83.
[175] *Id.* at 140.
[176] Baude & Sachs, *supra* note 136, at 1130.

are wrong that a judge can avoid it by making construction a part of interpretation or simply using the term "interpretation" capaciously.

In more recent work, McGinnis and Rappaport yield some ground, acknowledging the existence of the CZ but maintaining that interpretive rules from the founding period often will single out one construction.[177] That position is optimistic. They are convinced that in the CZ, moreover, more determinate interpretive rules, which are supposed to be part of the original meaning, can limit the judge's discretion and lead to a correct conclusion.[178] In their view, for close cases, the 51-49 rule requires the interpreter to choose the "better supported interpretation" to reduce the ambiguity to a tolerable level.[179] The stated purpose of this interpretive approach is to avoid "ambiguity and vagueness unless the evidence in favor of two meanings was exactly equal."[180] In the remote possibility of a tie, the judge could defer to the legislature.[181] As they see it, properly understood, the Constitution is a legal document written in the language of the law, not in ordinary language, making it more determinate than it initially appears to be.[182]

Apart from the impossibility of such precision in such situations, this claim cannot be settled at the level of theory. McGinnis and Rappaport have conceded that at times there may be a CZ but it is small enough because interpretative rules can reduce its size.[183] Interpretation can do most of the work, then, in originalist judicial decision making, because it can shrink the size of the CZ so that the remaining judicial discretion is tolerable (and how determinate the original meaning is in a case is a function of the size of the CZ).[184] When it is tiny, the interpretation-construction distinction becomes less significant because at most, construction plays a minor role.[185] For them, a thicker original meaning can generate the correct interpretive rules that can yield plausible originalist answers.[186]

IV. APPLICATION AND JUDGMENT

A. The Characterization of Fact Patterns

Although such interpretative rules could shrink the CZ in some hard constitutional cases more than others, the degree of precision, which Rappaport and McGinnis aspire to, is unrealistic when no interpretive rule, even one widely-accepted at the time of the founding, could possibility anticipate every conceivable fact pattern that could arise.[187] As Balkin writes, "A method of constitutional interpretation is not a decision procedure."[188] The meaning of such interpretive rules will be subject to at least reasonable disagreement over their meaning even when one of them has been singled out as having more evidentiary support than the others. Equally important, even when the interpretive rule is more or less determinate, the judge still must apply it to the fact pattern.[189] The point is not only that fact patterns of 2025 would differ markedly from those of the founding period due to social, political, economic, and technological changes over the last two hundred plus years. Even a single interpretive rule must be applied, requiring the judge to exercise good judgment by assigning legal relevance to the facts. For McGinnis and Rappaport, while there can be empirical disagreement about the size of the CZ and over which interpretative rules are applicable, almost all of the hard work has been

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[177] *Id.* at 1131.
[178] MCGINNIS & RAPPAPORT, *supra* note 115, at 141.
[179] John O. McGinnis & Michael R. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 922–24 (2021).
[180] MCGINNIS & RAPPAPORT, *supra* note 115, at 142.
[181] *Id.* at 143.
[182] McGinnis & Rappaport, *supra* note 179, at 921–22.
[183] *Id.*
[184] *Id.* at 921.
[185] *Id.* at 932.
[186] *Id.* at 933.
[187] WALUCHOW, *supra* note 32, at 11.
[188] BALKIN, *supra* note 9, at 136.
[189] As Klaus Günther writes, "no norm can regulate all of the cases of its own application." GÜNTHER, *supra* note 12, at 2.

done prior to construction.[190] The competent originalist judge can then be confident that she has done what she was supposed to do; any remaining disagreement will involve factual questions.[191]

This mild concession does not work. It is tantamount to declaring that a CZ does not exist by merely removing the orange cones. More likely than not, interpretation will leave several original meanings at different levels of generality, depending on the particulars of the constitutional case to be decided. This is where the challenge of construction, understood as application, becomes more apparent. While identification of the correct interpretive rules could reduce the size of the CZ, it is not evident how often and by how much. A smaller CZ may still be large enough to give the judge considerable discretion.[192] Because interpretative rules themselves can only provide so much guidance, the application or construction stage will leave the judge with considerable discretion, requiring a separate process. As Hart states, "[P]articular fact situations do not await us already marked off from each other, and labeled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances."[193]

For this reason, the application process in the CZ cannot be reduced to finding the right rule to follow. For a judge, it also concerns how to characterize the fact pattern of the case to be decided. According to one philosopher, "Proper attunement is paying attention to the right things in the right way, at the right time; being sensitive to significant features and ignoring what should be ignored."[194] Apart from the inherent challenges of ascertaining the original meaning after so much time has passed and the well-known dangers of law office (or legal academy) history, disagreement about the facts does not only implicate what happened, who did what, and so on. The judge must ascertain the legal relevance of the facts as well. And facts can be intertwined with values.[195]

Many originalists assume that the hardest part is on the front end, requiring the skills of a historian and an extensive knowledge of American constitutional history. However, in the CZ, the application of original meaning, even when it is thick and can be known to be so, to concrete circumstances is not deductive where a premise implies a conclusion.[196] The application of the interpretive rule or principle must be sensitive to the new context. Something like this may have been what Justice Oliver Wendell Holmes, Jr. had in mind when he wrote that, "General propositions do not decide concrete cases."[197] As Hart once remarked, "Logic is silent on how to classify particulars—and—this is the heart of a judicial decision."[198] The judge has the responsibility of identifying the relevant features of the fact pattern and screening out its irrelevant ones.[199] Put differently, judges also must engage in what Günther describes as "application discourses."[200] Otherwise, they risk misapplying the legal rule, whatever it may be, because they fail to size up the fact pattern of the case appropriately.

By comparison, consider the nature of moral judgment found in the philosophical literature in the field of applied ethics. According to Barbara Herman, "Much of the work of moral judgment takes place prior to any possible application of the rules of eliciting the relevant moral facts from particular circumstances."[201] As Preston Werner writes, "[M]oral perception may be crucial for deliberative guidance, in the sense that our perceptual experiences could draw our attention to the features of our situation that are morally relevant."[202] Moral perception is a distinct mental process, then, that can be thought of as the faculty that bridges the gap

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[190] McGinnis & Rappaport, *supra* note 179, at 934–35.
[191] *Id.* at 924.
[192] To their credit, they acknowledge that a large CZ would be a serious problem. *See id.*
[193] HART, *supra* note 40, at 123.
[194] GEORGI GARDINER, *Attunement: On the Cognitive Virtues of Attention*, *in* SOCIAL VIRTUE EPISTEMOLOGY 49 (2022).
[195] *See* Jack M. Balkin, *Nino's Paradox*, 173 U. PA. L. REV. 1871, 1891–94 (2025).
[196] HART, *supra* note 40, at 23.
[197] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).
[198] HART, *supra* note 40, at 25.
[199] GÜNTHER, *supra* note 12, at 270.
[200] *Id.* at 272.
[201] BARBARA HERMAN, *Making Room for Character*, *in* MORAL LITERACY 1 (Harvard Univ. Press 2007).
[202] Preston J. Werner, *Moral Perception*, 15 PHIL. COMPASS 2 (2020).

between moral rules (and principles) and particular situations.[203] For Lawrence Blum, this process takes place prior to moral judgment.[204] Alternatively, it is the first stage of exercising judgment, including in the context of judging in a hard constitutional case.

