

Duke Law Journal Online

VOLUME 66

JUNE

2017

LIVING CONSTITUTIONAL THEORY

ANDREW COAN[†]

INTRODUCTION

Recent work has questioned the dichotomy between living constitutionalism and originalism on the ground that our understanding of what is “original” is itself a changing phenomenon.¹ It is not just understandings of constitutional history, however, that evolve over time. It is also understandings of the role that history ought to play in constitutional interpretation and adjudication. Indeed, the two evolutionary processes are intertwined in complex ways.

In this Essay, I sketch a brief, stylized narrative explaining how this dynamic has played out in American constitutional theory over the past five decades. Although I believe this narrative to be basically accurate, my purpose is not to do rigorous intellectual history. Rather, it is to explore some of the ways that external political forces and shifting understandings of constitutional history shape the evolution of constitutional theory and vice versa. For this purpose, the precise factual particulars are not of great moment. What matters are the broad outlines and the patterns of reciprocal influence, leavened with a large measure of sheer contingency, that those outlines suggest.²

Copyright © 2017 Andrew Coan.

[†] Professor of Law, University of Arizona, James E. Rogers College of Law. For helpful comments, I thank Howie Erlanger, Toni Massaro, and David Schwartz.

1. See, e.g., Richard Primus, *Will Lin-Manuel Miranda Transform the Supreme Court?*, ATLANTIC (June 4, 2016), <https://www.theatlantic.com/politics/archive/2016/06/lin-manuel-miranda-and-the-future-of-originalism/485651> [<https://perma.cc/A775-EMR7>] (“[I]f the history of constitutional law shows anything, it is that the ‘original meaning’ of the Constitution changes over time.”).

2. For a more punctilious treatment of some of the intellectual history touched on in this Essay, see generally Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004) and Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

The upshot is that constitutional theory, no less than constitutional doctrine or constitutional history, lives. It grows and changes over time, according to its own internal logic and through a process of reciprocal interaction with its environment, which includes both the ever-changing literature of constitutional history and larger social and political forces. On some level, everybody knows this. But at any given time, it is far from the forefront of consciousness for most constitutional theorists. This Essay is a reminder and a call to greater self-consciousness.

Three caveats deserve mention at the outset. First, my narrative is divided into two periods, which I call “The Era of Old Originalism” and “The Era of New Originalism.” I use these labels because the evolution of originalism over time is the central thread of my narrative, not to accord originalism any pride of place among constitutional theories. Second, I make no pretense of comprehensiveness. Nor do I mean to suggest that the episodes and theorists I discuss are the most important during the periods covered by my narrative.³ They are chosen principally for their illustrative value and ease of exposition. Third, at various points, I attribute changes in constitutional theory to political and ideological forces. In so doing, I do not mean to impute conscious ideological motives to any constitutional theorist or historian, unless explicitly noted. Motivated reasoning and selection effects in the reception and recirculation of scholarly ideas are probably more common pathways for politics and ideology to influence the evolution of an academic discipline.⁴ In any case, those pathways are fully sufficient to support the causal connections I draw between

3. Among the many important works omitted from my narrative are those of Bruce Ackerman, Akhil Amar, and Lawrence Lessig. *See, e.g.*, BRUCE ACKERMAN, *WE THE PEOPLE*, VOL. 1: FOUNDATIONS (1991); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993). My narrative is also largely confined to the liberal democratic mainstream. There are obviously other traditions, which demonstrate the historicity of constitutional theory in other ways, but they are beyond the scope of this Essay. *See generally*, *e.g.*, DERRICK A. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and A Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 (1991); Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765 (1992).

4. *Cf.* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 935–39 (2016) (discussing motivated reasoning in connection with the choice and application of constitutional theory).

constitutional history, politics, and constitutional theory, without any need for recourse to subterfuge, opportunism, or bad faith.⁵

I. THE ERA OF OLD ORIGINALISM: 1970–1996

A. *Old Originalism and Its Critics*

Circa 1970, Robert Bork launched originalism as a self-conscious theory of constitutional interpretation.⁶ He did so in response to the constitutional decisions of the Warren and early Burger Courts, which by the standards of the time, aggressively protected the rights of racial and religious minorities, women, and criminal defendants. Bork’s originalism, which held that judges interpreting the Constitution were bound by the original intent of its framers and ratifiers, was predominantly a theory of judicial restraint. Its avowed goal was to roll back the interventionist decisions of a liberal Supreme Court to permit the more conservative policy views of American voters and elected officials free rein.⁷ To promote this vision, Bork relied not only on widespread veneration for the founding generation, but also on a straightforward appeal to democratic values. Without a fixed historical text to restrain them, life-tenured federal judges—especially, Supreme Court justices—could freely substitute their own policy views for those of the American people and their elected representatives.⁸

Bork’s argument quickly caught on with conservative lawyers and legal academics, many of whom, including Bork himself, were appointed to the federal bench by President Reagan. In the process,

5. Cf. J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 889 (1993) (“What appears to be theoretical opportunism may turn out to be so only from a perspective hostile to that of the accused.”). *But see* Pozen, *supra* note 4, at 935 (describing motivated cognition as a type of bad faith in the Sartrean sense of self-deception).

6. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). The roots of originalism, of course, go much further back. See, e.g., Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (“At least since *Marbury*, in which Chief Justice Marshall emphasized the significance of our Constitution’s being a written document, originalism in one form or another has been a major theme in the American constitutional tradition.”).

7. Whittington, *supra* note 2, at 602 (“The primary commitment within [Bork’s] critical posture was to judicial restraint.”); *id.* (“As Bork and others repeatedly argued, the central problem of constitutional theory was how to prevent judges from acting as legislators and substituting their own substantive political preferences and values for those of the people and their elected representatives.”).

8. See, e.g., Bork, *supra* note 6, at 11–12 (calling for reformulation of “broad areas of constitutional law” to prevent courts from deciding “matters of morality, of judgment, of prudence” that properly “belong . . . to the political community”).

judicial restraint—already an important theme of conservative legal theory and rhetoric—became inextricably bound up with originalism, which promised to bind judges to a historically fixed and precisely determinate constitutional text.⁹ With these twin rallying cries, a newly and increasingly conservative federal judiciary set about cabining, pruning, and in some cases, outright dismantling the liberal constitutional jurisprudence of their predecessors.¹⁰ In this task, they were powerfully aided by the rise of the conservative legal movement, most notably the Federalist Society, which matched conservative judges with like-minded law clerks; groomed and vetted future judicial nominees; and generally provided a forum for rigorously testing and honing the theory and rhetoric of constitutional conservatism.¹¹

For its first fifteen to twenty years, the originalist program was almost entirely reactive. Its overarching goal was to provide a theoretical and rhetorical justification for rolling back the liberal judicial activism of the Warren and early Burger Courts.¹² In more concrete terms, it sought to weaken judicial remedies against racial and gender discrimination,¹³ to make life easier for police and

9. See, e.g., Whittington, *supra* note 2, at 601 (“The primary commitment within this critical posture was to judicial restraint. Originalist methods of constitutional interpretation were understood as a means to that end.”); cf. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 7 (1990) (“The orthodoxy of original understanding, and the political neutrality of judging it requires, are anathema to a liberal culture that for fifty years has won a succession of political victories from the courts and that hopes for more political victories in the future.”).

10. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995) (reversing a district court desegregation order in deference to the “vital national tradition” of local autonomy); *Allen v. Wright*, 468 U.S. 737, 756, 761 (1984) (holding that the parents of black public-school children lacked Article III standing to challenge an IRS policy granting tax-exempt status to racially exclusionary private schools); *Stone v. Powell*, 428 U.S. 465, 494–95 (1976) (deciding that the Fourth Amendment exclusionary rule does not extend to habeas corpus); *Washington v. Davis*, 426 U.S. 229, 239–43 (1976) (finding the Equal Protection Clause was not violated by state action that disparately impacts racial minorities); *Michigan v. Tucker*, 417 U.S. 433, 451 (1974) (holding that the exclusionary rule does not extend to the fruits of an un-Mirandized confession).

11. See, e.g., STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 135–80 (2010).

12. See, e.g., Whittington, *supra* note 2, at 601 (“[Old] originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts; originalism was largely developed as a mode of criticism of those actions.”).

13. See, e.g., *Jenkins*, 515 U.S. at 99; *Davis*, 426 U.S. at 239–43; *Pers. Adm’r v. Feeney*, 442 U.S. 256, 271–75, 280–81 (1979) (holding that the Equal Protection Clause is not violated by state laws that disparately impact women).

prosecutors;¹⁴ to permit state regulation of abortion;¹⁵ and to support efforts to inculcate traditional Christian religious values.¹⁶ What the originalist program did not seek, at this stage, was to press an affirmative agenda of conservative judicial activism, at least not in any systematic way. It was as if conservative lawyers, judges, and legal theorists were too preoccupied with undoing the old order to realize that they now held the power to impose a new order of their own. The commitment to judicial restraint forged in an earlier era probably also had some—and perhaps a substantial—constraining effect.

