

2015

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Calvin TerBeek

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### Recommended Citation

TerBeek, Calvin (2015) "Originalism's Obituary," *Utah OnLaw: The Utah Law Review Online Supplement*: Vol. 2015 : No. 1 , Article 2.  
Available at: <http://dc.law.utah.edu/onlaw/vol2015/iss1/2>

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# ORIGINALISM'S OBITUARY

Calvin TerBeek\*

## I. INTRODUCTION

Originalism is currently the *de riguer* theory of constitutional interpretation in the legal academy. The law reviews are littered with articles taking up originalism from every imaginable angle; one even asks whether the creation of West Virginia was constitutional.<sup>1</sup> The theory has taken the name “new originalism”<sup>2</sup> and its adherents are quick to point out the putative sophistication of their theory,<sup>3</sup> in addition to making claims that “we are all originalists now”<sup>4</sup> or “it takes a theory to beat a theory.”<sup>5</sup>

The leading conservative and libertarian new originalist theorists—Randy Barnett, Michael Paulsen, John McGinnis, Michael Rappaport, Vasani Kesavan, John Yoo, Nelson Lund, Saikrishna Prakash, Steven D. Smith, Michael Ramsey, and Lawrence Alexander—and the progressive and non-ideological theoretical fellow travelers—Jack Balkin, Lawrence Solum<sup>6</sup> and Keith Whittington—form the core of this scholarly school. Many teach at impressive law schools (e.g., Yale, Berkeley, Georgetown, Northwestern, Virginia) or self-consciously conservative law schools (University of San Diego<sup>7</sup> and George Mason<sup>8</sup>). These scholars are part of

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\* University of Chicago, Ph.D. Candidate in Political Science; Tulane University, J.D.

<sup>1</sup> Vasani Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291 (2002) (querying, as the title gives away, whether West Virginia’s admission to the union ran afoul of the constitution from a textualist and original public meaning approach).

<sup>2</sup> New originalism uses “original public meaning” as its interpretive heuristic, as opposed to “original intent” or “original understanding.” Various, largely fungible variations “original public meaning” abound. For example, Kesavan and Paulsen define original public meaning as “the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted.” See, e.g., Vasani Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1118 (2003).

<sup>3</sup> See, e.g., Robert Delahunty and John Yoo, *Saving Originalism*, 113 MICH. L. REV. 1081, 1083 (2015).

<sup>4</sup> ROBERT W. BENNETT AND LAWRENCE SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011).

<sup>5</sup> Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 636 (1999) (“We are bound [to respect the original public meaning of the Constitution] because we today . . . profess our commitment to a written constitution, and original meaning interpretation follows inexorably from that commitment.”).

<sup>6</sup> Though Solum is not ideological in the “left-right” sense, his embrace of (his version of) originalism is deeply ideological in the Foucaultian sense. Solum’s brand of originalism gives pride of place to judges (and law professors) as *the* interpretive authority(ies) vis-à-vis the Constitution. This is a considerable amount of power. Saul Cornell deserves the credit for pointing this out to me.

<sup>7</sup> Bernard Siegan, one of the first legal academics of the modern era to embrace the law and economics approach and libertarian constitutionalism (and a failed Reagan nominee

the reason for originalism's staying power as a theory of constitutional interpretation.

Fashionable though it may be, a closer look reveals a theory in decline. First, originalism suffers from epistemic closure.<sup>9</sup> New originalist scholars largely ignore the insights of historians, political scientists, and other academic disciplines. Indeed, for a theory that purports to take history seriously, some originalists have taken to referring to historians' questions and critiques as "history department law."<sup>10</sup> This, however, is a rhetorical distraction from the uncomfortable fact that history is much more complex and contextual than much originalist scholarship would have it. As one leading Founding Era historian put it: originalists "are raiders who know what [evidence] they are looking for, and having found it, they care little about collateral damage to the surrounding countryside that historians know better as context."<sup>11</sup>

The reason for new originalism's epistemic closure is easy to discern: it is a political and ideological project. Though observers have been suggesting (persuasively) for years that originalism is not much more than an ideological stalking horse for substantively conservative and libertarian results, the evidence is now incontrovertible: originalism is a political project no matter what self-serving stories originalists want to tell themselves (and others). Lip service can be (and is) paid to originalism's ostensible objectivity, but this is only to give it the patina of dispassionate scholarship. Moreover, it is no coincidence—and proof that elite ideas and rhetoric matter<sup>12</sup>—that those members of the public who identify as originalists are politically conservative, libertarian, and moral

to the Ninth Circuit) taught at USD for 30 years. Margalit Fox, *Bernard Siegan, 81, Legal Scholar and Reagan Nominee, Dies*, N.Y. TIMES, Apr. 1, 2006, available at [http://www.nytimes.com/2006/04/01/us/01siegan.html?\\_r=0](http://www.nytimes.com/2006/04/01/us/01siegan.html?_r=0). Today, Steven D. Smith, Larry Alexander, Michael Ramsey, and Michael Rappaport teach at the law school.

<sup>8</sup> STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 207 (2008).

<sup>9</sup> Not coincidentally, the conservative movement does as well. Patricia Cohen, *Epistemic Closure? Those Are Fighting Words*, N.Y. TIMES, Apr. 27, 2010 ("The phrase is being used as shorthand by some prominent conservatives for a kind of close-mindedness in the movement, a development they see as debasing modern conservatism's proud intellectual history.")

<sup>10</sup> Saikrishna Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMM. 529, 538 (1998). Another, perhaps rhetorically overheated, example is Nicholas J. Johnson, *Rights Versus Duties, History Department Lawyering, and the Incoherence of Justice Steven's Heller Dissent*, 39 FORDHAM URBAN L.J. 1503 (2012).

<sup>11</sup> Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI. KENT. L.R. 103, 104 (2000).

<sup>12</sup> JAMES N. DRUCKMAN AND LAWRENCE R. JACOBS, *WHO GOVERNS? PRESIDENTS, PUBLIC OPINION, AND MANIPULATION* (2015); LAWRENCE R. JACOBS AND ROBERT T. SHAPIRO, *POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS* (2000); James N. Druckman et al., *Candidate Strategies to Prime Issues and Image*, 66 J. POL. 1180 (2004).

traditionalists.<sup>13</sup> From the conservative legal elite down to originalists' "honest Joe," the theory is an ideological project.<sup>14</sup>

Consider constitutional theory through a wider historical lens. The new originalism is simply the latest iteration of a constitutional theory propounded by legal academics flowing from the theorists' political predilections to justify or criticize Supreme Court opinions. Just as (for example) John Hart Ely wrote *Democracy and Distrust* to defend the Warren Court,<sup>15</sup> and just as Ronald Dworkin positioned himself as the leading liberal public intellectual and criticized conservative judicial decisions,<sup>16</sup> the new originalism is, by and large, an ideological project designed to justify the Rehnquist Court's and Roberts Court's conservative judicial rulings, criticize its occasional failings, and encourage it to climb further out on the ideological limb.<sup>17</sup>

Why does the theory's epistemic closure and ideological nature signal its demise? Consider the latest flailing about for new theoretical jargon that will expel Balkin's liberal originalism (and to a lesser extent, Barnett's libertarianism) from the originalist camp. Nelson Lund expresses his unhappiness this way: "[b]ut whatever one's reasons for accepting Balkin's proposal to marry originalism and living constitutionalism, doing so leaves originalism in a condition akin to the legal death that married women experienced under the old rules of coverture."<sup>18</sup> Steven Smith wants to re-orient the entire originalist project from "original public meaning" to "original decisions originalism."<sup>19</sup> That is, Smith would ask whether "an enactor" of the equal protection clause

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<sup>13</sup> Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011).