A moral agent must also be able to recognize and evaluate unfamiliar moral phenomena.[205] That is also a requirement of being a judge inasmuch as new cases will present novel legal issues. In harder situations, then, something like moral perception on the part of a judge is required so that like any moral agent, she can describe the situation of choice as accurately as possible. Just like a moral principle or rule, a legal rule also must be applied. As this Article explains in the following sections, for Aristotle and Kant, the process is not deductive—i.e., where a conclusion follows logically from the premise (the rule). A determinate rule may provide some guidance—the judge is not on her own in the CZ to do whatever she pleases—but it will not yield a uniquely correct answer in a hard case when the fact pattern can be described in one way or another, which is not to say that one description could not be better than another (if that were the case, then there would be nothing to disagree about). The point is that even for an originalist judge who has a firm grasp of the original meaning of the constitutional provision in question, considerable work, in the form of judgment, remains to be done before a decision can be rendered.

As noted, the original meaning could help the judge know what to look for as she decides which facts are likely to be legally relevant in the CZ. At the same time, there can be disagreement not only over their relevance but how significant their alleged relevance is (and therefore, what should be inferred).[206] In short, there is no obviously correct classification of facts that enables a person (or judge) to apply a principle or rule in a straightforward manner.[207] What she sees (and what she misses) will affect how she applies the rule, for better or for worse. The cognitive part of exercising good judgment, where a particular problem is initially described or even recognized at all, calls for the judge to appreciate salience—i.e., why some facts may matter more than others do. The meaning of "appreciating salience" calls for sufficient attentiveness to the particulars of concrete situations that enable the judge to frame the problem at hand without leaving out any of the legally and morally relevant details.

These kinds of decisions can be difficult because one may neglect a relevant fact and thus, not respond appropriately, even when one knows what rule should be followed. In some situations, all people can be obtuse in this way, regardless of how intelligent or well-educated they are or how much life experience they have. Consider the challenge of being in an unfamiliar culture abroad and how easy it is to misunderstand situations and social interactions due to using the wrong frame of reference. In hard constitutional cases, the best choice under difficult circumstances will incorporate the most significant considerations that count for or against a particular constitutional conclusion because reasons for action are always context-dependent and require background information. Such reasons must be assessed relative to the other particulars in the situation of choice. In the context of judging, a legal decision that leaves out too many of the relevant details will result in legal failure. This process will be especially challenging for judges who must decide such a wide range of constitutional cases. On the front end, originalists already recognize the importance of accurately describing the historical context in which the constitutional provision came into being with sufficient attention to detail. Otherwise, its meaning cannot be recovered. But what they fail to fully appreciate is that process of application also requires attention to such detail and explanations for why a fact pattern is justified in being characterized in one way rather than in another way. In such situations, reasonable disagreement can be expected.

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[203] Lawrence Blum, *Moral Perception and Particularity*, 101 ETHICS 701–02 (1991).
[204] *Id.* at 702.
[205] HERMAN, *supra* note 201, at 2.
[206] BRIAN LEITER, *A Note of Legal Indeterminacy, in* NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN PHILOSOPHY 9 (2007).
[207] *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 607 (1958).

B. Aristotle

In the next two sections, the Article draws on insights from Aristotle and Kant to show that application of a rule, legal or otherwise, cannot be reduced to merely following rules in a straightforward manner, as if the process were an algorithm. Indeed, an important part of the Aristotelian project is to expound upon the limits of rules and call attention to the character traits (or virtues) that make choosing wisely possible.[208] A human agent or a judge must accurately assess the context in which the rule is to be applied to increase the probability that the rule is applied correctly, that is, in a context-sensitive way. As one commentary on Aristotle's thinking puts it:

> In order to apply that general understanding to particular cases, we must acquire, through proper upbringing and habits, the ability to see, on each occasion, which course of action is best supported by reasons. Therefore practical wisdom, as [Aristotle] conceives it, cannot be acquired solely by learning general rules. We must also acquire, through practice, those deliberative, emotional, and social skills that enable us to put our general understanding of well-being into practice in ways that are suitable to each occasion.[209]

Also consider what Aristotle says about the critical relationship between *phronesis* (practical wisdom) and the evaluation of concrete context in the *Nichomachean Ethics*: "Nor is practical wisdom concerned only with universals. An understanding of particulars is also required, since it is practical, and action is concerned with particulars."[210] To be able to choose wisely, then, begins with sizing up the circumstances of choice appropriately. A person who cannot notice the relevant details of a particular situation and grasp their significance will lack wisdom or even competence in deciding what to do. For Aristotle, the focus is always on the specifics of the case. Even small details, when they matter, cannot be missed. As Nancy Sherman comments, "[W]ise judgment hits the mean not in the sense that it always aims at moderation, but in the sense that it hits the target for *this* case. As such, description and narrative of the case are at the heart of moral judgment."[211]

The problem is that in real situations, choice done well calls for much more fine-grained discernment than any rule can provide.[212] Mistakes of judgment do not always result from lacking complete access to empirical information, making the wrong inference, or from being incapable of predicting the probable consequences of possible courses of action. Instead, they can also reflect the failure to see the morally relevant considerations in the unique circumstances in which a decision must be made. Indeed, one of the great tragedies of life is that we often do not see what we ought to see. In that sense, all of us can be morally obtuse. One might assume that better rules—i.e., those that are more detailed or more comprehensive—will make such difficulties disappear. At most, they may mitigate them. After all, no decision procedure exists that will make choosing wisely more mechanistic or more algorithmic. For better or for worse, human agents have the responsibility of describing the context as accurately as possible, with the knowledge that they often will miss what they should see and thus, be prone to mistakes. An originalist judge, then, may fail to apply an interpretive rule (or the original meaning

