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The Particulate Constitution: Uncertainty and New Originalism

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> "We ought then to regard the present state of the universe as the effect of its anterior state and as the cause of the one which is to follow."[1]

Once upon a time, it was believed that the universe was determinate—that the past determined the present, that the present determined the future, and that this clear line of cause and effect was neatly tied together by a "set of scientific laws that would allow us to predict everything that would happen in the universe."[2] To know the state of any system at any point in time—past or future—all one needed to do was pinpoint the present position and velocity of the bodies in the system (like the Sun and planets) and then apply Newton's laws of motion. It was simple, straightforward, predictable, and even easy (assuming a person knew the math required to apply Newton's laws of motion). A determined past connected to an equally determined future through a discoverable present.

This view changed in 1926, however, when Werner Heisenberg developed his Uncertainty Principle.[3] Accepting that the relevant data points continued to be position and velocity, Heisenberg sought to isolate and observe single particles in the present to predict their future positions and velocities.[4] He discovered through his experiments that it is impossible to know both the position and velocity of a single particle at the same time; the more one tries to accurately know the particle's present position, the more that particle's velocity will be disturbed, and vice-versa.[5] Heisenberg thereby established that the futures of individual particles (and, by

1. PIERRE SIMON, MARQUIS DE LAPLACE, A PHILOSOPHICAL ESSAY ON PROBABILITIES 4 (Frederick Wilson Truscott & Frederick Lincoln Emory trans., 1902).

2. STEPHEN HAWKING, A BRIEF HISTORY OF TIME 55 (10th ed. 1998).

3. *Id.* at 56–63.

4. *Id.*

5. *Id.* at 57.

extension, systems and universes) can never exactly[6] be determined because their presents are and will always be indeterminate. In doing so, he showed Laplace's deterministic universe to be a Newtonian fairy tale;[7] there is no point or place in time that can ever or will ever be certainly known.

While interpreting a constitution does not require a thorough knowledge of Newtonian or quantum mechanics, it does require making a decision about how determinate that constitution should be. A constitution, like Heisenberg's particles and Laplace's systems, has both a fixed historical location based on its creation date and normative momentum that allows it to operate and work in the present and future. Theories of constitutional interpretation, when employed, create particular constitutional "universes," and whether that universe more closely resembles the wholly determinate Laplacian universe or the inevitably uncertain Heisenbergian universe depends on the extent to which the meaning of the historical constitution directly propels the adjudication of contemporary cases.

Though there are many constitutional interpretive theories, in this paper I will focus on discussing what kind of "universe" is

6. Instead of knowing position and velocity as certainties (which would, of course, make the universe a much simpler place to exist), Hawking indicates that the Uncertainty Principle "implies that particles behave in some respects like waves: they do not have a definite position but are 'smeared out' with a certain probability distribution." *Id.* at 58. When one is dealing with quantum mechanics, then, one is dealing in probability rather than certainty.

7. Hawking makes an interesting observation toward the end of the book. In regards to quantum mechanics and the properties of waves, he states,

> [t]he unpredictable, random element comes in only when we try to interpret the wave in terms of the positions and velocities and particles. But maybe this is our mistake: maybe there are no particle positions and velocities, but only waves. It is just that we try to fit the waves to our preconceived ideas of positions and velocities. The resulting mismatch is the cause of the apparent unpredictability.

Id. at 188–89. Perhaps we should stop trying to know position and velocity altogether and then uncertainty would disappear. This appears, in some ways, to be an argument that Living Constitutionalists (who accept New Originalism) make about how the Constitution should be characterized. Professor Jack Balkin argues, for example, that the Constitution is a framework, not a skyscraper, and that we should not be looking to the Constitution to try and find normative advice about how to decide particular cases (in other words, that the Constitution is more wave-like, with smeared probabilities regarding how future cases should be decided rather than particle-like, with position and velocity). *See* Jack M. Balkin, *Framework Originalism and the Living Constitution,* 103 NW. U. L. REV. 549 (2009); *see generally* JACK M. BALKIN, LIVING ORIGINALISM (2011).

created by the interpretive theory known as New Originalism.[8] It is a theory whose predecessor—what I will call Old Originalism—developed in reaction to the rather expansive constitutional interpretations of the Warren and Burger courts, particularly the individual rights decisions of those courts.[9] Old Originalism emphasized judicial restraint over judicial discretion, and tethered the task of constitutional interpretation to the discovery of the Framers' original intent.[10] While New Originalism claims to be a theory of originalism, in its most salient features—particularly its insistence that interpretation is a separate activity (in kind and in operation) from construction—it is an Originalist incarnation that bears little resemblance to the theory it claims to descend from.

In Part I, I will briefly discuss the significant features of New Originalism as distinguished from Old Originalism. In Part II, I will specifically discuss the Interpretation-Construction distinction that is a key feature of New Originalism, comparing the "interpretation" piece to a particle's position and the "construction" piece to a particle's momentum. In Part III, I will argue that New Originalism's Interpretation-Construction distinction injects Heisenbergian uncertainty[11] into the constitutional "universe" by divorcing the Constitution's operative past from its operative present (and future). Constitutional determinacy requires recognition, as it did in Laplace's universe, that the Constitution is a *single* particle/body that has *both* a knowable, fixed position and discoverable, continuing momentum from that position. Unless its fixed position is tethered to its momentum—in other words, unless its historical meaning closely influences present-day applications—the Constitution cannot be used to tell us where we presently are or where we should be heading; we may, instead, be constitutionally lost.

8. For a clear introduction to New Originalism, see Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

9. *Id*. at 601.

10. *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO L.J. 713 (2011). Colby presents a detailed and thorough discussion regarding the points of difference between Old Originalism and New Originalism.

11. While it may seem unconventional to compare quantum mechanics and constitutional interpretation, I feel like I am at least in good company by trying to: Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

I. OLD ORIGINALISM AND NEW ORIGINALISM

Originalism, in all of its forms, is fundamentally a theory and method of constitutional interpretation. In 1988, Justice Scalia delivered an address titled "Originalism: The Lesser Evil,"[12] where he clearly explained the differences between Nonoriginalism and Originalism. In it, he identified the "main danger in judicial interpretation of the Constitution" to be that "judges will mistake their own predilections for the law."[13] Such mistakes, he explained, are troubling because the "purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values."[14] Nonoriginalism does not provide a solution to this problem because it permits a judge to apply his/her own perception of fundamental values to decide constitutional questions.[15] Scalia explained that determining which values are actually fundamental to society and which are only fundamental to the individual decision-maker is "very difficult,"[16] and an interpretive approach that permits applying "current societal values" actually undermines the legitimacy with which the judiciary reviews constitutionality. Such a method creates a constitution more suited to be interpreted by legislatures that already deal in current societal values rather than the judiciary (whose province it is to interpret the Constitution).[17]

Scalia argued that Originalism, by contrast, at least offers a "coherent approach" to the problem of interpretation[18] and avoids aggravating that "main danger" of judicial review by establishing a "historical criterion . . . conceptually quite separate from the

12. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

13. *Id*. at 863.

14. *Id*. at 862 (emphasis omitted).

15. *Id*. at 863.

16. *Id*.

17. *Id*. at 854. *See also* Marbury v. Madison, 5 U.S. 137, 178 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

18. Scalia, *supra* note 12, at 855.

preferences of the judge himself."[19] Instead of deciding questions based on one's individual perceptions of fundamental values, a judge would immerse himself in the historical text, records, philosophies, attitudes, and beliefs pertinent to the time the text was originally written to discover the original meaning of that text.[20] Scalia explained that by using Originalist methods the historical answer would be clear for most constitutional questions, and even *if* the modern values of judges were imposed upon the historical record, at least the results of interpretation would be more "moderate" and "more likely to produce results acceptable to all."[21]

Originalism is thus a theory and method of constitutional interpretation that is employed to interpret our federal Constitution according to "the discoverable meaning of the Constitution at the time of its initial adoption," and considers that discovered meaning to be "authoritative for purposes of constitutional interpretation in the present."[22] It presumes that the Constitution's meaning was (and still is) "fixed at the time of" adoption/ratification,[23] and that its fixed meaning is also discoverable using traditional tools of interpretation.[24] In seeking resolution to constitutional questions, that fixed meaning creates a determinate Constitution with meaning that will not (in theory) change as modern values change.