<sup>14</sup> Prakash, *Unoriginalism's Law*, *supra*, note 10 at 538 (asserting that originalism "supplies the one, true interpretive method for honest Joe and for everybody else.").

<sup>15</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). Ely clerked for Chief Justice Warren and dedicated *Democracy and Distrust* to him.

<sup>16</sup> *The New York Review of Books* has an archive of Dworkin's essays; it would be challenging, if not impossible, to find an essay that did not advocate for a left-liberal political position regarding the Court, *available at* <http://www.nybooks.com/contributors/ronald-dworkin-2/>.

<sup>17</sup> Steven Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUDIES AM. POL. DEV. 61, 75-82 (2009); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORD. L. REV. 545 (2006). I once wrote that the originalism project had some redeeming qualities, such as refocusing the constitutional interpretation debate back on history and text. Calvin TerBeek, *The Cognitive Dissonance of the New Originalism*, at \*18-19, *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1091005](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091005). Upon reflection, I am not so sure I was correct. Originalism has introduced bad history into the debate and the textualism scholarship it helped sprout has proven to be disappointing. William Michael Treanor, *Against Textualism*, 103 NW. L. REV. 983 (2006).

<sup>18</sup> Nelson Lund, *Living Originalism: The Magical Mystery Tour*, at \*15, *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2570507](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570507).

<sup>19</sup> Steven D. Smith, *Meanings or Decisions? Getting Originalism Back on Track*, Liberty Law Blog, Dec. 2, 2014, *available at* <http://www.libertylawsite.org/liberty-forum/meanings-or-decisions-getting-originalism-back-on-track/> (arguing that the legislature, not the courts, have lawmaking authority).

would be surprised to learn that the clause was being invoked (say) in the name of same-sex marriage. If so, then the justices should *not* strike down the same-sex marriage bans.<sup>20</sup>

Further, now that the implications of the new originalist concepts *interpretation* and *construction*<sup>21</sup> are being made clear, conservative originalists want to do away with the distinction because construction allows clever liberal theorists to argue for progressive results on originalist grounds.<sup>22</sup> Conservative lawyer Joel Alicea has recognized this conundrum and called for Barnett's and Balkin's excommunication from "legal conservatism" *cum* originalism.<sup>23</sup>

Consider also the numerous theoretical permutations that originalists feel the need to offer. And as I have written elsewhere:

Each [originalist] theorist seemingly has their own preferred, and sometimes idiosyncratic, version of originalism. As noted, there is Balkin's liberal living originalism or "framework originalism" (as opposed to "skyscraper originalism" (i.e., conservative originalism)). Conservative law professors John McGinnis and Michael Rappaport call their approach "original methods originalism" which they prefer to "constructionist originalism" (which is just a synonym for liberal originalism). There is Vasan Kesavan and Michael Paulsen's — the latter once called his fellow law professors "persons of violence" for their support for abortion rights — awkwardly-termed "original, objective-public-meaning textualism." Solum calls his non-ideological approach "semantic originalism." Richard Kay insists that originalism should turn back to its intentionalist roots. Barnett has famously advocated for a libertarian brand of originalism. The disillusioned Smith at one point called for "old-time originalism." Now, however, he wants original

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<sup>20</sup> *Id.*

<sup>21</sup> KEITH WHITTINGTON, *CONSTITUTIONAL CONSTRUCTIONS: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); see also Randy Barnett, *Interpretation and Construction*, 34 HARV. J. L. PUB. POL'Y 65 (2011).

<sup>22</sup> See, e.g., John O. McGinnis, *The Duty of Clarity*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2578318](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2578318) (arguing that, "[t]he duty of clarity casts doubt on the legality of constitutional construction as opposed to constitutional interpretation in the course of judicial review, because constitutional construction can occur only when the meaning of the Constitution is unclear.")

<sup>23</sup> Joel Alicea, *Originalism and the Rule of the Dead*, 23 NAT. AFFAIRS 149 (2015). Barnett disagreed with Alicea's recommendation. Randy Barnett, *Am I "imperiling" originalism? A reply to Joel Alicea*, Volokh Conspiracy, March 30, 2015, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/am-i-imperiling-originalism/>.

decisions originalism because of Balkin's progressive presence. (And this is to say nothing of the "new textualism" which is not much more, crudely put, than liberal academic lawyers' rhetorical response to Justice Scalia's argument for textualism). But if all these members of the originalist "family" [as posited by Solum] can arrive at such disparate results, a paternity test is needed. A family resemblance between Balkin's, Barnett's, Solum's and (say) Paulsen's approach is difficult to see.<sup>24</sup>

Originalism, then, sounds much like (to draw a loose analogy)<sup>25</sup> a theory in Kuhnian crisis.<sup>26</sup> Kuhn noted that scientists (here, originalist theorists), upon entering *crisis* (an unexplained(able) "anomaly") will first devise a number of different articulations of the theory in question. This has happened to originalism. Then, as noted by Kuhn, if the anomaly continues to persist, prominent members of the discipline begin to acknowledge the existence of the anomaly and search for corrective steps.<sup>27</sup> Prominent originalist theorists have begun to recognize the tension in their theory, and many are calling for a reformation. Indeed, Balkin's "living originalism"<sup>28</sup> has caused originalism to enter what Kuhn termed a "paradigm war."<sup>29</sup> This paradigm war is on full display in competing amicus briefs filed in *Obergefell v. Hodges*, the same-sex marriage case. Conservative and liberal originalists filed dueling amici curiae on the "true" original public meaning of the equal protection clause in regard to same-sex marriage with the apparent goal of simply challenging the other's version of originalism, rather than persuading the justices (the two originalist justices' votes not being in doubt).<sup>30</sup>

It does not appear likely that conservative originalism will emerge from the paradigm war such that the field of constitutional theory will return to a state of "normalcy" with conservative originalism ruling the theoretical roost. Steven Teles has persuasively situated originalism

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<sup>24</sup> Calvin TerBeek, *Originalism's Obituary*, Balls & Strikes, Feb. 11, 2015, <https://constitutionalpoliticsdotcom.wordpress.com/2015/02/11/originalisms-obituary/>.

