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Originalism as a Political Practice: The Right's Living Constitution

Cover Page Footnote

We greatly appreciate the comments of Larry Kramer and Neil Siegel, as well as the indispensable research assistance of Patrick Casey Pitts.

ORIGINALISM AS A POLITICAL PRACTICE: THE RIGHT'S LIVING CONSTITUTION

Robert Post & Reva Siegel*

To whatever extent the Rehnquist Court actually executed a counterrevolution, surely a good deal of its inspiration came from “originalism,”¹ from the view that the only acceptable method of interpreting the U.S. Constitution is to apply “the text and original meaning of various specific constitutional provisions.”² Originalists attacked progressive Warren Court decisions as judicial usurpations³ in need of discipline and reversal.⁴ Drawing on the work of pioneer conservative academics like Robert Bork⁵ and Raoul Berger,⁶ originalism became a central organizing principle for the Reagan Justice Department’s assault on what it regarded as a liberal federal judiciary.⁷ Originalism was proudly

* We greatly appreciate the comments of Larry Kramer and Neil Siegel, as well as the indispensable research assistance of Patrick Casey Pitts.

1. Earl M. Maltz, *Introduction to Rehnquist Justice: Understanding the Court Dynamic* 1, 5 (Earl M. Maltz ed., 2003).

2. Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 Harv. J.L. & Pub. Pol’y 5, 7 (1988).

3. See, e.g., Symposium, *The End of Democracy? The Judicial Usurpation of Politics*, First Things, Nov. 1996, at 18; Lino A. Graglia, *Judicial Review on the Basis of “Regime Principles”: A Prescription for Government by Judges*, 26 S. Tex. L.J. 435, 441 (1985) (“[J]udicial usurpation of legislative power has become so common and so complete that the Supreme Court has become our most powerful and important instrument of government in terms of determining the nature and quality of American life.”); see also Office of Legal Policy, U.S. Dep’t of Justice, *Original Meaning Jurisprudence: A Sourcebook* 4 (Mar. 12, 1987) (“[I]f the courts go beyond the original meaning of the Constitution . . . they usurp powers not given to them by the people.”); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager’s “Court-Stripping” Polemic*, 44 Ohio St. L.J. 611 (1983); Raoul Berger, *The Imperial Court*, N.Y. Times, Oct. 9, 1977, § 6 (Magazine), at 38 (“The Supreme Court . . . has usurped legislative powers that the framers reserved to the states.”).

4. See Keith E. Whittington, *The New Originalism*, 2 Geo. J.L. & Pub. Pol’y 599, 601 (2004).

5. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 San Diego L. Rev. 823, 824 (1986); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 4, 8 (1971); Robert H. Bork, *Styles in Constitutional Theory*, 26 S. Tex. L.J. 383, 394 (1985).

6. See, e.g., Raoul Berger, *Government by Judiciary* 283-84 (1977).

7. Office of Legal Policy, U.S. Dep’t of Justice, *Guidelines on Constitutional Litigation* 3 (Feb. 19, 1988) [hereinafter 1988 Guidelines on Constitutional Litigation], available at <http://islandia.law.yale.edu/acs/conference/meese-memos/guidelines.pdf>. “The approach this administration advocates is rooted in the text of the Constitution as illuminated by those who drafted, proposed, and ratified it.” Edwin Meese III, *Construing the Constitution*, 19 U.C. Davis L. Rev. 22, 25 (1985) [hereinafter Meese, *Construing the Constitution*]; see also Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited*

embraced by aggressively conservative Justices like William H. Rehnquist,⁸ Antonin Scalia,⁹ and Clarence Thomas.¹⁰ Originalism remains even now a powerful vehicle for conservative mobilization, as can clearly be seen in recent popular opposition to the citation of foreign law.¹¹

Attention to original understanding has been a prominent theme in American constitutional practice almost since the Founding.¹² Americans

Constitution, 27 S. Tex. L. Rev. 455, 465-66 (1986) [hereinafter Meese, *The Supreme Court*] (“It has been and will continue to be the policy of this administration to press for a *jurisprudence of original intention*. In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.”).

8. See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 698 (1976); see also Ronald Reagan, Remarks at the Swearing-In Ceremony for William H. Rehnquist as Chief Justice and Antonin Scalia as Associate Justice of the Supreme Court of the United States, 2 Pub. Papers 1268, 1270 (Sept. 26, 1986) (“[The founding fathers] understood that, in the words of James Madison, if ‘the sense in which the Constitution was accepted and ratified by the nation is not the guide to expounding it, there can be no security for a faithful exercise of its powers.’”).

9. See, e.g., Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 46 (1997) [hereinafter Scalia, *A Matter of Interpretation*]; Antonin Scalia, Assoc. Justice, U.S. Supreme Court, *Originalism: The Lesser Evil*, William Howard Taft Constitutional Law Lecture (Sept. 18, 1988), in 57 U. Cin. L. Rev. 849, 854 (1989) [hereinafter Scalia, *Originalism*].

10. See, e.g., *United States v. Lopez*, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring); Clarence Thomas, *Judging*, 45 U. Kan. L. Rev. 1, 6-7 (1996); see also Edwin Meese III, *The Jurisprudence of Clarence Thomas*, 12 Regent U. L. Rev. 349 (2000).

