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## The Inclusiveness of the New Originalism

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# THE INCLUSIVENESS OF THE NEW ORIGINALISM

*James E. Fleming\**

## I. THE ARC OF ORIGINALISM FROM 1996 TO THE PRESENT

This Symposium on *The New Originalism in Constitutional Law* is an excellent sequel to the 1996 *Fordham Law Review* Symposium on *Fidelity in Constitutional Theory*.<sup>1</sup> I was privileged to be a co-organizer of that conference—together with Abner Greene as well as Martin Flaherty, Robert Kaczorowski, and William Treanor—as Dean Michael Martin and Associate Dean Benjamin Zipursky have graciously recalled in their opening remarks. I also wrote an article for it.<sup>2</sup>

I want to begin by acknowledging how much the landscape of constitutional theory has changed since the Fordham Symposium on Fidelity. In 1996, it was common for originalists such as Robert Bork and Antonin Scalia to assert a monopoly on concern for fidelity in constitutional interpretation, claiming that fidelity requires following the rules laid down by, or giving effect to the relatively specific original understanding or meaning of, the Framers and ratifiers of the Constitution.<sup>3</sup> Bork and Scalia said that the originalists are the ones who care about fidelity in constitutional interpretation, and all those other folks—the “revisionists” and “nonoriginalists”—don’t.<sup>4</sup>

The Fordham Symposium on Fidelity implicitly challenged this narrow originalist claim to a monopoly on fidelity, for it featured several competing conceptions of fidelity that were decidedly not conventional originalist conceptions: (1) Ronald Dworkin’s understanding of fidelity as pursuing

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\* Professor of Law, The Honorable Frank R. Kenison Distinguished Scholar in Law, and Associate Dean for Research and Intellectual Life, Boston University School of Law. Congratulations to Ben Zipursky, along with Abner Greene and Saul Cornell, for organizing such a splendid Symposium. Thanks to Sot Barber, Abner Greene, and Ben Zipursky for helpful discussions concerning my arguments in the Article. Thanks also to my research assistants, Kate Lebeaux and Chris Mercurio. The Article is part of a book in progress, tentatively entitled *Fidelity to Our Imperfect Constitution*, and accordingly I have drawn upon prior work that is a part of that project.

1. Symposium, *Fidelity in Constitutional Theory*, 65 *FORDHAM L. REV.* 1247 (1997).

2. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335 (1997).

3. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 854, 862–63 (1989).

4. BORK, *supra* note 3, at 187–240; ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37–47 (Amy Gutmann ed., 1997); Scalia, *supra* note 3, at 852–56, 862–64.

integrity with the moral reading of the Constitution;<sup>5</sup> (2) Bruce Ackerman's understanding of fidelity as synthesis of constitutional moments;<sup>6</sup> (3) Lawrence Lessig's understanding of fidelity as translation across generations;<sup>7</sup> (4) Jack Rakove's understanding of fidelity as keeping faith with the Founders' vision;<sup>8</sup> and (5) an early formulation of Jack Balkin's conception that ultimately became his method of text and principle with its argument for fidelity to abstract original public meaning.<sup>9</sup>

Most pointedly, Dworkin sought to turn the tables on the narrow originalists like Bork and Scalia: he argued that commitment to fidelity—understood as pursuing integrity with the moral reading of the Constitution—entails the very approach that they are at pains to insist it forbids and prohibits the very approach that they imperiously maintain it mandates. Ackerman, Lessig, and Balkin have taken a different tack, attempting to beat narrow originalists at their own game: they have advanced fidelity as synthesis, fidelity as translation, and the method of text and principle as broad or abstract or “living” forms of originalism that are superior, as conceptions of originalism, to narrow originalism.

By 1996, originalists had begun to talk about “original understanding” or “original meaning” as distinguished from “intention of the Framers.” And some people had begun to talk about “broad” originalism (e.g., Lessig) and “faint-hearted” originalism (e.g., Scalia).<sup>10</sup> But the “new originalism” as we know it today had not yet appeared on the landscape. Not long after that

5. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 73–76 (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*]; RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 125–29 (1993); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1253 (1997).

6. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 88–89, 159–62 (1991) (developing an understanding of fidelity as questing “multigenerational synthesis” or “interpretive synthesis” across the three constitutional regimes or moments of the Founding, Reconstruction, and the New Deal); Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519, 1519–20 (1997) (advancing his conception of fidelity as pursuing intergenerational synthesis).

7. See Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1367–68, 1371–76 (1997) (arguing for an understanding of fidelity as “grounded in a practice of translation”); see also Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1263–64 (1993) (arguing for a conception of fidelity as translation).

8. See Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *FORDHAM L. REV.* 1587, 1605–09 (1997) (discussing “fidelity to history” and its superiority to originalism, which is a kind of “fidelity through history”); see also JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 3–22 (1996) (discussing the “perils” of conventional originalism).

9. See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1708–09 (1997) (distinguishing between fidelity to the “true Constitution or the best interpretation of the Constitution [and] its various historical interpretations and manifestations”). Balkin subsequently reworked and incorporated this piece in JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 103–38 (2011), the companion book to JACK M. BALKIN, *LIVING ORIGINALISM* 3–5 (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*] (arguing for fidelity to abstract text and principle).

10. See generally Fleming, *supra* note 2 (discussing Lessig's “broad” originalism and Scalia's narrow “faint-hearted” originalism).

conference, the new originalism did emerge. Its earliest formulations evidently came from Randy Barnett in *An Originalism for Nonoriginalists*<sup>11</sup> and Keith Whittington shortly thereafter in *The New Originalism*.<sup>12</sup>

How has originalism changed since 1996? I shall distinguish several points or phases in the “arc of originalism” from the old to the new.<sup>13</sup> These points are analytical, and only roughly chronological. The first phase I have called (1) the “Balkanization of originalism” (together with (2) the “Balkinization of originalism”). That is what happens (1) when originalism splits into warring camps and (2) when even Jack Balkin, hitherto a pragmatic living constitutionalist, becomes an originalist.<sup>14</sup> During this phase, which continues today, we see that originalism is a moving target, a work in progress, or a family of theories rather than one coherent, unified constitutional theory.

