

2013

Editors' Foreword

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Recommended Citation

Editors, *Editors' Foreword*, 82 Fordham L. Rev. 371 (2013).
Available at: <http://ir.lawnet.fordham.edu/flr/vol82/iss2/1>

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SYMPOSIUM

**THE NEW ORIGINALISM IN
CONSTITUTIONAL LAW**

Editors' Foreword

On March 1 and 2, 2013, the *Fordham Law Review* hosted a Symposium entitled *The New Originalism in Constitutional Law*. The two-day Symposium reflected on a host of theories that have developed since the advent of originalism in the late 1970s and 1980s, considering if, how, and why these theories—broadly referred to as New Originalism—should influence constitutional interpretation. The Symposium presented five panels that examined these questions from a variety of angles.

The first panel examined the evolution of originalism from its origins as a theory of constitutional interpretation to the way it influences other theories today. Professor Keith Whittington discussed the origins of originalism as a reaction by conservative critics of the Warren Court's decisions, and characterized the New Originalism as a response to criticisms of the old originalism, as well as a reconsideration of earlier originalist assumptions and conclusions.¹ Professor Whittington also outlined points of harmony and disagreement between recent originalist theorists and originalist critics.² Professor Randy Barnett discussed the gravitational force that New Originalism has on judges who accept the relevance of original meaning, even when the original meaning of the Constitution does not appear to be the basis of a judicial decision.³ Professor James Fleming discussed the shift from old originalism to an inclusive New Originalism and acknowledged that reconciliation between New Originalism and the moral reading of the Constitution may be better than anticipated.⁴ Professor Fleming cautioned, however, that New Originalism's shift in focus from Framers' intent to original public meaning blunts reflection and choice in constitutional self-government.⁵

The second and third panels analyzed the different ways that these theories define, identify, and use meaning in constitutional interpretation.

1. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 373 (2013).

2. *Id.*

3. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411 (2013).

4. James E. Fleming, *The Inclusiveness of the New Originalism*, 82 *FORDHAM L. REV.* 433 (2013).

5. *Id.*

Professor Lawrence Solum focused his discussion on constitutional construction, advancing two primary claims: “First, constitutional construction is ubiquitous in constitutional practice.”⁶ Second, the construction zone—where the constitutional text is underdeterminate or irreducibly ambiguous—is ineliminable.⁷ Professor Larry Alexander posited that anyone who must interpret the promulgations of legal authorities should seek the authorially intended meaning.⁸ Professor Mitchell Berman, joined in the authorship of his article by Professor Kevin Toh, examined what they describe as the “center of gravity” of New Originalism, identifying what judges are supposed to interpret, and what the answer to that question implies.⁹ Professor Andrei Marmor discussed the difference between originalist and nonoriginalist views between concepts and conceptions, arguing that the debate is mostly a moral-political one about the purpose a constitution serves and what makes it legitimate.¹⁰ Professor Scott Soames presented “Deferentialism,” a close affiliate of originalism that first asks, “[W]hat does the law say, assert, or stipulate?”¹¹ Once meaning is identified, “intent becomes constitutive, as opposed to merely evidential.”¹² Professor Tara Smith argued that originalism suffers from a fatal flaw of conflating objective meaning with original meaning, and that this flaw turns constitutional interpretation into a “he said, she said” battle that ultimately does not provide for objective rule of law.¹³

The fourth panel discussed the role of history in constitutional interpretation. Professor Jack Balkin used his own version of New Originalism that he called “framework originalism,” developed in *Living Originalism*,¹⁴ to recognize how originalists use and nonoriginalists should use arguments from tradition and cultural memory as intellectual tools “to understand the challenges of the present, and to argue with their fellow citizens about the proper direction of the constitutional project in the future.”¹⁵ Professor Saul Cornell highlighted how originalist practices are largely antithetical to accepted historical methodology and offered an analysis of how contemporary intellectual history provides a stronger historical base to help facilitate a more serious debate over the proper role

6. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 453 (2013).

7. *Id.*

8. Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539 (2013).

9. Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 545–46 (2013).

10. Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 FORDHAM L. REV. 577 (2013).

11. Scott Soames, *Deferentialism: A Post-originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597, 597 (2013).

12. *Id.*

13. Tara Smith, *Originalism, Vintage or Nouveau: “He Said, She Said” Law*, 82 FORDHAM L. REV. 619 (2013).

14. JACK M. BALKIN, *LIVING ORIGINALISM* (2013).

15. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 718 (2013).

of history in constitutional analysis.¹⁶ Professor Andrew Kent evaluated how New Originalism interprets the foreign affairs provisions of the U.S. Constitution and suggested that the exacting textualism of New Originalism may leave a large gap between its results and the expectations and practices of the Founders, calling New Originalism's usefulness into question.¹⁷

The Symposium concluded with a panel discussing constitutional theory with and without originalism. Professor Leslie Goldstein discussed the originalist position on precedent, taking issue with the originalist argument that U.S. Supreme Court justices should feel obliged to follow the original understanding of the Constitution, even when it contradicts longstanding precedent.¹⁸ In contrast to this position, Professor Goldstein argued "that the same rule of law and popular sovereignty concerns deployed to justify originalism are best interpreted as recommending some well-settled precedent be upheld."¹⁹ Professor Bernadette Meyler posited that the constitutional construction theory that many New Originalists adopt as a supplement to interpretation accepts that, in the absence of a majority Founding-era view about meaning, there can be no original meaning.²⁰ Professor Meyler argued that this position undervalues and neglects the role of multiple meanings in constitutional analysis and in the democratic process itself.²¹

16. Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013).

17. Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757 (2013).

18. Leslie F. Goldstein, *Original Meaning, Precedent, and Popular Sovereignty?: Whittington et al. v. Lincoln et al.*, 82 FORDHAM L. REV. 783 (2013).

19. *Id.* at 785.

20. Bernadette Meyler, *Accepting Contested Meanings*, 82 FORDHAM L. REV. 803 (2013).

21. *Id.*