11. See, e.g., Phyllis Schlafly, *Is Relying on Foreign Law Impeachable?*, Phyllis Schlafly Report, May 2005, <http://www.eagleforum.org/psr/2005/may05/psrmay05.html> (“[W]e should not tolerate judges who try to change the rules of our written Constitution by pretending that its meaning is evolving, or that they have discovered new privileges no one else has detected for 200 years, or that our Constitution must be changed to conform to modern trends in foreign law.”); Alan Sears, *First-Person: Avoid the Siren Song of Foreign Law*, Baptist Press News, Mar. 3, 2005, <http://www.sbc Baptist Press News/bpcolumn.asp?ID=1750> (“If you believe the written Constitution—with a fixed and definite meaning—is the supreme governing legal document in our land and that the opinions of foreign courts and governments and decrees from the United Nations should seldom hold sway to interpret what our federal Constitution means, or ought to mean, then beware the siren song and the approaching dangers ahead for marriage, the family and many other legal issues. . . . No matter how lovely the song seems, no matter how sweet the tune, following that song will mean crashing upon the jagged rocks of international law, and we, along with the Constitution and our nation’s legal heritage, may well be shipwrecked.”); see also S. Res. 92, 109th Cong. (2005); H.R. Res. 97, 109th Cong. (2005) (“[I]t is the sense of the House of Representatives that judicial interpretations regarding the meaning of the Constitution . . . should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution . . .”). Originalism has also figured prominently in right wing mobilization over President George W. Bush’s appointments to the U.S. Supreme Court. See, e.g., Andrew Becker, *Selection Doesn’t Serve Diversity, Groups Complain*, Dallas Morning News, July 21, 2005, at 14A (quoting Phyllis Schlafly); see also Lynette Clemetson, *Meese’s Influence Looms in Today’s Judicial Wars*, N.Y. Times, Aug. 17, 2005, at A1; *Originalism Better Than Politics on the High Court*, Focus on the Family, Dec. 22, 2005, <http://www.family.org/cforum/news/a0039013.cfm>.

12. See, e.g., *Ex parte Bain*, 121 U.S. 1, 12 (1887); *Reynolds v. United States*, 98 U.S. 145, 162 (1878); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188-89 (1824); 1 Joseph

construing the Constitution have considered the original understanding of its text and the intentions of its framers, while also consulting forms of authority such as case law, custom, structure, and common sense. But claims about original understanding changed significantly in the era that the Rehnquist Court was formed. Critics of the Warren Court began to argue that determining the original understanding of the Constitution's framers was the *only* legitimate way of interpreting the Constitution, and they began to denounce all other approaches to constitutional interpretation as improper and unprincipled.¹³ This claim of methodological exclusivity justified their opposition to the substance of the Warren Court's jurisprudence.¹⁴

Story, Commentaries on the Constitution of the United States § 400, at 383-84 (Fred B. Rothman & Co. 1999) (1833); Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 Mich. L.J. 109, 110 (1893); see also Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 9-13 (1982); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 204 (1980); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 Stud. Am. Pol. Dev. 191 (1997).

13. The pattern was set by Raoul Berger, who argued against "proponents of a 'living Constitution'" that "the sole and exclusive vehicle of change the Framers provided was the amendment process; judicial discretion and policymaking were in high disfavor; all 'agents and servants of the people' were to be 'bound by the chains' of a 'fixed Constitution.'" Berger, *supra* note 6, at 363-64, 386. "Enchanted by judicial fulfillment of libertarian hopes, academe . . . has endeavored to discredit 'original intention,' to rid us of the 'dead hand of the past.'" *Id.* at 367. But, Berger argued, "If the Court may substitute its own meaning for that of the Framers it may . . . rewrite the Constitution without limit." *Id.* at 370. To repudiate originalism would "convert the 'chains of the Constitution' to ropes of sand." *Id.* at 371; see 1988 Guidelines on Constitutional Litigation, *supra* note 7, at 3-4 ("[C]onstitutional language should be construed as it was publicly understood at the time of its drafting and ratification and government attorneys should advance constitutional arguments based only on this 'original meaning.' To do this, government attorneys should attempt to construct arguments based solely on the ordinary usage of the words at the time the provision at issue was ratified. . . . Where the text of a particular provision is ambiguous or vague, arguments may then be premised on the structure of the government as defined elsewhere in the text of the Constitution, and on other sources indicating the intent of those who drafted, proposed, and ratified that provision (*i.e.*, the Founders). It should be remembered, however, that the aim of any *extratextual* analysis is only to elucidate the meaning of the actual constitutional text at issue."); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 143, 159 (1990); Dennis J. Goldford, *The American Constitution and the Debate Over Originalism* 24 (2005); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1211 (1987). Elements of a claim of interpretive exclusivity were visible prior to the Rehnquist Court. In his 1899 treatise, for example, John Randolph Tucker had asserted that "[t]he written Constitution of 1789 must be what those who brought it into being and gave it the sanction of their ratification believed and knew it to be, and cannot be changed by what men a century thereafter choose to think it ought to have been." John Randolph Tucker, *The Constitution of the United States* 180 (1899). But Paul Mishkin, writing in 1978, observed that only "relatively few" besides Raoul Berger "take essentially this position." Paul J. Mishkin, *Federal Courts as State Reformers*, 35 Wash. & Lee L. Rev. 949, 961 & n.52 (1978).

14. See, e.g., Berger, *supra* note 6, at 372 ("A 'transcript of their minds' was left by the framers [of the Fourteenth Amendment] in the debates of the 39th Congress, and they left abundant evidence that, for example, in employing 'equal protection of the laws' they had in mind only a ban on discrimination with respect to a limited category of 'enumerated' rights. Disregard of that intention starkly poses the issue whether the Court may 'interpret' black to

At this same time, and for the first time, claims about fidelity to originalist interpretive methodology became a vehicle for widespread and sustained mobilization of conservatives. Although Americans have traditionally incorporated assertions about constitutional text and history into both liberal¹⁵ and conservative arguments, it is almost unknown for a general theory of constitutional interpretation to itself become a site for popular mobilization. During the Reagan Presidency, however, "originalism" emerged as a new and powerful kind of constitutional politics in which claims about the sole legitimate method of interpreting the Constitution inspired conservative mobilization in both electoral politics and in the legal profession. In this form originalism has flourished ever since.