A. Features of New Originalism

Initially, Originalism arose in the 1970s and 1980s when the Constitution that the Warren and Burger courts interpreted

19. *Id.* at 864.

20. *Id.* at 856–57.

21. *Id.* at 863–64.

22. Whittington, *supra* note 8, at 599.

23. *See* Randy E. Barnett, *Interpretation and Construction,* 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011); Gary Lawson, *On Reading Recipes . . . and Constitutions,* 85 GEO. L.J. 1823, 1826 (1997).

24. *See* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 861–62 (2009) (suggesting that the original meaning is found by considering "original public meaning of [the] words, phrases, and internal structural logic" of the Constitution); *see generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 99–100 (2010) (discussing some various "facts" to draw from a piece of communication that impute linguistic meaning to a piece of text, such as the "marks" in the writing, "how [the] word [is] used," and "the 'rules' (or regularities) of syntax and grammar").

appeared to many to be anything but fixed or determinate. In particular, their individual rights cases conveniently "found" rights in the Constitution that many critics felt were neither obvious nor implicitly compelled from its plain language.[25] As a result, Originalism was initially a "negative and react[ionary] theory" with an emphasis on judicial restraint that was accomplished by tethering the task of constitutional interpretation to discovering the intent[26] of the Framers regarding the text at issue. The "value choices" of the Founders rather than the value choices of the sitting Justices were applied,[27] and if, after assessing the relevant historical records, it appeared clear that the Framers did not intend a particular right to be included in a provision, that right was not protected by the Constitution. For Old Originalists, the Constitution's legitimacy (as well as the judiciary's legitimacy) depended upon its being, at least in some discoverable measure, determinate; the words chosen and included in the document needed to provide actual predictive direction for the resolution of present and future cases.

However, Old Originalism faced legitimate criticisms. In particular, critics claimed that finding a single "intent" from a collectively created (and even more collectively ratified) document was an impossible and ultimately discretionary task. They argued that

25. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971). Bork, early in the piece, discusses the *Griswold* case as being "typical . . . of the Warren Court," and states that the "choice of 'fundamental values' by the Court cannot be justified" and that instead "[t]he judge must stick close to the text and the history, and their fair implications, and not construct new rights." *Id*. at 7–8. The *Griswold* case "found" a right to privacy in the Constitution that included the right to make decisions in marriage about contraception. Griswold v. Connecticut, 381 U.S. 479 (1965). Another particularly policy-driven opinion from the Warren Court was *Miranda v. Arizona*, where the Court, under the Fifth Amendment, held that statements made in response to police interrogation would be inadmissible in court unless a suspect in custody was informed of the right to remain silent and the right to counsel and thereafter voluntarily waived those rights. This opinion certainly imposed detailed procedural requirements upon law enforcement, but it imposed upon them the plain language of the 5th Amendment as well. 384 U.S. 486 (1966).

26. *See* Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 708–13 (2011). Old Originalism, in its initial version, searched for evidence of Framer intent rather than evidence of the public's original understanding.

27. Bork, *supra* note 25, at 4. Bork states, "Value choices are to be attributed to the Founding Fathers, not to the Court." *Id*. He states this as a justification for the legitimacy of the Supreme Court's authority. He also states that "[i]f judges are to avoid imposing their own values upon the rest of us, however, they must be neutral" in the "application," "the definition," and "the derivation of principles." *Id*. at 7.

searching for intent undermined whatever restraint Originalism claimed to create; a judge could still impose his/her own beliefs about values by choosing among the multiplicity of historical "intent" proofs to justify a particular decision.[28] Critics also claimed that the Framers themselves did not intend the Constitution to be interpreted according to Framer intent.[29] In response, and also in an attempt to gain academic legitimacy, Originalism has therefore been adapted and adjusted to address these criticisms.[30]

Today, Old Originalism has become New Originalism, and New Originalism bears little resemblance to its predecessor. Both share a commitment to discovering the historical meaning of the Constitution, and both versions regard that meaning as a restraint upon judicial interpretive discretion. However, these Originalisms part ways in what kind of meaning is to be discovered, how determinate the language of the Constitution itself is considered to be, and what kind of part the discovered meaning has to play in application or adjudication.[31] I briefly discuss each difference (fairly clinically) below.

1. Original public meaning

One of the key features of Originalism (both Old and New) is fixation—that the Constitution's meaning was fixed at the time of its adoption, and discovering that fixed meaning is the ultimate object

28. *See* Smith, *supra* note 26, at 712–13 (2011); Whittington, *supra* note 8, at 605–07. Also, Scalia noted that one of the issues with originalism is that "it may indeed be unrealistic to have substantial confidence that judges and lawyers will find the correct historical answer to such refined questions of original intent," particularly because of the "enormous amounts of material," some of it unreliable, that must be gone through, as well as the difficulty in "somehow placing out of mind knowledge, . . . beliefs, attitudes, philosophies, prejudices, and loyalties" of our day when parsing through the "enormous" evidence of original intent. *Scalia, supra* note 12, at 856–57, 863. New Originalism, as discussed, attempts to obviate the difficulty of determining one correct intent from an "enormous" amount of historical material by replacing original intent with original, objective meaning. *See* Smith, *supra* note 26, at 712–13. Presumably, it would be much easier for an actor to read his own policy preferences into historical evidence that elucidates many individual intents than it would be to read policy preferences into a search for objective understanding.

29. *See* Smith, *supra* note 26, at 712–13; Whittington, *supra* note 8, at 606.

30. *See* Colby, *supra* note 10, at 744–64 (Part III, "The Cost of the New Originalism").

31. For a comprehensive, point-by-point discussion about the differences, see *id.*

of any constitutional interpretive inquiry.[32] This insulates the Constitution from changing circumstances, values, exigencies, or events; that meaning is always original and always tied to the Founding Era.[33]

However, while Old Originalism's inquiry centered on discovering the Framers' original intent as manifested through the text, New Originalists seek to discover the original public meaning of the text.[34] This is an objective meaning because it is a search for "the meaning of the provision to the public on whose behalf it was ratified"[35] (rather than the subjective meaning that many have argued is inherent in any search for intent[36]). In addition, for New Originalists, this meaning is not what the public *actually* would have understood the provision to mean; instead, it is an understanding centering on what a "hypothetical, reasonable person would have understood the words of the Constitution" at the time of fixation to mean.[37]

32. Lawrence Solum has written specifically about what he calls the "fixation thesis" regarding why the semantic meaning of text is fixed at the time it is written. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459 (2013) [hereinafter Solum, *Originalism and Constitutional Construction*]; Lawrence B. Solum, *Semantic Originalism*, ILL. PUB. L. & LEGAL THEORY RES. PAPERS SERIES NO. 07-24 2–4 (2008) [hereinafter Solum, *Semantic Originalism*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244. *See also* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 634 (1999). Barnett argues that because the Constitution was written, "where it speaks it establishes a rule of law from that moment forward" and that "writtenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment." *Id.*

33. Or the date when specific amendments were adopted.

34. This is the least controversial of New Originalism's features. For an interesting (and pithy) discussion as to why original public meaning must be so, see Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309 (2013). Lawson states, "if you want to know what an agency instrument (which the U.S. Constitution gives every indication of being) means, then you employ a methodology of original public meaning." *Id.* at 1317 (emphasis omitted) (footnote omitted). He also, for anyone interested, somehow incorporates Humpty Dumpty into all of this.

35. Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 675 (1991).

36. *See, e.g.*, Colby, *supra* note 10, at 721. Colby cites Scalia as arguing that "focus on original intent can be seen as inconsistent with the rule of law." *Id.* (emphasis omitted) (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997).

37. *See* Colby, *supra* note 10, at 724; Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise,* 23 CONST. COMMENT. 47, 48 (2006). In this article, Lawson and Seidman

2. Standards, principles, and generality

The switch to original public meaning has influenced the level of specificity New Originalists discover in the constitutional text. There are many provisions in the Constitution that are very rule-like and appear to require little in the way of interpretation (regardless of theory). For example, the requirements that the President be thirty-five years old[38] and that each state shall send two senators to Congress[39] seem to be very rule-like; the language itself does not appear to be flexible. A President, per the language, may not be merely thirty at the time of election, and a state may not send four senators instead of two. However, there are also provisions in the Constitution (particularly in the amendments) that do not appear so rule-like, such as the meaning of "due process" and "equal protection," both of which could arguably encompass many specific but un-articulated rights.

