
THE PROBLEM OF CHANGE: RETHINKING CRITIQUES OF “NEW ORIGINALISM”

ABSTRACT

How do originalists deal with change? It turns out many minimize the issue. Those that have dealt with it have offered solutions that are, to be generous, not great.

Some originalists, often called “new originalists,” acknowledge that the correct application of the original meaning is not always clear. These originalists then turn to non-originalist principles for an answer. Some originalist scholars, such as Professors John O. McGinnis and Michael B. Rappaport, have been highly critical of this aspect of new originalism.

This Comment argues new originalism is a necessary evil. First, it argues the methods originalists have proposed to deal with change are, essentially, all the same. This Comment then labels these methods “abstraction-based originalism” because they all require the interpreter to “abstract” something—such as a value from the practices of the Founding generation. This Comment argues the faults of living constitutionalism are present in both new and abstraction-based originalism, but new originalism is honest because it acknowledges the problem. This Comment also uses arguments made by textualists when discussing purposed-based statutory interpretation against abstraction-based originalism. This Comment concludes that originalist literature should be friendlier to new originalism and proposes one possible area for further study.

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I. INTRODUCTION

What does an originalist do when the original meaning of the Constitution is difficult to apply due to changed circumstances? Unfortunately, “[o]riginalism’s proponents have not answered the challenge of change. Instead, they have only noted the challenge in passing . . . Justice [Antonin] Scalia . . . has even conceded the force of the challenge of change.”¹ Indeed, Justice Scalia once declared in a debate against Justice Stephen Breyer: “I’m not pretending that . . . original[ism] . . . is going to solve every problem.”²

Originalists’ failure to answer the “challenge of change” is problematic because an old-school originalist judge does not leave the confines of originalism merely because originalist principles become extremely difficult to apply.³ Originalists who are willing to use another approach to constitutional interpretation, when originalism appears to provide no answer, are sometimes referred to as “new originalists.”⁴ A new originalist, after finding a provision “vague or ambiguous,” will consider “extra constitutional values” that may go beyond the “history, structure, purpose, and intent” of the Constitution.⁵ Prominent scholars, such as Professors John O. McGinnis and Michael B. Rappaport, have been critical of new

1. Lee J. Strang, *Originalism and the “Challenge of Change”: Abducted-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 929 (2009). Indeed, when Professor Lee J. Strang looked at the problem of change he only cited one other scholarly work as “thoroughly explain[ing] one of originalism’s tools to meet the challenge.” *Id.* at 929 n.9 (citing Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 555–56 (2006)).

2. *A Conversation on the Constitution with Supreme Court Justices Stephen Breyer and Antonin Scalia—Event Audio*, FEDERALIST SOC’Y, at 43:56 (Dec. 5, 2006), <https://fedsoc.org/commentary/videos/a-conversation-on-the-constitution-with-supreme-court-justices-stephen-breyer-and-antonin-scalia-event-audio>.

3. See John O. McGinnis & Michael B. Rappaport, *Federalism & Separation of Powers: An Originalist Future*, ENGAGE, Feb. 2014, at 34, 35.

4. *Id.* at 36 (“So-called ‘new originalists’ . . . believe that original meaning controls the interpretation of provisions that are not ambiguous or vague, but that constitutional construction provides judges and other political actors with discretion to resolve ambiguity and vagueness based on values not derived from the Constitution.”).

5. *Id.*

originalism, even comparing it to living constitutionalism.⁶

This Comment argues, however, that new originalism is a necessary evil. While originalism has several benefits over living constitutionalism, such as preserving popular sovereignty⁷ and limiting judicial activism,⁸ it has one glaring problem: change. The type of change this Comment is concerned with is not a mere shift in popular opinion. Shifts in popular opinion do not affect the application of the original meaning. At times, however, determining the correct application of the original meaning is difficult due to changed circumstances not anticipated at the time of the Founding.⁹ Originalist literature offers only one significant method for dealing with this kind of change: abstracting a value from the text of the Constitution or practices of the Founding generation and then applying the value.¹⁰ This Comment refers to this method as abstraction-based originalism.¹¹

6. *Id.* at 35 (“Many of the new theorists of originalism—the so-called new originalists—believe that the original meaning controls the decision only in cases where the Constitution is sufficiently clear. The theoretical difficulty with this approach is that new originalism can then easily collapse back into living constitutionalism . . .”); see Peter J. Smith, *How Different Are Originalism and Non-Originalism*, 62 HASTINGS L.J. 707, 709 (2011) (“If . . . an originalist judge’s obligation is to seek the original meaning of abstractly expressed text at a high level of generality . . . then there is no obvious distinction . . . between new new originalism and non-originalism.”).