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[208] For Aristotle's discussion of phronesis or practical wisdom, *see* ARISTOTLE, NICOMACHEAN ETHICS 108–16 (Roger Crisp ed., 2014) (describing the capacity as a virtue, which can be improved with experience, with a focus on the particulars of the situation, suggesting that each situation is unique and ought to be treated as such).
[209] *Aristotle's Ethics*, STANFORD ENCYCLOPEDIA PHIL. (July 2, 2022), https://plato.stanford.edu/entries/aristotle-ethics/.
[210] ARISTOTLE, *supra* note 208, at 108.
[211] NANCY SHERMAN, MAKING NECESSITY A VIRTUE: ARISTOTLE AND KANT ON VIRTUE 244 (Cambridge Univ. Press 1997).
[212] *See, e.g.*, MARTHA NUSSBAUM, *The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality, in* ARISTOTLE'S ETHICS: CRITICAL ESSAYS 145–81 (Nancy Sherman ed., 1999) (providing an example of Aristotelian moral particularism).

itself) accurately not because she acts in bad faith or misunderstands the interpretive rule but because she misses salient features of the fact pattern.

C. Kant

Despite their deep philosophical differences, like Aristotle, Kant views judgment as a matter of properly relating universals to particulars. The problem of application cannot be reduced to having the right principles or understanding them because whether an agent can appreciate their possible implications requires more than a theoretical understanding of the principles themselves. As Kant puts it:

> It is obvious that no matter how complete the theory may be, a middle term is required, providing a link and a transition from one to the other [practice]. For a concept of the understanding, which contains the general rule, must be supplemented by an act of judgment whereby the practitioner distinguishes instances where the rule applies from those where it does not. And since rules cannot in turn be provided on every occasion to direct the judgment in subsuming each instance under a previous rule (for this would involve an infinite regress), theoreticians will be found who can never in all their lives become practical, since they lack judgment.[213]

In this passage, he distinguishes judgment from mere theoretical knowledge of general principles, implying that such principles cannot provide an algorithmic decision procedure that simplifies the task of choosing wisely. One can be theoretically knowledgeable but at the same time lack the ability to implement that knowledge because she cannot formulate what Kant calls a "middle term," a description of the circumstances that warrant application of the general principle. To exercise judgment is to give content to this middle term or to predicate universals of particulars by deciding whether the situation is covered by the more general principle. In this way, judgment bridges the gap between the abstract principle and the concrete facts, safeguarding us against stupidity.[214] Kant also writes:

> [A] physician, a judge, or a politician may carry in his head many beautiful pathological, juridical, or political rules, even to the degree that he may become an active teacher in them, and he may yet in the application of these rules commit many a blunder. For either he is deficient in the natural power of judgment, though not in the understanding, and may know the universal *in abstracto*, yet be unable to distinguish whether a case *in concreto* falls under it; or it may be that his judgment has not been sufficiently trained by examples and practical experience.[215]

> For this principle [judgment] is one which must not be derived from a priori concepts, seeing that these are the property of understanding, and judgment is only directed to their application. It has, therefore, to furnish a concept, and one from which it can adapt its judgment because for that, another faculty of judgment would again be required to enable us to decide whether the case was one for the application of the rule or not.[216]

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[213] IMMANUEL KANT, *Theory and Practice, in* KANT: POLITICAL WRITINGS 61 (Hans Reiss ed., 1994).
[214] IMMANUEL KANT, CRITIQUE OF PURE REASON 174 (Marcus Weigelt ed. & trans., 2007).
[215] *Id.* at 174.
[216] KANT, CRITIQUE OF JUDGMENT 5 (J.C. Meredith trans., Oxford Univ. Press 1957).

As he points out, a rule cannot contain additional rules for its application in the situations in which it is possibly applicable.[217] Otherwise, there would be an infinite regress, where a second-order rule would require a third-order rule and so on. For Kant, the ability to apply rules derives from a faculty that cannot itself be rule-governed.[218] Eventually, rules will run out and this is true of McGinnis and Rappaport's interpretive rules as well, even if some of them are as determinate as they have led us to believe (which may be true of some constitutional provisions but not others). The need for judgment arises in the first place because of doubt about how principles should be interpreted and applied.[219] Judgment is the capacity to apply such rules, to see something as the sort of thing that those rules pick out, subsuming a particular instance under a general rule.[220] While Kant characterizes judgment as a "natural gift" and claims that deficiency in judgment cannot be remedied, he also claims that examples and actual practice can sharpen the faculty.[221]

D. The Example of Race-Conscious Affirmative Action ("AA") in Admissions in Higher Education

The implication of the preceding discussion concerning the nature of the exercise of judgment more generally is that even in a constitutional case with a relatively determinate interpretive rule, derived from the original meaning, the process of application may not be nearly as straightforward as many originalists assume it to be.[222] As such, a hard constitutional case is also hard to the extent that the judge may mischaracterize the fact pattern (and context) to which the rule must be applied to produce a legal effect. The constitutional issue of race-conscious AA in admissions in higher education can illuminate the problem of how to characterize the fact pattern to which the original meaning is to be applied. In what follows, the Article will use the familiar example of the issue of the constitutionality of race-conscious AA plans to illustrate two points: (1) the characterization of the fact patterns can be done multiple ways, dividing the justices and generating intractable reasonable disagreement, and (2) that description of the fact pattern, however it is done, will contain value judgments about the moral permissibility or wisdom of such plans.[223] Some of them will be explicit but others will be implicit.

In *Students for Fair Admissions*, the Court ruled that race-conscious AA plans, which gave a preference to members of underrepresented racial minority groups in the admissions process, violated the Equal Protection Clause [hereinafter, EPC].[224] In the past, Justice Clarence Thomas had advanced the stigma argument, using the memorable phrase "tarred as undeserving," to underscore how black students, whether they had benefited from AA or not in the admissions process, would be perceived by many of their white classmates.[225] In his concurrence, unlike his previous opinions in such cases, he puts forth an originalist argument designed to establish that the Constitution is colorblind and therefore, does not permit any racial legislative classification whatsoever, regardless of its purpose.[226] If he is right that the original meaning of the EPC of the Fourteenth Amendment is determinate—no use of race whatsoever, no exceptions—then the CZ is so small that it may not be visible to the naked eye.[227] What on its