<sup>25</sup> Every analogy has some play in the joints, otherwise it would be an identity.

<sup>26</sup> THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 68-84 (1962).

<sup>27</sup> *Id.* at 81-84.

<sup>28</sup> JACK BALKIN, *LIVING ORIGINALISM* (2011); Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. L. REV. 549 (2009).

<sup>29</sup> KUHN, *SCIENTIFIC REVOLUTIONS* at 84. I ask only half-jokingly: did Jack Balkin murder originalism? A mind more suspicious than mine might think that Balkin's goal all along was precisely to create this Kuhnian crisis.

<sup>30</sup> Jack Balkin, *Living Originalism and Same-Sex Marriage*, Balkinization, Apr. 7, 2015, <http://balkin.blogspot.com/2015/04/living-originalism-and-same-sex-marriage.html>. As Balkin points out, the conservative originalists' rhetorical ploy is to lump Balkin with Ronald Dworkin and Jacques Derrida.

within the rise of the conservative legal movement.<sup>31</sup> Ken Kersch, in a number of papers in the American Political Development tradition, has argued that “Declarationism”<sup>32</sup> when combined with originalism “offer[s] a powerful constitutional politics capable of affecting legal doctrine and altering the tenor and content of American public policymaking and the practice of American politics.”<sup>33</sup> Thus, new originalism is part and parcel of judicial politics and the larger political milieu.<sup>34</sup> Conservative

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<sup>31</sup> Teles, *Transformative Bureaucracy*, *supra*, note 17 at 75-82; TELES, CONSERVATIVE LEGAL MOVEMENT at 208.

<sup>32</sup> Ken I. Kersch, *Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in National Review, 1955-1980*, 25 STUDIES AM. POL. DEVELOPMENT 86 (2011). Kersch explains Declarationism this way: “Declarationism rests on the conviction that the Declaration of Independence is not only an inherent component of the U.S. Constitution, but foundational. Declarationists understand the Declaration to be both philosophically and temporally prior to the Constitution. For, without a prior commitment to the (purportedly Christian) proposition that all men are created equal, there is no basis for considering consent to the Constitution binding.” *Id.* at 101.

<sup>33</sup> Ken I. Kersch, *Beyond Originalism: Conservative Declarationism and Constitutional Redemption*, 71 MARYLAND L. REV. 229, 282 (2011); *see also* Ken I. Kersch, *Constitutive Stories About the Common Law in Modern American Conservatism*, in NOMOS: AMERICAN CONSERVATISM (eds. Sanford Levinson and Joel Parker) forthcoming.

<sup>34</sup> Quantitatively-oriented political scientists have shown that the “Justices might speak about following an ‘originalist’ jurisprudence, but they only appear to do so when arguments about text and intent coincide with the ideological position that they prefer.” Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC’Y REV. 113, 133 (2002); *accord* FRANK CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2008). Given that originalism is largely an ideological stalking horse this comes as no surprise.

And a plethora of scholarship looking at the way originalism works in practice on the Court has come to a similar conclusion. For examples, a study of the federalism jurisprudence of the Rehnquist Court showed that the Court’s federalism majority—Justices Rehnquist, O’Connor, Kennedy, Scalia, and Thomas—tended to give pride of place to Anti-Federalists statements opining about the dangers of a strong national government, while the dissenters—Justices Stevens, Souter, Ginsburg, and Breyer—placed greater weight on the Federalists’ nationalistic statements. To the extent the majority cited the Federalists, it cited those statements which were intended to quell Anti-Federalists concerns about an overly powerful central government. Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 UCLA L. REV. 1, 5-7 (2004); *see also* Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court’s Criminal Docket*, 104 MICH. L. REV. 71, 73 (2005) (study of all justices votes in criminal cases since 1953 finding that Scalia and Thomas are among the most conservative justices in that voting area); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 434 (2002) (noting that Rehnquist Court’s pro-federalism bent would subordinate that goal when it conflicted with “substantive conservatism”); Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1244 (2012) (“As the survey of recent ostensibly originalist decisions above makes plain, authentically originalist adjudication is something like the Loch Ness Monster—much discussed, but rarely encountered. In constitutional adjudication, nonoriginalism is where the action is”); Barry Friedman and Scott Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 6 (1998)

originalism will only continue to be taken seriously insofar as the New Right governing coalition remains intact. When, not if, it crumbles, originalism will no longer have much intellectual purchase. Just as the media write obituaries in advance for persons of note on the decline, it is time to start writing originalism's obituary. Before that can be done, I will look at the two central and inextricably intertwined problems with originalism that are leading to its decline: ideology and epistemic closure.

## II. IDEOLOGY AND IMMODESTY

Examples abound of the political nature of originalism. Conservative new originalists have skewered the Court for decisions that they regard as liberal. McGinnis and Lund characterize *Lawrence v. Texas* as “a tissue of sophistries embroidered with a bit of sophomoric philosophizing.”<sup>35</sup> Paulsen contends that *Planned Parenthood v. Casey* is the worst constitutional decision of all time.<sup>36</sup> New originalists' Second Amendment scholarship vigorously defends a strong individual rights view.<sup>37</sup> Gary Lawson believes that “[t]he post-New Deal administrative state is unconstitutional.”<sup>38</sup> Along those same lines, he also contends that the nondelegation doctrine runs afoul of the original meaning of the

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(“Time and again, judges have jettisoned history when founding intentions seemed inconsistent with present needs and understandings.”).

Another data point in regard to the political project that is originalism: Cass Sunstein's and Thomas Miles's study of voting patterns in the administrative law context found that Justice Thomas won the “Partisan Voting Award” (though Justice Stevens was a close second) and Justice Scalia won the “Judicial Activism Award.” Posting of Thomas Miles and Cass R. Sunstein to The University of Chicago Law School Faculty Blog, <http://uchicagolaw.typepad.com/faculty/2007/10/thomas-miles-an.html> (October 31, 2007). And Lori Ringhand's research on the Rehnquist natural court (1994-2005) found that that Thomas and Scalia voted for the conservative outcome in 93 and 85 percent respectively in those cases where the Court invalidated federal legislation. Lori Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMM. 43, 48-49 (2007). By point of comparison, the most liberal justices, Stevens and Ginsburg, voted in for a liberal outcome in 70 percent of those cases. *Id.* at 51-52. See also Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORD. L. REV. 545 (2006).

New originalist Prakash proclaims that “perhaps originalist proponents make too much of its ability to constrain judges” because, after all, “originalism has no answers for bad faith, bias, and other human frailties” that affect judges. Prakash, *Unoriginalism's Law*, *supra* note 10 at 538. But perhaps the more accurate way to put it is that originalists have no answer for the way judges, even those who profess to be originalists, actually adjudicate cases.

<sup>35</sup> Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1610 (2004).

<sup>36</sup> Michael Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003).

<sup>37</sup> See, e.g., Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

<sup>38</sup> Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).