7. See, e.g., Andrew Coan, *The Foundations of Constitutional Theory*, 2017 WIS. L. REV. 833, 854–55 (“[C]onstitutional decision-makers should be originalists because originalism is necessary to preserve the popular sovereignty of the ratifiers whose democratic endorsement gives the Constitution its legal force.”).

8. See, e.g., Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 602 (2004).

9. See Robert H. Bork, Circuit Judge, U.S. Court of Appeals for D.C., Speech at the University of San Diego Law School: The Constitution, Original Intent, and Economic Rights (Nov. 18, 1985), in 23 SAN DIEGO L. REV. 823, 823–32 (1986).

10. See, e.g., Strang, *supra* note 1, at 949.

11. See *id.* at 948 (“The Constitution, according to Dworkin, embodies ‘broad and abstract’ ‘moral principles.’” (quoting RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7–12 (1996))); Green, *supra* note 1, at 555 (“I deploy the sense–reference distinction . . . I suggest that a constitutional expression’s reference, but not its sense, can change.”); see also Ctr. for Constitutional Studies UVU, *Justice Scalia and Technological Change* | Jack Balkin, YOUTUBE (Nov. 16, 2016), <https://www.youtube.com/watch?v=pIIxh7YEdmw>. In Australia, one scholar has suggested a similar concept to abstraction-based originalism as an alternative to the normative “literalist” approach currently employed by most Australian judges. Geraldine Chin, *Technological Change and the Australian Constitution*, 24 MELB. U. L. REV. 609, 609 (2000) (proposing a “purposed-based methodology” where courts are guided by “the purpose of a constitutional provision to determine the essential meaning of a constitutional term”).

Abstraction-based originalism, this Comment argues, is often too similar to living constitutionalism. For example, problematically, abstraction-based originalism does not limit judicial activism. While new originalism has similar problems, at least new originalism is honest. It asks judges to stop pretending that originalism has all the answers.¹²

The body of this Comment proceeds in three parts. Part II describes originalism and living constitutionalism. Part III looks at different approaches originalists have taken in order to deal with change, and it argues all the approaches are versions of abstraction-based originalism. Part IV critiques new and abstraction-based originalism from two ironic points of view. First, it argues the faults of living constitutionalism are present in abstraction-based originalism. Second, it uses arguments made by textualists—the same people who are often originalists¹³—when discussing statutory interpretation against abstraction-based originalism. This Comment concludes abstraction-based originalism must take a backseat to new originalism—at least in some situations.

II. THE BATTLE FOR THE CONSTITUTION'S SOUL: OR IS IT A BATTLE FOR POLITICAL CONTROL?

This Part describes the history of originalism and living constitutionalism. It explains some of the arguments in favor of each, but this Part is not a defense of either. It merely lays the groundwork for understanding why specific critiques of living constitutionalism are equally applicable to both new and abstraction-based originalism. However, new originalism at least acknowledges the problem.

12. And make no mistake, originalists need to stop pretending. See Smith, *supra* note 6, at 710–11 (“[Originalism’s proponents] can acknowledge that originalism is a limited theory of interpretation that alone cannot answer many questions of constitutional law and thus, accept judicial creativity in implementing the Constitution’s abstract principles; or they can instead continue to claim that originalism can effectively answer most constitutional questions without any need for broad judicial discretion. . . . If they choose the latter, they risk revealing originalism as a political philosophy, rather than an interpretative methodology.”).

13. For example, Justice Neil Gorsuch is both an originalist and a textualist. See generally Max Alderman & Duncan Pickard, Note, *Justice Scalia’s Heir Apparent?: Judge Gorsuch’s Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185 (2017).

A. “Old” Originalism: A Reaction to Living Constitutionalism in the Warren Court

Since an influential article authored by Professor Keith Whittington was published in 2004, scholars have divided originalism into two schools—old and new.¹⁴ Old originalism emerged as a reaction to the Warren Court’s perceived judicial activism.¹⁵ During Richard Nixon’s 1968 campaign for President, he promised “to appoint only ‘strict constructionists who saw their duty as interpreting law and not making law.’”¹⁶ When President Nixon nominated William Rehnquist for the Supreme Court, it became clearer what President Nixon meant by “strict constructionists.”¹⁷ At his confirmation hearing, soon-to-be Justice Rehnquist stated he interpreted the Constitution in accordance with “the language used by the framers, [and] the historical materials available.”¹⁸ Over the next two decades, “the central problem of constitutional theory was how to prevent judges from acting as legislators.”¹⁹ According to Professor Whittington, some aspects of old originalism—primarily those concerned with judicial restraint—started to die out in the early 1990s, in part, because “the Rehnquist Court made it largely irrelevant” for promoting conservative goals.²⁰