The second phase is the development of a highly programmatic new originalism (or new originalisms). During this phase, which is well represented at this conference by Randy Barnett, Keith Whittington, and Lawrence Solum, sophisticated constitutional theorists have developed disciplined, programmatic conceptions of constitutional interpretation and construction. These new originalists have emphasized two developments: (1) the movement from a focus on “intention of the Framers” to “original public meaning” and (2) the articulation of and emphasis on the distinction between interpretation and construction.

Third, and roughly parallel to the movement from the first phase to the second, is the movement from: (1) a dogmatic, axiomatic view assuming that originalism simply has to be the best, or indeed the only, conception of constitutional interpretation to (2) a view recognizing that originalists have to make normative arguments in support of their conceptions. I have criticized the former view as stemming from what I have called “the originalist premise.”<sup>15</sup> The originalist premise is the assumption that originalism, rightly conceived, *is* the best, or indeed the only, conception of fidelity in constitutional interpretation. Put more strongly, it is the assumption that originalism, rightly conceived, *has to be* the best, or indeed the only, conception of constitutional interpretation. Why so? Because originalism, rightly conceived, just *has to be*. By definition. In the nature of things—in the nature of the Constitution, in the nature of law, in the nature of interpretation, in the nature of fidelity in constitutional interpretation! Axiomatically.

11. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

12. Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599 (2004). Whittington presented drafts of this paper as early as 2002.

13. The title of the panel in the Fordham Symposium on *The New Originalism in Constitutional Law* for which I prepared this Article was “The Arc of Originalism.”

14. See, e.g., James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10 (2007); James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669 [hereinafter Fleming, *Balkinization*].

15. James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1794–97 (2013); Fleming, *supra* note 2, at 1344.

Illustrating the latter view, Solum stresses normative arguments for originalism from rule of law/determinacy, popular sovereignty/democracy, and ruliness, while Whittington emphasizes an argument from fidelity.<sup>16</sup> I shall take up their arguments in Part IV. In making these normative arguments, the new originalists have made spectacular concessions to critics of originalism like the moral readers. (By “moral reading,” I refer to conceptions of the Constitution as embodying abstract moral and political principles, not codifying concrete historical rules or practices.) Indeed, they have unwittingly shown that they are engaged in making normative judgments that the moral readers have argued were necessary and that the old originalists have contended were illegitimate and forbidden (in Bork’s formulations, “subver[sive]” and “here[tical]”).<sup>17</sup>

A fourth and final point in the arc of originalism, also parallel to these other movements, is a shift from an exclusionary outlook to an inclusionary outlook, to be explained in Part II. As my title suggests, I am going to bring out the inclusiveness of the new originalism and ponder its implications.<sup>18</sup>

This Article is part of a larger work, a book in progress tentatively entitled *Fidelity to Our Imperfect Constitution*.<sup>19</sup> To set the stage for my arguments about the inclusiveness of the new originalism, I shall draw upon several pieces in the story thus far. My main points are two. First, the inclusiveness of the new originalism shows that it will require the very judgments that proponents of the moral reading have argued are necessary in constitutional interpretation and construction. Indeed, this inclusiveness points toward the possibility of reconciliation between certain forms of the new originalism and the moral reading. But second, I shall sketch a cautionary tale about the movement within originalism from “intention of the Framers” to “original public meaning.” For example, in Justice Scalia’s hands, resort to original public meaning over and against the purposes of constitutional amendment as expressed by the Framers and ratifiers in their language and debates may blunt the very possibility of constitutional transformation through amendment.

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16. *See infra* Part IV.

17. BORK, *supra* note 3, at 136, 352.

18. I mean to intimate an analogy between inclusive new originalism and the idea within jurisprudence of “inclusive legal positivism.” Put roughly, “inclusive legal positivism” responds to criticisms of positivism by moral readers like Dworkin by incorporating the moral principles and judgments Dworkin says are necessary—and which exclusive legal positivism excludes—within positivism itself. Likewise, inclusive new originalism responds to criticisms of originalism by moral readers like Dworkin by incorporating the moral principles and judgments Dworkin says are necessary—and which exclusive originalism excludes—within the new originalism itself.

19. My article for the Fordham Symposium on Fidelity bearing the same title, Fleming, *supra* note 2, was my first article in what has become the book project.

## II. ARE WE ALL ORIGINALISTS NOW?

In recent years, some have asked: “Are we all originalists now?” My response to the question is: “I hope not!”<sup>20</sup> By contrast, Solum replies: “We are all originalists now.”<sup>21</sup> The answer to the question depends, as he recognizes, on “what one means by originalism”<sup>22</sup> and whether we define it exclusively or inclusively.

In defining originalism, Solum distills an elegant framework with four basic ideas. It is worth quoting in full:

1. *The fixation thesis*: The linguistic meaning of the constitutional text was fixed at the time each provision was framed and ratified.
2. *The public meaning thesis*: Constitutional meaning is fixed by the understanding of the words and phrases and the grammar and syntax that characterized the linguistic practices of the public and not by the intentions of the framers.
3. *The textual constraint thesis*: The original meaning of the text of the Constitution has legal force: the text is law and not a mere symbol.
4. *The interpretation-construction distinction*: Constitutional practice includes two distinct activities: (1) constitutional interpretation, which discerns the linguistic meaning of the text, and (2) constitutional construction, which determines the legal effect of the text.<sup>23</sup>

Solum aspires to understand originalism (and, for that matter, living constitutionalism) “in their best light—in their most sophisticated and defensible versions.”<sup>24</sup>

If we define originalism inclusively enough, we might say that we evidently are all originalists now. Indeed, we might just define originalism so broadly that even I would no longer hope that we are not all originalists now! Applying Solum’s framework, we would conclude that Balkin, with his self-described living originalist method of text and principle, definitely is an originalist.<sup>25</sup> Dworkin, with his moral reading of the Constitution, surely also is.<sup>26</sup> Sotirios A. Barber and I, with our philosophic approach to constitutional interpretation (and my own “Constitution-perfecting theory”), are as well.<sup>27</sup> So, too, are reasonable, bounded, and grounded versions of

20. Fleming, *supra* note 15. In this section, I draw upon my arguments in the cited article.

21. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 3 (2011). All citations to the foregoing source refer only to Lawrence Solum’s contributions to the book. In this section and the next, I draw from my review of the book, James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539 (2013) (book review).