Constitution.<sup>39</sup> Another scholar argues that the academic debate concerning the original meaning of the Establishment Clause should be resolved in favor of Justice Thomas's position taken in his *Newdow*<sup>40</sup> concurrence arguing that the clause is a federalism provision and does confer not an individual right.<sup>41</sup> There is the further contention that the Founders desired the Fourth Amendment to prohibit searches of residences, but nothing else.<sup>42</sup> Barnett's version of originalism is concerned with reconstituting constitutional law toward a libertarian reading of the document.<sup>43</sup> Barnett is a libertarian.<sup>44</sup> Richard Epstein has maintained that the original meaning of the commerce clause is such that "[t]he affirmative scope of the commerce power should be limited to those matters that today are governed by the dormant commerce clause: interstate transportation, navigation and sales, and the activities closely incident to them. All else should be left to the states."<sup>45</sup> Recently, two law professors predicted that originalism is now primed to provide a theoretical ballast for Supreme Court opinions resurrecting strong judicial protection for economic rights claims.<sup>46</sup> Justice Thomas's *Obergefell* dissent contended that because the petitioners had not "been imprisoned or physically restrained by the States for participating in same-sex relationships" they had no cognizable due process claim.<sup>47</sup> And it should go without saying that *Roe v. Wade* is not admired.<sup>48</sup> In short, it is hard to

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<sup>39</sup> Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 404 (2002).

<sup>40</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (Thomas, J., concurring).

<sup>41</sup> Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PENN. J. CON. LAW 585, 585-587 (2006).

<sup>42</sup> David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HAST. CONST. L.Q. 47, 48-49 (2005).

<sup>43</sup> Trevor Morrison, *Lamenting Lochner's Loss*, 90 CORNELL L. REV. 839, 851-53 (2005).

<sup>44</sup> Randy Barnett, *Libertarians and the War*, Wall St. Journal, Op-ed, July 17, 2007, available at <http://www.opinionjournal.com/editorial/feature.html?id=110010344> (last visited September 2, 2007).

<sup>45</sup> Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1454 (1987).

<sup>46</sup> Thomas B. Colby and Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015). Colby and Smith have been perceptive observers of the originalism movement, but thesis of their article – that new originalist theorizing is at the center of the return of economic rights claims – is implausible.

<sup>47</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (Thomas, J., dissenting).

<sup>48</sup> Robert BORK, THE TEMPTING OF AMERICA, 32 ("[O]nce it is conceded that a judge may give the due process substantive content, *Dred Scott*, *Lochner*, and *Roe* are equally valid examples of constitutional law."); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1610 (2004) (arguing that *Roe* epitomizes "an unrepresentative and unaccountable group of Justices . . . fabricating the rights that are pleasing to them."); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1014 (2003) ("In *Roe*, one sees the constitutional text essentially disappear entirely. *Roe* is judicial legislation completely cut loose from any pretense of textual justification."); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMM. 311, 322 (2005) ("On abortion, is it more important to follow a bitterly contested precedent from thirty

find an area of law where most originalists do not argue that a substantively conservative outcome is dictated by the original meaning of the Constitution. *Mirabile dictu*.

What also seems to escape, or is at least ignored by, new originalists is that the theory was crafted by New Right conservative legal elites. Teles has shown that originalism, especially in the Department of Justice under Edwin Meese, became an intellectual banner under which conservative legal positions consolidated.<sup>49</sup> There was a concerted effort to create what conservative legal elites called the “Reagan underground” in order to undergird the burgeoning conservative legal movement.<sup>50</sup> Indeed, McGinnis, Lund, Paulsen, and Calabresi served time in the executive branch of a Republican president (Calabresi after he helped found the Federalist Society and clerked for Justice Scalia).<sup>51</sup> It is hard to improve on Teles’ assessment of originalism in the Reagan Justice Department:

Starting as a series of speeches, the originalism project grew into a broader set of departmental programs, with consequences that are still being felt today. The project was “transformative” in the sense that it was designed to provide a unifying language for conservative elites and to legitimate conservative ideas within the profession and the legal academy. While the originalism project was certainly designed to aid the short-term objectives of the DOJ leadership, it was equally the case that its leaders expected

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years ago or is it more important to repudiate that precedent so as to tame a line of substantive due process disasters that begins with *Dred Scott* and goes on to include *Lochner*? Sometimes preserving continuity with our fundamental values means displacing wayward practices and precedents that have grown up like barnacles on the pristine language of the constitutional text.”); Raoul Berger, *Activist Censures of Robert Bork*, 85 N.W. L. REV. 993, 1013 (1991) (“*Roe* was decided by a vote of five to four [sic]; the vote of a swing Justice does not render the majority omniscient. And the *Roe* minority was hardly alone in its views--respected scholars, too, consider that there is no ‘right of privacy’ in the Constitution.”). Of course, *Roe* was decided on a 7-2 vote with Justices Rehnquist and White dissenting.

<sup>49</sup> Teles, *Transformative Bureaucracy*, *supra* note 17; TELES, RISE OF CONSERVATIVE LEGAL MOVEMENT at 207.

<sup>50</sup> Teles, *Transformative Bureaucracy*, *supra* note 17 at 70.

<sup>51</sup> Faculty Profiles of Stephen Calabresi, *available at* <http://www.law.northwestern.edu/faculty/profiles/StevenCalabresi/>; and Michael Paulsen, *available at* <http://www.stthomas.edu/law/facultystaff/faculty/paulsenmichael/>. What is more, John Yoo famously served in the Bush II Administration and authored an important memorandum on the unitary executive and torture. *A Guide to the Memos on Torture*, N.Y. Times, *available at* <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html>. Prakash clerked for D.C. Circuit “feeder judge” Laurence Silberman and then Justice Thomas. Ramsey clerked for Scalia as well. On the Federalist Society as an epistemic network, *see* Amanda Hollis-Brusky, *Ideas With Consequences: The Federalist Society and the Conservative Counterrevolution* 13-27 (2015).

it to have longer-term impacts on the strategic environment outside of government.<sup>52</sup>

In addition to largely being an ideological stalking horse, the new originalism is also an immodest theory (though it came from much more humble origins, i.e., “old originalism,” or, as Keith Whittington more accurately describes it, “reactive originalism”).<sup>53</sup> As the judiciary became more conservative as a result of Presidents Ronald Reagan’s and George H.W. Bush’s appointments to the federal bench, originalism morphed into a theory whose academic adherents contended that the countermajoritarian difficulty was of no moment, judicial restraint was uncalled for if the Court was to “get it right,” and *stare decisis* was a loose constraint, if a constraint at all.<sup>54</sup> One originalist scholar has it that “[i]nterpreting the

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<sup>52</sup> Teles, *Transformative Bureaucracy*, *supra* note 17 at 70.