In recent decades, a large scholarly literature has developed that is dedicated to exposing the analytic inconsistencies and theoretical

mean white, to convert the framers' intention to leave suffrage to the States into a transfer of such control to the Supreme Court."); Whittington, *supra* note 4, at 601 ("[O]riginalism 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. Above all, originalism was a way of explaining what the Court had done wrong, and what it had done wrong in this context was primarily to strike down government actions in the name of individual rights."); Edwin Meese III, Speech to the A.B.A. House of Delegates (July 1985), in A.B.A. J., Feb. 1, 1987, at 66 ("In my opinion a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of limited but energetic government. What, then, should a constitutional jurisprudence actually be? It should be a jurisprudence of original intention. By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid both the charge of incoherence and the charge of being either too conservative or too liberal.").

15. At different junctures in the past, claims about the original understanding of the Constitution's framers have been incorporated into progressive constitutional arguments. See, e.g., *Congress to Rule Courts, Labor's Aim*, N.Y. Times, Sept. 16, 1922, at 14 ("Every great advocate of democracy has feared the encroachment of the courts. By a gradual process an intolerable condition has developed. The Congress is no longer the final authority on legislation. The Supreme Court is the final authority and in the Supreme Court five men, a bare majority, determine the issue. We are governed by an arbitrary, autocratic bureaucracy of five. This is an abject surrender of constitutional authority which betrays the purpose and the clearly stated intent of the founders and makes of America today little less than an autocratically ruled nation. It is to put an end to that condition and restore the Constitution and Congress to the original intent and power that labor now proposes to launch the proposed constitutional amendment. It is a battle for American freedom and democracy, so that the people may rule." (quoting a statement released by Samuel Gompers and the Executive Council of the American Federation of Labor)). Justice Hugo Black in particular stressed that "in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Adamson v. California*, 332 U.S. 46, 72 (1947) (Black, J., dissenting) (quoting *Ex Parte Bain*, 121 U.S. at 12). Black was later claimed by Edwin Meese as an important precursor for "the 'jurisprudence of original intention,'" which was not, Meese argued, merely "some recent conservative ideological creation," but instead reflected a traditional American concern "for reducing judicial discretion by focusing attention on the actual words of the Constitution." Edwin Meese III, *A Tribute to Justice Hugo Black*, 6 St. Louis U. Pub. L. Rev. 187, 188, 193 (1987). For a different view of Black's jurisprudence, see Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv. L. Rev. 673, 735-37 (1963).

deficiencies of originalism.¹⁶ While we each have elsewhere expressed doubts about originalism as a methodology,¹⁷ that is not our object in this essay. Our concern is to explore a different question. We ask how originalism has acquired the authority it now possesses. Our conclusion is that scholars who criticize originalism as a jurisprudence have failed to appreciate the true sources of originalism's influence. The current ascendancy of originalism does not reflect the analytic force of its jurisprudence, but instead depends upon its capacity to fuse aroused citizens, government officials, and judges into a dynamic and broad-based political movement.

We argue that originalism's current appeal cannot be understood unless the jurisprudence of originalism is distinguished from the political practice of originalism. Scholars have analyzed the former, but the ongoing authority of originalism depends on the latter. To understand originalism's power at the dawn of the twenty-first century is to appreciate the subtle ways in which originalism connects constitutional law to a living political culture and provides its proponents a compelling language in which to seek constitutional change through adjudication and politics.¹⁸

Our goal is to redirect scholarship away from the methodological principles of originalism as a jurisprudence and toward the social forms of originalism as a political practice, in the belief that reorienting analysis in this way will provide scholars a better understanding of the dynamics that have enabled modern originalism to rewrite the face of the Constitution. In what follows, we explore deep tensions between the jurisprudence and political practice of originalism, yet in so doing our objective is neither to

16. See, e.g., Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 Colum. L. Rev. 1029, 1032-33 (1977) (rejecting the approach of Raoul Berger); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1, 6, 101-02 (1999) (describing the failure of originalists to adhere to the original meaning of "commerce"); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. Rev. 217, 287 (2004) (describing the "vast body of primary historical materials . . . that support a spectrum of constitutional meaning" and describing the resulting failure of originalist methodology to restrain judicial interpretation); Laurence H. Tribe, *Comment, in* Scalia, *A Matter of Interpretation*, *supra* note 9, at 68-72 (describing the impossibility of determining the level of abstraction at which constitutional clauses should be read and applied).

17. See, e.g., Robert Post, *Theories of Constitutional Interpretation*, Representations, Spring 1990, at 13, 13-41; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 1032-34 (2002).

18. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 Cal. L. Rev. (forthcoming Oct. 2006) (manuscript at 25, on file with the Fordham Law Review) ("Originalism, in other words, is not merely a jurisprudence. It is a discourse employed in politics to mount an attack on courts. . . . Once we understand originalism as a language employed to pursue constitutional change *in politics and through adjudication*, we can see that denouncing constitutional change without constitutional lawmaking is a rhetoric used to pursue constitutional change without constitutional lawmaking.").

discredit the methodology of originalism nor to charge its proponents with inconsistency or hypocrisy.¹⁹ Our aim is instead to understand how originalism has become authoritative, both inside and outside of courts, and in this way to explore the historical processes through which constitutional law is made.