B. New Originalism: Making Originalism Work in the “Real World”

With a “conservative” Supreme Court, originalists faced a problem: old originalism “was largely a negative theory developed to criticize the decisions of the Warren and Burger Courts.”²¹ Now, originalism—if it was to be used by a majority-conservative Court—had to develop into a full theory.²² Two issues blocked the path forward for originalism. First, old originalism centered on the intentions of the Founders.²³ However, these

14. Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 *FORDHAM L. REV.* 545, 545 (2013) (citing Whittington, *supra* note 8, at 599).

15. Whittington, *supra* note 8, at 600.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 602.

20. *Id.* at 603–04. Admittedly, the implication that judges are “promoting” political goals is cynical and probably too often exaggerated.

21. Smith, *supra* note 6, at 708.

22. *See id.*

23. *See* Steven G. Calabresi, *Introduction to ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 11–12 (Steven G. Calabresi ed., 2007); Berman & Toh, *supra* note 14, at 545 (“Whittington . . . observed, new originalists maintain that the proper target of

intentions are often unclear. Consider, for example, the debate over the Bank of the United States.²⁴ Thomas Jefferson and James Madison argued incorporating a bank was outside the scope of Congress's enumerated powers, while Alexander Hamilton argued it could be implied from other enumerated powers given the Necessary and Proper Clause.²⁵ Which Founder's intention should govern? Second, the historical record is incomplete. For example, one scholar has argued, "there is no . . . record setting forth the intent of any Framers regarding the [Intellectual Property] Clause" ²⁶

Originalists claimed to develop a solution: look to the text or history and abstract values.²⁷ This solution—and several other traits—evolved into what scholars now call new originalism.²⁸ However, nomenclature is inconsistent in the literature.²⁹ (In reality, most originalists likely hold some beliefs from both schools.)³⁰ While some of these new originalists were

originalist interpretation is the original public meaning of the constitutional text, as opposed to the Framers' or ratifiers' intentions or expectations.").

24. See, e.g., Ezra Klein, *The Long History of Constitutional Disagreement*, WASH. POST (May 11, 2011), https://www.washingtonpost.com/blogs/wonkblog/post/the-long-history-of-constitutional-disagreement/2011/05/09/AFIc1zpG_blog.html?noredirect=on&utm_term=.74da9dcf6036.

25. *Id.*

26. Edward C. Walterscheid, *Originalism and the IP Clause: A Commentary on Professor Orlin's "New Reading"*, 58 UCLA L. REV. DISCOURSE 113, 114 (2010). Note that the Author of this Comment has some reservations about this scholar's assertion, but the point is that historical records are sometimes incomplete.

27. See Smith, *supra* note 6, at 708–11.

28. See, e.g., *id.*

29. One scholar (confusingly) referred to both new originalism and "new new originalism." *Id.* at 709.

30. Professor Whittington separated what he considered new originalism from a willingness to depart from futile old-school originalist approaches. See Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 134 n.25 (2010). He described the willingness to depart in terms of interpretation and construction. See generally *id.* He explained:

Construction lies closer along the continuum to the process of creation Construction picks up where interpretation leaves off. Interpretation attempts to divine the meaning of the text. There will be occasions, however, when the Constitution as written cannot in good faith be said to provide a determinate answer to a given question. This is the realm of construction. . . . Constitutional meaning is no longer discovered at that point. It is built.

Id. at 120–21. Despite Professor Whittington's belief that the two are separate concepts, he acknowledged, "The interpretation–construction distinction is often associated with

willing to concede that originalism did not provide all the answers, others seemingly held on to the old originalist mindset that it must in order to constrain judicial activism.³¹ This Comment separates these two views: new originalism describes a school that is willing to depart from originalism under difficult circumstances, and abstraction-based originalism is used to describe the school that is not willing to so depart.

C. Living Constitutionalism

In contrast with originalists, living constitutionalists believe the meaning of the Constitution can change over time.³² While elements of living constitutionalism are prevalent in opinions since the Founding,³³ it became popular during the New Deal.³⁴ Living constitutionalists often cite changing circumstances, such as the emergence of new technology, and argue originalists cannot determine how the original meaning of the text or the intent of the Framers applies.³⁵ Indeed, the ability to adapt to change is arguably the central advantage of living constitutionalism.³⁶

III. ABSTRACTION-BASED ORIGINALISM BY DIFFERENT NAMES

In the ongoing debate between originalists and living constitutionalists, one glaring issue is how originalists deal with change.³⁷ Surprisingly, little

and viewed as characteristic of the ‘new originalism.’” *Id.* at 134 n.25.