Old Originalists did not easily admit that the Constitution contained broad, open-ended, undefined provisions. If the judiciary was to be restrained by this interpretive theory, allowing the existence of vague or ambiguous passages without a determinate historical meaning would have defeated the theory's admitted purpose;[40] a judge could easily insert his/her own beliefs and values into vagueness or ambiguity to determine the case. To avoid this, Old Originalists presumed that the Constitution contained rules whose limits and boundaries could be determined by discovering specific Framer intent; if a provision did not initially seem rule-like, it would become so after the historical intent attached to that provision was discovered after research.[41] The intent would then be applied to resolve the present case, which meant that by employing

argue essentially that the "ultimate inquiry [regarding original public meaning] is legal," even though it does appear to involve quite a historical undertaking as well. *Id*. The hypothetical reasonable person Lawson and Seidman describe is undoubtedly a figure that only lawyers would truly find comfort passing some time with.

38. U.S. CONST. art. II, § 1.

39. U.S. CONST. art. I, § 3.

40. Colby, *supra* note 10, at 717; *see also* Bork, *supra* note 25, at 17–18.

41. Colby, *supra* note 10, at 735. This is so because, as Colby states, "to the Old Originalists, originalism was more than simply an interpretive theory of meaning; it was an adjudicative theory as well." *Id*. In other words, the interpretation drove the adjudication, and was not separated or divorced from it.

Originalism, the broader provisions of the Constitution (like "equal protection" and "due process") effectively became as rule-like as the provision requiring that the President must be thirty-five.

New Originalists, however, openly admit the existence of broad, indeterminate standards and principles in the Constitution.[42] Because of the switch from subjective Framer intent to objective public meaning, interpreters accept that the reasonable hypothetical person at the time of the Founding might have understood a particular provision to embody a broad principle or standard, regardless of how narrowly or specifically the Framers may have expected or intended the provision to be applied.[43] Indeed, many New Originalists have argued that proper interpretation *requires* this to be true—that in order to be faithful to the original public meaning, an interpreter must allow the Constitution to mean exactly what it would have been understood to mean—rule, standard, principle, and all.[44]

By extension, some New Originalists[45] also accept that the Constitution itself contains requisite levels of generality and abstraction within its language, and that the search for the original public meaning includes a search for the level of abstraction and generality. If the hypothetical reasonable person would have

42. It is important to note that even though New Originalists accept the existence of standards and principles in the Constitution, they do vary in how many such provisions they allow to exist or how broadly they allow those standards and principles to stretch. This Paper is written theoretically, exploring the implications of the interpretation-distinction rather than passing opinion or discussing in-depth the various viewpoints regarding points within New Originalism.

43. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 382–86 (2013). Whittington specifically states, "[E]xpectations about applications are merely predictions about the future consequences of adopting a given legal rule, and the author of the rule has no special privilege in predicting the future." *Id.* at 384. *See also* Balkin, *supra* note 7, at 551–52; Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 264 (2005) (stating that "an original meaning originalist can take the abstract meaning as given, and accept that the application of this vague meaning to particular cases is left to future actors, including judges, to decide").

44. *See* Solum, *Originalism and Constitutional Construction*, *supra* note 32, at 458 (stating that "the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction . . . for their application to concrete constitutional cases").

45. *See* Smith, *supra* note 26. Smith has referred to New Originalists who accept the levels of abstraction argument as New New Originalists. Again, within New Originalism there appears to be a spectrum (even if there is agreement on the basic theory and the components of the basic theory) regarding details within the New Originalist theoretical elements. Another paper for another day (or perhaps one could just read Smith's article).

understood a very high level of generality to be contained in a provision such as "equal protection," then that provision must fairly be interpreted as containing that high level of generality. Such interpretation is how an Originalist can be able to, for example, find that *Brown v. Board of Education* comports with the Constitution's original public meaning when there is clear evidence that, at the time of the Fourteenth Amendment's adoption, equal protection was "understood not to invalidate racial segregation in public schools."[46] The more general and abstract a provision is, the more potential rights and potential interpretations (or re-interpretations) that provision will encompass.

3. Interpretation-construction distinction[47]

Finally, one of the most defining adaptations of New Originalism is an insistence that there is a functional, separable distinction between constitutional interpretation and constitutional construction. Old Originalists did not distinguish between interpretation and construction. Once a judge had determined the meaning of a provision, that meaning drove the resolution of a particular case. In a sense, Old Originalist judges were purveyors and dealers of facts—the discovered intent was treated as a past fact[48] that was unquestionably applied to resolve present facts. If the discovered intent would not have functioned to absolutely determine present adjudication, that fixed intent would have become a discretionary guideline rather than a rule, and in order to legitimize their claim to curbing judicial discretion, Old Originalists needed a Constitution of fixed, non-negotiable rules. Recognizing a space between interpretation and construction would have meant recognizing room

46. *See* David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1162 (2012) (stating that the usual Originalist justification for *Brown* is that it is correct when the "original understandings are characterized at the right level of generality"). It should be noted that Strauss is decidedly against this kind of generalization (as he argues in this article). *See also* Smith, *supra* note 26, at 720 (noting that even Bork, as an original Old Originalist, eventually came to justify *Brown* by determining that the meaning of the constitutional text includes its level of generality); Balkin, *supra* note 7, at 563, 571, 575 (suggesting that *Brown* makes sense based on changed social values in states and changes in national public opinion).

47. This phrase has been borrowed from Lawrence Solum's article, *supra* note 24.

48. This was part of the chief criticism surrounding intent, though. Intent was not really a factual, objective inquiry.

for judges to impose their views and values onto the case at hand, and those discovered "facts" would have lost their rule-like character.

By contrast, New Originalists regard interpretation and construction as distinct activities[49] requiring different decisions and skills. Constitutional interpretation is the activity of discovering the original public meaning for a specific provision at issue.[50] This will involve employing familiar tools of legal interpretation and assessing the historical evidence. Constitutional construction, on the other hand, is the activity of actually "applying that meaning to particular factual circumstances."[51] This involves translating the provision at issue into a norm capable of resolving the current case.[52] Resolving a single case therefore requires (at least) two distinct steps: a judge must first determine the original public meaning of the provision, and only after that meaning has been discovered will the judge determine how to apply that meaning. In recognizing this distinction, New Originalists have been clear that Originalism is *only* a theory of interpretation, not a theory of construction (and thereby not a theory of adjudication).[53] The implications of this distinction will be further discussed below, but this means that knowing what a provision means will not necessarily tell an interpreter how to apply or even *whether* to apply that provision to the case at hand. For those choices, something more than Originalism (or, in other words, something more than mere interpretation) will be required.

II. THE INTERPRETATION-CONSTRUCTION DISTINCTION FURTHER EXPLAINED

In this Part, I will discuss (again, fairly clinically) in more detail the difference between interpretation and construction as explained by New Originalists. Section A will discuss interpretation, and Section B will discuss construction.

49. Barnett, *supra* note 23, at 66.

50. *Id.*

51. *Id.*

52. *Id.* at 70.

53. *Id.* at 69 (stating that "originalism is a method of constitutional interpretation that identifies the meaning of the text as its public meaning at the time of its enactment . . . . Originalism is not a theory of what to do when original meaning runs out. This is not a bug; it is a feature").

A. Interpretation

Professor Gary Lawson has described the Constitution as "a recipe for a particular form of government" and has contended that interpreting it is no different "than interpreting a late-eighteenth-century recipe for fried chicken."[54] Like a recipe, the Constitution is simply a set of instructions conveyed to the reader with varying degrees of linguistic clarity and precision.[55] Determining the meaning of those instructions requires figuring out what the instructions would have meant to the public at the time the recipe was written.[56] Interpretation does not include factoring in how fried chicken was prepared after the recipe was written; such an inquiry tells an interpreter little about what the words of this particular recipe meant because future readers' actions or understandings are irrelevant as to a recipe's original meaning.[57] Likewise, interpretation does not include consideration of the present reader's desire to make the best fried chicken possible because to do so would impose a presumption that the recipe should be used and applied before its instructions are even determined (in other words, it gets the inquiry backwards, when it is entirely possible the recipe produces terrible fried chicken).[58] Interpretation is therefore an inquiry dealing solely and completely with the fixed, instructional past; the present plays no role in the ultimate determination of what those instructions mean.