I. THE JURISPRUDENCE OF ORIGINALISM

In 1995, James F. Simon published *The Center Holds*,²⁰ which describes the Rehnquist Court as “a conservative judicial revolution that failed.”²¹ Simon’s thesis was criticized by Edwin Meese III, who, as Ronald Reagan’s Attorney General, was probably the person most responsible for fusing conservative activism with the idea of originalism.²² Meese faulted Simon for

19. For examples of articles charging originalists with hypocrisy, see andré douglas pond cummings, Grutter v. Bollinger, *Clarence Thomas, Affirmative Action and the Treachery of Originalism: “The Sun Don’t Shine Here in This Part of Town,”* 21 Harv. BlackLetter L.J. 1, 58 (2005); Louis W. Hensler III, *The Recurring Constitutional Convention: Therapy for a Democratic Constitutional Republic Paralyzed by Hypocrisy*, 7 Tex. Rev. L. & Pol. 263, 298 (2003).

20. James F. Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Court* (1995).

21. *Id.* at 11.

22. See Debra Cassens Moss, *The Policy and the Rhetoric of Ed Meese*, A.B.A. J., Feb. 1, 1987, at 64; see also Edwin Meese III, *Reagan’s Legal Revolutionary*, 3 Green Bag 2d 193 (2000). According to Meese,

[p]erhaps Reagan’s most important achievement was to revive the jurisprudence of original understanding. The governing orthodoxy prior to his presidency was the “living constitution” approach that tended to support judicial activism and highly creative legal theories in academia. To paraphrase Franck, this theory paradoxically holds that the Constitution and laws have no settled meaning, but that the Supreme Court has a settled power to ascribe such meaning to the Constitution and laws as it sees fit. This approach certainly made judging and legal writing more freewheeling, but it conflicted with the American theory of a written Constitution that was supreme.

Reagan challenged the prevailing activist approach on such issues as racial discrimination through preferences and quotas, unenumerated constitutional “rights,” federalism, exaggerated expansions of the Bill of Rights and the separation of powers. He did so in speeches, interviews, proclamations, executive orders and perhaps most importantly in superb appointments to the federal judiciary. . . .

In the White House, Reagan continued the careful review process for judges he had initiated in California. Professors Antonin Scalia, Ralph Winter, Robert Bork, J. Harvey Wilkinson and Stephen Williams were among the academics he appointed to the circuit courts who shared his approach to constitutional interpretation. Other appointments from his administration, including Douglas Ginsburg, Alex Kozinski, Kenneth Starr and Danny Boggs, helped turn the tide of activism in many federal circuits. Today, the originalist approach to constitutional interpretation is still gaining ground.

Following Reagan’s lead, it was my responsibility to help revive a jurisprudence of original intent through an exchange of speeches I had with Justice William Brennan in 1985 and 1986. I noted that while the Supreme Court has the duty to apply the Constitution in deciding cases and has great moral force when it does its job faithfully, there is still a difference between the Constitution and

a mistake common to many liberal academics and journalists: he views the Supreme Court as simply a political institution, and in doing so, fundamentally misunderstands its true Constitutional role. . . . He assumes that each justice has a political agenda which he or she is trying to impose upon the rest of the Court. This constant preoccupation with the *result* of each particular case blinds Simon to the essential task of a true judge: insuring that the *process* of decision-making is consistent with the *interpretive* role of the judiciary, and that the ultimate disposition based upon the words and meaning of the Constitution or the statute under consideration, rather than individual policy views or political predilections.²³

Meese claimed that “Presidents Ronald Reagan and George Bush, by their Supreme Court appointments,” did not seek “to achieve a ‘conservative judicial revolution’ in substantive law,” but rather to establish “a federal judiciary that understood its proper role in a democracy, respected the authority of the legislative and executive branches, and limited their judgments according to the role of the judiciary prescribed in the Constitution.”²⁴ As to the latter goal, said Meese, barely concealing his pride, Reagan and Bush were successful:

If one were to construct a spectrum, with judicial activism on one pole and Constitutional fidelity on the other, any objective evaluation would have to recognize how far the Court has moved in the latter direction. Gone are the decades of judicial activism, where . . . judicial activists attempted to hide their manipulations and distortions of the Constitution

constitutional law. The Constitution’s true meaning, based on its original understanding, should be the sole basis for court rulings.

Edwin Meese III, *A Return to the Founders*, Nat’l L.J., June 28, 2004, at 22.

23. Edwin Meese III, *A Return to Constitutional Interpretation From Judicial Law-Making*, 40 N.Y.L. Sch. L. Rev. 925, 925 (1996). Meese further condemned Simon for “continually labeling Justices ‘conservative,’ ‘liberal,’ or ‘moderate.’ He fails to perceive that when a Court becomes activist, and thereby promotes a political agenda, that agenda can favor ‘conservative’ as well as ‘liberal’ causes, depending on the personal views of the judges involved.” *Id.* at 927.

24. *Id.* at 928. Meese sought to demonstrate that Reagan and Bush rejected any “political agenda for the Court” by quoting directly from their statements. *Id.* President Reagan praised O’Connor, for example, because of her belief “that a judge is on the bench to interpret the law, not to make it. . . . This philosophy of judicial restraint needs representation in our courtrooms and especially on the highest court in our land.” *Id.* (quoting Ronald Reagan, Statement on Senate Confirmation of Sandra Day O’Connor as an Associate Justice of the Supreme Court of the United States, 1981 Pub. Papers 819 (Sept. 22, 1981)). Meese argued that

analysis of the nation’s highest Court should not be denigrated to a simplistic argument over whether a non-existent political agenda has been achieved, or whether the imagined political objectives of previous presidents have been advanced or thwarted. Instead, scholarly inquiry should be directed at whether the judicial integrity required by the Constitution has been restored to the Supreme Court and—if it has—how such integrity can be preserved.