31. See generally Smith, *supra* note 6, at 713.

32. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1 (2010).

33. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (explaining six different arguments used throughout history in constitutional analysis, including consequences).

34. See Franklin D. Roosevelt, President, U.S., Constitution Day Address at Sylvan Theatre 9 (Sept. 17, 1937) (transcript available at http://www.fdrlibrary.marist.edu/_resources/images/msf/msf01104) (“When the Framers were dealing with what they rightly considered eternal verities, unchangeable by time and circumstance, they used specific language. . . . But when they considered the fundamental powers of the new national government they used generality, implication and statement of mere objectives, as intentional phrases which flexible statesmanship of the future, within the Constitution, could adopt to time and circumstances.”). President Roosevelt seemed to believe that an originalist interpretation actually required living constitutionalism, at least with respect to the powers of the federal government. See *id.*

35. See generally STRAUSS, *supra* note 32, at 1. For a strong critique of originalism, see Univ. of Ga. Sch. of Law, *Supreme Court Justice John Paul Stevens: “Originalism and History”*, YOUTUBE (Oct. 1, 2015), <https://www.youtube.com/watch?v=3owPefBacVA> (speech by Justice Stevens given on November 7, 2013).

36. See STRAUSS, *supra* note 32, at 1–2.

37. *Id.* at 18.

legal scholarship addresses how originalists should respond when faced with a question that originalism cannot reasonably answer.³⁸ This Part explains four approaches originalists have used to deal with change.³⁹ All of these approaches are highly similar. This Part also speculates that the lack of originalist literature addressing changed circumstances can be traced back to the birth of the originalist movement in the 1970s.⁴⁰

A. Judge Bork's Approach

This Part explains the first approach originalists used to deal with change. It makes two arguments. First, Judge Robert H. Bork's method for how originalism should deal with changed circumstances generally reflects how originalists today deal with the issue. Second, Judge Bork's method minimizes the problem of changed circumstances, which has continued to this day in originalist thinking.⁴¹

Critics of originalism might take joy in knowing the modern originalist movement started in 1971.⁴² That year, Judge Bork authored a famous law review article titled *Neutral Principles and Some First Amendment Problems*.⁴³ (As of 2012, his article was the tenth most-cited law review article of all time.)⁴⁴ His article began a campaign for originalism that lasted through the 1980s.⁴⁵ Judge Bork dealt with the changed circumstances issue head-on in a 1985 speech at the University of San Diego Law School, where he argued:

[T]he text, structure, and history of the Constitution provide [an interpreter] not with a conclusion but with a premise. That premise states a core value that the framers intended to protect. The . . . judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the framers could not foresee.

38. See sources cited *supra* note 1.

39. See discussion *infra* Parts III.B, III.C.

40. See discussion *infra* Part III.A.

41. See *A Conversation on the Constitution with Supreme Court Justices Stephen Breyer and Antonin Scalia—Event Audio*, *supra* note 2 (quoting Justice Scalia minimizing the problem of changed circumstances but not addressing the ultimate question).

42. Calabresi, *supra* note 23, at 14.

43. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971).

44. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

45. Calabresi, *supra* note 23, at 14.

Courts perform this function all of the time. Indeed, it is the same function they perform when they apply a statute, a contract, a will, or, indeed a Supreme Court opinion to a situation the framers of those documents did not foresee.⁴⁶

Judge Bork’s approach is simple: Take a value held by the Framers and use it as a starting point. For example, Senator Amy Klobuchar asked Neil Gorsuch during his Supreme Court confirmation hearing if women could become President under an originalist interpretation of the Constitution.⁴⁷ He responded, “The Constitution doesn’t change. The world around us changes, and we have to understand the Constitution and apply it in light of our current circumstances.”⁴⁸ He cited *United States v. Jones* as an example.⁴⁹ Federal agents had put a GPS tracking device on the car of the defendant without a warrant.⁵⁰ The United States argued that the defendant lacked a reasonable expectation of privacy.⁵¹ While perhaps true, Justice Scalia, writing for the majority, found the Framers also valued property rights and that placing the GPS was a trespass to chattel.⁵² The value placed on property by the Framers served as a starting point for the legal analysis leading to the conclusion the search was unreasonable under the Fourth Amendment.⁵³ Soon-to-be Justice Gorsuch then told Senator Klobuchar, “I’m not looking to take us back to quill pens and horses and buggies. . . . Of course women can be President of the United States.”⁵⁴ Thus, he thought originalism could deal with change. (Although, it is unclear what “value” from the time of the Founding Justice Gorsuch thought justified his analogy between *Jones* and his conclusion that women could be President.)