Meanwhile, defenders of the Warren Court’s legacy were busily mounting a response to the emerging threat posed by originalism. That response proceeded along multiple fronts. Most important were the following arguments, pressed by Paul Brest and others:

- The original intent of the founders is too remote and indeterminate to recover (or to meaningfully constrain judges);¹⁷
- The founders were a “they, not an it,” with many divergent and conflicting intentions;¹⁸
- The dead have no right to rule the living, especially when the dead in question are virtually all white men, making rules to govern a tiny, premodern agrarian society, heavily dependent on slave labor;¹⁹
- The founders themselves were pragmatists, who hoped and expected that subsequent generations would adapt their handiwork to meet the needs of a changing society;²⁰

14. See, e.g., *Tucker*, 417 U.S. at 451; *Stone*, 428 U.S. at 494–95.

15. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 465 (1983) (O’Connor, J., dissenting) (“[W]e must keep in mind that when we are concerned with extremely sensitive issues, such as [the regulation of abortion], ‘the appropriate forum for their resolution in a democracy is the legislature.’” (quoting *Maier v. Roe*, 432 U.S. 464, 479–80 (1977))).

16. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting) (“[I]t is a bold step for this Court to seek to banish from [a public-high-school graduation] the expression of gratitude to God that a majority of the community wishes to make.”).

17. See, e.g., Brest, *supra* note 6, at 222 (“One need not embrace [radical skepticism about] historical knowledge to appreciate the indeterminate and contingent nature of the historical understanding that an originalist historian seeks to achieve.”).

18. See, e.g., *id.* at 215–16 (discussing the conceptual and practical difficulties of discerning the intentions of collective bodies).

19. See, e.g., *id.* at 225 (“We did not adopt the Constitution, and those who did are dead and gone.”).

20. See, e.g., *id.* at 216–17 (discussing this possibility).

- Originalism is inconsistent with *Brown v. Board of Education*²¹ and other landmark decisions that most modern-day Americans would be loath to give up.²²

Together, these arguments formed the core of an almost universally hostile academic response to originalism and its political aims, one that somewhat belied an ongoing crisis of conscience among many liberals over “the root difficulty . . . that judicial review is a counter-majoritarian force in our system.”²³

B. *Constitutional Theory Meets Constitutional History*

The debate over originalism created an obvious opportunity for professional constitutional historians to weigh in, which they did in significant numbers. Jack Rakove’s *Original Meanings*, which emphasized the complex and contested political environment from which the Constitution emerged, was the most influential work of this sort.²⁴ It is an excellent illustration of one way that the evolution of legal theory can influence the evolution of historical understandings. Put simply, debates among twentieth-century academic legal theorists, lawyers, and judges set the agenda (or at least *an* agenda) for professional historical inquiry, which in turn reshaped historical understandings for the next generation of historians and constitutional theorists.

The influence also runs in the opposite direction. Even as Paul Brest and other defenders of the Warren Court’s legacy were developing their critique of originalism, another group of liberal and

21. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

22. *See, e.g.*, Brest, *supra* note 6, at 231–32 (making this point).

23. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (Yale Univ. Press 2d ed. 1986) (1962). The most obvious and influential example of this ongoing crisis was JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing that judicial review is legitimate only if limited to policing malfunctions of the political process, rather than imposing substantive value judgments). Of course, the struggle of liberals to reconcile themselves to the countermajoritarian difficulty was in part a hangover from the New Deal era, when the central tenet of progressive constitutional thought was hostility to judicial review on democratic grounds similar to those espoused by Bork and his originalist followers. *See, e.g.*, Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 367–68 (2013) (discussing democracy-based skepticism of judicial review by Felix Frankfurter and other New Deal liberals); Whittington, *supra* note 2, at 601 (“It is an intriguing feature of conservative critiques of the Court during this era that they mirror the central critique of the *Lochner* Court favored by the New Dealers in the 1930s: that the justices were essentially making it up and ‘legislating from the bench.’”).