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[217] KANT, *supra* note 213, at 61.
[218] CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 3 (2012).
[219] RICHARD B. MILLER, CASUISTRY AND MODERN ETHICS: A POETICS OF PRACTICAL REASONING 18 (1996).
[220] *Id.* at 4.
[221] KANT, *supra* note 214, at 174.
[222] By contrast, Justice Scalia thought hard constitutional cases were not so hard, after all. TANG, *supra* note 164, at 1–2.
[223] The term "AA" comes from President John F. Kennedy's executive order 10925, which was promulgated in 1961. BARBARA A. PERRY, THE MICHIGAN AFFIRMATIVE ACTION CASES 7 (Univ. Press of Kansas 2007).
[224] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).
[225] Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting in part).
[226] *Students for Fair Admissions, Inc.*, 600 U.S. at 232–87 (Thomas, J., concurring).
[227] However, the original meaning of the EPC may allow lawmakers to take race into account in enacting legislative classifications in some circumstances. There is substantial historical evidence supporting that view. *See* Brief for Constitutional Law Scholars & Constitutional Accountability Center as Amici Curiae in Support of Respondents at 15, Fisher v. Univ. of Tex. at Austin (Fisher I), (No. 11-345), 2012 WL 3527858. Above all, the Fourteenth Amendment was deliberately designed to help newly freed slaves. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, (Harper Perennial 2014); *see also* FONER, *supra* note 109. It seems counterintuitive to conclude that the EPC requires racial neutrality on the part of the government it

face appears to be a hard case ultimately turns out to be an easy case after a thorough historical investigation. That is what originalists bank on.

Normally, with respect to the facts, there will not be too much disagreement over exactly what happened prior to the litigation. For instance, in *Gratz*, the undergraduate admissions committee assigned 20 points, out of a possible 150 points, with 100 points for automatic admission, to applicants who were members of underrepresented racial minorities.[228] Whether this assignment of 20 points was more than a mere plus factor caused disagreement, though, with Justice David Souter in his dissent arguing that it was an acceptable plus factor when other non-racial variable also could result in 20 extra points.[229] A comprehensive description of the AA program whose constitutionality is being challenged requires considerably more than an accurate rendition of the facts, understood as how the AA policy actually worked in the admissions process (for example, what does "highly individualistic, holistic review" entail in *Grutter*?). Indeed, for a rich description of the policy itself and its context, a judge will have to draw on all sorts of background knowledge in sizing up what an AA policy is, including the fairness of such plans; the weight race is and can be assigned; their consequences (including unintended but foreseeable ones); the present-day effects of past racial injustice and how to measure them; and who, if anyone, should bear the costs of past racial wrongs.[230]

It is hard to imagine that in one way or another, when a justice characterizes what she sees as the legally salient features of the fact pattern, her characterization is not affected by her political or moral position on AA as well (although the effects can exhibit variance). In his *Grutter* dissent, Justice Thomas also articulates a concern with AA plans also known as "mismatch," which has been expounded upon in a book-length treatment by Richard Sander and Stuart Taylor Jr..[231] That AA may turn out to be "bad" for the beneficiaries (or at least many of them) is not only an empirical claim but a moral one as well. In short, judges can (and do) reasonably disagree about the features of an AA plan when there are so many possible normative and empirical sources of reasonable disagreement. An AA plan can be described as either benign or invidious discrimination—where the former means it is intended to benefit underrepresented racial minorities who have been (and still are) discriminated against and the latter means whatever its purpose(s), non-beneficiaries, like white and Asian-American applicants, are still being unfairly disadvantaged due to their race, over which they have no control. This was the same issue that divided the justices in *Bakke* and was critical insofar as the description determined which standard of review would be triggered (and the strength of the presumption of the unconstitutionality of the policy). Surely, the "benign" or "invidious" part is not merely a factual claim, if the term "reverse discrimination" is used instead of "invidious," the evaluative judgment becomes more apparent.

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also was designed to protect white people from so-called reverse discrimination when that was not a problem in 1868 and nothing like a contemporary AA policy existed where white people were disadvantaged by a government program as a side effect of a program designed to help African-Americans. As a result, the original meaning probably is less determinate than Justice Thomas believes.

[228] Gratz v. Bollinger, 539 U.S. 244, 255 (2003).

[229] *Id.* at 294 (Souter, J., dissenting).

[230] STEVEN M. CAHN, *Introduction, in* THE AFFIRMATIVE ACTION DEBATE xi-xiv (Steven M. Cahn ed., 2002).

[231] Grutter v. Bollinger, 539 U.S. 306, 372 (2003) (Thomas, J., concurring in part); *see also* RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012). According to the authors, such preferences harm most recipients in that the intended beneficiaries learn less and lose self-confidence in their academic ability, leading to lower graduation and bar passage rates. *See id.* at 3–4. A typical affirmative action beneficiary is likely not to be unprepared in an absolute sense but underprepared relative to her classmates who have been admitted mostly on the basis of their LSAT score and undergraduate GPA. Law professors teach to the median student and anyone at the bottom of the class is more prone to academic difficulties. As a result, most "beneficiaries" fall behind quickly, feel lost in class, stop trying, receive poor grades, and have higher bar exam failure rates. *Id.* at 4–5. As it moves downward to lower-ranked schools, the mismatch effect of racial preferences worsens or cascades. *See id.* at 19. When elite law schools grant a significant preference to an African-American or Hispanic applicant, who otherwise may not have been admitted, their doing so deprives a second law school of a qualified student who would have been better suited for a less academically rarefied environment. The second tier school acts the same way, taking away a student who might have thrived at a third or fourth tier school. The cumulative effect is to mismatch affirmative action recipients at all levels. But if such students had enrolled at lower-ranked law schools that better matched their academic abilities, they would have stood better chances of becoming lawyers. *See* Ronald C. Den Otter, *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It*, L. & POL. BOOK REV., http://www.lpbr.net/2013/02/mistmatch-how-affirmative-action-hurts.html (last visited Nov. 16, 2025).

In *Bakke*, Justice Lewis Powell framed the UC Davis Medical School AA plan in terms of invidious discrimination and then applied strict scrutiny standard of review (SS), finding it to be unconstitutional.[232] At the same time, he spelled out how an AA plan could be upheld even under SS. The burden of proof was on the state to prove that it had (a) a compelling state interest (diversity, in its broadest sense, due to its educational benefits) and (b) a narrowly tailored legislative classification (race only being used as a plus factor, that is, as one variable among other non-racial variables). Unlike the dissenters in Justice William Brennan's group, who maintained that the AA plan was benign discrimination and thus should only be subject to intermediate scrutiny standard of review (IS), Justice Powell thought that any racial classification should trigger SS, regardless of its benign purpose, underscoring the unfairness of race being used to disadvantage any applicants. After all, if race is a plus factor for some designated applicants, it is a minus for those that do not receive the plus or preference.