<sup>53</sup> Keith Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599, 604 (2004). It appears that nearly every law review article on new originalism has a *de facto* requirement that a section of the article must be dedicated to telling the history of old originalism, many times in a fabular manner. This is unnecessary (here), and can be accomplished in a few citations set forth in reverse-chronological order. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 889 (1985); Edwin Meese III, U.S. Attorney Gen., Speech Before the American Bar Association (July 9, 1985); Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465–66 (1986); Antonin Scalia, U.S. Supreme Court Justice, Address by Justice Antonin Scalia Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in U.S. Dep’t of Justice, Office of Legal Policy, *Original Meaning Jurisprudence: A Sourcebook*, app. C at 101, 106 (1987); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); William Brennan, *The Constitution of the United States: Contemporary Ratification*, in *Interpreting the Constitution* (Jack Rakove, ed. (1990)); ROBERT BORK, THE TEMPTING OF AMERICAN: THE POLITICAL SEDUCTION OF THE LAW 116 (1990); Phillip Bobbit, *Constitutional Interpretation* (1991); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992). I am unaware of any originalist creation story that gives credit to Justice Black. Cf. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 145 (2010).

<sup>54</sup> See Calabresi, *Text, Precedent, and the Constitution*, *supra* note 48 at 322; Michael Stokes Paulsen, *The Intrinsically Corrupting Case Against Precedent*, 22 CONST. COMM. 289, 289 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 25 (1994) (arguing that precedent is unconstitutional subject to some qualifications); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1537–39 (2000); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2733 (2003); cf. Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001) (responding to Paulsen’s argument and arguing that *stare decisis* is grounded not only in the text, history, and structure of the constitution, but also because of entrenched status as part of

Constitution is no more difficult, and no different in principle, than interpreting a late-eighteenth century recipe for fried chicken.”<sup>55</sup> Justice Scalia, the most prominent originalist on the bench, has called “non-originalists—originalists favored term for those who do not share their views—“idiots,”<sup>56</sup> and has backed away from his prior confession of being a “faint-hearted” originalist.<sup>57</sup> Prakash contends that originalism “supplies the one, true interpretive method for honest Joe and for everybody else.”<sup>58</sup> He goes further, arguing that non-originalist “propositions” are “absurd” and this “is why we all are (or should be) originalists.”<sup>59</sup> Prakash also champions his “Default Rule” of interpretation—construe (almost) all communications using their original, ordinary meaning<sup>60</sup>—as the “universal” method for interpreting most texts.<sup>61</sup> In fact, according to Prakash, the fact of “the Constitution’s very existence as law” supports the Default Rule.<sup>62</sup> John Yoo argues that originalism “can help keep [the] Union alive and well.”<sup>63</sup> And, it is worth reiterating, new originalists continually self-congratulate their theory as “sophisticated.”<sup>64</sup>

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American constitutionalism); Morrison, *Lamenting Lochner’s Loss*, *supra*, note 43 at 859 (“Professor Barnett, however, is little concerned with countermajoritarianism.”); EARL MALTZ, *RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW* 18-20 (1994). Maltz, in a 1990 law review article, presciently noted that “ideological forces will probably move the Court toward a more aggressive conservative activism in the future” and that, especially in the commerce power area, originalism would counsel an activist role for the judiciary. Earl Maltz, *The Prospects for a Rival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, 631-32 (1990); *see also* Stephen M. Griffin, *Barnett and the Constitution We Have Lost*, 42 SAN DIEGO L. REV. 283, 287-292 (2005); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 68 (2007); Raoul Berger, *New Theories of “Interpretation”: The Activist Flight From the Constitution*, 47 OHIO ST. L. J. 1, 2 (1986).

<sup>55</sup> Gary Lawson, *On Reading Recipes . . . And Constitutions*, 85 GEO. L. J. 1823, 1834 (1997).

<sup>56</sup> Associated Press, *Scalia: Non-originalists Are ‘Idiots’*, Feb. 14, 2006, available at <http://www.foxnews.com/story/2006/02/14/scalia-non-originalists-are-idiots/>.

<sup>57</sup> Ilya Somin, *Justice Scalia Repudiates “Fainthearted” Originalism*, The Volokh Conspiracy, Oct. 7, 2013, <http://volokh.com/2013/10/07/justice-scalia-repudiates-fainthearted-originalism/>; Randy Barnett, *Scalia’s Infidelity: A Critique of “Fainthearted” Originalism*, 75 U. CIN. L. REV. 7 (2006); Scalia, *Lesser Evil*, *supra* note 53 at 864 (describing himself as a “faint-hearted” originalist).

<sup>58</sup> Prakash, *Unoriginalism’s Law*, *supra* note 10 at 529.

<sup>59</sup> *Id.* at 531.

<sup>60</sup> *Id.* at 529.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 541-42; *see also* Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors are Wrong for America*, 106 COLUM. L. REV. 2207, 2216, 2219 (2006) (REVIEWING CASS SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)). For an entertaining reply to Prakash, *see* Cass A. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234 (2006).

<sup>63</sup> Robert Delahunty and John Yoo, *Saving Originalism*, 113 MICH. L. REV. 101, 1081 (2015).

<sup>64</sup> *Id.* at 103.

New originalists, according to their lights, have constitutional interpretation figured out. There may be some kinks to work out—interpretation and construction, the constraint principle or thesis, the best normative justification for originalism—but these are intramural disputes. To invoke and paraphrase Mark Tushnet, one might view the originalist as astrophysicist.<sup>65</sup> He—and they are all male—has surveyed and selectively sampled scholarship far and wide, whether it be history, philosophy, or linguistics, and has mastered constitutional interpretation. But this unjustified confidence is a result of originalists’ epistemic closure. I now turn to that feature of the theory’s Kuhnian crisis.

### III. ORIGINALISM’S EPISTEMIC CLOSURE

The new originalism suffers from epistemic closure. Though happy to borrow from other disciplines, new originalists rarely grapple with the criticisms academics trained in those disciplines set forth. Perhaps the most prominent approach to deconstructing originalism has been by academic historians such as Saul Cornell and Jack Rakove. Rakove won a Pulitzer Prize for his *Original Meanings*, a work of scholarship that should have given originalists significant pause.<sup>66</sup> In Rakove’s account of James Madison’s first exercise in into constitutional interpretation in his early congressional days, Rakove shows that even Madison, when it suited his purposes, rejected and then relied on the original understanding in congressional debates over the president’s removal power of executive officials and a proposed bank bill.<sup>67</sup> The upshot of course is that Madison’s reliance on what we now call original understanding was contextual vis-à-vis his priors.<sup>68</sup> Elbridge Gerry criticized Madison’s argument “as ‘being made for the occasion.’”<sup>69</sup>

There is a lesson to be drawn from this:

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<sup>65</sup> As Tushnet wrote: “the ‘lawyer as astrophysicist’ assumption, namely, that the generalist training of lawyers allows any lawyer to read a text on astrophysics over the weekend and launch a rocket on Monday.” Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1338 n.140 (1979).

<sup>66</sup> JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

<sup>67</sup> *Id.* at 347-54.