24. *See generally* JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

left constitutional theorists was drawing on the historical literature of civic republicanism, in particular the work of Bernard Bailyn, Gordon Wood, and J.G.A. Pocock, as inspiration for an affirmative vision of American constitutionalism that could be invoked to support and expand on the Warren Court's constitutional decisions.²⁵ The work of these theorists, notably including Frank Michelman and Cass Sunstein, is too rich and varied to be neatly summarized here. But their central argument is that the American constitutional tradition is not merely, perhaps not even predominantly, one of liberal individualism.²⁶ It also contains an important and largely salutary strand of civic republicanism, emphasizing collective deliberation, democratic participation, equality, and community.²⁷ Through "serious and sympathetic (but not uncritical) reflection" upon this tradition, theorists like Michelman and Sunstein sought to exploit its "visionary resources" to "invigorate a constitutional discourse" that would justify the preservation and extension of the Warren Court's liberal constitutional jurisprudence.²⁸

Notably, this project was not premised on a simple embrace of the civic republican tradition described by historians. Because "[v]arious strategies of exclusion—of the nonpropertied, blacks, and women—were built into [that] tradition," liberal and left constitutional theorists seeking to exploit it were compelled to reflect critically on the role that history ought to play in constitutional interpretation and adjudication.²⁹ Like originalists, these theorists also had to confront the difficulty of translating an intellectual tradition from one historical epoch to another. As Sunstein put it, "the task is not simply one of excavation. History does not supply conceptions of political life that

25. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988) ("[A]n examination of our constitutionalism from a republican-inspired standpoint might help invigorate a constitutional discourse that would steel judges against the desertion of claims like Hardwick's."); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544 (1986) ("A feminine jurisprudence, instead of rejecting the communitarian and virtue-based framework of Jeffersonian republicanism, might embrace and adapt it for modern society."); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1540 (1988) ("Republican thought played a central role in the framing period, and it offers a powerful conception of politics and of the functions of constitutionalism.")

26. See Sunstein, *supra* note 25, at 1541–42 (making this argument).

27. See *id.* (defining the republican tradition in these terms).

28. Michelman, *supra* note 25, at 1494–96.

29. Sunstein, *supra* note 25, at 1539; cf. Mark V. Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 WM. & MARY L. REV. 93, 94 (1987) (expressing skepticism about the utility of the concept a republican tradition). See generally Michelman, *supra* note 25 (offering an extended argument for a rehabilitated form of republicanism).

can be applied mechanically to current problems.”³⁰ Different theorists responded to these challenges in different ways, most of which could be grouped under the broad heading of “rational traditionalism.”³¹ The particulars are not especially important for present purposes. What matters is that the historical literature of civic republicanism not only provided substantive grist for constitutional theory; it also influenced the debate over history’s normative significance for constitutional law.

II. THE ERA OF NEW ORIGINALISM: 1997–2015

A. *New Originalism and Its Critics*

By the late nineties, two things had happened. First, the critiques of originalism had done real intellectual damage. At least within the academy, the damage was so severe that many liberal constitutional theorists were confidently pronouncing originalism dead.³² Second, conservative lawyers, judges, and legal theorists were beginning to realize their own power and were looking for rhetorical and theoretical justifications for using it proactively to advance conservative interests.³³ Together, these conditions created a powerful demand for a new approach to constitutional decisionmaking that could both withstand the critiques leveled at early versions of originalism and also justify greater judicial activism on behalf of conservative causes.

Over the next ten years or so, the New Originalism arose to meet this demand. It did not happen overnight. Randy Barnett and Keith Whittington were early contributors, developing original public meaning, the argument from writtenness, and the interpretation-construction distinction as linchpins of the new approach.³⁴ If the

30. Sunstein, *supra* note 25, at 1539.

31. Cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996) (advocating a “rational traditionalism” that “acknowledges the claims of the past but also specifies the circumstances in which traditions must be rejected because they are unjust or obsolete”).

32. See, e.g., Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611 (1999) (“The received wisdom among law professors is that originalism is dead, having been defeated in intellectual combat sometime in the eighties.”).

33. See, e.g., Whittington, *supra* note 2, at 604 (“[C]ontrol of the judicial majority also creates a need to identify what the Court should be doing in the political system, which the old originalism never really did.”); *id.* at 609 (“The new originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”).

34. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWER AND CONSTITUTIONAL MEANING* 6 (1999) (drawing a distinction between interpretation and construction); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL*

original intentions of the framers and ratifiers were inscrutable or impossible to aggregate, original public meaning was an objective linguistic fact.³⁵ If the founders could not claim legitimate democratic authority to rule contemporary Americans, the commitment of those Americans to a written constitution as a constraint on government power could supply an alternative justification for originalism.³⁶ If original meaning could not determinately resolve all constitutional controversies, constitutional construction could supplement constitutional interpretation to fill in the gaps.³⁷

The initial appeal of these innovations was theoretical and defensive. They enabled originalists to respond to some of the strongest arguments leveled against originalism by the previous generation of liberal constitutional theorists. In this sense, the forces that catalyzed originalism's evolution were intellectual and internal to constitutional theory. In time, however, other advantages presented themselves that helped to consolidate this evolution and strongly influenced the future course of its development.