Id. at 933.

behind such phrases as “a living document” and “the penumbras and emanations” derived from the text of the Bill of Rights.²⁵

Disagreements within the contemporary Court, Meese concluded, are “usually over how far and how fast the Court should go in correcting the excesses of the Warren and immediately post-Warren Courts. The conflict is between dedication to precedent and stability on the one hand versus a return to Constitutional authenticity on the other.”²⁶

Meese’s insistence that originalism is a matter of constitutional “process” and “role,” rather than constitutional substance, is a central tenet of the jurisprudence of originalism. Originalism is desirable because it promotes constitutional “fidelity” and “authenticity,” as distinct from “manipulations” and “distortions.” “A jurisprudence that seeks fidelity to the Constitution—a jurisprudence of original intention—is not a jurisprudence of political results. It is very much concerned with process, and it is a jurisprudence that in our day seeks to depoliticize the law.”²⁷ Originalism promotes the “judicial integrity required by the Constitution.”²⁸

Meese offered three reasons why a jurisprudence of originalism would be desirable. First, “a jurisprudence of original intention” would preserve constitutional law from politicization.

By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid both the charge of incoherence *and* the charge of being either too conservative or too liberal.

A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection.²⁹

By offering a method of interpretation that maintains “fidelity” to the Constitution itself, a jurisprudence of originalism would allow courts to remain neutral with respect to ongoing political disputes. Originalism would enable constitutional interpreters to transcend mere politics and rise above partisan squabbles, preserving the Constitution as a domain of law distinct from politics.

Second, a jurisprudence of originalism would protect democratic authority. Constitutions, argued Meese,

confer democratic legitimacy by formally expressing the consent of the people to the government’s exercises of authority. Thus, in a democracy or a republic . . . a constitution becomes a social contract by which the

25. *Id.* at 930-31.

26. *Id.* at 931.

27. Meese, *Construing the Constitution*, *supra* note 7, at 29.

28. Meese, *supra* note 23, at 933. “A jurisprudence based on first principles is neither conservative nor liberal, neither right nor left. It is a jurisprudence that cares about committing and limiting to each organ of government the proper ambit of its responsibilities. It is a jurisprudence faithful to our Constitution.” Meese, *Construing the Constitution*, *supra* note 7, at 29.

29. Meese, *The Supreme Court*, *supra* note 7, at 464.

people agree to be bound by laws which are made pursuant to and in accord with the Constitution's commands. In such a system, the Constitution may become, as it is in the United States, the principle bulwark of the government's legitimacy.³⁰

By enforcing a constitutional provision "according to its plain words as originally understood," a judge expresses the "will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue."³¹ Judicial review, if "guided by text and original meaning, . . . validates the consent of the governed,"³² thereby expressing "a deeply rooted commitment to the idea of democracy."³³

Third, originalism would preserve the American Constitution as "a document of fixed and legally binding meaning."³⁴ The fundamental purpose of the Constitution "is to prevent passing fads and passions in the body politic from overriding fundamental values and principles."³⁵ To interpret the Constitution in a manner that departs from a "jurisprudence of original intention" would undermine "the permanence of the Constitution."³⁶ Meese believed that a

problem arises . . . when the courts do not feel bound by the original intention of a constitutional provision. In such instances courts may sometimes be tempted to add or subtract from the written Constitution. In doing this, judges occasionally justify what they have done by acting as though we have some extra-constitutional tradition where doctrine and meaning have no fixed written source and hence, can be easily changed over time by judicial fiat.

Of course nothing could be further from the truth. The Framers would have seen no point in *writing down* constitutional provisions if the courts did not then interpret those written provisions in the same manner as they would interpret any other written legal document, such as a statute, a contract, or a will. Our *written* Constitution cannot bind or limit

30. Meese, *supra* note 2, at 8.

31. *Id.* at 10.

32. *Id.*

33. Meese, *The Supreme Court*, *supra* note 7, at 465 ("The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is the reason the Constitution is the fundamental law. To allow the courts to govern simply by what it [sic] views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered."); see also Edwin Meese III, *Our Constitution's Design: The Implications for Its Interpretation*, 70 Marq. L. Rev. 381, 387 (1987) [hereinafter Meese, *Our Constitution's Design*] ("A judge acts properly in declaring an executive or legislative act unconstitutional when he or she looks at the relevant written constitutional provision and enforces it according to its plain words as originally understood. Thus, the judge properly treats the Constitution as the supreme law and enforces the will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue.").

34. Meese, *Our Constitution's Design*, *supra* note 33, at 382.

35. Meese, *supra* note 2, at 8.

36. Meese, *The Supreme Court*, *supra* note 7, at 465 (emphasis omitted).

discretion or governmental power if it is not interpreted on the basis of an enduring standard. Thus, non-interpretivism is not only contrary to common sense, it is also antithetical to the very notion and purposes of constitutionalism.³⁷

By affirming the Constitution's authority to restrain illegitimate judicial discretion,³⁸ originalism would prevent a "philosophical adventurism"³⁹ that would alter the Constitution's "color and form in each era."⁴⁰ Originalism would thus preserve the Constitution from the corruption of contemporary concerns that express merely the transient political views of judges.

II. THE POLITICAL PRACTICE OF ORIGINALISM

Americans have always included among the many modalities of interpreting the Constitution a focus on constitutional text, original meaning, and the historical intentions of those who framed and ratified the Constitution.⁴¹ In scholarly debates, originalism is typically conceptualized as if it were an abstract and theoretical jurisprudence that primarily advances a particular method of constitutional construction.⁴² Legal scholarship has focused on evaluating the pros and cons of this method of interpretation.

It is a grave mistake, however, to conceive the originalism espoused by Edwin Meese to be merely an abstract and theoretical jurisprudence of this kind. Since the 1980s, originalism has primarily served as an ideology that inspires political mobilization and engagement. Its success and influence is due chiefly to its uncanny capacity to facilitate passionate political participation.