Ultimately, then, the task of interpretation is historically linguistic. For New Originalists, it involves discovering the semantic content[59] of the language as understood by the public at the time of adoption. The semantic content is the linguistic meaning of the words, and the linguistic meaning "is determined by a set of facts."[60]

54. Lawson, *supra* note 23, at 1833–34.

55. *Id.* at 1827.

56. *Id.* at 1826 ("The presumptive meaning of a recipe is its original public meaning.").

57. *Id.* at 1828–29.

58. *Id.* at 1828. ("One solution is to argue that the document should be construed to be the best document that it can be—the document that best achieves its evident purposes. On this understanding, whatever interpretation leads to the best fried chicken is correct. This, however, is a classic example of getting it backwards. Interpretation must precede evaluation, not vice versa.") (citation omitted).

59. Solum, *supra* note 24, at 98–100.

60. *Id.* at 99.

This set of facts includes "the characteristics of the utterance itself," such as "what marks appear in the writing," "facts about linguistic practice," how the words are used, and applicable "rules" of syntax and grammar.[61] This may also include applying canons of interpretation[62] that deal solely with how language works, such as the canon against superfluous text whereby each piece of the text is presumed to add meaning rather than repeating meaning already stated.[63] However, interpretation involves no more than searching for and discovering the historical linguistic meaning.[64] By extension, any activity beyond discovering this linguistic meaning is beyond the scope of Originalism.

Practically, the instrumental effect of interpretation is determined both by whether the provision at issue would have been understood to be a rule, a standard, or a principle, and also by the linguistic precision of the words themselves. As discussed in Part I, New Originalists understand the Constitution to contain rules, standards, and principles. If the provision at issue would have been understood by the original public to embody a principle or standard, it is much more likely the interpretation of that provision will simply "run out"[65] before resolving the present case. Principles and standards are inherently able to encompass and resolve a wider range of situations than rules; they are also concomitantly able to encompass a wider range of value and policy choices that can comport with the original

61. *Id*.

62. These are distinct from canons of construction that actually instruct and direct as to the text's substance rather than simply its linguistic and/or grammatical interpretation. *See id*. at 113.

63. *Id*.

64. *See* Colby, *supra* note 10, at 734 ("When originalist interpretation produces a meaning that is not specific enough to resolve the issue at hand, we must go beyond originalism in order to decide the case. There can be no originalist answer to the question of which construction to apply; by definition, construction supplements interpretation and cannot be dictated by it."); Whittington, *supra* note 8, at 611 ("However, originalism is incomplete as a theory of how the Constitution is elaborated and applied over time. Although originalism may indicate how the constitutional text should be interpreted, it does not exhaust what we might want to do and have done with that text."); Solum, *supra* note 24, at 104 ("Because interpretation aims at the recovery of linguistic meaning, it is guided by linguistic facts—facts about patterns of usage. Thus, we might say that interpretation is 'value neutral,' or only 'thinly normative.' The correctness of an interpretation does not depend on our normative theories about what the law should be.").

65. Solum, *Semantic Originalism*, *supra* note 32, at 19; Colby, *supra* note 10, at 733.

public meaning. In such cases, the semantic meaning will be unable to resolve case-by-case applications because that meaning will not clearly or precisely instruct an adjudicator how to narrow that range of value and policy choices to resolve a specific question or issue. Something else—construction—will have to supplement the semantic meaning in order to give effect to that meaning and allow the standard or principle to do work in the present.[66]

In contrast, if the provision at issue would have been understood to embody a clear rule, it is likely that the interpretation will both inform the interpreter as to the provision's meaning and also allow the interpreter to apply that meaning without any supplement. This will be the case because rules, unlike principles and standards, allow for only narrow policy and value choices, and whether the facts of a particular case comport with the rule will be much more obvious. In such a case, the interpretation does not run out, and the two activities—interpretation and construction—effectively collapse into each other.[67]

Additionally, linguistic precision (or lack thereof) will determine how instructive interpretation will be when the meaning is applied. New Originalists readily recognize that the language of the Constitution is often either ambiguous or vague. "Ambiguity refers to words that have more than one sense or meaning."[68] Generally speaking, ambiguity can be resolved by resorting to the context in which a statement is made. Because interpretation will routinely involve viewing statements in the context in which they appear, a theory of interpretation will often resolve any ambiguity to indicate which meaning is correct. Also, because the inquiry is historical, there will usually be historical evidence available to indicate which meaning is likely to be correct.[69] However, in the cases where the ambiguity is irreducible[70]—where the context actually does not

66. Whittington, *supra* note 8, at 611–12.

67. It is important to remember that even if the interpretation and construction appear to collapse or merge into each other, they are still distinct activities. The difference with clear, precise rules is that their original public meaning simply will not require a judge to devise any doctrine or rule of construction beyond the words themselves to apply them. Application is still separate from interpretation, though.

68. Barnett, *supra* note 23, at 67 (emphasis removed).

69. *Id.* at 68.

70. Solum, *supra* note 24, at 102.

reduce the question of meaning to indicate which meaning is correct—the interpretive theory alone will not be able to solve the issue and construction will be required.

Vagueness, by contrast, "refers to the penumbra or borderline of a word's meaning, where it may be unclear whether a certain object is included within it or not."[71] While there may be historical evidence and contextual clues to allow the interpretation of the words themselves, with vagueness, the words (and all the evidence explicating the words) often do not provide enough information to indicate how those words are to be applied, especially where it is not clear whether something does or does not fall within the boundaries of the words.[72] In such cases, construction will be necessary, as in cases of irreducible ambiguity, to supplement the meaning of the words even if the words themselves are accurately interpreted.[73]

B. Construction

While interpretation is thus a fairly factual inquiry, construction requires making normative decisions about how to apply the discovered semantic meaning in the present to a set of actual facts or circumstances.[74] New Originalists accept that these normative decisions are many and varied. One type of normative decision involves creating doctrines that the judiciary believes to best effectuate a certain provision. For example, the "time, place, and manner" restriction in First Amendment jurisprudence is a judicially-created doctrine[75] designed to balance the government's interest in maintaining order with a citizen's interest in free expression. The language of the First Amendment itself would not have linguistically been understood to require time, place, and

71. Barnett, *supra* note 23, at 67 (emphasis removed).

72. *Id*. at 68.

73. *See* Solum, *supra* note 24, at 102.

74. *Id*. at 104 ("But construction is not like interpretation in this regard—the production of legal rules cannot be "value neutral" because we cannot tell whether a construction is correct or incorrect without resort to legal norms. And legal norms, themselves, can only be justified by some kind of normative argument. For this reason, theories of construction are ultimately normative theories: because constructions go beyond linguistic meaning, the justification for a construction must include premises that go beyond linguistic facts.").

75. Barnett, *supra* note 23, at 69.

manner restrictions at the time it was adopted, nor would it have obviously required the reviewing court to balance government interests against private interests; there is simply no way that the original public would have linguistically understood the words "Congress shall make no law . . . abridging the freedom of speech" to somehow incorporate time, place, and manner or balancing considerations.[76] However, in determining how best to apply that portion of the First Amendment to present circumstances and fairly represent both interests—government and private—regarding expression, the Court constructed the "time, place, and manner" doctrine. The doctrine extended beyond the factual interpretive meaning to normatively incorporate present value and policy choices into the text of the First Amendment.

Another type of normative decision in construction is deciding which institutional body—the political branches or the judiciary—should make decisions regarding construction in the first place. New Originalists are not all in agreement on this point. Some have argued that in cases where interpretation does run out, the judiciary should defer to the political branches because that best effectuates democratic policy and choice.[77] On the other end of the spectrum, others[78] argue that the judiciary and the political branches may both engage in construction because they are all institutionally capable and mutually supportive of each other in the task of creating doctrines to solve present-day cases and exigencies.[79]

76. In fact, an argument could be made, based on the language itself, that the public would have understood those words to mean that time, place, and manner restrictions expressly abridged their right of expression.

77. James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433, 440 (2013) (identifying three available "models" of construction: construction as politics, construction as principle, and construction by original methods). *See also* Paulsen, *supra* note 24, at 881 ("A somewhat improved answer might be that the Constitution's text itself suggests, as a practical matter, a default rule of interpretation where the constitutional text is unspecific: popular republican self-government. . . . The more unspecific a text, the more room it leaves for democratic choice, in accordance with the structures of government the Constitution creates at the federal level and mostly leaves alone at the state level.").