Emphasis on objective public meaning, rather than the subjective intentions or expectations of the framers and ratifiers, gave originalists a plausible basis for embracing widely celebrated decisions like *Brown* and *Loving v. Virginia*³⁸ that were plainly inconsistent with original intentions and expectations but arguably consistent with the original public meaning of the Fourteenth Amendment, defined at a

MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 50–61 (1999) (arguing that originalism follows from the writtleness of the U.S. Constitution); Barnett, *supra* note 32 at 629–36 (explaining original public meaning, drawing the interpretation-construction distinction, and arguing that originalism follows from a commitment to written constitutionalism).

35. See Barnett, *supra* note 32, at 622 (“While some originalists still search for how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases, original meaning originalists need not concern themselves with this, except as circumstantial evidence . . .”); see also Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 382 (2013) (“[T]he focus on public meaning also avoids some of the problems associated with uncovering collective intent.”); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 416 (2013) (“Given the empirical nature of ascertaining original public meaning, the New Originalism ought to be practiced more rigorously than the old originalism.”).

36. See Barnett, *supra* note 32, at 652.

37. See *id.* at 645–46. See generally Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *CONST. COMM.* 95 (2010) (arguing that constitutional construction and constitutional instruction are two distinct stages in interpreting legal text to determine its meaning).

38. *Loving v. Virginia*, 388 U.S. 1 (1967).

sufficiently high level of abstraction.³⁹ Emphasis on original public meaning also enabled originalists to argue that the abstract language of the Privileges or Immunities Clause warranted judicial protection of a host of economic liberties, either as a matter of constitutional interpretation or construction.⁴⁰ Here was the beginning of originalism as a sword, an offensive justification for judges to advance conservative values against a hostile democratic process.

Further offensive potential was implicit in the argument from writtenness—the distinction between judicial restraint and constitutional constraint.⁴¹ The point of a written constitution, according to New Originalists, was to constrain the power of government, including but not limited to the power of judges. If other government actors exceeded the constraints imposed by that Constitution, it was the duty of judges acting under it to enforce those constraints even against more democratically accountable officials and institutions. In such circumstances, judicial restraint—defined as judicial forbearance—was not cause for celebration; it was an abdication of duty.⁴²

Only quite recently have originalists begun to elaborate on this argument explicitly, and its terms are still evolving. In addition to the contrast between judicial restraint and judicial constraint, Randy Barnett, Clark Neily, and others have sought to promote “judicial engagement” as a desirable form of judicial activism in the

39. See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2381 (2015) (noting the influence on the Court of Alexander Bickel’s argument that “the Fourteenth Amendment was originally meant to be read at a high, and perhaps evolving, level of abstraction”). See generally Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (mounting a more traditional originalist defense of *Brown*).

40. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 193–225 (2004).

41. See, e.g., Randy Barnett, *Constraint vs. Deference: Two Possible Meanings of ‘Judicial Restraint,’* WASH. POST (June 29, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/29/constraint-vs-deference-two-possible-meanings-of-judicial-restraint> [<https://perma.cc/UM3B-T94L>] (defending this distinction); see also Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 751 (2011) (proposing the distinction in the context of a broader critique of New Originalism); Jack Balkin, *Judicial Constraint, Judicial Restraint, and the New Originalism*, BALKINIZATION (May 12, 2016), <http://balkin.blogspot.com/2016/05/judicial-constraint-judicial-restraint.html> [<https://perma.cc/2MKF-CZ4A>] (skeptically playing out the distinction’s implications for conservative and libertarian originalism).

42. See, e.g., Whittington, *supra* note 2, at 609 (“The new originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”).

enforcement of original meaning.⁴³ Whatever term the literature settles on, this principle has been latent in the New Originalism for some time. It played an important animating role in both *Heller v. District of Columbia*⁴⁴ and *National Federation of Independent Business v. Sebelius*,⁴⁵ as well as other less successful conservative constitutional challenges.⁴⁶ More than any nice theoretical distinction, it is this celebration of conservative judicial activism in an era of conservative ascendancy on the federal bench that distinguishes the New Originalism from the Old.