46. Bork, *supra* note 9.

47. Wash. Free Beacon, *Klobuchar Asks Gorsuch if, as an Originalist, He Thinks Women Should Be Allowed to Be President*, YOUTUBE (Mar. 21, 2017), <https://www.youtube.com/watch?v=to13izMf5rE>.

48. *Id.*

49. *Id.* (citing *United States v. Jones*, 565 U.S. 400 (2012)).

50. *Jones*, 565 U.S. at 402–03.

51. *See id.*

52. *Id.* at 404–05 (“The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such physical intrusion would have considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted. . . . [In 1765], Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis” (citations omitted)).

53. *Id.*

54. Wash. Free Beacon, *supra* note 47.

B. Judge Bork's Influence on Twenty-First Century Originalism

Judge Bork's value-based approach is popular in the twenty-first century. In 2016, Professor Jack Balkin gave a speech titled *Justice Scalia and Technological Change*.⁵⁵ Although he never explicitly mentioned Judge Bork, his explanation of Justice Scalia's approach in cases involving technological change was essentially the same as Judge Bork's approach.⁵⁶

Two of his examples are worth noting. His first was *Brown v. Entertainment Merchants Ass'n*.⁵⁷ California passed a law prohibiting "the sale or rental of 'violent video games' to minors, and requir[ing] their packaging to be labeled '18.'"⁵⁸ The Entertainment Merchants Association challenged the law on First Amendment grounds.⁵⁹ Justice Scalia, writing for the majority, struck down the law.⁶⁰ Surprisingly, however, Justice Clarence Thomas, the Court's other originalist, dissented.⁶¹ Justice Thomas stated, "The practices and beliefs of the founding generation establish that 'the freedom of speech,' . . . does not include a right to speak to minors (or a right of minors to access speech)"⁶²

How could the Court's two originalists reach such different conclusions? According to Professor Balkin, Justice Scalia saw the Founders as imposing a value—the "protection of public discourse"—into the First Amendment.⁶³ Professor Balkin noted, "When the text states an abstract principle [such as freedom of speech], then we have to go on to ask how we apply the abstract principle in the current situation."⁶⁴ Justice Thomas, on the other hand, looked to actual child-rearing practices from the seventeenth century through the Founding, for example, citing Puritan customs.⁶⁵ Both opinions could be described as abstraction-based originalism. But note that Justice Scalia seemed to assume the Framers had a value in mind, whereas Justice Thomas's dissent abstracted a value from child-rearing practices.⁶⁶ A

55. Ctr. for Constitutional Studies UVU, *supra* note 11.

56. *See id.*

57. *Id.* (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011)).

58. *Brown*, 564 U.S. at 789.

59. *Id.* at 789–90.

60. *Id.* at 805.

61. *Id.* at 821 (Thomas, J., dissenting).

62. *Id.*

63. Ctr. for Constitutional Studies UVU, *supra* note 11.

64. *Id.*

65. *Brown*, 564 U.S. at 823 (Thomas, J., dissenting).

66. *See generally* Ctr. for Constitutional Studies UVU, *supra* note 11.

critical difference between the opinions is thus the level of generality from which the abstraction occurred.

Professor Balkin’s second worthy example was Justice Scalia’s majority opinion in *District of Columbia v. Heller*.⁶⁷ In *Heller*, the Court held that a law prohibiting individuals from possessing handguns in their homes violated the Second Amendment.⁶⁸ One often-cited purpose of the Second Amendment is to protect citizens from government tyranny.⁶⁹ Justice Scalia concluded that this general principle, or value, embodied within the Second Amendment could not continue to exist given technological change.⁷⁰ The government, after all, has nuclear weapons.⁷¹ He noted a second value or purpose, however, embodied in the Second Amendment: the right to self-defense in the home.⁷² Technological change may have negated the first purpose, but not the second.

These cases demonstrate Judge Bork’s approach is one of originalism’s most commonly employed tools for dealing with change. Note that this method assumes the value is determinable and that it is clear how the value applies. These assumptions are questionable. Is it so obvious, for example, that the protection of public discourse gives video game companies the right to sell a violent video game, such as *Grand Theft Auto*, to children?

C. The Other Methods for Dealing with Change

Three other approaches have been proposed in originalist literature, which all look highly similar to Judge Bork’s approach. This Part walks through them and attempts to demonstrate that any differences are trivial.