78. Such as Professor Jack Balkin.

79. Balkin, *supra* note 7, at 562 ("This is the central insight of living constitutionalism: state-building by the political branches and judicial constructions are, generally speaking, mutually productive and mutually supportive. To use the metaphor of the living constitution, they grow up together.").

Yet another normative consideration is choosing which substantive canons of construction to apply to a particular provision at issue.[80] While textual canons deal solely with the linguistic meaning of the text, substantive canons go toward how the provision will legally apply to particular facts.[81] For example, the "rule of lenity" is a canon that says a criminal statute's ambiguity is to be resolved in favor of the criminal defendant. This canon does not go toward determining the linguistic meaning of the statute at issue—presumably, the entire reason for lenity to be applied in the first place is because the linguistic meaning of the text does not clearly resolve the case at issue—and after the canon is applied, its linguistic meaning will likely still be ambiguous. Instead, this canon reflects a substantive value choice in favor of criminal defendants. It is a value choice that instructs judges how to apply the laws at issue in a particular case, not how to determine the linguistic meaning of such laws.

In any event, whatever the normative considerations in play, the application of such considerations to the facts of a particular case is what ultimately gives the historical semantic meaning its present legal content. According to New Originalists, without construction, semantic meaning cannot often translate into law; without construction, the linguistic meaning will be known in the present without actually doing work in the present.[82]

III. UNCERTAINTY INJECTION: THE PARTICULATE CONSTITUTION

The Old Originalist's constitutional universe was much like the Marquis de Laplace universe—determinate and discoverable and predictable and cohesive. The Constitution in the present meant what the Framers intended it to mean in the past, Framer intent would continue to resolve constitutional questions in the future, and that intent was predictably discoverable through traditional tools of interpretation. Further, Old Originalism's entire purpose was to

80. Solum, *supra* note 24, at 113.

81. *Id.*

82. As discussed before, while there are provisions in the Constitution where the semantic meaning and the legal content appear to be synonymous (such as the age-of-the-President provision), for many provisions, this will not be the case. Even so, New Originalists still regard the two activities as separate and still in play in their respective roles behind the scenes.

eliminate space that would have allowed judges to impose their own beliefs onto the Constitution. Because of this, interpretation and construction were not recognized as separate activities; the Constitution meant what it meant, and that meaning, in every case, determined the outcome. Old Originalism was thus a theory of adjudication, not a theory of law.[83]

The New Originalist's constitutional universe, instead, is often rather uncertain. As discussed in Part II, interpretation and construction are separate activities. Interpretation involves looking backward to 1787 (or to the subsequent dates when amendments were adopted), while construction involves pulling that meaning forward to resolve issues in the present. In some cases, it is not always necessary for a court to obviously construct a legal doctrine to effectuate particular provisions; there are some provisions in the Constitution where the semantic meaning clearly resolves a question at issue.[84] In contrast, while New Originalists do claim to be bound by the original public meaning in construction, it is not clear whether that meaning has anything but a vanishing-point bearing on the resolution of a case where the constitutional text at issue is general, abstract, vague, or communicates a broad principle.[85] Additionally, the activity of interpretation is not actually necessary to the activity of construction. It is possible to know the original public meaning—the semantic meaning of the words to the public when

83. Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 546 (2013) ("In a nutshell, old originalism was (chiefly) a theory of adjudication, whereas new originalism is (chiefly) a theory of law."); *see also* Lawson, *supra* note 23, at 1823 ("Theories of interpretation concern the meaning of the Constitution. . . . Theories of adjudication concern the manner in which decisionmakers (paradigmatically public officials, such as judges) resolve disputes.").

84. Solum, *Originalism and Constitutional Construction*, *supra* note 32, at 468 ("In some cases, giving the text legal effect might be unmediated; we read the text and put it into effect. But in other cases, the legal effect of the text is mediated by doctrines of constitutional law.").

85. *Id.* at 457–58. In fact, Solum's argument in this article is that the "construction zone," as he refers to it, "is ubiquitous in constitutional practice" and that this "construction zone is ineliminable: the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction . . . for their application to concrete constitutional cases." *Id.*

the text was adopted—without that meaning dictating or determining the construction of legal doctrine.[86]

The recognition of the interpretation-construction distinction therefore injects Heisenbergian Uncertainty into the Constitution. It imposes onto the Constitution two distinct, separable characteristics, much like Heisenberg's particles: the Constitution has both location (through interpretation back to that fixed original meaning), as well as velocity (through construction to assemble present legal meaning). In this Part, I will briefly discuss the Uncertainty Principle, and then discuss how the interpretation-construction distinction in New Originalism imposes particle-like characteristics on the Constitution. I will conclude this Section by discussing implications of having a particle-like Constitution.

A. The Uncertainty Principle

In a Heisenberg universe, particles are the featured players. Particles make up everything;[87] they are fundamental building blocks, and their properties (and interactions) ultimately determine how the universe operates and expresses itself. In 1926, Heisenberg wanted to be able to use these particles to predict the future of the universe by measuring both the present location and the present velocity of the particles. If those two properties could be known, then presumably the entire universe was ultimately predictable.[88]

However, he encountered a problem. The best way to "see" a particle is to shine light on it. In this scenario, the particle will theoretically cause the light waves to scatter, and this scattering will indicate the location of the particle.[89] Prior to Heisenberg's experiments, in 1900, Max Planck suggested that light waves emitted in specific "packets" he called "quanta," and that "each quantum had a certain amount of energy."[90] The energy of a

86. *See* Balkin, *supra* note 7, at 552 ("But fidelity to *original meaning* does not require fidelity to *original expected application*. Original expected application is merely evidence of how to apply text and principle. Each generation is charged with the obligation to flesh out and implement text and principle in their own time.").

87. HAWKING, *supra* note 2, at 68.

88. *Id.* at 56–58.

89. *Id.*

90. *Id.*

quantum increased as the wave frequency[91] increased (in other words, the shorter the wavelength, the more energy the wave carried). Because the particles Heisenberg desired to "see" were very small, in order to "see" a single particle, the wavelength needed to be very short. Unfortunately, he found that directing a quantum of light toward a particle unpredictably interacted with the particle to change its velocity, and the more precisely he tried to measure the location (by directing quanta of increasingly higher energy toward the particle), the more the velocity of the particle was displaced.[92]

Heisenberg had discovered the problem of quantum mechanics—that every particle has a quantum state which is a combination of position and velocity,[93] and that one cannot precisely know both at the same time. The more one tries to locate the particle, the more energy must be used to "see" the particle, and the more that particle's velocity will be disturbed. On the other hand, the more one tries to measure a particle's velocity, the less precisely one will be able to know the particle's position (a person will know how quickly it is moving, but just not from where). Importantly, Heisenberg showed that it does not matter the method by which a person attempts to measure the position or velocity, or even what kind of particle one attempts to measure; the uncertainty he discovered, like those particles themselves, is a fundamental part of our universe. In such a universe, the best we are able to do is predict "a number of different possible outcomes" and indicate how probable each outcome is;[94] we live in a universe of probabilities rather than certainties. Instead of a clear, precise, predictable universe, we are left with one that is, at best, blurry.[95]

91. Hawking defines this as "the number of complete cycles per second." *Id.* at 201. A wave cycle is the wavelength, or the "length of one complete wave cycle." *See also The Anatomy of a Wave*, THE PHYSICS CLASSROOM, http://www.physicsclassroom.com/class/waves/Lesson-2/The-Anatomy-of-a-Wave (last visited Nov. 21, 2015).

92. Particle velocity is directly related to the energy of the wavelength directed at it (and that is moving through/around it); the velocity of the particle is thus the displacement speed caused by the particle's interaction with the wave itself. *See* HAWKING, *supra* note 2, at 56–57.

93. *Id.* at 57.

94. *Id.* at 58.

95. *Id.* Hawking's precise terminology is "smeared out."

B. The Constitution as a Particle

If we accept that everything else in the physical universe is fundamentally composed of particles, there is no reason to think the Constitution, as a fundamental building block of our national universe, is any different.[96] New Originalism's interpretation-construction distinction creates such a particulate Constitution. Rather than conceptualizing constitutional case resolution as a cohesive inquiry where position and velocity (or interpretation and construction) are one-in-the-same,[97] it fragments the resolution into two distinct inquiries—a factual, position-like inquiry and a normative, velocity-like inquiry. In this Section, I will discuss the position-like characteristics of interpretation, and the velocity-like characteristics of construction.