The main liberal/left response to New Originalism has been to emphasize just how much ground that approach cedes in its quest for theoretical respectability. The *ne plus ultra* of this response is Jack Balkin's "*Living Originalism*," which attempts to demonstrate that original-public-meaning originalism and living constitutionalism are entirely consistent.⁴⁷ Even *Roe v. Wade*,⁴⁸ he contends, can be justified on New Originalist grounds.⁴⁹ The nub of Balkin's argument is that the Constitution's original public meaning is capacious, providing only a bare-bones constitutional framework, which judges, elected officials, and social movements must and should flesh out in a continuous process of living constitutionalist construction.⁵⁰ Having thus defined originalism nearly out of existence, Balkin declares himself a card-carrying member of the club.⁵¹

Most liberal constitutional theorists have not gone so far. Instead, they have argued that the New Originalism protects one flank only by

43. See generally, e.g., CLARK M. NEILY III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT* (2013) (calling for courts to use judicial engagement to restore courts as the check on other branches of government as envisioned by the Framers); Randy E. Barnett, *Judicial Engagement Through the Lens of Lee Optical*, 19 *GEO. MASON L. REV.* 845 (2012) (describing what judicial engagement is and how it can be used when interpreting law).

44. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

45. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

46. E.g., *United States v. Comstock*, 560 U.S. 126 (2010); *Gonzales v. Raich*, 545 U.S. 1 (2005).

47. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (arguing that modern conceptions of civil rights and civil liberties are consistent with the Constitution's original meaning).

48. *Roe v. Wade*, 410 U.S. 113 (1973).

49. See Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291, 292 (2007).

50. See, e.g., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *NW. U. L. REV.* 549, 550–59 (2009).

51. *Id.*

exposing the other. Original meaning is both more determinate and more coherent than attempts to discern the collective intent of multi-member bodies like the Philadelphia and state ratifying conventions. It is also less vulnerable to dead-hand objections because original public meaning is so capacious that it gives the present generation a large role in shaping its application through constitutional construction.⁵²

At the same time, however, original-public-meaning originalism, by conceding the existence of large gaps and open areas in original meaning, gives up both of the principal normative claims that set Old Originalism apart. It fails to meaningfully constrain judges because it licenses free-wheeling constitutional construction of open-ended constitutional text without reference to original meaning. It also severs the content of contemporary constitutional law from the democratic will of those who ratified it, whose expectations and intentions New Originalist judges are fully permitted to ignore.⁵³ Or so critics of New Originalism have contended.

B. *An Unintended Offspring*

By emphasizing the flexibility and inclusiveness of original-public-meaning originalism, the critics of New Originalism may have inadvertently helped to pave the way for the latest development in originalist theory—positivist originalism, which argues that “originalism is our law.”⁵⁴ In Robert Bork’s day, this idea would have seemed bizarre at best. Originalism was a critique of legal practice, not a description of it. Even well into the conservative legal ascendancy of the 1970s and 1980s, Antonin Scalia wrote:

It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one’s youthful head, the opinions that have in fact been rendered not on the basis of what the

52. See generally Colby, *supra* note 41, at 740–41; Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 715 (2011).

53. See, e.g., Smith, *supra* note 52, at 715; Trevor W. Morrison, *Lamenting Lochner’s Loss: Randy Barnett’s Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 864 (2005) (“[I]f looking beyond the text includes constant adjustment of constitutional meaning with reference to changes in the common law, then this is an originalism that only a ‘living constitutionalist’ could love.”); see also FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 40–42 (2013).

54. See generally Baude, *supra* note 39, at 2351 (providing positive law framework for originalism); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 821 (2015) (using originalist theory to argue original meaning is the law).

Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean.⁵⁵

But if New Originalism is fully or even mostly compatible with a living Constitution, as its liberal critics contend, then the claim that originalism is our law becomes much more plausible.⁵⁶

Decisions that were previously taken as obvious deviations from original intent and expectations might be at least consistent with original public meaning. To the extent that such decisions acknowledge the ultimate authority of original meaning, they might actually be taken to confirm that originalism is our law, even if their conclusions about original meaning are incorrect or insincere. This, in any case, is the argument of positivist originalism—a development made possible mostly by the internal logic of constitutional theory—but one that arrives just in time to be deployed by a newly reinforced conservative Supreme Court majority.⁵⁷

The rise of positivist originalism nicely illustrates the importance of intellectual forces internal to constitutional theory, as well as sheer contingency, in driving theoretical evolution over time. The staying power of this approach, I suspect, will be more strongly influenced by external social and political forces, especially the ideological balance of the Supreme Court and the pace and direction of constitutional change the new majority of that Court pursues.⁵⁸ Time will tell, though

55. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

56. I do not mean to lay the blame (or credit) entirely at the feet of New Originalism's critics. Plenty of New Originalists (and fellow travelers) have worked hard to show the consistency of their approach with widely admired decisions that had previously been thought inconsistent with originalism. See generally David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213 (2015) (offering an originalist defense of *Loving v. Virginia*'s invalidation of anti-miscegenation laws); Michael B. Rappaport, *Originalism and the Colorblind Constitution* (San Diego Legal Studies Paper No. 13-115 Apr. 3, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244610 [<https://perma.cc/5KFD-68M4>] (offering a new originalist defense of *Brown v. Board of Education* and the colorblindness principle that has animated the Court's modern affirmative action cases).

57. It might seem that the inclusive definition of originalism adopted by the positivists to render their descriptive claims plausible would deprive their argument of all critical edge, but they have developed ingenious arguments to the contrary. See Baude, *supra* note 39, at 2371 (“[T]he point is to look to how the Supreme Court justifies its rulings, as evidence of what counts as a legally sufficient justification in our current system of constitutional law.”); Sachs, *supra* note 54, at 820 (“What matters for our understanding of the law isn’t just everyday practice, but the premises that are implicit in our legal arguments, the claims about the structure of our law that we’re willing publicly to accept and defend.”).

58. Compare Eric Posner, *Why Originalism Will Fade*, ERICPOSNER.COM (Feb. 18, 2016), <http://ericposner.com/why-originalism-will-fade> [<https://perma.cc/HZL6-6H6V>] (arguing that a dearth of originalist Supreme Court justices will kill academic originalism), with Jack Balkin, *Why*

the confirmation of a vocally originalist junior justice augurs well for the future of originalism in general.⁵⁹

C. *Constitutional Theory Meets Constitutional History*

Besides launching the career of positivist originalism, the debate over New Originalism has reopened, or at least reoriented, the dialogue between constitutional theory and history. One element of this dialogue is methodological, with intellectual historians vigorously disputing the possibility of recovering the original meaning of the constitutional text without a full-blown analysis of its intellectual context.⁶⁰ Another element focuses on the content of original public meaning. The rise of New Originalism has spawned a cottage industry of “originalist histories,” whose self-professed object is to discover the linguistic or communicative content of the constitutional text that New Originalism recognizes as legally authoritative.⁶¹ Such histories span a wide range of constitutional provisions and exhibit at least some ideological diversity, as liberal critics attempt to turn the precepts of New Originalism to their own ends.⁶² In both of these respects,

Originalism Will Not Fade Away, BALKINIZATION (Feb. 19, 2016), <http://balkin.blogspot.com/2016/02/why-originalism-will-not-fade-away.html> [<https://perma.cc/H4H8-PVDY>] (“Originalism rests on powerful forces in American politics and culture. Those forces will not fade away any time soon.”). Balkin has the better of this exchange, but the implications of his argument for positivist originalism specifically are unclear.

59. See, e.g., Lawrence Solum, *Originalism in Constitutional Time*, LEGAL THEORY BLOG (Apr. 8, 2017), <http://lsolum.typepad.com/legaltheory/2017/04/originalism-roundup-the-case-for-the-constraint-principle-and-much-else.html> [<https://perma.cc/LHL6-PXRF>] (“Gorsuch’s appointment assures the originalism will continue to occupy center stage in public and judicial debates over constitutional theory.”).

60. See, e.g., Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721, 755 (2013) (“If legal scholars and judges wish to continue to make serious claims about what the Constitution meant in the Founding era, they will need to master the basic methods of intellectual history.”); G. Edward White, *Intellectual History and Constitutional Decision Making*, 101 *VA. L. REV.* 1165, 1175 (2015) (“[I]f one is interested in recovering the communicative content of a constitutional provision enacted in a past epoch, the methods of intellectual history would be extremely useful.”). But see Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 *VA. L. REV.* 1111, 1157 (2015) (contesting these claims, primarily on the ground that constitutional interpretation and intellectual history are concerned with different types of meaning).

61. See, e.g., Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. CHI. L. REV.* 101 (2001); Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus*, *The Limits of Enumeration*, 124 *YALE L.J.F.* 180 (2014); Rappaport, *supra* note 56; Upham, *supra* note 56.