Here, the point is not that either Justices Powell or Brennan are wrong, but that how a judge characterizes the AA plan makes all of the constitutional difference in the world. When facts and values are intertwined, an AA plan can be described as either invidious (leading to its unconstitutionality when SS is really applied) or benign discrimination (supporting its constitutionality). A relatively determinate original meaning of the EPC cannot do that hard work of characterizing the particulars, assessing their relevance, and weighing them. The fact that some racial preferences were permissible in 1868 does not mean that all would be permissible in 2025. At most, there may be some analogues. On the one hand, a race-conscious AA plan is a racial classification and therefore, arguably, should be subject to SS if our Constitution is supposed to be colorblind. That way, it would protect white persons (and certain Asian applicants) from so-called reverse discrimination. On the other hand, for the dissenters, an AA plan is a racial classification done for a benign purpose, that is, to consider the fact of past discrimination against racial minorities and how it continues to disadvantage them in America. For Justice Brennan, such a plan is not the equivalent of a Jim Crow law targeting white people and reinforcing the notion of black racial inferiority. Because white people do not experience the same kind of racial discrimination, Brennan reasoned, they are not entitled to the special judicial protection associated with strict scrutiny, which was designed to strike down invidious discrimination against racial minorities. After all, usually, white people constitute a legislative majority, and it is unlikely that they would discriminate against themselves.

There are other possible normative sources of disagreement. Consider disagreement over the meaning of merit.[233] Does "merit" have to mean only numbers, like undergraduate grade point average or LSAT score, in the context of law school admissions? Or could being a member of an under-represented racial minority group count as merit to some extent if that applicant's presence would contribute to the educational benefits that diversity may bring about? Surely, those questions do not only call for factual responses. When it comes to the narrowly tailored part of strict scrutiny, when race is being used as a preference or some sort of plus factor, how much is too much? The word "preference" or legal term "plus factor" is vague. A preference could mean assigning a lot of weight to race in the admissions process, only assigning some weight to it, or only breaking ties. Ultimately, what is an AA plan designed to do? And what does it do? And is it justified, all things considered? It depends on who you ask because AA is a hard case morally and constitutionally because it is invariably mired in reasonable disagreement about a lot more than disagreement over the brute facts.

V. WHAT IS TO BE SAID ON BEHALF OF ORIGINALISM?

Recall that, properly understood, for most contemporary originalists, originalism is only a theory of interpretation, notwithstanding several recent attempts to elide the difference between interpretation and construction to address the problem of indeterminacy in the CZ. In

[232] *See generally* Regents of Univ. Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion).
[233] WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 276–79 (Princeton Univ. Press 1998).

plain English, interpretation does not dictate how, for instance, the Free Speech Clause ought to be applied to a fact pattern; it can only provide guidance (perhaps little, or more than a little, contingent on the circumstances). Generally, the more determinate the rule to be applied is, the less discretion the judge will have. At the same time, fact patterns can be complicated and open to considerable interpretation, especially when it comes to the legal relevance of particular facts. Nor does it follow that judicial discretion is not trivial in harder constitutional cases, even in a relatively small CZ. The judge still must characterize the fact pattern and there will be multiple, plausible ways of doing so.

Referencing Wittgenstein, Solum once remarked that originalism must be silent about construction.[234] Nevertheless, originalists cannot remain silent if they wish to defend their theory of judging while rejecting "construction denial" or "construction minimalism." They must explain what originalist judges are supposed to be doing in the CZ to develop a comprehensive theory of judicial decision making, whatever they want to call it. If scholars such as Solum and Barnett are correct about the indispensability of construction to originalist judging, they must not only articulate a viable normative theory of construction but also specify how original meaning constrains judicial discretion in hard constitutional cases so that originalist judges can truly try to follow the law. As of now, originalists have too many theories about what is supposed to go on in the CZ, and those theories do not have much in common, even though they tend to produce conservative results.

Like McGinnis and Rappaport, Solum recognized the problem of the CZ: "decision making in the construction zone [could] simply reintroduce the problem of ideological judging driven by the personal morality and politics of individual judges."[235] The issue is not about how determinate original meaning is, which would require thorough historical research, and it may be hard to generalize. If it were more determinate, it could be true that original meaning is determinate enough to constrain what a judge is doing in the CZ in some constitutional cases, without generating answers. Steven Calabresi accepts the New Originalist methodology yet insists that constitutional provisions like "the Privileges or Immunities, Equal Protection, and Due Process Clauses all have very determinate content."[236] The disagreement, then, would be about how much judicial discretion remains on a case-by-case basis. Be that as it may, the trouble is that such originalism fails to address the concern that constitutional constructions, due to their very nature, may not be tethered to the original meaning in the way that they ought to be if they are to be properly called originalist. Only in a very small CZ will the originalist judge have less discretion and thereby be able to eschew judicial lawmaking. The point is not that they are not properly motivated but instead they could not avoid such lawmaking even when they want to avoid it.

The harder the case, the larger the CZ is likely to become—undermining the traditional rationale for adopting originalism in the first place: restraining judges from doing whatever they please and producing decisions that divide the nation. In Colby's words, "By its very nature—and to a far greater degree than its proponents have tended to recognize—the New Originalism is a theory that affords massive discretion to judges in resolving contentious constitutional issues."[237] At times, that discretion may not be massive; whether it turns on the size of the CZ in the particular constitutional case must be decided.

For critics of originalism who take the problem of the CZ seriously, even a relatively determinate interpretive rule would not be able to cover every situation that inevitably would arise in the future. In the CZ, a judge will still have multiple non-legal reasons to draw upon, which are not deducible from original meaning(s). Due to their normative nature, constitutional constructions tend to be even more open-ended than original meaning(s). It is not as if professional philosophers, who do applied ethics, normative ethics, or metaethics see eye-to-eye on every single important issue in their respective fields. That is not to say that there is never a

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[234] SOLUM, *supra* note 89, at 26.
[235] SOLUM, *supra* note 89, at 150.
[236] Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 665 (2009).
[237] Colby, *supra* note 9, at 715.

consensus on anything that matters but it is to say that such theoretical debates are riddled with reasonable disagreement and in such situations, it is hard to make much progress. At present, scholars and judges lack shared criteria for recognizing a "good" construction, and even general agreement about how much discretion an originalist judge possesses—or how it should be curtailed—remains elusive.