The structure of this participation flatly contradicts originalism's own professed jurisprudential principles. We can see this quite clearly if we look again at the three reasons offered by Meese for why a jurisprudence of originalism is desirable. Consider Meese's first argument: A jurisprudence of original intention is necessary to preserve constitutional law from politicization.⁴³ It is assuredly not plausible that the Reagan Administration was immunized from ideological taint by using originalism to guide its choice of judicial nominees, its litigation of cases, and its interpretation of the American Constitution. No politically literate person could miss the

37. Meese, *Our Constitution's Design*, *supra* note 33, at 387.

38. For a classic discussion of the "quest for certainty" as responsive to the threats posed by a rapidly changing world, see John Dewey, *The Quest for Certainty: A Study of the Relation of Knowledge and Action* (1929).

39. Meese, *Our Constitution's Design*, *supra* note 33, at 382.

40. Meese, *Construing the Constitution*, *supra* note 7, at 29.

41. See *supra* notes 12-13 and accompanying text.

42. For excellent examples, see generally Goldford, *supra* note 13; *Interpreting the Constitution: The Debate over Original Intent* (Jack N. Rakove ed., 1990); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *Ohio St. L.J.* 1085 (1989).

43. See *supra* notes 27-28 and accompanying text.

point that the Reagan Administration's use of originalism marked, and was meant to mark, a set of distinctively conservative objections to the liberal precedents of the Warren Court. Originalism "made a grand entrance onto the public stage as the centerpiece of the conservative jurisprudential agenda."⁴⁴

Beginning roughly in the 1980s, originalism gave conservative activists a language in which to attack the progressive case law of the Warren Court on the grounds that it had "almost nothing to do with the Constitution" and was merely an effort to enact "the political agenda of the American left."⁴⁵ As one originalist claimed,

Opponents of interpreting the Constitution in accordance with the original intent (or, better, original understanding) of its framers and ratifiers are not seeking a different means of interpretation—there are no different means—rather, they are seeking to empower the Court to make constitutional law apart from the Constitution to permit the Court to nullify as unconstitutional, policy choices that the Constitution does not in fact prohibit.⁴⁶

Originalism empowered conservatives to criticize past Supreme Court decisions as efforts "to move public policy choices in a left-liberal direction,"⁴⁷ and it simultaneously advanced "nearly every plank in the conservative platform that might become involved in litigation."⁴⁸

Thus when President Reagan praised his appointees because they embraced a judicial "philosophy of restraint,"⁴⁹ and when he opined at the swearing in of Chief Justice Rehnquist and Justice Scalia that for the

44. Goldford, *supra* note 13, at 24.

45. Lino A. Graglia, "Constitutional Theory": *The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 *Tex. L. Rev.* 789, 789 (1987) [hereinafter Graglia, "Constitutional Theory"]; *see id.* at 798 ("Minimum intellectual integrity requires acceptance of the fundamental facts that the Constitution has had little or nothing to do with the 'constitutional' decisions of the Supreme Court in the past three decades. Those decisions did not turn on any genuine issue of constitutional interpretation, but are simply the results of the policy preferences of a majority of the Court that made them."); Lino A. Graglia, *The Legacy of Justice Brennan: Constitutionalization of the Left-Liberal Political Agenda*, 77 *Wash. U. L.Q.* 183, 186-88 (1999) ("Who would have suspected, without Justice Brennan's guidance, that the Constitution is a codification of the far left's political agenda?"); Terry Eastland, Op-Ed., *Proper Interpretation of the Constitution*, *N.Y. Times*, Jan. 9, 1986, at A23 ("Not surprisingly, those who reject a jurisprudence of original intention . . . attempt to root constitutional decision-making in sources other than the written text—including 'contemporary values,' 'ethical arguments,' 'the notion of moral evolution' and the 'right of equal citizenship.' In our time, these extra-textual sources typically draw on political liberalism.")

46. Lino A. Graglia, *Constitutional Interpretation*, 44 *Syracuse L. Rev.* 631, 632 (1993).

47. *Id.* at 637.

48. Leonard W. Levy, *Original Intent and the Framers' Constitution* 374 (1988); *see* Scott Douglas Gerber, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation* 4-5 (1995). For a prominent contemporary example of the connection between originalism and a substantive conservative agenda, *see* Phyllis Schlafly, *The Supremacists: The Tyranny of Judges and How to Stop It* (rev. 2006).

49. *See supra* note 24.

founding fathers “the question involved in judicial restraint was not . . . will we have liberal or conservative courts. . . . The question was and is, will we have government by the people,”⁵⁰ everyone immediately understood that he was appealing to the high ground of neutrality in order to justify the appointment of judges who were “committed to a narrow ideological agenda.”⁵¹ Meese himself would articulate “the harm . . . caused our society” by a “judicial activism” which invited federal judges to “exceed their proper interpretive role” in terms that plainly referenced such hot-button conservative issues as affirmative action, public welfare assistance, law and order, abortion, suppression of gays, and so on.⁵² Meese was explicit about the need for “*a jurisprudence of original intention*” to check the “drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court” that could “once again be a threat to the notion of a limited but energetic government.”⁵³ Invoked in these ways, originalist argument clearly signaled (and continues to signal) its affiliation with a particular political perspective passionately concerned with outcomes rather than processes.⁵⁴ The political practice of originalism thus reflected

50. Reagan, *supra* note 8, at 1270; *see also* Ronald Reagan, Remarks at the Swearing-in Ceremony for Anthony M. Kennedy as Associate Justice of the Supreme Court of the United States, 1 Pub. Papers 219, 221 (Feb. 18, 1988) (“For as the framers knew, unless judges are bound by the text of the Constitution, we will, in fact, no longer have a government of laws, but of men and women who are judges. And if that happens, the words of the documents that we think govern us will be just masks for the personal and capricious rule of a small elite.”).