62. See, e.g., James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 *VA. L. REV.* 1523, 1561–70 (2011) (collecting examples). See generally Jack M.

constitutional theory has set an agenda for constitutional history, though many originalist histories would not earn the plaudits of professional historians.⁶³

As in the Era of Old Originalism, the influence also runs in the other direction. Even as Jack Balkin and other liberal theorists were critically engaging with New Originalism, another group of liberal and left constitutional theorists was drawing on (and contributing to) the historical literature on popular constitutionalism in an effort to wrest interpretive authority from a newly ascendant—and assertive—conservative judiciary.⁶⁴

The work of these theorists is too wide-ranging to adequately summarize here. Their central normative claim, however, is that, in one way or another, the people themselves are entitled to exercise “active and ongoing control over the interpretation and enforcement of constitutional law.”⁶⁵ Drawing on a wide range of historical materials, theorists like Larry Kramer, Reva Siegel, and Robert Post explicitly advanced this claim in response to the increasingly assertive conservative judicial activism of the Rehnquist Court in the late 1990s, especially its invalidation of legislation enacted under the remedial powers granted to Congress by the Reconstruction Amendments.⁶⁶

Balkin, *Commerce*, 109 MICH. L. REV. 1 (2009) (using precepts of New Originalism to argue for expansive congressional commerce power).

63. See, e.g., Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS (Mar. 20, 2017), <http://www.processhistory.org/originalism-history> [<https://perma.cc/RG7H-36V4>] (criticizing New Originalists for “fundamentally fail[ing] to understand what historians do.”). Of course, this may say as much about the historians as it does about originalists. See Randy Barnett, *Challenging the Priesthood of Professional Historians*, WASH. POST (Mar. 28, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/28/challenging-the-priesthood-of-professional-historians/?utm_term=.0cacd11b4b8 [<http://perma.cc/655Q-HJEH>] (“If all you have is the historical method—as defined by Professor Gienapp—then the meaning of ‘meaning’ must be reduced to the *import* or *purpose* of a constitutional provision, not the communicative content of what it said.”). I do not take sides here.

64. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that the Court should reflect popular will when interpreting the Constitution); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (challenging judicial review and judicial supremacy); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) (arguing for policentric constitutional interpretation).

65. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004).

66. See generally Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Post & Siegel, *supra* note 64.

Like the republican revival of the 1980s, the popular constitutionalist project was not premised on a simple embrace of a legal tradition described by historians (or by legal scholars acting as historians). Some popular constitutionalist work is almost completely normative, engaging only indirectly, if at all, with the historical literature.⁶⁷ Other work combines the normative and historical in a number of different ways. Larry Kramer offers an original historical account of what he understands as a lost popular constitutionalist tradition, together with a passionate normative argument for reclaiming it.⁶⁸ In a more sanguine and also a more comprehensive historical account, Barry Friedman argues that popular constitutionalism has always and, in some sense, inevitably defines the American constitutional tradition—and it's a good thing, too.⁶⁹ Reva Siegel and Robert Post offer a descriptive account of the pathways by which social movements—especially, the Civil Rights and Women's Movements—have historically influenced the development of constitutional doctrine, which they then deploy to criticize the Rehnquist Court's pretensions to interpretive supremacy.⁷⁰

To summarize, and to oversimplify significantly, the relationship between the history and theory of popular constitutionalism is recursive. History sets the agenda for theory, which in turn sets the agenda for history, which sets the agenda for theory, and so on.

CONCLUSION

Constitutional theory lives. It evolves over time through a process of reciprocal interaction with its environment, as well as its own

67. The best example is Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006) (arguing “that judicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society”). For further criticism of final judicial decisionmaking, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) and JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

68. See generally LARRY D. KRAMER, *supra* note 64 (describing a now-defunct populist constitutional tradition).

69. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (analogizing the relationship between the Court and the public to that of a marriage whereby both parties contribute to the direction of the relationship).

70. See, e.g., Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003); see also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1329 (2006); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299 (2001).

internal logic. Sheer contingency also plays an important role. The narrative sketched above is far from comprehensive, but it illustrates this process in broad brush.

In advancing these claims, I take no position on the larger question of whether there is “any set of political or constitutional principles that might remain as fixed standards for all the others, and against which all others might be judged[.]”⁷¹ Certainly some constitutional theorists understand themselves as seeking such transcendent principles. Others see their search in more pragmatic and contextual terms. Either way, the complex evolution of constitutional theory over time carries an important lesson. For those chasing eternal verities, it is vital to remember that every seeker inevitably approaches the search from a particular historical vantage point, with attendant biases, blind spots, and unconscious assumptions. For those with more terrestrial ambitions, the complex evolutionary processes described in this Essay are the whole ballgame. To play well, it is helpful to remember what game you are playing.

71. Balkin, *supra* note 5, at 870.