22. BENNETT & SOLUM, *supra* note 21, at 61 (emphasis omitted).

23. *Id.* at 4.

24. *Id.* at 5.

25. BALKIN, LIVING ORIGINALISM, *supra* note 9.

26. DWORKIN, FREEDOM’S LAW, *supra* note 5.

27. SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (2007); JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 16, 210–11 (2006).

living constitutionalism. All of these theories evidently can accept the four theses quoted above. Under Solum's formulation, originalism clearly is a big tent—charitable, magnanimous, and inclusionary—rather than the dogmatic, scolding, and exclusionary outlook that we see in originalist works like Bork's *The Tempting of America* and Scalia's *A Matter of Interpretation*.<sup>28</sup>

But if we define originalism so inclusively—and we are all now in this big tent—it may not be very useful to say that we are all originalists now. We may obscure our differences more than we elucidate common ground. We would persist in most of our theoretical disagreements—it is just that we would say that the disagreements are among varieties of so-called originalism. And the debates concerning interpretation and construction, thus recast or translated, would go on much as before.

Clearly, affirmative answers to the question, “are we all originalists now?” stem from inclusive conceptions of what comes within originalism and, in particular, the new originalism or new originalisms. For we most definitely are not all old originalists now! In bringing out the inclusiveness of the new originalism, I shall focus on Solum's emphasis on the distinction between interpretation and construction, in particular, his acknowledgment of the large role that construction (which on his account is not originalist) plays in our constitutional practice.

### III. THE SIGNIFICANCE OF THE DISTINCTION BETWEEN INTERPRETATION AND CONSTRUCTION

Let's be clear about what Solum claims regarding the significance of the distinction between interpretation and construction. In explaining this distinction, he invokes H.L.A. Hart's well-known formulation concerning the core and penumbra. He presents the core as a zone for interpretation and the penumbra as a zone for construction.<sup>29</sup> He contends that hard cases, by definition, are underdetermined by interpretation of original public meaning and so require construction.<sup>30</sup>

Furthermore, Solum says that originalism is a theory of interpretation, not a theory of construction. In developing the interpretation-construction distinction, Solum plainly states, “Originalism itself does not have a theory of constitutional construction.”<sup>31</sup> He also states, “Whereof originalism cannot speak, thereof it must be silent.”<sup>32</sup> Even though construction in hard cases lies beyond interpretation (and thus beyond originalism), he claims that new originalists insist that original public meaning should constrain construction.<sup>33</sup>

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28. BORK, *supra* note 3; SCALIA, *supra* note 4.

29. BENNETT & SOLUM, *supra* note 21, at 22 (discussing H.L.A. HART, THE CONCEPT OF LAW 121–32 (1961)).

30. *Id.* at 22–23.

31. *Id.* at 60.

32. *Id.* at 26.

33. *Id.*

I shall make two general observations that demonstrate how inclusive Solum's new originalism is. First, Solum concedes that much that is important in constitutional law goes on in the construction zone in deciding hard cases and developing constitutional doctrine. We might doubt how many important constitutional questions are resolved through interpretation of original public meaning. I suspect that Solum would find greater agreement with his analysis of interpretation and construction among living constitutionalists and moral readers than among most conventional originalists. For living constitutionalists and moral readers would agree that hard cases lie in the construction zone and that interpretation of original public meaning does not determine the outcomes in these disputes. But old originalists and many other contemporary originalists would reject these claims as capitulations. Some, like the old originalists, would insist that interpretation is determinative both in deciding hard cases and developing constitutional doctrine.<sup>34</sup> Others would deny the necessity or the legitimacy of construction. And some who accept the legitimacy of construction would go along with Whittington in adopting what Solum calls the model of construction as politics: they would say that interpretation is for courts and construction is for legislatures and executives.<sup>35</sup>

Second, what Solum says about how construction should proceed—how he proposes to build out doctrine and decide hard cases in the construction zone—is compatible with a moral reading. In defending this view, I shall focus on two things he says about originalism in relation to construction. One, Solum states that “originalists can and should agree that constitutional construction (as currently practiced) involves a plurality of methods—purposes, structure, precedent, and all the rest.”<sup>36</sup> He rejects the common living constitutionalist argument that the very existence of “multiple modalities” shows the impossibility of originalism. He contends instead that “these methods are properly brought to bear on the task of constitutional construction.”<sup>37</sup> Thus, he practically makes peace with living constitutionalism concerning the multiple modalities of argument in the construction zone. Whittington recently has taken a similar approach in recognizing what he calls “pluralism within originalism” or how originalist arguments exist in an environment of “pluralism in constitutional interpretation”<sup>38</sup> (or, Solum would insist, construction).

Two, Solum mentions three available models of construction as eligible within the new originalism:

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34. *Id.* at 20–22.

35. *Id.* at 69–70.

36. *Id.* at 60.

37. *Id.* at 59–60 (referring to the well-known view concerning multiple modalities as developed in PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982)).

38. See Keith E. Whittington, *On Pluralism Within Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 70, 76 (Grant Huscroft & Bradley W. Miller eds., 2011).