<sup>68</sup> *Id.* at 354. Rakove is agnostic as to Madison’s precise motivations but posits that his opposition may have been motivated by skepticism of Hamilton, a regional dislike of the bank as serving mostly Northern interests, or simply ideological suspicions. *Id.* More charitably, Rakove also theorizes that Madison’s divergent interpretations were driven by his philosophical distrusts of legislatures. *Id.* at 353-54. It is also interesting that Elbridge Gerry, Alexander Hamilton and Edmund Randolph (the first Attorney General) all rejected the use of notes or speeches from the Convention as a guide to constitutional interpretation. *Id.* at 353-54.

<sup>69</sup> *Id.* at 353.

But if originalism could thus be defended as a neutral mode of interpretation, the temptation to resort to it was manifestly political. It was dictated not by prior conviction that this was the most appropriate strategy to ascertain the meaning of the Constitution but by considerations of partisan advantage . . . . It merely demonstrated that the neutrality could rarely be attained when the Constitution was so highly politicized, or when politics was highly constitutionalized.<sup>70</sup>

In short, the “first serious foray in originalism was a failure.”<sup>71</sup> However, besides one largely dismissive book review by Prakash—wherein he largely created the “Default Rule” of interpretation and relied almost exclusively on other new originalist scholarship for support<sup>72</sup>—new originalists had no answer for Rakove’s critique.

Cornell has been equally if not more devastating in his critiques of new originalism. Cornell has shown that the “original public meaning” heuristic subscribed to by most academic originalists is historically incoherent (there was not *one* public meaning) and any choice of whose views to give pride of place (e.g., Federalist, Anti-Federalists) is inherently an ideological choice.<sup>73</sup> Cornell has also shown that new originalism is law-office history (which is to say, bad history) by taking his historical scalpel to Justice Scalia’s opinion in *Heller v. District of Columbia*.<sup>74</sup>

Cornell has also taken to task Solum’s attempt to fashion a non-ideological approach to originalism, based on linguistics and philosophy,

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<sup>70</sup> *Id.* at 365.

<sup>71</sup> *Id.*

<sup>72</sup> Prakash, *Unoriginalism’s Law*, 15 CONST. COMM. at n. 4, 7, 10, 12, 13, 15, 17, 21, and 26. As noted above, Prakash dismisses Rakove’s study as “history department law.” *Id.* at 534. But it is Prakash’s “Default Rule” that is unsupported by deeply researched scholarship. Judges in the Founding Era were not especially textualist. Treanor, *Against Textualism*, *supra*, note 17; William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2006). Treanor is trained as a historian. For a critique of liberal textualism (e.g., Akhil Amar), see Jack N. Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUMAN. 191 (1999).

<sup>73</sup> Saul Cornell, *The People’s Constitution v. The Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J. L. & HUMANITIES 295 (2011). Indeed, one has to only skim the surface of the available Founding Era historiography to understand that the “original public meaning” heuristic is problematic. See, e.g., JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* (2007); GORDON WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815* (2009); GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1991); ALFRED E. YOUNG, *LIBERTY TREE: ORDINARY PEOPLE AND THE AMERICAN REVOLUTION* (2006); SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828* (1999).

<sup>74</sup> Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss”*, 56 UCLA L. REV. 1095 (2009).

as misapprehending crucial aspects of those fields.<sup>75</sup> Thus, despite his best efforts, Solum has not provided a viable “non-ideological” alternative basis on which to ground originalism. (Professor Solum almost certainly disagrees with this assessment, but I leave it to the interested reader to digest the dueling papers).

Neither do new originalists pay much attention to political science if it gets in the way of their ideological project. For example, take the originalist literature on abortion. As shown above, new originalists do not much care for *Roe*. One new originalist scholar contends that in reading *Roe* “one sees the constitutional text essentially disappear entirely. *Roe* is judicial legislation completely cut loose from any pretense of textual justification.”<sup>76</sup> McGinnis and Lund argue that *Roe* epitomizes “an unrepresentative and unaccountable group of Justices . . . fabricating the rights that are pleasing to them.”<sup>77</sup>

However, we know that *Roe* was in large part a product of a social movement.<sup>78</sup> It is also misleading to contend that the justices simply

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<sup>75</sup> Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013); Lawrence Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015); Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 FORDHAM L. REV. 1 (2015). What is more, a recent philosophical critique of originalism, and especially semantic originalism, has further underscored the intellectual challenges that face new originalism. Gregory Bassham and Ian Oakley, *New Textualism: The Potholes Ahead*, 28 RATIO JURIS 1 (2015). Indeed, Solum’s theory of originalism has been persuasively critiqued on its own terms by a law student. Ethan J. Ranis, *Loose Constraints: The Bare Minimum for Solum’s Originalism*, 93 TEX. L. REV. 765 (2015).

<sup>76</sup> Paulsen, *Worst Constitutional Decision*, *supra* note 48 at 1014.

<sup>77</sup> Lund & McGinnis, *Judicial Hubris*, *supra* note \_\_ at 1610. It seems important to note, but is rarely mentioned by originalists, that Justice Blackmun appears to have been “egged on” by the other justices in the *Roe* majority to write a more expansive opinion than he originally planned. David J. Garrow, *How Roe v. Wade Was Written*, 71 WASH. & LEE L. REV. 893 (2014).

<sup>78</sup> DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 79-130 and 270-334 (1994). The classic work in the field of how courts can, and cannot, effectuate significant social change is GERALD ROSENBERG, THE HOLLOW HOPE (1991; 2d ed. 2008); *see also* Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VIRG. L. REV. 7, 10, 11, 76 (1994) (arguing, in a perhaps overstated thesis, that *Brown* and the federal judiciary in general had almost no power to effect social change when acting on its own). For more on social movements and constitutional change *see* Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 28 SUFFOLK L. REV. 27, 28 (2005) (explaining how social movements change what it “constitutional common sense”); Jack M. Balkin & Reva B. Siegel, *Principles, Practices and Social Movements*, 154 U. PENN. L. REV. 927 (2006) (arguing that social movements contest the received wisdom of constitutional meaning and that with the help of “broad-based social, economic, or technological changes that unsettle conventional understandings” of constitutional principles change the way we view the meaning of the Constitution); Reva Siegel, *Social Movement Conflict and Constitutional Change: The Case of the de fact ERA*, 94 CAL. L. REV. 1323, 1323 (2006) (“Social movements change the ways Americans understand the Constitution”). Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11 (2003); *see also*

imposed their liberal values on an unwilling populace. Prior to the Court's decision in *Roe*, a majority of the American public supported some limited form of abortion rights<sup>79</sup> and that right has continued to enjoy steady support over the past thirty-plus years.<sup>80</sup> (Though it is worth considering if abortion rights are actually an elite policy preference that the "median voter" happens to share).<sup>81</sup> We also know that abortion is an issue many legislators want the public to believe is in the courts' hands and that elites (especially Republican elites) are happy to have the issue constitutionalized.<sup>82</sup>