1. Position-like interpretation

Interpretation is solely concerned with discovering an original textual position. The text is frozen at a fixed point in time, much like a particle's position (if it could be discovered) is fixed. That point in time is whenever the particular provision *was* first. As discussed, for most of the Constitution, that specific point will be when the Constitution was adopted as the founding document of our government, and that point in time corresponds to the *only* linguistic meaning that matters. This means that all of the evidence the interpreter will need to examine to determine that linguistic meaning must also be from that same fixed point, to the exclusion of future evidence.[98]

96. There's no reason to think that it isn't, you know. It was written by people composed of particles, on paper composed of particles, with ink composed of particles. And if everything else in the entire universe—from asteroids to neutron stars to the rock-formerly-known-as-planet-Pluto—is composed of particles, I'm not sure why we should think that the Constitution is an exception to the rule. In fact, our national universe could be said to be populated with many kinds of particles. There are congresses, judiciaries, executives, and agencies. There are state constitutions, statutes, precedential cases, and executive orders. There are treaties and diplomatic agreements. And there are the actors themselves—people who use these different kinds of particles to continually shape our national universe. In such a model, the Constitution would also be a particle that, like all the others, has distinct position and velocity.

97. Such as, "What does the Constitution say about how to resolve this particular case?" Realize, this is essentially what Old Originalism asked.

98. *See supra* Part II.

Additionally, like a particle's position will be factually objective, the meaning of fixed constitutional provisions is also considered to be factually objective. Rather than ascertaining what specific persons (such as the Framers) or a specific segment of the public might have understood the words to mean at that fixed point in time, New Originalists ask what a hypothetical person at the time would have understood the words to mean;[99] however the Framers (individually or collectively) may have expected, desired, or intended a particular provision to be applied simply does not matter.[100] As part of this inquiry, New Originalists specifically seek to discover and apply the objective characteristics of that hypothetical, historical, reasonable individual[101] to determine how those characteristics bear on the factual linguistics of the words. For example, Professors Gary Lawson and Guy Seidman have theorized that the hypothetical person possesses characteristics such as "high degree of intelligence and education," "strong commitment to human reason," and "learned in the law."[102] They ultimately conclude that this hypothetical person is like the familiar "reasonable person" that we already frequently use in other legal contexts, and that this legal "hypothetical mind"[103] is the public mind we should be employing to understand and interpret constitutional provisions.

New Originalist interpretation, like a particle position, therefore involves discovering a "where" that is both singular and wholly independent from both the judge's own views about history as well as the individualistic views of those who wrote, recorded, or experienced that history. In theory, the range of judicial choice will be narrowly and highly focused on discovering one objective, locative meaning; the only "where" that New Originalists care about discovering vis-à-vis public meaning is that original, objective "where."[104]

99. Lawson & Seidman, *supra* note 37.
100. Whittington, *supra* note 43.
101. Lawson & Seidman, *supra* note 37, at 70–73.
102. *Id.* at 72.
103. *Id.* at 73.
104. *See supra* Part II.

2. Velocity-like construction

Knowing the fixed "where," however, is not sufficient for the New Originalist.[105] Interpretation does not incorporate the facts or circumstances of present questions, and so New Originalists employ construction in recognition of the fact that the Constitution will always be applied and adjudicated in the present (surrounded by pertinent, present, policy concerns) rather than at that fixed past. This normative desire for inclusion of present circumstances presupposes that the Constitution itself is capable of a kind of velocity. Recall that particle velocity is not the velocity of the particle before the interaction with light wave; it is the *displacement* speed caused by the interaction with the wave (and the quanta energy contained in the wave) itself. For the Constitution to have displacement velocity, there must be waves interacting with it to unpredictably change its speed. New Originalist waves include "quanta" of present-day values, circumstances, and exigencies (particularly those intertwined into a specific case) that are pressed onto the constitutional text.[106] These "quanta" of present-day values, circumstances, and exigencies are directed at the constitutional particle and necessarily interact with the constitutional text during adjudication. The displacement velocity—the change in speed—is represented by the construction that finally incorporates present-day circumstances and considerations into those historical, fixed provisions.

As opposed to the factually-driven semantic meaning, velocity thus involves normative, what-this-provision-should-mean-today inclusion into the text based on the "quanta" of value and policy considerations in play as well as the normative considerations in construction discussed in Section II.B. Also, as cultural norms and technology change, those changes are also incorporated as additional "quanta" that may be passed through the constitutional text to seemingly and necessarily create or discover rights (or new aspects of rights) based on the anticipated implications of those changed norms or new technologies.[107] Given all of this, constructive, "quanta"-

105. It would have been for the Old Originalist.

106. For the most controversial discussion of these "waves," see Balkin, *supra* note 7.

107. For example, in Fourth Amendment jurisprudence, the rise of automobiles created new concerns about increased mobility of criminals and potential criminal evidence; in

incorporated decision(s) a judge makes when adjudicating a present case will ultimately displace the meaning of the constitutional provision at issue.

3. Comparing position and velocity

Because these waves and "quanta" therefore involve considerations about *how* the present should explicate semantic meaning rather than *what* that semantic meaning is, velocity is functionally and qualitatively different than the factually-determinate position. This difference means that velocity and position can be (and are) measured with little to no reference to the other. In order to determine position through interpretation, a New Originalist will never incorporate present values or circumstances and impose them on the original semantic meaning. Interpretation is an end in itself; whatever one chooses to do with the semantic meaning is beyond the task of interpretation and becomes construction.[108]

Similarly, while constructions may be said to be constrained by the semantic meaning, when that semantic meaning embodies a broad principle (as is often the case in many of our most controversial cases), as long as the constructed meaning comports with the semantic meaning (remember, this is nothing more than the historically factual, grammatical, linguistic meaning), there is no New Originalist issue with the construction. In those cases, the semantic meaning operates as little more than a silent figurehead, and the construction easily carries and incorporates present-day considerations. Further, normative considerations are created in the present rather than discovered through historical fact. While history may have some bearing, it is not a necessary incident to a normative consideration's creation or use; it is completely possible to comport with historical linguistic meaning (especially if this meaning is a principle or standard) without having considered or incorporated any of the substantive history behind that linguistic meaning.[109]

response, in 1925 the Supreme Court ruled in *Carroll v. United States* that a car could be searched without a warrant because of how quickly cars could change location, incorporating the effects of technology into traditional search and seizure law. 267 U.S. 132 (1925).

108. In fact, one could choose to not apply it at all. Lawson, *supra* note 23, at 1833–36.

109. For example, as referenced in Part I, *Brown v. Board of Education*, 347 U.S. 483 (1954), in stating that separate but equal education is never equal education, technically comported with a very broad principle of equal protection without incorporating the history

The interpretation-construction distinction, then, creates a separable Constitution, one with two faces—factual and normative—where both are used to give meaning to the Constitution, but neither is truly dependent on or necessary to the other. Interpretation does not need construction to work or play its part, and construction, especially in the most controversial cases, does not need interpretation to work or play *its* part. Additionally, because interpretation does not have a formal role in the activity of construction, the distinction forces a choice in adjudication that Old Originalists, with their integrated understanding of interpretation and application, did not have to make. Either the constructionist can be faithful to the past—to that fixed original meaning—or the constructionist can be faithful to the present. But in cases where there is any kind of vagueness, irreducible ambiguity, or generality in the language of the Constitution (in other words, most cases), the constructionist cannot be faithful to both because that semantic meaning will not clearly indicate what the resolution should be. In those cases, the fixed past that presumably tells an interpreter what the Constitution meant will also cease to be useful, and the issue or question will then inevitably be decided by what the Constitution means presently (or should mean presently), rather than what it used to mean.