In historical disputes, professional historians have methods of attempting to resolve disagreements, and a rough consensus may emerge with respect to the abstract original meaning of a particular constitutional clause, even when they do not reach a consensus on what counts as evidence, what sources are prioritized, and what weight conflicting evidence should be assigned. Ongoing inarticulacy about what is supposed to take place in the CZ encourages nonoriginalist skeptics to discredit originalism by showing that it cannot do what it purports to do. At the end of the day, it may not matter too much how close to determinate the original meaning is in some constitutional cases, The CZ may be small every now and then but not nearly small enough most of the time when many of the most important constitutional cases that divide the country must be decided. In other words, enough determinacy (or less indeterminacy) in less important cases, which usually will not reach the Court, is not very helpful. Perhaps, then, the academic discussion should be less about whether the CZ is large or small generally and more about its size in particular hard constitutional cases.

As a way of trying to meet the objection that originalist judges have considerable discretion in the CZ, academic originalists can come up with constitutional default rules. Judicial restraint might be a promising candidate since it defers to the constructions of elected lawmakers when the law cannot be known well enough to warrant a judicial veto.[238] When they find themselves at that stage of the decision-making process, and the right answer could be either that the law whose constitutionality is in dispute is constitutional or unconstitutional, judges can simply exercise the power of judicial review to uphold it.[239] Although the application of such a default rule would be a construction, that approach would allow other political actors to engage in their own construction. Considerable historical evidence may support doing constructions in that way, and this approach may be the most promising way forward when multiple constructions are compatible with the original meaning. Nonetheless, as noted above, such an approach is a theory of construction and must be normatively defended as such. On top of that, there are plenty of reasons why judicial restraint, as a default rule, would not be appropriate, including the fundamental idea of checks and balances. The American constitutional story is certainly not one about the prevalence of such restraint.[240]

It is understandable why some kind of originalism may be attractive to some legal scholars and not only because it tends to produce conservative or libertarian results for those who want to see the Court push the country somewhere to the right of the American political center. After all, originalism aspires to curb judicial discretion, thereby preventing judges from usurping the role of elected lawmakers and illegitimately making law with little accountability. That justification needs little defense in a constitutional democracy. The widespread acceptance of the importance of popular sovereignty in the United States always will put progressives, who defend judicial review and can be expected to do so in the future with the conservative majority on the Court, on the defensive; it will make it harder for them to interpret constitutional principles at the highest level of abstraction and apply them to ensure that government respects or promotes their visions of what follows from values like freedom and equality. The specter of the Warren Court will continue to haunt them and to put into doubt their efforts. No defender of any theory of constitutional interpretation wants to find herself in the awkward position of conceding that it is incompatible with the most fundamental principle of democratic theory: in a representative democracy, the people (and their elected representatives) are supposed to rule most of the time.

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[238] Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE. L.J. 2037, 2057 (2006).
[239] Segall, *supra* note 6, at 44.
[240] Richard A. Posner, *The Rise and Fall of Judicial Restraint*, 100 CALIF. L. REV. 519–55 (2012).

In the eyes of originalists, originalism is supposed to be the last, best hope for a society that takes the rule of law seriously, lets legislative majorities have their way most of the time, and refuses permit unaccountable judges to legislate from the bench with impunity. Those aims are admirable. On its face, it does not seem to be unreasonable to ask judges to exercise judicial humility and interpret the law as much as they can, thereby respecting the division of labor among the three branches of the national government. This ongoing debate regarding the institutional question of who should decide constitutional issues is as old as the country itself (in fact, it predates its birth). Originalists ask quite a bit from their preferred theory of constitutional interpretation: to answer even the hardest constitutional questions in a world that the founding generation (and the Reconstruction Era) never would have conceived of, coupled with sufficient epistemic warrant that the decision is most likely correct. Their inability to specify the relationship between original meaning and construction in more detail and acknowledge the place of judgment in the CZ, indicates that the term "originalism" could be misleading inasmuch as the original meaning is supposed to produce the outcome or have a substantial impact upon it, whereas normally construction does so much of the labor in the judicial decision-making process. Most constitutional controversies are resolved in the CZ.[241]

In this space, the difference between originalist and non-original judging might be negligible, yet that depends on the size of the CZ, which may be smaller in some constitutional cases than in others.[242] Another purpose of this Article is to show that how originalist any judicial decision really is also depends on the difficulty of describing the situation of application in the right or in a defensible way. That problem cannot be addressed by trying to find a way to make the original meaning more determinate, though an interpretive rule, for instance, or through more thorough and reliable historical research. Like everyone else, it appears that originalists engage in judicial lawmaking to a greater or lesser extent during the construction stage. Their final line of defense is that they do not do so nearly as much as living originalists do, thereby ostensibly eschewing an invitation to do whatever they please in the CZ to make the Constitution mean what they want it to mean.

There is something to be said for that view judicial lawmaking is not an all-or-nothing affair but instead varies case-by-base. As a result, the debate could be about how much judicial lawmaking is too much or what its scope should be when it comes to certain constitutional issues. If they were more charitable, non-originalist critics might entertain the possibility that what happens in the CZ is not "anything goes" in every hard constitutional case (and each case is entitled to individualized treatment). When the application of original meaning to the fact pattern of the constitutional case in the CZ also is understood as involving the challenge of characterizing the legally relevant facts appropriately, the quality of the construction will not always be in the eye of the beholder. Instead, the problem will be that no construction unequivocally supports one outcome over the other, resulting in indeterminacy. Even though when the original meaning is more or less determinate in a given case, only so much precision can be expected, coupled with that fact that it is not evident how much epistemic justification is enough—and where the burden of proof lies—to be confident that the originalist judge has reached the right constitutional conclusion after the construction stage. In other words, there are two kinds of indeterminacy that originalists must worry about..

Perhaps more often than not, or at least often enough, an originalist interpretive approach may accomplish some of what it purports to do, including possibly doing a better job of internally constraining judges than any non-originalist approach by reducing the size of the CZ, which is not to say that it always can eliminate considerable judicial discretion in the kinds of cases that the Court takes and Americans care about. Past a certain point, though, it probably matters very little how large CZ is from the standpoint of the judge who must decide one way or the other. Even when it is relatively small, originalist judges will still have some, and perhaps

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[241] JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN AMERICAN CONSTITUTIONAL INTERPRETATION 129–37 (Oxford Univ. Press 2024).