1. Abduced-Principle Originalism

Professor Lee J. Strang explained that “abduced-principal originalism” could deal with change.⁷³ This approach has two forms:

The first form is where an interpreter abduces a legal norm . . . that fits the . . . uses of the constitutional term or phrase and thereby makes

67. *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

68. *See Heller*, 554 U.S. at 635.

69. Ctr. for Constitutional Studies UVU, *supra* note 11.

70. *Id.* (noting that there is not a level playing field between citizens with small arms and a government’s possession of tactical bombers).

71. *Id.*

72. *Id.*

73. Strang, *supra* note 1, at 927–28.

explicit the coherent original meaning of the term or phrase that lay behind the uses. The second form is where an interpreter abduces a legal norm that fits the discrete *practices* that the Framers and Ratifiers understood the constitutional text in question to prohibit, require, or permit.⁷⁴

Professor Strang used the Cruel and Unusual Punishment Clause as an example.⁷⁵ The historical record may indicate a discrete number of practices that were prohibited, such as “breaking criminals on the wheel.”⁷⁶ Additionally, the historical record may demonstrate the acceptability of the death penalty.⁷⁷ From these practices, a judge should abduce some legal norm that fits the cases.⁷⁸ Perhaps the legal norm might relate to the amount of pain. Professor Strang acknowledged that his approach assumes it is possible to find these practices.⁷⁹ Problematically, “the text in question may, in fact, have been a capacious term intentionally chosen to . . . avoid resolving conflict over the text’s subject matter.”⁸⁰ Nevertheless, Professor Strang seems to hold on to the old originalist approach—that some form of originalism must be applied—by suggesting “[t]hese challenges . . . are no greater than those posed by originalism generally” and offering no guidance as to whether one should depart from originalism.⁸¹

2. The Sense–Reference Distinction

Professor Christopher R. Green argued, “[A] constitutional expression’s reference, but not its sense, can change.”⁸² The modern notion of “sense” and “reference” is highly analogous, possibly even identical, to earlier conceptions of connotation and denotation.⁸³ Connotations represent an “essential meaning” with certain elements or attributes, whereas denotations are specific examples that have the elements.⁸⁴ A practical example can be found in Justice Scalia’s opinion in *Brown*.⁸⁵ The Founding

74. *Id.* at 930.

75. *Id.* at 960.

76. *Id.* (quoting *In re Kemmler*, 136 U.S. 436, 446–47 (1890)).

77. *Id.*

78. *Id.*

79. *See id.* at 962.

80. *Id.* at 963.

81. *Id.* at 964.

82. Green, *supra* note 1, at 555.

83. *See id.* at 567–68 n.36.

84. Chin, *supra* note 11, at 620.

85. *See supra* text accompanying notes 57–66.

generation knew nothing of video games, yet free speech represented a broader concept: forms of expression.⁸⁶ Therefore, a video game qualified as speech for the purposes of the First Amendment.⁸⁷ It was a denotation of speech.

Professor Green’s sense–reference distinction is quite similar to Professor Strang’s abduced-principle originalism.⁸⁸ Whereas Professor Strang seemed to contemplate abstracting from both practice and text, Professor Green’s method seems to focus on abstracting from the public’s understanding of the text.⁸⁹ It is far from clear that either method is significantly different. If a word has a particular meaning, according to textual sources, it should follow that the public understands the meaning in the same way. For example, Justice Thomas argued in his concurrence in *United States v. Lopez* that “[a]t the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.”⁹⁰ He cited dictionaries from the 1700s for this proposition.⁹¹ But, additionally, he cited practices of the Founders that fit the definition.⁹²

3. The Purpose-Based Methodology

Lastly, Geraldine Chin has argued for a move away from connotation or denotation toward “purpose-based methodology.”⁹³ She admitted that a purpose-based methodology would likely reach similar results as connotation/denotation but suggested it is easier to understand.⁹⁴ For example, if the purpose of the First Amendment is to protect the public discourse, and video games are a part of the public discourse, speech would include video games.⁹⁵ Ms. Chin admitted her argument is highly analogous to purpose-driven statutory interpretation.⁹⁶ The problems with this admission are discussed in Part IV.

86. Ctr. for Constitutional Studies UVU, *supra* note 11.

87. *Id.*

88. *See supra* Part III.C.1.

89. *See supra* Part III.C.1.

90. *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

91. *Id.* at 585–86.

92. *Id.* at 586 (“Alexander Hamilton . . . repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors.”).

93. Chin, *supra* note 11, at 609–11.

94. *Id.* at 610–11.

95. *See discussion supra* Part III.B.