1. Construction as politics (associated with Whittington): “when judges leave the realm of constitutional interpretation and enter the construction zone, they defer to the decisions made by political processes.”
2. Construction as principle (associated with Balkin): “[i]n the construction zone, judges should aim to create constitutional doctrines that comport with political ideals for which the general, abstract, and vague provisions of the Constitution aim.”
3. Construction by original methods (inspired by the work of John McGinnis and Michael Rappaport but not their own view): “when modern courts engage in constitutional construction, they should employ” the original methods in use when the Constitution was adopted.<sup>39</sup>

Solum does not exactly say which model of construction is the most promising for the new originalism that he himself proposes. But there are significant differences between Whittington’s model of construction as politics and Solum’s approach to construction. For Whittington, at least in his initial formulation, interpretation is for judges and construction is for legislatures and executives.<sup>40</sup> For Solum, by contrast, construction is also for judges in developing constitutional doctrine where interpretation is underdeterminative.<sup>41</sup> Furthermore, it does not appear that Solum himself would emphasize construction by original methods. Finally, there is good reason to believe that Solum thinks that Balkin’s model of construction as principle is the most promising approach for the new originalism that he himself advocates. What is more, Balkin’s is the most promising model for a reconciliation of originalism and living constitutionalism; indeed, Balkin calls his new originalism “living originalism.”<sup>42</sup>

There is also considerable hope for reconciliation between new originalism and moral readings regarding construction. First, moral readers like Barber and I deploy a fusion of approaches in what Solum calls “the construction zone.” “Within such a fusion, we . . . understand text, consensus, intentions, structures, and doctrines not as alternatives to but as sites of philosophic reflection and choice about the best understanding of our constitutional commitments.”<sup>43</sup> Second, moral readers should embrace Balkin’s model of construction as the method of text and principle. In fact, I have argued that Balkin’s theory is a moral reading of the Constitution.<sup>44</sup> For Balkin conceives the Constitution as embodying not only rules but also general standards and abstract principles. He recognizes that in interpreting these general standards and abstract principles, we have to make moral and political judgments concerning the best understanding of our commitments; history alone does not make those judgments for us in rule-like fashion.<sup>45</sup> Moreover, there are unmistakable affinities between Balkin’s commitment

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39. BENNETT & SOLUM, *supra* note 21, at 69–70.

40. *See infra* Part IV.

41. *See infra* Part IV.

42. BALKIN, LIVING ORIGINALISM, *supra* note 9.

43. BARBER & FLEMING, *supra* note 27, at 190.

44. Fleming, *Balkinization*, *supra* note 14, at 675–79.

45. BALKIN, LIVING ORIGINALISM, *supra* note 9, at 23–34.

to interpret and construct the Constitution so as to redeem our faith in its promises and aspirations, and a moral reading's commitment to interpret and construct the Constitution so as to make it the best it can be.<sup>46</sup>

Thus, if Solum's new originalism embraces Balkin's method of text and principle—as an approach to interpretation and construction—it has much in common with a moral reading.

#### IV. THE NORMATIVE JUSTIFICATIONS FOR THE NEW ORIGINALISM

Unlike many originalists, who practically assume that originalism—by definition or axiomatically—is the only legitimate approach to constitutional interpretation,<sup>47</sup> Solum acknowledges the need to make normative arguments for originalism. He stresses the arguments that originalism is more compatible with the rule of law and popular sovereignty and is more ruly than competing theories.<sup>48</sup> But Solum's generous and inclusive formulation of the new originalism undercuts all of these arguments concerning the supposed virtues of originalism over the moral reading.

In making such normative arguments for originalism, the new originalists trade on certain features of familiar pictures of originalism without acknowledging that they have redrawn those pictures so as to blur or obliterate those features—without acknowledging the concessions that they have made to living constitutionalists' and moral readers' criticisms. Once we bring the concessions to light—as aspects of the inclusiveness of the new originalism—we see that the new originalists forfeit their claims to these supposed virtues of originalism over the moral reading. And, once the new originalists make these arguments—with their concessions to moral readers—we see that they are no longer simply engaged in a quest for the original public meaning of the Constitution while avoiding normative judgments of the sort called for by the moral reading. Instead, we see that they implicitly have conceded the need to make the very normative judgments that moral readers have insisted upon and that the old originalists have been at pains to avoid.

First, consider the rule-of-law/determinacy argument. The general claim is that originalism promises more determinacy in constitutional interpretation than does the moral reading and, as such, is more consistent with the rule of law. After all, originalism, even the new originalism, seeks to discover and enforce the original public meaning of the Constitution. By contrast, the moral reading requires complex and controversial normative judgments about the best understanding of abstract constitutional commitments.

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46. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 255 (1986).

47. For criticism of originalists who evidently take it as axiomatically given, see BARBER & FLEMING, *supra* note 27, at 104–07; Fleming, *supra* note 15, at 1794–96; Fleming, *supra* note 2, at 1344.

48. BENNETT & SOLUM, *supra* note 21, at 36–44.

Yet Solum's concessions that interpretation underdetermines outcomes, and that the development of doctrine occurs in the construction zone, undermines his rule of law argument that only originalism "guarantees a stable core of fixed constitutional meaning."<sup>49</sup> Indeed, on his account, the development of doctrine takes place in the construction zone, and originalism does not provide a theory of construction. Moreover, Solum concedes that some constitutional commitments are relatively abstract principles and standards, for example, equal protection, liberty, cruel and unusual punishment, freedom of speech, and the like. Interpretation (much less construction) of these abstract principles and standards, however, will not be a matter of doing historical research to unearth determinate, concrete original public meanings (much less concrete original expected applications of the Framers and ratifiers). It will not be bounded and determinate in the way that the argument from rule of law/determinacy presupposes. Nor, indeed, will construction be bounded in this way. Rather, interpretation and construction of relatively abstract principles and standards are going to require normative judgments about the best understanding of those principles and standards. These are the very judgments which moral readers have insisted are central to constitutional interpretation and construction and which old originalists have sought in vain to banish.

Second, consider the argument from popular sovereignty/democracy. The general claim is that originalism is more democratic than the moral reading because originalism invalidates actions embodying current majority will (as enacted in the ordinary law of legislation) in the name of preserving the will of We the People (as embodied in the higher law of the Constitution) against encroachment. Whereas (so the originalists say) the moral reading does so in the name of the moral judgments of unelected justices of the Supreme Court. As such, the argument goes, originalism is ultimately more democratic. Indeed, it is consistent with and reinforces popular sovereignty.