51. Anthony T. Podesta, Op-Ed., *Court-Packing, Reagan-Style*, N.Y. Times, July 26, 1985, at A27.

52. Edwin Meese III, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 Ga. St. U. L. Rev. 781, 784-89 (1998) [hereinafter Meese, *Constitutional Track*]; *see also* Edwin Meese III & Rhett DeHart, *Reining in the Federal Judiciary: Federal Judges Have Strayed Far Beyond Their Proper Functions of Interpreting and Clarifying the Law by Reading Their Personal Views and Prejudices into the Constitution*, 80 *Judicature* 178 (1997).

53. Meese, *The Supreme Court*, *supra* note 7, at 464.

54. To select two recent examples from the appeals to originalism now circulating within politically mobilized groups, notice how Focus on the Family explicitly ties original understanding to a traditional family values agenda:

As a result [of judicial “legislating” from the bench], the federal courts have created a number of “privacy rights” that in turn are used to mandate new social policies, such as the right to abortion, the right to homosexual sex, the right to publish obscenity, as well as trampling on First Amendment religious freedoms. This type of activism (indeed, judicial legislation) by unelected and unaccountable judges was never contemplated by our Founding Fathers and poses grave threats to the sanctity of life, the sanctity of marriage, states’ rights, separation of powers, and religious freedoms.

The only way to reverse this unconstitutional and ungodly trend is to appoint judges whose judicial philosophy is the same as that intended by the Founding Fathers; judges who will apply existing law and not scribble in the margins of the Constitution when it suits their ideological agenda.

Focus on the Family will support federal judicial nominees who subscribe to a “strict constructionist” judicial philosophy and oppose nominees who have a history of judicial activism.

(and continues to reflect) conservative commitments that are not determined by objective and disinterested historical research into the circumstances of the Constitution's ratification.

The same tension between the jurisprudence and political practice of originalism is evident if we consider Meese's second argument—that originalism is necessary to preserve the democratic legitimacy of the Constitution.⁵⁵ As a jurisprudence, originalism locates democratic legitimacy in the consent of the governed, a consent that is manifested only during rare moments when constitutional text is proposed and ratified. The jurisprudence of originalism therefore holds that constitutional change cannot be justified except through the Article V amendment process. Since the 1980s, however, the political practice of originalism has sought relentlessly to change the Constitution without recourse to Article V amendments.

Advocates of originalism have sought to transform the content of constitutional law through judicial appointments⁵⁶ and constitutional

Focus on Social Issues: Position Statement on Federal Judicial Appointments, Focus on the Family, Mar. 7, 2005, <http://www.family.org/cforum/fosi/government/facts/a0035775.cfm>. Notice also how Concerned Women for America protests a Fourth Circuit decision invalidating the tradition of voluntary prayer as a violation of the Establishment Clause:

The appeals court based its decisions on recent Supreme Court decisions, rather than on the original meaning of the Constitution itself. This trend of disregarding the Constitution's intended meaning in favor of the Supreme Court's preferred meaning has resulted in many decisions eliminating religious speech or symbols from many public settings.

Tom Jipping, *Fourth Circuit Rules Prayer "Unconstitutional,"* Concerned Women for America, Apr. 30, 2003, <http://www.cwfa.org/articledisplay.asp?id=3856&department=CWA&categoryid=freedom>.

55. See *supra* notes 30-33 and accompanying text.

56. See Moss, *supra* note 22. For Meese's comments on the judicial appointment process, see Meese, *Constitutional Track*, *supra* note 52, at 791:

The Senate should use its confirmation authority to block the appointment of activist federal judges. The Senate Judiciary Committee, by holding hearings on every judicial nomination, provides an excellent opportunity to discern a judicial candidate's understanding of a constitutionally limited judiciary. The confirmation hearings also provide a public opportunity for judicial watchdog organizations to testify in support of or against a particular nominee. In addition to the hearing, the careful review of the nominee's background, experience, writings and other information . . . can provide a check on potentially activist judges. Likewise, the full Senate should vote individually on each judicial nominee. There is no more important duty for the Senate than ensuring the qualification and constitutional commitment of judges who are, in essence, appointed for life.

For a contemporary example of originalist activism focusing on the judicial appointment process, see James Dobson, *The Battles Ahead*, Focus on the Family Action, Jan. 2006, <http://www.focusaction.org/Articles/A000000165.cfm>, which announced the support of Focus on the Family for Judge Alito because

[Judge Alito] is, without question, a judicial conservative, which means that he will interpret the Constitution as it was originally written and understood, rather than endeavor to rewrite it or ignore it altogether. We have every reason to believe that, as a Supreme Court justice, Judge Alito will consider modern legal questions in light of the enduring text of the U.S. Constitution.

litigation.⁵⁷ These advocacy efforts could be characterized as attempts to preserve the democratic consent of the ratifying generations only if we assume that originalists have used appointments and litigation disinterestedly to implement a democratic will that was fixed at past moments of constitutional ratification and amendment. This assumption is most implausible.

Michael Oakeshott once famously observed that “[t]he practical man reads the past backwards. He is interested in and recognizes only those past events which he can relate to present activities.”⁵⁸ As a political practice, originalism has been nothing if not practical. It has engaged in a perfectly ordinary effort to identify and appropriate a politically useable past by strategically selecting and resurrecting particular historical themes and events.⁵⁹ It has ignored elements of the original understanding that do not resonate with contemporary conservative commitments.