96. Chin, *supra* note 11, at 634.

IV. THE PROBLEM WITH ABSTRACTION-BASED ORIGINALISM

This Part explains the irony of old originalism: arguments used by old originalists against living constitutionalism as well as arguments made by textualists against purpose-driven statutory interpretation can be used against old originalism. First, it is not always clear what the Founders intended, in the same way it is not always clear what a legislature intended. Second (and relatedly), when originalism cannot provide a clear answer, it breeds allegations of judicial activism—the evil originalism was “created” to prevent.⁹⁷

Recall originalism developed as a response to judicial activism.⁹⁸ Textualism is often cited as valuable for similar reasons: it constrains judges.⁹⁹ Textualists, such as Justice Scalia, often argue determining the intent or purpose of the legislature is impossible.¹⁰⁰ He stated:

The notion that you can pluck statements from a couple of legislators or even from a committee report, which is usually written by some teenagers, and . . . very often not even read by the committee . . . [and presume the statements] somehow [are] reflective of the intent of the whole Congress and of the President . . . it truly is the last surviving fiction in American law.¹⁰¹

Nevertheless, Justice Scalia was okay with abstraction-based originalism, which, as seen above, does not naturally constrain judges when the intent of the Founding generation is unclear. In *Brown*, he could have, for example, abstracted from practices of the Founding generation and found freedom of speech did not protect video game sales to minors like Justice Thomas’s dissent did.¹⁰² Indeed, it is at least arguable old originalism does no better job of constraining judges than living constitutionalism. Originalism only serves to constrain judges, preserve popular sovereignty, and promote predictability when originalism provides clear answers. In the same way legislators may vote for a law for different reasons, thus making legislative history a lousy source,¹⁰³ states may have ratified the Constitution

97. See Whittington, *supra* note 30, at 127.

98. See *supra* Part II.A.

99. See generally Hoover Inst., *Uncommon Knowledge with Justice Antonin Scalia*, YOUTUBE, at 11:30 (Oct. 30, 2012), <https://www.youtube.com/watch?v=DaoLMW5AF4Y>.

100. *Id.* at 17:00.

101. *Id.* at 17:40.

102. See discussion *supra* Part III.B.

103. Hoover Inst., *supra* note 99, at 17:00.

with different understandings.¹⁰⁴ In fact, some provisions were seemingly written ambiguously so all parties could claim “victory.”¹⁰⁵

Justice Scalia also stated, “The problem with purpose and consequence is that they invite subjective judgment. To decide the purpose of a statute, it depends on what generality you look at it.”¹⁰⁶ For example, the purpose of a statute might be to protect civil rights, but the narrow purpose of an exception might be to balance civil rights and individual liberties.¹⁰⁷ Depending on what purpose the judge focuses on, the judge can reach the answer he or she ultimately desires.¹⁰⁸ Abstraction-based originalism is highly analogous to purpose-driven statutory interpretation in that a judge gets to pick the level of generality of the abstraction.¹⁰⁹

Thus, abstraction-based originalism is dangerous. It asks judges to perform the same purpose-driven analysis that is often frowned upon in statutory interpretation, sometimes without a clear historical record.¹¹⁰ For example, consider the National Bank. No originalist, if they are arguing sincerely, can claim to know the Founding generation’s understanding of this problem. Founders were on both sides of the argument.¹¹¹ In abstracting values either from early practice or the text, a judge could reach either result and then ground that result in “history.”¹¹² What makes more sense in these situations is to defer to some other method of interpretation.

V. CONCLUSION

It may be fair to determine a value or a sense of a constitutional provision using abstraction. Justice Scalia’s opinion in *Jones*, for example, seems difficult to argue with.¹¹³ Note that not a single Justice argued that Justice Scalia’s originalist analysis was incorrectly performed.¹¹⁴ No one

104. Strang, *supra* note 1, at 962.

105. *See id.* at 962–63.

106. *A Conversation on the Constitution with Supreme Court Justices Stephen Breyer and Antonin Scalia—Event Audio*, *supra* note 2, at 18:00.

107. *See id.*

108. *See id.*

109. Compare Smith, *supra* note 6, at 727, with Hoover Inst., *supra* note 99.

110. *See generally* Smith, *supra* note 6, at 720.

111. *See, e.g., Establishing a National Bank*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/establishing-national-bank/> (last visited Feb. 6, 2019).

112. *See* Smith, *supra* note 6, at 723–24.

113. *See generally* United States v. Jones, 565 U.S. 400 (2012).