Yet Solum's ideas about how we develop doctrine in the construction zone undermines his popular sovereignty argument for originalism. For it turns out that We the People when ratifying the Constitution in 1791, or ratifying the Fourteenth Amendment in 1868, did not adopt determinative answers to our questions. And so, in constructing doctrine, the new originalists are not simply following the rules laid down by We the People. Thus, even on Solum's account, the decisions made by the popular sovereign in the past are underdeterminative; to that degree, the argument for originalism from popular sovereignty is attenuated. The method of construction as principle is not going to involve resolution of hard cases through historical research concerning relatively concrete and determinate original public meaning. It is going to require making normative judgments about the best understanding of our constitutional commitments to relatively abstract principles and standards. Again, these are the very

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49. *Id.* at 41.

judgments that moral readers have insisted are necessary and that old originalists have asserted were illegitimate if not subversive and heretical.

Third, consider the ruliness argument for originalism. The ruliness claim is that originalism is more rule-like and thus more ruly than living constitutionalism and moral readings. For originalism claims, again, that constitutional interpretation is a matter of determining the historical original public meaning of relatively concrete commitments. This is as it should be under an understanding of the rule of law as a law of rules.<sup>50</sup> Constitutional interpretation is not—the ruliness argument claims—a matter of making controversial normative judgments about the best understanding of abstract commitments. It is not a matter of making all-things-considered “reasoned judgments” about what our commitments and traditions, understood as “living thing[s],” have come to when understood in their best light.<sup>51</sup> Nor is constitutional interpretation a matter of making complex normative and pragmatic judgments after deploying “multiple modalities” of constitutional argument.<sup>52</sup> These types of argument and judgment—the heart of interpretation and construction for living constitutionalists and moral readers—have been anathema to originalists like Scalia and Bork because they seem to be unruly and to require complex normative or pragmatic judgments.

Yet, new originalists like Solum, in response to living constitutionalist arguments that “multiple modalities” of argument in our constitutional practice refute originalism, now say that originalists can accept that construction embraces these multiple modalities of argument.<sup>53</sup> Likewise, new originalists like Whittington now say that (evidently hitherto monistic) originalists can recognize and accept what he calls “pluralism within originalism” or how originalist arguments exist in an environment of “pluralism in constitutional interpretation”<sup>54</sup> (or, Solum would insist, construction).

But in making these concessions the new originalists forfeit the ruliness argument for originalism over the moral reading. Not just because they let in the “multiple modalities” in the first place; but also because they cannot plausibly claim that judges and scholars who work through and assess the multiple modalities of argument are seeking to discover and enforce the original public meaning of the Constitution. Instead, they quite plainly are making normative or pragmatic judgments about the best understanding of our constitutional commitments and practice. Again, these are the very

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50. I am alluding to Justice Scalia’s famous article, *The Rule of Law As a Law of Rules*. See generally Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

51. I am alluding to the joint opinion of Justices O’Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 848–49 (1992), embracing Justice Harlan’s approach to constitutional interpretation in *Poe v. Ullman*, 367 U.S. 497, 543, 549 (1961) (Harlan, J., dissenting).

52. I am alluding to Bobbitt’s well-known view as developed in his book. See *supra* note 37.

53. See *supra* note 37 and accompanying text.

54. See *supra* note 38 and accompanying text.

judgments that the moral readers have insisted were necessary, and that the old originalists have disparaged as illegitimate.

Fourth and finally, consider the argument for originalism from fidelity. In *The New Originalism*, Whittington argues, “The primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.”<sup>55</sup> He contends that the new originalism “does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”<sup>56</sup> Whittington’s argument from fidelity brings us back to the topic of the 1996 Fordham Symposium.

As I observed above, many originalists have claimed a monopoly on concern for fidelity in constitutional interpretation, yet many leading constitutional scholars in that Symposium advanced conceptions of fidelity that are not conventional originalist conceptions. In my paper for the Symposium, I argued that the aspiration to fidelity

raises two fundamental questions: *Fidelity to what?* and *What is fidelity?* The short answer to the first—fidelity to the Constitution—poses a further question: *What is the Constitution?* For example, does the Fourteenth Amendment embody abstract moral principles or enact relatively concrete historical rules? . . . The short answer to the second—being faithful to the Constitution in interpreting it—leads to another question: *How* should the Constitution be interpreted? Does faithfulness to the Fourteenth Amendment require recourse to political theory to elaborate general moral concepts or prohibit it and instead require historical research to discover relatively specific original understanding? And does the quest for fidelity in interpreting the Constitution exhort us to make it the best it can be or forbid us to do so in favor of enforcing an imperfect Constitution?<sup>57</sup>

The old originalists answered the first question—*Fidelity to what?*—by saying, why of course fidelity to the intention of the Framers or the concrete original expected applications of the Framers and ratifiers. Yet the new originalists, somewhat like the moral readers, answer it by saying, fidelity to the original public meaning, which includes that of some relatively abstract principles and standards. The old originalists answered the second question—*What is fidelity?*—with their authoritarian understanding that fidelity commands us to follow the authority of the past: following our historical practices and the concrete original expected applications of the Framers and ratifiers. The moral readers, by contrast, answer it with their understanding that fidelity exhorts us to honor our abstract aspirational principles (or to redeem the promise of our abstract commitments). Fidelity is living up to and realizing the aspirations embodied in our experiment in self-governance under a scheme of principles.

The new originalists, with their new arguments and new conceptions, cannot simply adhere to the old originalist conception of fidelity. In other

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55. Whittington, *supra* note 12, at 609.

56. *Id.*

57. Fleming, *supra* note 2, at 1335.

work, I have argued—and in my book in progress I shall further argue—that the moral reading offers a better understanding of fidelity than does any variety of originalism, old or new.<sup>58</sup> I shall not repeat those arguments here. The point that is relevant here is that once the new originalists make the reasonable and inclusive concessions that they have made—that constitutional adjudication: (1) includes interpretation and construction of relatively abstract principles and standards, not merely interpretation of determinate, concrete rules or terms of art; (2) involves interpretation and construction through multiple modalities of argument, not simply interpretation through historical research concerning concrete original expected applications; and (3) requires construction that is not originalist and that involves making normative judgments about how to redeem the Constitution’s abstract commitments—they have forfeited their arguments that originalism is superior on the ground of fidelity to the moral reading. For they have implicitly accepted the moral reading’s conception of fidelity as requiring complex normative judgments in order to realize our constitutional commitments and aspirations, or to interpret and construct the Constitution so as to make it the best it can be. And they have implicitly rejected the old originalist conception of fidelity as simply following the commands of the Framers and ratifiers, or following the authority of the past.