In other words, the Constitution does have both position and velocity, but the interpretation-construction distinction severs one from the other. If an interpreter knows the semantic position of the past, it will not necessarily tell that interpreter how to decide the present; if the constructionist is creating a normative doctrine to resolve the constitutional issue (and thereby displace the meaning of the text), that normative doctrine can be created without any real-world functional reference to the semantic past. And, because

surrounding the adoption of the Fourteenth Amendment. It is highly unlikely the hypothetical, reasonable public of 1868 would have understood their newly adopted Amendment to constitutionally mandate integrated education through the words "equal protection of the laws." However, that construction of the Fourteenth Amendment certainly incorporated normative considerations pertinent in the time the case was decided. Previous to the decision in *Brown,* normative momentum for its decision had been building for many years, particularly through aggressive NAACP efforts to alter the educational opportunities for African Americans, particularly through cases such as *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma Board of Regents of Higher Education*, 339 U.S. 637 (1950), where enforced segregation in higher education was ruled by the Supreme Court to be unlawful.

determining semantic meaning and constructing a resolution are entirely different inquiries requiring entirely different tools and considerations, it would not matter if they did. The New Originalist Constitution, then, *is* a kind of quantum mechanical, inherently uncertain particle.

C. Implications of a Particulate Constitution

As discussed above, the interpretation-construction distinction divorces past constitutional meaning from present constitutional meaning. This divorce has several important implications for how the Constitution is conceptualized. First, it allows the Constitution to be a kind of blueprint bereft of normative force in its own right; the only normative force the New Originalist Constitution has is how much the present constructionist is willing to give it. Second, it accepts and condones untethered, free-agented constitutional meaning. Finally, it creates a Constitution of indeterminate, blurry probabilities where the unknowable future creates an equally unknowable Constitution.

1. Dead recipe constitution

First, New Originalists have characterized the Constitution as a recipe,[110] a blueprint, an instruction manual, and a framework.[111] It provides instruction about how our government should be structured. It frames certain rights that the federal government should not intrude upon. It lists out and identifies duties of each coordinating branch. It explains why it was created in the first place. For the Old Originalists, this characterization would have created an instrumental Constitution. The manual or recipe would have answered both the question of what the words mean and how (or even whether, though Old Originalism presupposes the

110. Lawson, *supra* note 23.

111. This is Jack Balkin's conception. *See* Balkin, *supra* note 7; BALKIN, *supra* note 7. It makes sense, if constitutional momentum is all one is really concerned about. Whatever that momentum builds around the framework is what it builds, and is really, as a result, neither constitutionally correct nor incorrect. It simply *is*. However, I also think that, at its most absurd, it seems to me to lead to a kind of Winchester Mystery House Constitution, and seriously, nobody needs doors that go nowhere or stairways that abruptly end for no apparent reason.

"whether" altogether, where New Originalism does not) they should be applied; the Old Originalist Constitution was therefore a working, living Constitution.[112] By contrast, the New Originalist Constitution is a recipe or manual with language that does have meaning, but that meaning may have little (or does not even need to have any) present-day instrumentality. The Constitution tells an interpreter the "what" without forcing the interpreter to decide the "how" or the "whether."

Ironically, then, the New Originalist interpretation-construction distinction creates the potential problem of a Dead Recipe Constitution[113] where the words can be understood, but it is not clear that that meaning necessarily influences the present. Perhaps there is nothing inherently wrong with not automatically presupposing that the Constitution's original meaning, as a normative matter, should be applied in every case; there are certainly provisions in the Constitution that do not appear to have any present-day meaning at all.[114] However, unconcernedly allowing the Constitution to become a Dead Recipe ignores the fact that the entire impulse behind using, reading, and interpreting the Constitution *is* normative. Litigants invoke the Constitution, judges read and refer to the Constitution, and law students learn and study the Constitution precisely because there are standards and rights and principles and rules and guidelines articulated in it that we still think, as a normative matter, continue to have direct bearing on present-day questions and issues. Interpretation is employed *because* of how we normatively regard the Constitution.

112. Note, though, that Old Originalism also was criticized for the "dead-hand" problem—that it rather blindly enforced a dead-hand Constitution that perhaps has little functionality in present-day circumstances. Whittington, *supra* note 8, at 605–06, notes this as a criticism of Old Originalism.

113. *See* Lawson, *supra* note 23. This "dead recipe" obviously plays off of his suggestion that the Constitution is like a recipe for government. Lawson also brings up the "dead hand" issue in his article, *Dead Document Walking,* 92 B. U. L. REV. 1225, 1232 (2012). In that article, he discusses Balkin's ideas about living constitutionalism, identifying the major question in Balkin's work to be: "Is the Constitution a largely completed (and therefore mostly dead) skyscraper or a largely unfinished (and therefore mostly living) framework?" Balkin argues that it is framework, not skyscraper, and through that, obviates the issue of being led by a kind of dead recipe. *See* Balkin, *supra* note 7; BALKIN, *supra* note 7.

114. For example, the Migration and Importation clause probably has little meaning in today's world, most especially because it is rather historically obvious that that provision dealt with the slave trade.

Further, the Constitution was debated and discussed and written and ultimately adopted to *be* normative. The Framers convened in that summer of 1787 to re-work the Articles of Confederation because its provisions (and the theoretical underpinnings of its provisions) were not proving to be effective in solving many practical issues encountered in the post-independence confederation.[115] The Framers wrote the document (and the words in the document) to hopefully fix their present problems and provide predictive, principled structure to solve future problems. However the Framers may or may not have intended individual provisions to be applied in the future, it is at least clear that they intended the Constitution, as our federal government's founding document, to create a government of specifically chosen and deliberately articulated normative elements that would do actual, continual, real-world work.[116]

Thus, if the Constitution is a recipe for a government, it is undoubtedly being read, invoked, and interpreted (even by New Originalists) to keep "making" the government that was created in 1787.[117] The normative choice to use the Constitution has already been made, and that decision continues to be made every time it is invoked, studied, interpreted, and even used to justify a particular result through construction. The words were written to effectuate ends (or in other words, to be instrumental) by embodying particular principles (by being normative). This suggests that the Constitution's semantic meaning *does*, as a practical matter, incorporate fundamental normative meaning and should have

115. Our Constitution forbids states from forming treaties with foreign nations and declares treaties to be supreme law, for example, precisely because of problems created by the Confederation's inability to enforce post-Revolutionary War treaties.

116. The text of the Preamble seems to establish this: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl.

117. Perhaps this is a circular argument—we read recipes for fried chicken because we choose to make fried chicken and we make fried chicken by reading the recipe, much like we make this particular government by reading its recipe and this recipe was written to make this particular government. But that is also kind of the point. It is too difficult, too problematic, to separate the making from the choice, and the choice from the making, especially in a case where both are necessary to produce, as it were, the fried chicken for dinner in an hour, or tomorrow, or next week, or next year.

normative force, just like any constructed meaning will have normative force. Willingly divorcing the semantic force[118] from application creates a dead recipe of known facts that are not normatively necessary.[119] In place of this dead recipe, what is left—what becomes normatively necessary—are the value choices of the adjudicating judiciary. However accurate or appealing this may be in theory this is a result that does not reflect the reality—that by continuing to actively use the Constitution, the words are still expected to live rather than die a factual death.

2. Free-agented constitution

Second, by asserting the distinction between interpretation and construction, the New Originalists have untethered its present meaning from its past meaning, and it is thereby unclear what the Constitution will mean for (or how it will be used in) the present or the future.[120] The Old Originalist insistence on tethering past meaning to present circumstances limited the range of potential present (and future) meanings to those connected to historical intent. While reasonable interpreters could differ regarding the evidence bearing upon the intent or regarding which evidentially-supported intent seemed to be the most accurate (in cases where more than one intent was apparent from available historical evidence), at least there was a single and consistent frame of reference imposed upon present-day constitutional application.[121] Without this kind of tethering, the range of potential present and future meanings expands, and it seemingly expands according to

118. If the preceding discussion did not make this clear, I'm arguing that yes, the semantic meaning of the constitution *does* have normative force. The Framers, whatever else they were doing in that 1787 summer, weren't penning pretty words simply because the words themselves were pretty.

119. Whatever else may be said about Old Originalists, being ruled by a so-called "dead hand" may actually be better than turning the Constitution into a dead recipe.

120. The Constitution's meaning can be determined by free-agent judges (which is a state of being that our government structure rather prefers: to have judges that are theoretically separated from politics) who may perceive values, norms, and exigencies differently from each other, which is pretty much what Old Originalism originally attempted to prevent.

121. As discussed earlier, this was one of Justice Antonin Scalia's main points in *Originalism: The Lesser Evil*, *supra*, note 12. *See supra* Part I.

however broadly or restrictively one (such as a free-agent-esque judge) is willing to read the language of the Constitution.