114. *Id.*

questioned the Founders' valued property rights and that this value was incorporated into the Fourth Amendment.¹¹⁵ The only disagreement between the Justices was whether the case should be decided on originalist grounds at all.¹¹⁶ In other cases a value cannot be reasonably abstracted. The *Brown* opinion, which divided the two originalists on the Supreme Court, is a good example.¹¹⁷ The criticism of new originalism is that it is too easy for judges to depart from originalism and use some other method.¹¹⁸ They may fall back too easily to living constitutionalism.¹¹⁹ However, forceful application of abstraction-based originalism is analogous to living constitutionalism.¹²⁰ The old-school originalist mindset of always applying originalism is thus problematic. New originalism offers a balanced approach that considers the benefits of originalism but admits that originalism is not perfect. Using other tools—like new originalism asks judges to do—makes more sense than a forceful application of abstraction-based originalism.

Precisely what these tools are is beyond the scope of this Comment; but, perhaps, falling back to a common law method of constitutional interpretation would be appropriate because it constrains judges more than living constitutionalism. Note many (perhaps most) new originalists would not label the method they are falling back on. Instead, they would simply state they are “us[ing] the various modalities of argument—text, structure, history, precedent, prudence, and national ethos—to decide the cases before them.”¹²¹

Originalist literature going forward should focus on the point at which a judge should abandon originalism. To the extent a judge must use abstraction, at what point does the abstraction become problematic? One example the literature could latch onto and consider further is hearsay exceptions and the Confrontation Clause.¹²² An out-of-court-statement offered to prove the truth of the matter asserted, i.e., hearsay, is facially at odds with a defendant's right to confront his or her accuser. However, originalist interpretations of the Constitution have long justified some

115. *Id.*

116. *See id.*

117. *See generally* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).

118. *See* McGinnis & Rappaport, *supra* note 3, at 35.

119. *Id.*

120. *See* Smith, *supra* note 6, at 713–14.

121. *Id.* at 718 (quoting Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U.L. REV. 549, 609 (2009)).

122. The Author thanks Stephen P. Hurley of Hurley Burish, S.C. for inspiring this example during an evidence lecture at the University of Wisconsin Law School.

hearsay exceptions. Justice Scalia, for example, relied heavily on originalism in *Crawford v. Washington*.¹²³ Writing for the majority, he explained that the Confrontation Clause was adopted against the backdrop of common law, which allowed some hearsay.¹²⁴ The problem, however, is the exceptions to hearsay at common law were generally premised (at least in part) on conceptions about the reliability of the admitted evidence.¹²⁵ Scholars have begun to question the reliability of some of the evidence admitted by the exceptions, such as excited utterances—statements made by an emotional person with little time to think.¹²⁶ For example, Professor McKee argued:

If instead of escaping out the window, Goldilocks had been cornered by the trio of talking carnivores who startled her awake, there is a good chance she would have resorted to lying to protect herself. “Look over there! It’s the Wicked Witch!” “I’m so sorry! I thought this was my granny’s house!” “You don’t want to eat me! I have mad cow (bear?) disease and you’ll get infected if you have even one bite!”

According to the social-cognitive framework used to predict a decision to lie . . . deciding to lie would be a rational choice for someone in a high threat situation like this one with few better defensive options. Goldilocks would have multiple motivations to lie—to protect herself from getting eaten, being punished by her parents, or going to juvenile court. The chances of getting caught lying are likely low—mostly people get away with lies. And in any event, she has little to lose—if she does not lie, she probably gets eaten, if she does lie, maybe she escapes. And finally, we can feel confident that a junior burglar and vandal like her has the ability to lie well within her wheelhouse. Fibbing will probably be one of the first options that comes to mind once she is confronted.¹²⁷

If modern psychologists were to generally agree that excited utterances are not reliable (at least under specific circumstances), what should an

123. *Crawford v. Washington*, 541 U.S. 36, 42–57 (2004).

124. *Id.*

125. Steven Baicker-McKee, *The Excited Utterance Paradox*, 41 SEATTLE U. L. REV. 111, 116 (2017) (“By the 1800s, courts were creating and regularly applying common law exceptions to the hearsay rule. Under these exceptions, out-of-court statements were admissible if they contained sufficient indicia of reliability to outweigh the intrinsic infirmities of hearsay. Such hearsay exceptions were lumped into a common law doctrine referred to as ‘res gestae.’ . . . Common law res gestae included dying declarations, declarations of present sense impressions, and declarations of present bodily conditions or mental states.” (citations omitted)).

126. *See generally id.*

127. *Id.* at 165–66.

originalist do about it? The originalist could merely follow the practices of the Founding generation. However, the originalist could also look at how psychological literature has developed to question some of the underlying assumptions of the Founding generation. These are the kinds of real-world changes that further study of new originalism, as this Comment has used that phrase, can help with.

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