To recapitulate: the inclusiveness of the new originalism—in particular, the arguments regarding construction—undermines the new originalists’ normative arguments for originalism over the moral reading, indeed forfeits the new originalism’s supposed comparative virtues. What is the upshot of my argument? Should the new originalists like Solum not have made these reasonable, inclusive concessions to the moral reading that conventional originalists have resisted? Should they have remained doggedly exclusionary, dogmatically insisting on their superior claim to these virtues and rejecting construction as illegitimate?

Most certainly not. My point is not that the new originalists have gone wrong in being inclusive. Quite the opposite. It is rather that the new originalists, having made these concessions, should now also acknowledge that they are engaged in a moral reading of the Constitution. To Solum’s question, “Are we all originalists now?” I not only answer “I hope not,” but also aim to show the extent to which we are all moral readers now.<sup>59</sup> I shall pursue these matters further in my book. There I shall urge the new originalists to come within the big tent of the moral reading.

So far, I have focused on the first of Solum’s claims about what is distinctive about the new originalism: the significance of the distinction between interpretation and construction. Now, I shall turn to the second of his claims: the significance of the movement from “intention of the

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58. See *id.* at 1338, 1353–55; see also Fleming, *supra* note 15, at 1798–99, 1806; James E. Fleming, *Fit, Justification, and Fidelity in Constitutional Interpretation*, 93 B.U. L. REV. 1281, 1288–90 (2013).

59. Fleming, *supra* note 15, at 1786, 1805–06; Fleming, *Balkanization*, *supra* note 14, at 669–71.

Framers” to “original public meaning.” To this point, I have characterized this development optimistically, pointing out that to the extent the new originalists acknowledge that we might conceive original public meaning abstractly, the new originalism might be inclusive and bear affinities to the moral reading. In the final section of this Article, I shall acknowledge that this move to original public meaning is not necessarily more hospitable to the moral reading. We can see this clearly in the constitutional jurisprudence of Justice Scalia.

#### V. THE SIGNIFICANCE OF THE MOVEMENT FROM INTENTION OF THE FRAMERS TO ORIGINAL PUBLIC MEANING

In some instances, I believe that the move within originalism from intention of the Framers to original public meaning is largely a public relations move—one that seems to acknowledge the flaws in the old originalism, yet to leave the actual practice of originalism unaffected. That is, originalists officially state that their quest is for the original public meaning. But they persist in dredging up what they see as concrete original expected applications of the Framers and ratifiers or they rewrite evidently abstract commitments like “privileges or immunities” or “freedom of speech” into determinate, lawyerly terms of art (commitments concerning which, ironically, there is no original public meaning, only technical lawyerly meanings beyond the ken of the public). Balkin has demonstrated this point effectively.<sup>60</sup>

In other instances, however, the move to original public meaning does affect the practice of originalism. For example, in Justice Scalia’s jurisprudence, it moves originalism in a conservative direction. Here I mean “conservative” not simply in a substantive political sense of supporting the outcomes conservatives favor, but also in a Burkean sense of conceiving original public meaning as being the deposit of historical practices rather than abstract normative commitments that might be critical of, or at any rate different from, those practices. We see this clearly in Justice Scalia’s dissenting opinion in the Virginia Military Institute (VMI) case, *United States v. Virginia*,<sup>61</sup> and his opinion of the Court in the right to bear arms case, *District of Columbia v. Heller*.<sup>62</sup>

On Justice Scalia’s view, the original public meaning of the Equal Protection and Due Process Clauses of the Fourteenth Amendment is not the ordinary moral understandings of citizens in 1868 concerning their normative commitments to abstract and contested principles like equality and liberty. Rather, it is the deposit of historical practices embodied in the statute books and common law as of 1868. Scalia famously articulates this conception in his dissent in *Virginia* (in the context of equal protection) and

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60. BALKIN, LIVING ORIGINALISM, *supra* note 9, at 100–01, 103–05; Fleming, *Balkinization*, *supra* note 14, at 674–75.

61. 518 U.S. 515, 566 (1996) (Scalia, J., dissenting).

62. 554 U.S. 570 (2008).

in his plurality opinion in *Michael H. v. Gerald D.*<sup>63</sup> (in the setting of due process).

According to Scalia, the point of constitutional commitments is to embody historical practices so conceived. And so, for example, the original public meaning of the Equal Protection Clause is not that of an abstract, normative principle that condemns class legislation or the maintenance of a caste system that reduces or maintains certain classes of people in the status of an inferior caste beneath full citizenship—whether on the basis of race, sex, or sexual orientation. Instead, for Scalia, the Equal Protection Clause embodies a deposit of historical practices: if single-sex educational institutions like VMI were not viewed as an unconstitutional practice in 1868, and there has been a historical practice of maintaining such single-sex educational institutions ever since, then the operation of VMI as a single-sex military college simply does not violate the Constitution.

To elaborate, in dissent in *Virginia*, Scalia objects that “[the Court] counts for nothing the long tradition, enduring down to the present, of men’s military colleges supported by both States and the Federal Government.”<sup>64</sup> Let’s contrast Scalia’s view with Justice Ginsberg’s view in the opinion of the Court concerning history and tradition in interpreting the Equal Protection Clause. Let’s distinguish between two competing conceptions of tradition: *historical practices* (equal protection includes whatever was protected specifically in the statute books or recognized concretely in the common law when the Fourteenth Amendment was adopted in 1868) versus *aspirational principles* (equal protection embodies principles to which we as a people aspire, and for which we as a people stand, whether or not we have always or yet realized them in our historical practices, statute books, or common law).<sup>65</sup> Which conception does Scalia embrace? Clearly the former, historical practices. Which conception does Ginsburg embrace? Clearly the latter, aspirational principles that are critical of our longstanding historical practices. Furthermore, let’s contrast Ginsburg’s and Scalia’s attitudes toward the longstanding historical practice of excluding women from VMI. Ginsburg views this as longstanding sex discrimination in violation of the Constitution, which aspires to “full citizenship stature” for women as well as men.<sup>66</sup> By contrast, Scalia writes that “longstanding national traditions [are] the primary determinant of what the Constitution means.”<sup>67</sup> Indeed, he argues that the Court’s interpretation of the Equal Protection Clause “cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people’s understanding” of the Equal Protection Clause.<sup>68</sup> In short, the fact that we have a longstanding historical practice of excluding women from VMI is practically conclusive evidence that the

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63. 491 U.S. 110 (1989).