Interestingly, not every New Originalist expresses the same level of comfort with the size of this potential range. For example, Professor Gary Lawson suggests that the uncertainties arising from interpretation can be resolved in adjudication by selecting the "standard of proof for claims about constitutional meaning."[122] He suggests that, for example, someone arguing that a particular action is constitutional must prove it according to an assigned burden of proof—beyond a reasonable doubt, by a preponderance of the evidence, or otherwise.[123] He argues that this shrinks the potential size of the area available for constitutional construction by assigning the resolution of uncertainties to a specific party, rather than to potential normative constructions by the adjudicator. Alternatively, John O. McGinnis and Michael B. Rappaport argue that construction will become unnecessary altogether if the Constitution is "interpreted using the interpretive methods that the constitutional enactors would have deemed applicable to it."[124] They suggest that there is no support for construction at all at the Framing, and that any ambiguity or vagueness would have been "resolved by considering evidence of history, structure, purpose, and intent."[125] Similarly, Professor Michael Stokes Paulsen argues that the Constitution itself prescribes its own rules for interpretation, and, as

122. Lawson, *Dead Document Walking, supra* note 113, at 1235 (emphasis omitted).

123. *Id.*

124. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009). McGinnis and Rappaport cannot fairly be called "New Originalists" as described in this article, because they do not find evidentiary support that constitutional construction was a method the Framers used to interpret a constitutional document. However, neither can they fairly be called Old Originalists, either, because they do not advocate simply looking for Framer intent. Rather, they argue that constitutional interpretation should be governed by "interpretive rules in place when the Constitution was enacted." *Id.* at 752. Because they assert that original methods originalism does not "guarantee[] that [the original interpretative rules] were originalist," and that those original interpretative rules may have included looking for "original meaning" as well as "original intent," I have included them here as another data point in the broad spectrum of how to deal with the space between interpretation and construction. *Id.* They may reject constitutional construction, but they do so only by replacing it with another theory (their original methods theory) that purports to deal with the questions construction attempts to answer. *Id.* at 751–53. In effect, they therefore appear to be theorizing about how to best deal with and conceptualize construction.

125. *Id.* at 752.

embodied in the Constitution, when the text itself stands for a principle, "popular republican self-government" should decide how that principle should be interpreted, which effectively shrinks the choices for resolution.[126] Professor Keith Whittington argues that construction is merely supplementary to interpretation, and that even if construction is necessary to apply the semantic meaning, those constructions should not presumptively be made by the judiciary.[127] He argues that while judicial constructions are sometimes appropriate, at other times they are "more avoidable" in favor of political branch resolution,[128] and that if there *is* a range of normative choices, those normative choices should at least be constrained by choices of elected, democratic majorities.[129] Finally, Professor Jack Balkin argues that the Constitution is merely a framework, and that construction is required precisely because it does not actually give detailed normative advice about how to decide cases.[130] Instead, he argues that the Constitution itself explains how constitutional change is to occur between political branches and the courts. For Balkin, construction is constitutionally mandated, and that potential range of constructive choices is entirely determined by the range of present-day circumstances, political pressures, and cultural changes.[131]

Importantly, each of the above solutions presupposes that the range of potential choice does exist, and each appears to mitigate (or, perhaps for Balkin, happily accept) the consequences of a semantic past that, for many cases, is effectively stuck in the past, thereby leaving open a thoroughfare-like constructive future. The variety in these solutions does, by itself, seem to indicate how open, innovative, different, and new present and future constitutional

126. Paulsen, *supra* note 24, at 881.

127. Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 128 (2011).

128. *Id.*

129. *Id.* at 129 ("So long as judges are acting as faithful agents to provisionally maintain constitutional understandings widely shared by other political actors, then their role in articulating constitutional constructions may not be objectionable. As they become innovators on behalf of constitutional understandings that are not widely shared by other political actors, then the legitimacy of courts engaging in constitutional construction would seem to be limited.").

130. Balkin, *supra* note 7, at 550.

131. *Id.*

meaning can be without a connected past. The more possibilities for dealing with the range of potential constructions and resolutions, the more potential constructions and resolutions there seemingly must be. Therefore, instead of trying to tether, New Originalists must instead try to corral, and however they choose to corral will ultimately be a product of their own normative, free-agent constructions.

3. Blurry constitution

Finally, whatever the range-size of potential outcomes, the interpretation-construction distinction also changes the quality of those possible outcomes. Because the distinction does not require past meaning to play an active role in determining present potential outcomes, the various present-day quantum "waves" pressed through the Constitution will only ever present a "smeared"[132] and blurry range of probable outcomes, rather than actual, certain, determinate possibilities.

Recall that in quantum mechanics, the higher the energy in the quantum used to locate the particle, the more the particle's speed will be displaced (and therefore the more unknowable the velocity will be). Similarly, the more vague, abstract, or principle-like the constitutional text at issue, the more inherently unknowable the potential outcomes issuing from that text will be. Passing a present-day "wave" through that text will create a resultant range that will be blurrier and contain a larger number of probable, potential outcomes than a wave passed through a rule-like provision. The final constructed outcome in such a blurry case will be no more "correct" in a constitutional sense than any of the other probable outcomes, and the outcome will ultimately be driven by whatever normative forces the adjudicator chooses to recognize and apply to the text and the case at hand. This is particularly so because if the fixed meaning of the past does not meaningfully (or even perceptibly) interact in the construction of a particular provision, that blurry range of probable choices will change with every new case to be resolved under that provision, because the present circumstances, in every case, will be different. The legal meaning, particularly of those vague

132. HAWKING, *supra* note 2, at 58.

and abstract provisions, will be continually dependent on those changing present circumstances. The "blur" will therefore not focus or clear up with repeated adjudication of the same provision; every case will present a qualitatively different "blur" from the "blur" that may have been used to finally decide any prior case.

Additionally, the lack of clarity caused by the "blur" will be exacerbated by being, as referenced previously, adjudicator-dependent. A New Originalist judge, unlike an Old Originalist judge, will not be restrained by a fixed past, particularly when confronted with having to apply broad constitutional principles. Instead, such a judge may effectively apply his/her own views about construction and the normative considerations driving it.[133] As discussed above, even New Originalist scholars are not all in agreement about what to do with the construction zone. If those claiming to identify with the theory cannot agree on how to deal with the constructive step, it cannot be expected that judges adjudicating actual cases will agree on the breadth of that range of probabilities or how to ultimately deal with those probable outcomes either.

The result of this constitutional "blur" will be that unless a case's facts and circumstances and exigencies and values and policy choices and year and political climate and judge are exactly the same, it is unlikely that the outcomes related to a constitutional provision will be particularly predictive (as is the big quandary in quantum mechanics). The only point that will ever be constitutionally "known" will be that one fixed, isolated, thinly useful point of a provision's adoption; beyond that there will be shifting probabilities, blurs, and smears that are dependent upon a continuously shifting present. Thus, we cannot "see" or effectively use constitutional position and constitutional velocity at once, so we cannot truly "know" the present or the future constitutional particle either. The result of the New Originalist interpretation-construction distinction

133. Solum, *Originalism and Constitutional Construction*, *supra* note 32, at 472–73 ("Constitutional construction is not driven by facts in the same way. Rather, construction is essentially driven by normative concerns. . . . The abstract fact that construction is essentially normative does not entail any particular account of the norms that ought to govern the practice of construction. . . . [T]he important point is that there are several possible approaches to the construction zone that are consistent with the core commitments of originalism to fixation and constraint.").

is therefore that we may know what the Constitution meant once upon a time, but we do not now know, and cannot further know, what it actually *means*.

IV. CONCLUSION

In 1926, with the formulation of the Uncertainty Principle, Marquis de Laplace's determinate universe was forever obliterated, and we will likely never get it back. Since that time, we have had to adjust to living in a fundamentally uncertain universe where the present cannot be precisely known and the future cannot be precisely predicted.

In such a universe, it is possible that the New Originalists are right—that there *is* a functional and qualitative difference between the activities of interpretation and construction, and that one is not determinate of the other. However, this distinction makes uncertainty inherent in the Constitution by treating it like a particle with two separable characteristics—a locative, fixed past, and a present, continuously displaced normative velocity. Constitutional outcomes are thus ultimately expressed as probabilities rather than actualities. The cost of living in such a constitutional universe is that the present and future meaning of the Constitution is unknowable. Perhaps this is how it must be.

But it does make one crave a little Laplace.

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