What is more, the legal elites that make up the federal judiciary, and the political elites from both parties that place them there, are generally supportive of legalized abortion.<sup>83</sup> Rather than removing abortion from the political arena—a common originalist charge—*Roe* is responsible for creating a constitutional dialogue between the Court, the legislative branch, and the public.<sup>84</sup> In fact, it was not until the late-1970s that what we know as the pro-life movement became a coherent and powerful social movement.<sup>85</sup>

More broadly, despite their alleged lack of concern with judicial restraint, new originalists still refer to "We the People"<sup>86</sup> "legislating from the bench,"<sup>87</sup> and the judiciary taking away "decisions from the political

Michael L. Wells, "Sociological Legitimacy" in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 3 (2007). Carol Nackenoff argues that constitutional meaning—rather than culled from the original public meaning—is instead a product of "[m]obilized activists, interest groups, lawyers, legal scholars, social scientists, legislators, administrative officials, other political figures, journalists and editors, and maybe even now bloggers" who all "play an important role in framing—and reframing—constitutional issues." Carol Nackenoff, *The Political Tilt of "Juristocracy"?*, 65 MARYLAND L. REV. 139 (2006). She continues, "[a] jurisprudential model that focuses so exclusively on the Court's interpretation of constitutional meaning incorrectly neglects the ways in which constitutional meanings are actually and actively constructed by other actors in the political process." *Id.*

<sup>79</sup> Friedman, *Dialogue*, *supra* note \_\_ at 607.

<sup>80</sup> See Calvin TerBeek *Empiricizing the Equal Protection Approach*, 38 MCGEORGE L. REV. 775, 796 (2007).

<sup>81</sup> Calvin TerBeek, *Politics by Other Means*, THE NEW RAMBLER, May 27, 2015, available at <http://newramblerreview.com/book-reviews/law/politics-by-other-means>.

<sup>82</sup> TerBeek, *Equal Protection Approach* at 796, n. 145 (collecting sources).

<sup>83</sup> Mark GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 7 (2008).

<sup>84</sup> Friedman, *Dialogue*, *supra* note \_\_ at 658-67.

<sup>85</sup> Reva Siegel & Robert Post, *Roe Rage: Democratic Constitutionalism and Backlash*. 42 HARV. C.R.-C.L. L. REV. 373 (2007).

<sup>86</sup> Steven D. Smith, *Meanings or Decisions? Getting Originalism Back on Track*, Liberty Law Blog, Dec. 2, 2014, available at <http://www.libertylawsite.org/liberty-forum/meanings-or-decisions-getting-originalism-back-on-track/> (arguing that the legislature, not the courts, have lawmaking authority).

<sup>87</sup> Nelson Lund, *Living Originalism: The Magical Mystery Tour*, at \*2-7, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2570507](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570507) (arguing against Balkin's form of originalism as essentially nothing more than living constitutionalism in originalist jargon).



process.”<sup>88</sup> But these “old originalism” concerns are seemingly raised only when a liberal rights claim is at issue. Simply stating “We the People” is not much more than invoking a political slogan. The empirics of the actual political process we have is much more complex than the new originalists’ simplistic conception.

Consider the evidence regarding elite capture of the policymaking process. Martin Gilens has shown in great detail that merely being affluent—that is, being in the 90th percentile of income earners (“only” \$135,000 per year)—means that the policies you support are much more likely to be enacted.<sup>89</sup> Moreover, in an important paper co-authored with Benjamin Page, Gilens sets forth more evidence that elites and business interests have an outsized impact on policy, and the majoritarian electoral voter theory (implicit in new originalists’ invocation of the “political process”) suffers in empirical comparison.<sup>90</sup> Perhaps even more troubling, a pilot study by political scientists found that the top-tenth of the one percent (in wealth) are significantly more conservative in economic preferences than the American populace – and they are politically active.<sup>91</sup> Thomas Keck has shown that courts’ decisions in contested hot-button issues (e.g., same-sex marriage and affirmative action) reward both liberals’ and conservatives’ use of the judicial process as another tool to enact their preferred policies.<sup>92</sup> Larry Jacobs and James Druckman’s pathbreaking recent scholarship on how elites, especially those in the executive branch, help shape public opinion should give any (small-d) democrat pause.<sup>93</sup> Expanding on Robert Dahl’s work, Jacobs and Druckman argue that American democracy is best understood as a *neopolyarchy*.<sup>94</sup>

This lack of familiarity with how the political process actually works in reality is further evidence of originalism’s epistemic closure.<sup>95</sup>

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<sup>88</sup> Yoo and Delahunty, *Saving Originalism*, *supra* note 3 at 107.

<sup>89</sup> MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012). *See also* KAY LEHMAN SCHLOZMAN, SIDNEY VERBA, AND HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012); LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008).

<sup>90</sup> Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSPECTIVES ON POLITICS* 564 (2014).

<sup>91</sup> Benjamin I. Page, Larry M. Bartels, and Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 *PERSPECTIVES ON POLITICS* 51 (2013). The study was limited to Greater Chicago area and has “*n* = 83.” Broad conclusions cannot be drawn, but the findings are worthwhile and interesting nonetheless.

<sup>92</sup> THOMAS M. KECK, *JUDICIAL POLITICS IN POLARIZED TIMES* (2014).

<sup>93</sup> DRUCKMAN AND JACOBS, *WHO GOVERNS*, *supra* n. \* (see, especially chapters 4 & 5).

<sup>94</sup> *Id.* at 120-128, 134-137.

<sup>95</sup> Consider the implications of this research for the countermajoritarian difficulty. A number of scholars have argued that the countermajoritarian difficulty is not nearly as big a concern as previously supposed. *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L. J.* 153, 156 (2002); Barry Friedman, *Dialogue and Judicial Review*, 91 *MICH. L. REV.* 577 (1993) (arguing that countermajoritarian difficulty does not have much explanatory power); *see also* Mark A. Graber, *Foreword: From the Countermajoritarian Difficulty to*

What is more, not content to ignore discrete findings, new originalists will dismiss whole bodies of research that threaten their theory. For example, Solum dismisses nearly a century's worth of political science research on judicial behavior in his book on originalism:

In the grand sweep of human history and in the light of judicial practice across the globe, the theories advanced by the American legal realists and their heirs are aberrational. For most of human history and in most of the legal systems of the developed world, the ability of judges to follow the law has been accepted in theory and demonstrated in practice.<sup>96</sup>

Solum marshals no support for this assertion.<sup>97</sup> Solum's epistemic closure is unfortunate, but perhaps understandable. Counting conservatively,

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*Juristocracy and the Political of Judicial Power*, 65 MARYLAND L. REV. 1, 1-4 (2006) (detailing the conflicting research agendas of political scientists—who long ago dismissed the countermajoritarian difficulty as inadequate as a descriptive matter—and legal academics, a number of whom still take it seriously); Cornell W. Clayton, *The Supply and Demand Sides of Judicial Policy-Making (or, Why be so positive about the Judicialization of Politics?)*, 65 LAW & CONTEMP. PROB. 69, 76 (2002) (“If, however, the empirical claim is true—if courts rarely deviate from the concerted and coherent policy direction of the elected-governing coalition—then the normative debate becomes largely academic.”). But if we have legal elites reviewing elite-preferred policy, might this render the entire debate somewhat incoherent? This is an issue that deserves further research.