64. *Virginia*, 518 U.S. at 566 (Scalia, J., dissenting).

65. For elaboration of this distinction, see FLEMING, *supra* note 27, at 112–16.

66. *Virginia*, 518 U.S. at 532.

67. *Id.* at 570 (Scalia, J., dissenting).

68. *Id.* at 568.



exclusion of women from VMI does not violate the Equal Protection Clause.

For moral readers such as Justice Brennan, Justice Ginsburg, or Justice Stevens, the point of adopting and amending the Constitution is not to embody longstanding historical practices, but to transform them in pursuit of our constitutional aspirations to normative principles like equality and liberty. Brennan wrote, “Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized.” He continued, “Thus, for example, when we interpret the Civil War amendments . . . we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world.”<sup>69</sup> That is Brennan’s conception of the abstract, aspirational original public meaning of the Civil War Amendments, including the Fourteenth Amendment. For Brennan, Ginsburg, and Stevens, the Fourteenth Amendment commits us to equal protection on our best understanding, not equality as it was reflected in the common law and statute books in 1868, with all manner of racist, sexist, and heterosexist expectations and presuppositions.<sup>70</sup> It also commits us to liberty on our best understanding, not liberty as it was manifested in the common law and statute books as of 1868.<sup>71</sup> As they see it, originalists seeking to enforce Scalia-like conceptions of original public meaning eviscerate the Fourteenth Amendment’s transformative purposes.

To take another example, in *Heller*, Scalia presupposes—with his version of original public meaning originalism—that the point of adopting the Second Amendment was to codify a preexisting common law individual right to bear arms for self-defense as recorded in Blackstone.<sup>72</sup> He presupposes this irrespective of (and in the face of) the language of the Second Amendment—“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed”<sup>73</sup>—which suggests that its purpose instead is to preserve well-regulated state militias. And he presupposes this irrespective of the

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69. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

70. See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612, 2637 (2013) (Ginsburg, J., dissenting) (“[T]he Civil War Amendments used ‘language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality.’” (quoting AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 361, 363, 399 (2005))); Reva B. Siegel, *Equality’s Frontiers: How Congress’s Section 5 Power Can Secure Transformative Equality (As Justice Ginsburg Illustrates in Coleman)*, 122 YALE L.J. ONLINE 267 (2013).

71. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 743 (1997) (Stevens, J., concurring) (“[T]he source of [the] right to refuse treatment was not just a common-law rule. Rather, this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law. This freedom embraces not merely a person’s right to refuse a particular kind of unwanted treatment, but also her interest in dignity, and in determining the character of the memories that will survive long after her death.”).

72. *District of Columbia v. Heller*, 554 U.S. 570, 593–97 (2008).

73. U.S. CONST. amend. II.

arguments in the debates concerning the reasons for adopting the Amendment, which suggest that its purpose was to protect state militias from being abolished by the federal government.<sup>74</sup> Scalia construes the purpose of the Amendment in light of his prior jurisprudential presupposition that constitutional commitments are the deposit of historical practices. The “meaning of the operative clause” of the Second Amendment<sup>75</sup>—because of his prior jurisprudential presuppositions about the point of adopting a constitutional amendment protecting rights—just *has to be* to codify the common law right to bear arms for self-defense.

Justice Stevens, who takes a purposive approach to constitutional interpretation in general, and to the Second Amendment in particular, begins with the preamble to the Amendment—“A well regulated Militia, being necessary to the security of a free State”—and construes the right to bear arms in light of that stated purpose.<sup>76</sup> He observes that the language of the Amendment says nothing about a common law individual right to bear arms for self-defense. He further observes that the arguments in the debates confirm that the purpose in adopting the Amendment was to protect against federal abolition of state militias. Furthermore, just as Stevens has rejected Scalia’s idea that the purpose of the Fourteenth Amendment’s Due Process Clause is to embody common law practices regarding liberty,<sup>77</sup> so too he rejects the idea that the purpose of the Second Amendment is to codify common law practices concerning an individual right to bear arms for self-defense. Instead, for Stevens, we have to ask what purpose is expressed in the actual language of the Second Amendment, and whether the debates by the Framers and ratifiers concerning the reasons for adopting the Amendment confirm that stated purpose.

In common understanding, originalist interpretation is thought to involve discovering and following the intent of the Framers. Yet Scalia, an avowed originalist, writes:

Justice Stevens relies on the drafting history of the Second Amendment—the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one.<sup>78</sup>

What is going on here? Many have distinguished between “old originalism,” which is concerned to discover and follow the intent of the Framers, and “new originalism,” which is concerned to discover and follow the original public meaning of the words of the document (irrespective of what the Framers might have intended). Here, Scalia is claiming to be an original public meaning originalist, and he is claiming that the original public meaning of the Second Amendment was to codify a preexisting

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74. *Heller*, 554 U.S. at 637 (Stevens, J., dissenting).

75. *Id.* at 592–95 (majority opinion).

76. *Id.* at 640–44 (Stevens, J., dissenting).

77. *See supra* note 71 and accompanying text.

78. *Heller*, 554 U.S. at 603.

common law right, which he claims was an individual right to bear arms for self-defense.