[242] *Cf.* Eric Segall, *The Concession that Dooms Originalism*, 88 GEO. WASH. L. REV. ARGUENDO 39 (2020); *see also* Balkin, *supra* note 195, at 1879.

considerable, discretion when it comes to describing the legally relevant features of the fact pattern. It is not as if the CZ can be reliably measured. At most, a commitment to original meaning may be able to curb judicial discretion somewhat "if it is supplemented with a theory that narrows or fills in construction zones."[243]

Nonetheless, it remains far from clear how that is supposed to be done. By definition, an originalist judge accepts both the fixation and constraint theses.[244] Not only must the originalist judge, whichever theory of originalism she adheres to, get the original meaning right as a matter of interpretation, she also must get the construction right in the sense of having it fit with her (correct) interpretation of the constitutional language at issue and the fact pattern. For these reasons, non-originalists doubt that originalist judges are actually doing what they think they are doing when they decide constitutional cases even when they can resist the temptation to impugn their motives. Their dilemma takes the following form: on the one hand, they must apply constitutional provisions to real fact patterns. Thus, construction is necessary, even when a few originalists scholars eschew that term or acquiesce to its use. Alternatively, when they are in the CZ, their constructions cannot be said to be unequivocally or perhaps even arguably originalist when they must move from an "is" to an "ought" when the law itself, understood as the original meaning, is either indeterminate or underdetermined. Progressive legal scholars can concede that in theory, original meaning, coupled with a smaller CZ, could curb judicial discretion in some instances, thereby making it harder for appropriately motivated originalist judges to legislate from the bench, without retracting their well-known worries.

VI. A POST-ORIGINALIST FUTURE

According to Gienapp, outside of theory, originalism in practice does not appear to be particularly principled.[245] These days, that claim is hard to refute. After all, originalist arguments usually have happy politically endings for conservatives. The constitutional conclusions that Justices Scalia and Thomas reach after engaging in originalist reasoning coincide with their deeper convictions of political morality in almost every case they decide. An occasional exception hardly shows that either was or is a principled originalist. At present and for the foreseeable future, no U.S. Supreme Court Justice is going to be indifferent to results in the name of any principled kind of judging. The stakes are too high, winning matters more than anything else these days for both sides, and that is not how the game ever has been played. For most progressives, originalism is a flawed doctrine; it is easily manipulated, produces bad results, and is predicated upon an even worse methodology, particularly when originalism locks in egregious moral mistakes that are nearly impossible to correct through the formal amendment process. Additionally, as they see it, originalism perpetuates the myth of judicial impartiality to serve conservative ends or what could be called a "noble lie." As this Article has argued, for principled originalists, the best-case scenario is that originalism permits some judicial lawmaking in the CZ, but perhaps not as much as living constitutionalist (and other non-originalist) critics allege. In short, originalists have two fundamental problems: (1) recovering the semantic meaning of constitutional language despite the passage of so much time with adequate evidentiary support, and (2) exercising judgment in the CZ in a way that remains faithful to the original meaning, however it is understood. It is not evident that originalists have sufficiently quelled critics' doubts. Thus, they may have to entertain the possibility that an originalist approach to constitutional adjudication will not work as well as they hoped it would work at its inception.

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[243] Baude, *supra* note 94, at 2226.

[244] SOLUM, *supra* note 89. The former means that the original meaning, however it is conceptualized, does not change over time and the latter means that that fixed meaning constrains how a judge may decide a case.

[245] "Even a principled and somewhat bounded account of the CZ might still amount to little more than a form of living constitutionalism (not as it has been caricatured but as it has actually been practiced over the last century). In other words, even if you're not trying to deliver a knockout blow but are simply asking originalists to develop a more rigorous theory of the backend of their theory, by the way you've set it up (properly emphasizing that what seems to fall into the construction zone is in fact virtually every litigated case and disputed constitutional issue) it could be that you're nonetheless delivering a knockout blow in showing that even a well-defended form of originalism still must be the very thing it set out to combat." Email from Jonathan Gienapp, Associate Professor of Hist. and L. Stanford L. Sch., to Author (July 13, 2025) (on file with author).

All of that said, there may be an opportunity here for conservatives. Originalists can insist that some constraint is better than no restraint at all or they can give up their pretensions of meaningful constraint, openly acknowledge that they too engage in judicial lawmaking in the CZ, and endorse conservative forms of non-originalism that advance their own partisan ends (which is what most progressive and conservative judges and justices already do anyway and have done in the past). When conservatives are no longer in the thrall of originalism, which is no longer as useful as it once was, they no longer need to preach to the converted and can try to win hearts and minds of those who are more centrist, by showing that their moral vision of the Constitution is more attractive than that of progressives. The United States has never really been a left-of-center country. Furthermore, as a practical matter, constitutional change is highly unlikely to come about via the formal amendment route.[246] As such, litigation strategies are even more appealing than they were in the past, coupled with the fact that constitutional change can take place (and has) through informal means like judicial review.

Long ago, Dworkin acknowledged that moral readings could be conservative.[247] But to claim that race-conscious affirmative action really is morally permissible is not to claim that it can be known to be so (after all, Hercules is an ideal judge). Thus, its moral impermissibility is just as plausible—it may be the best argument of political morality at the end of the day—and there is no Dworkinian standard by which judge between conflicting progressive and conservative moral readings on their merits. The issue is not whether the best argument of political morality exists. Instead, the real issue is what to do in the face of disagreement among judges, scholars, and ordinary people when it comes to knowing how it could be such.[248] Practically, for both progressives and conservatives, what matters, above all, is not whether metaethically one answer in important constitutional case is morally correct but persuading as many people as possible in the electorate that their views are superior to those of their rivals.

At the time Dworkin developed his theory of moral reading, conservatives still were trying to reverse or mitigate the profound constitutional changes that the Warren Court had precipitated. Understandably, they were attracted to a theory of judging like originalism which purported to follow the law, even in hard constitutional cases, to prevent progressives from making laws from the bench that would shape the country according to their own standard of what is right and good. Because they were fighting a defensive campaign, they did not reflect much about the potential of an unapologetically conservative political vision to become entrenched into American constitutional doctrine. If conservatives were to abandon originalism for something like conservative living originalism, conservative perfectionism, or whatever they want to call it, progressives will have lost one of their most effective rhetorical weapons: the allegations that originalists act in bad faith and originalism is politics by other means (which is hard to deny when one observes what the Roberts Court has been doing these days). Originalists always will be vulnerable to this charge when they continue to deny that they engage in judicial lawmaking while relying so heavily on a theory of constitutional adjudication that remains vulnerable to a number of serious objections.

Moreover, conservative judges openly and unapologetically could do what their progressive counterparts already do, namely molding the Constitution to reflect their vision of what it ought to mean. The time has come for more transparency and more intellectual honesty from both sides of jurisprudential debates in the legal academy and elsewhere. As Adrian Vermeule astutely observes, "[C]ircumstances have now changed. The hostile environment that

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[246] *See* Jill Lepore, *How Originalism Killed the Constitution*, THE ATL. (Sep. 10, 2025), https://www.theatlantic.com/magazine/archive/2025/10/constitutional-originalism-amendment/683961/.