<sup>96</sup> ROBERT BENNETT & LARRY SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 51 (2011).

<sup>97</sup> Moreover, the concern is whether judges follow the law in the U.S., and if originalism is even possible in practice here. See Daniel Levin, *Review of Constitutional Originalism: A Debate*, LAW & POLITICS BOOK REVIEW at 385-387. To dismiss the body of judicial behavior research in two sentences is, at best, puzzling. That literature raises significant issues for new originalist theory. To start, the canonical cite is to Jeffrey Segal's and Harold Spaeth's *The Supreme Court and the Attitudinal Model*. See JEFFREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). But while a judge's “attitude” certainly has an explanatory component, ideological considerations do not fill out the whole picture.

There are numerous exceptions to the attitudinal model in the judicial behavior literature. See, e.g., LEE EPSTEIN, WILLIAM LANDES, AND RICHARD POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS AND THE DECISIONS JUSTICES MAKE* (2011); CASS SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006); THOMAS G. HANDSFORD & JAMES F. SPRIGGS, *THE POLITICS OF PRECEDENT ON THE SUPREME COURT* (2006); CORNELL CLAYTON AND HOWARD GILLMAN, *SUPREME COURT DECISIONMAKING: NEW INSTITUTIONALIST APPROACHES* (1999); HOWARD GILLMAN AND CORNELL CLAYTON, *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* (1999); LEE EPSTEIN AND JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1999); Maya Sen and Adam Glynn, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37 (2015); Neal Devins and Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, available at

Solum has published eleven journal articles—not including the 176-page article entitled *Semantic Originalism* available on SSRN—and a book on new originalism. This is an enormous amount of time and energy to expend on an intellectual project. Solum is deeply invested in the continuing vitality of new originalism. This might help explain the otherwise puzzling dismissal of judicial politics literature by a scholar as accomplished as Solum.

Yet it does not help for originalists to be ostrich-like<sup>98</sup> to the reality that the theory is in the fight for its life. As a number of scholars have noted, originalism as currently conceived (allowing for Balkin and Barnett) does not much differ from “non-originalism.”<sup>99</sup> This is why conservative originalists are flailing about for a terminology that will exclude Balkin and Barnett. Indeed, Alicea has accurately stated that “originalism’s future” is at stake in what I have called originalism’s

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2432111](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2432111) (exploring how party polarization and social psychology help explain the current Court); see also Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?* 101 AM. POL. SCI. REV. 321, 337 (2007) (criticizing analysis that seeks to explain Supreme Court decisionmaking solely through an ideological lens); Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQ. 601, 606, 622 (2000) (noting the strength of the attitudinal model—“its ability to muster quantitative evidence” in support of it—and its weaknesses: “[t]he attitudinalist model tells us a great deal about how a given justice is likely to vote in a case that raises particular issues, but it tells us little about how such cases arose, how those issues had been framed, and why the justices approach their task in these ways.”); Howard Gillman, *What’s Law Got to Do with It? Judicial Behaviorists Test the “Legal Model” of Judicial Decisionmaking*, 26 LAW & SOC. INQ. 465, 494-95 (2001) (arguing that Segal and Spaeth’s account is necessarily incomplete).

Legal scholars have been critical of the attitudinal model as well. See STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 132 (1996) (calling the empirical evidence for the attitudinal model “somewhat weak” given its reliance on newspaper editorials written at the time of justices’ nomination to classify her as liberal or conservative); Barry Friedman, *Taking Law Seriously*, 4 PERSPECTIVES POL. 261 (2006) (noting that the central point of the attitudinal model “can be vastly overstated”); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 280 (2005) (noting that scholars “ignore . . . at their peril” that law plays a role in judging); Stephen Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQ. 89, 95 (2005) (noting that if Segal’s and Spaeth’s denigration of the legal model has any explanatory power, it is based “their cramped vision”); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1443-44 (2001) (calling attitudinal model “naïve”); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 279 (1997) (identifying the shortcomings of the attitudinal model).

<sup>98</sup> In reality, ostriches do not bury their heads in the sand as this would be a poor evolutionary adaptation.

<sup>99</sup> Eric Segal, *Originalist Defenses of Overturning Same-Sex Marriage Bans: Really?*, Dorf on Law, Feb. 9, 2015, <http://www.dorfonlaw.org/2015/02/originalist-defenses-of-overturning.html>; Peter J. Smith, *How Different are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707 (2011) (answering the question in the title: not very much). For a cogent critique on this very point, see Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

paradigm war.<sup>100</sup> But at a certain point, coining new jargon that purports to fix a “theoretical” hole in order save ideologically-preferred outcomes will fail to be intellectually respectable. Given its ideological nature, intellectual immodesty, and epistemic closure, originalism will eventually join other theories of normative constitutional interpretation previously discarded.

#### IV. CONCLUSION

In the mid-1990s, Laura Kalman wrote of the crisis of legal liberalism.<sup>101</sup> Legal realism sparked academic lawyers to “search[] for criteria that would enable them to identify objectivity in judicial decisions.”<sup>102</sup> Kalman noted the many (now discarded) liberal constitutional theories: the turn to Rawls, Dworkin’s body of work, Ely, and the attempt to intertwine the Founding Era’s republicanism with legal liberalism.<sup>103</sup> Indeed, it was only twenty years ago that a liberal law professor could write: “We are all republicans now.”<sup>104</sup>

That search for objectivity failed. This is because, at bottom, constitutional law and constitutional interpretation are inextricably intertwined with politics.<sup>105</sup> As the New Deal coalition faded, so too did legal liberalism. As the New Right emerged, originalism seemed to “make sense.” Just as the New Deal coalition faded, so will the New Right, and with it originalism, at least in any form recognizable today. The paradigm war will soon claim originalism as a casualty. A new theory will emerge and perhaps, at least for a while, we can “all be [ ] now.”

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<sup>100</sup> Joel Alicea, “Yes, you are imperiling originalism: A response to Professor Barnett, The Volokh Conspiracy, April 4, 2015, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/04/yes-you-are-imperiling-originalism-a-response-to-professor-barnett/>

<sup>101</sup> LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 10 (1996).

<sup>102</sup> *Id.* at 5.

<sup>103</sup> *Id.* at 62-65, 89-93, 116-121, 143, 146-47, 237.

<sup>104</sup> *Id.* at 8, 9 n. 15.

<sup>105</sup> It should be noted that the new doctrinalism offers a different way to understand what the Court does, and one without a distinct political valence. See Brannon Denning, *The New Doctrinalism in Constitutional Scholarship and Heller v. District of Columbia*, 75 TENN. L. REV. 789 (2008).