Furthermore, in our own time, disagreement about the meaning of our basic constitutional commitments, including constitutional rights protected by the Second Amendment, is deep and pervasive. Yet Justice Scalia writes, “Justice Stevens’ view . . . relies on the proposition, unsupported by any evidence, that different people of the Founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.”<sup>79</sup> Is this a sound presupposition about constitutional commitments? If one looks at all of the historical evidence presented in the three opinions in *Heller*, isn’t it very much open to question whether the Second Amendment was “widely understood” to protect the liberties that Scalia insists upon? Again, Scalia takes this view because of his prior jurisprudential presupposition that this just *has to be* the nature of constitutional commitments, irrespective of the language of the Constitution and of the evidence of disagreement concerning its meaning. That is why Scalia rejects, as “dubious,” any arguments from the debates concerning the reasons for adoption of the Second Amendment—the arguments that Stevens sees as central to understanding the purpose of the Amendment.

To suggest just how radically conservative Scalia’s presuppositions about original public meaning are, I shall formulate two hypotheticals involving constitutional amendments protecting the right to bear arms, with two sets of evidence concerning the reasons for adopting the amendment. Each hypothetical amendment contains the same text: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Is this some kind of joke? Don’t I know that the Second Amendment already consists of this very language? I do. As will soon become clear, that’s part of the point of the exercise.

(1) The first hypothetical goes like this. It is 1791. James Madison proposes the foregoing language of the amendment. He says:

I know that there is a common law individual right to bear arms for self-defense as recorded in Blackstone. Forget that common law right. And forget Blackstone. We’ll leave it to the common law to protect that right. We must never forget that it is a Constitution we are making and amending.<sup>80</sup> We are making over the world<sup>81</sup>—embarking upon an experiment in constitutional self-government by reflection and choice<sup>82</sup>—not codifying common law rights or enshrining the deposit of historical practices. What we are concerned about here is the states’ right to maintain a well regulated militia, and we are concerned that without this

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79. *Id.* at 604–05.

80. I am alluding, of course, to Chief Justice John Marshall’s famous statement in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 317, 407 (1819).

81. I am alluding to Brennan, *supra* note 69, at 438.

82. I mean to evoke a famous line from THE FEDERALIST NO. 1 (Alexander Hamilton).

amendment the federal government might abolish state militias. And so, to make it as clear as language possibly can, we are going to insert a preamble at the beginning of the amendment: “A well regulated Militia, being necessary to the security of a free State.” This language will make it clear beyond doubt that we are not here talking about any common law individual right to bear arms for self-defense. No one will ever be able to gainsay that the amendment is instead concerned with protecting the states’ right to maintain a well regulated militia.

In this hypothetical, Madison drafts the amendment and is the only one who speaks about its purpose and meaning at the convention. Immediately after his speech, which receives a standing ovation, the delegates unanimously propose the amendment. It is subsequently ratified.

I daresay that, even under this hypothetical, Scalia would interpret the original public meaning of the amendment as being to codify the common law individual right to bear arms for self-defense. He would advance this interpretation, not because of any reason given in support of this interpretation at the time of the framing and adoption of the amendment. He would advance it instead because of his prior jurisprudential presupposition that constitutional rights, as such, must codify known, preexisting rights, not fashion new ones. Again, with this jurisprudential preconception, Scalia blunts the transformative purpose of constitution making and amendment, and renders vain any attempt to “make over the world” or “fashion new rights” that are not longstanding common law rights.

(2) Here is the second hypothetical. It is 2018. In the ten years since the Supreme Court decided *Heller*, *Heller* itself—together with a series of school massacres and assassinations of presidents and members of Congress who fought for gun control measures—provokes a backlash leading to a constitutional amendment. The supporters of gun control in the House and Senate—led by the biggest critics of *Heller*’s reading of the Second Amendment as protecting an individual right to bear arms for self-defense rather than the states’ right to maintain a well regulated militia—as a rebuke to the Court’s interpretation in *Heller*, reaffirm the very language of that Amendment through the constitutional amendment process. During the process of amendment, they hold elaborate and extensive debates concerning the reasons for adopting the amendment and reaffirming the language of the Second Amendment, emphasizing the aim to repeal *Heller*’s interpretation of that very language. They engage in extensive criticism of Scalia’s opinion in *Heller* and extensive praise of Stevens’s and Breyer’s dissenting opinions. They also carry out extensive discussion to establish beyond doubt that the purpose of the preamble is to make it as clear as words can make it that this amendment is to protect the states’ right to maintain a militia, not any common law individual right to bear arms for self-defense.

I daresay that, even under this second hypothetical, Scalia likely would interpret the original public meaning of the newly adopted amendment as being to codify the common law individual right to bear arms for self-

defense. I imagine that he would reject, as “dubious,” any recourse to the original public meaning as manifested in the debates concerning the purposes of adopting the language of the Amendment. I would expect him to stand firm in his contention that the text was “to codify a pre-existing right, rather than to fashion a new one.”<sup>83</sup>

My larger point with both of these hypotheticals is that Scalia’s approach to original public meaning blunts the transformative purpose of constitution making and amendment—as we have also seen in his approach to interpreting the Fourteenth Amendment’s Equal Protection and Due Process Clauses. It does so because of his prior jurisprudential presuppositions concerning (1) what counts as original public meaning, and (2) what the purpose of constitution making and amendment is. Scalia’s approach to original public meaning historicizes rights. Under his approach, constitution makers and amenders are not fashioning abstract commitments to rights whose meaning must be elaborated over time to determine our best understanding of them in the context of problems as they arise. Instead, they are codifying preexisting rights whose content is known through their deposit in historical practices—the common law and statute books at the time of the ratification of the language.

#### CONCLUSION

I have suggested that the salutary inclusiveness of the new originalism—in particular, its emphasis on the distinction between interpretation and construction—may give away more to the moral reading than the new originalists have recognized. Accordingly, the prospects for reconciliation between the new originalism and the moral reading may be better than have been appreciated. But I also have suggested that the movement from intention of the Framers to original public meaning may have an unacknowledged or at any rate underappreciated conservative bent. I have issued a cautionary tale about how resort to original public meaning has entered into judicial decisionmaking by Justice Scalia, blunting the very possibility of constitutional transformation through amendment, and, indeed, of constitutional self-government through reflection and choice.

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83. *See supra* note 78 and accompanying text.