[247] DWORKIN, *supra* note 31, at 3. (For Dworkin, moral readings are not intrinsically liberal (or progressive) or conservative. In principle, the best argument of political morality could be conservative or libertarian in a particular constitutional case. Descriptively, that is what judges are disagreeing about, that is, what the best understanding of political morality requires when it comes to abortion or affirmative action. That Dworkin believes that conservatives are almost always wrong about what the best argument of political morality in the most important constitutional cases is does not mean that he is right or that such conservative arguments are bad).

[248] WALDRON, *supra* note 154, at 1–17 (Waldron believes that too much is made by legal scholars about whether there is a morally or constitutionally correct answer to whether there is a right to abortion, as an example, and too little about what to do when we disagree to settle the matter, as much as it can be settled for the time being).

made originalism a useful rhetorical and political expedient is now gone."[249] This advance would be significant in American constitutional theory since it would become evident what scholars, judges, and ordinary citizens, are really (and reasonably) disagreeing about: what the Constitution can mean in cases involving disputed issues of political morality; it also would illuminate the nature of reasonable disagreement in hard constitutional cases and debunk the myth that judges are disagreeing about what the law is in a hard constitutional case when there may be no law at all to disagree about. In the CZ, there probably is no law (or at least not enough so that it can be known and then followed to reach a correct legal answer that will not produce reasonable and intractable disagreement). What constitutional scholars have been disagreeing about for years is what should be done in the CZ. The underlying and deeper normative question concerns how much, if any, judicial lawmaking is desirable in a constitutional democracy like our own and how it should be done, without the distraction of trying to figure out what the elusive original meaning of the Second Amendment purportedly tells us about the regulation of AR-15s or bump stocks.

The failure on the part of originalists to specify the relationship between interpretation (properly understood as original meaning in their eyes) and construction, beyond the claim that the latter must be consistent with the former, was foreseeable. For years, the New Originalists emphatically stated that originalism is a theory of interpretation, not construction, to make room for the separate process of application. This is one reason why the advent of the New Originalism is so significant. Although that move was justified, the implications remain problematic. As this Article has argued, one should be skeptical that the process of construction is tethered closely enough to the original meaning for any originalist to insist with confidence that the Constitution (or its original meaning) yielded the result in a hard case or significantly contributed to it. Even if their theory of constitutional interpretation is defensible, originalists still must articulate a much more sophisticated account of how an originalist judge applies the original meaning to the fact pattern in reaching a constitutional conclusion, including how the fact pattern is supposed to be characterized, as opposed to being left to the discretion of the judge to do more or less what she pleases. Otherwise, they will only be preaching to the converted.

In a sense, then, conservatives should not fret about being liberated from originalism. If progressive judges are playing the game to win, which they are, conservatives should do so as well, without guilt or worry about inherent difficulties of recovering the original meaning of this or that. They can argue against the constitutionality of a race-conscious affirmative action plan in admissions in higher education, for example, without fixating on what the text of the EPC might have meant in 1868.[250] All of them can defend their views openly, unapologetically, and vigorously on their merits as their progressive critics will continue to do likewise. It is noteworthy that in *Grutter*, the dissenters—Rehnquist, Scalia, Kennedy, and Thomas—did not make originalist arguments.[251]

This Article has tried to offer a more sympathetic critique of originalism than it usually receives from non-originalists who seek to land a knockout blow to discredit originalism once and for all, typically by impugning the motives of originalist judges or accusing them of malpractice for their historical research. While living constitutionalists and other kinds of non-originalists face the same problem, they do not adhere to the fixation thesis nor fetishize the text. Originalists cannot be let off the hook by being allowed to either deny or minimize the role of construction in constitutional adjudication. As a theory of constitutional interpretation, despite its political origins in the 1980s in its current manifestation, originalism is animated by a noble ideal: an attempt to uphold the rule of law by identifying what the law is, even in hard constitutional cases, where American higher law might settle political conflict. Without a more comprehensive theory of constitutional construction at the critical stage in the process of

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[249] Adrian Vermuele, *Beyond Originalism*, THE ATL. (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

[250] For an excellent overview of the "conservative case" in *SFFA*, *see* JUSTIN DRIVER, THE FALL OF AFFIRMATIVE ACTION 25-66 (2025).

[251] Grutter v. Bollinger, 539 U.S. 306, 378–87 (2003) (Rehnquist, C.J., dissenting).

deciding real constitutional cases, though, it may not be able to deliver on this promise. This Article maintains not only that originalists have fallen short of developing an account of construction that clarifies the critical relationship between original meaning and construction; they may never be able to do so well enough to convince their non-originalist critics (and other originalists too) when the place of the exercise of judgment also is accounted for in characterizing the fact pattern. Such failure is foreseeable. That is so because while an originalist judge can draw normative inferences from the original meaning to reach the most appropriate conclusion, she cannot deduce constitutional conclusions from it, and the fact pattern cannot characterize itself.

The application of the original public meaning, assuming it can be ascertained with some confidence in the first place, requires a lot more insight and background knowledge on the part of the judge than the original meaning itself, however it is defined, can provide. For this reason, the role of construction in originalist judicial decision making should receive a lot more attention from legal scholars when so many judges and scholars take originalism so seriously, the former have so much power, and several justices on the Court at present self-identify as originalists. As it turns out, they may not be able to be originalists most of the time, even if they wanted to be. That state of affairs need not terrify conservatives as much as it does, unless they doubt the quality of their own constitutional positions or do not care enough about outcomes. They, too, can advance their views of political morality in the form of constitutional arguments and not feel bad about doing so.That way, they can do battle in the CZ without having to worry about the past, what has been lost in translation, or developing the expertise of a professional historian.

CONCLUSION

For years, many originalists have not taken the problem of the CZ as seriously as they should have and have not come close to reaching a consensus about what should be done there when constitutional language (and its original meaning) runs out. Given how vehemently many conservative scholars and judges continue to defend originalism, and overlook some of its obvious flaws, one might conclude that they are done for without originalism. However, that may be the wrong implication, as this Article tries to establish. Alternatively, by abandoning originalism, conservatives will be forced to develop more sophisticated theoretical arguments for their own normative constitutional conclusions, encouraging the public not to care about what the Second Amendment may have meant in 1791, for example, but instead to focus on the merits of gun ownership and flaws of gun control. In a post-originalist future, conservatives should have more confidence in their own arguments of political morality, cast in the form of constitutional arguments, and in their ability to beat progressives at their own living constitution game. That way, the process of judging in hard constitutional cases would be considerably more transparent, and ordinary Americans could evaluate for themselves which side has made the better case.