No one paid any attention, for example, when Lino Graglia earnestly sought to prove that the Warren Court violated the basic tenets of the jurisprudence of originalism when the Court decided in *Bolling v. Sharpe*⁶⁰ that the Due Process Clause prohibited the federal government from practicing school segregation in the District of Columbia. Graglia argued, not implausibly, that “the fifth amendment . . . was adopted in 1791 as part of a Constitution that explicitly and repeatedly provided for slavery.”⁶¹ Although Graglia complained that school desegregation “was held unconstitutional in *Brown v. Board of Education*, as in *Bolling*, for no other reason than that the Justices had a different policy preference and were willing to have their preference prevail,”⁶² those who guided the political practice of originalism had no intention of assaulting *Bolling*, much less *Brown*. They quite properly would not let the political agenda of

57. See *supra* note 7.

58. Michael Oakeshott, *Rationalism in Politics and Other Essays* 153 (1962). Oakeshott's observation is variant of Nietzsche's aphorism: “History, so far as it serves life, serves an unhistorical power . . .” Friedrich Nietzsche, *The Use and Abuse of History* 12 (Adrian Collins trans., 1957). Edward Said has recently reiterated the point: “The invention of tradition is a method for using collective memory selectively by manipulating certain bits of the national past, suppressing others, elevating still others in an entirely functional way. Thus memory is not necessarily authentic, but rather useful.” Edward W. Said, *Invention, Memory, and Place*, 26 *Critical Inquiry* 175, 179 (2000). The tension between history and present practical purposes is why we speak of the notoriously “illicit love affair” between “Clio and the Court.” See, e.g., Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *Sup. Ct. Rev.* 119.

59. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 11 (1997) (“[A]s Leonard Levy, the dean of American constitutional historians, has argued, the Supreme Court's use of originalist evidence is best described as a mix of ‘law office history’ and justificatory rhetoric which offers little reason to think that this method of interpretation can provide the faithful and accurate application of the original constitutional understandings its advocates promise.”).

60. 347 U.S. 497 (1954).

61. Graglia, “*Constitutional Theory*,” *supra* note 45, at 796.

62. Graglia, *supra* note 46, at 637.

originalism be determined by the dry and contingent research of antiquarians.

Conservative groups that have mobilized in the name of originalism are not inspired by professional historical research. These groups are instead stirred by those dimensions of the past that can sustain a present political perspective that is persuasive and attractive. Historians and anthropologists understand this phenomenon, for they know well that “[p]ublic memory is produced from a political discussion that involves . . . rather fundamental issues about the entire existence of a society.”⁶³

It is inevitable, then, that originalism’s relationship to the past will change as its contemporary political agenda changes. In the first flush of originalism, for example, Meese’s assistant Terry Eastland argued that “a jurisprudence of original intention” would have prevented the Court from holding that the Equal Protection Clause of the Fourteenth Amendment required elevated scrutiny for classifications based upon sex.⁶⁴ “Needless to say, the Framers of that Amendment did not contemplate sexual equality,” and a decision to the contrary “could not have been grounded in any recognizable jurisprudence of original intention, and could only have reflected the Justices’ own moral beliefs.”⁶⁵ Today, however, most originalists do not publicly challenge equal protection doctrines concerning sex discrimination in this way.⁶⁶ Meese himself argued in 1986 that “the

63. John Bodnar, *Remaking America: Public Memory, Commemoration and Patriotism in the Twentieth Century* 14 (1992). “[C]ultural forms that derive their authority from a perceived connection with the past are ‘invented,’ ‘imagined,’ ‘constructed’ or ‘made.’” Charles L. Briggs, *The Politics of Discursive Authority in Research on the “Invention of Tradition,”* 11 *Cultural Anthropology* 435, 435 (1996).

64. Eastland, *supra* note 45.

65. *Id.*; see also 1988 Guidelines on Constitutional Litigation, *supra* note 7, at 78 (“Although the states may be free to create classes entitled to special protection if the classification does not violate a constitutional prohibition, the federal courts are not. Therefore, whatever the efficacy of the existing suspect classes recognized by the Supreme Court—and with the exception of racial equality, which under the Fourteenth Amendment is entitled to special scrutiny, the constitutional rationale of these classes is tenuous at best—attorneys should avoid making arguments, and should attack argument advanced by opposing counsel, for creating new suspect classes not found in the Constitution.”); cf. Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* 255 (1989) (discussing the Justice Department’s role in managing Bork’s testimony on equal protection and sex discrimination).

66. See Siegel, *supra* note 18, at 87 (recounting how public repudiation of Robert Bork’s originalist position on questions of sex discrimination helped defeat his confirmation and consolidate the authority of the cases he criticized); Reva B. Siegel, “*You’ve Come A Long Way, Baby*”: *Rehnquist’s New Approach to Pregnancy Discrimination* in Hibbs, 58 *Stan. L. Rev.* 1871 (2006) [hereinafter Siegel, *Rehnquist’s New Approach*] (discussing the evolving views of William Rehnquist over his three decades on the Court). *But see* Allan C. Carlson & Paul T. Mero, *The Natural Family: A Manifesto*, *Fam. in Am.*, Mar. 2005, at 1, 21-22, available at <http://familymanifesto.net> (“We will allow men to live in harmony with their true natures. We will end the aggressive state promotion of androgyny. . . . We will encourage employers to pay a ‘family wage’ to heads of households. We will end laws that prohibit employers from recognizing and rewarding family responsibility.”).

doctrine of incorporation” rested on an “intellectually shaky foundation.”⁶⁷ But originalists do not now urge that States be exempt from the First Amendment’s guarantee of freedom of expression.⁶⁸

As a political practice, in short, originalism aspires to “return to Constitutional authenticity”⁶⁹ only insofar as it perceives authenticity to make sense in the present.⁷⁰ Originalism uses political and litigation strategies to infuse the law of the Constitution with contemporary political meanings that originalists find compelling. This is not a question of hypocrisy or of a failure of theoretical purpose. Vibrant and viable political movements characteristically establish this constructive relationship to the past.⁷¹ Yet this active reconstruction of the past is simply incompatible with the democratic authority of consent, as conceived by the jurisprudence of originalism.

The third reason offered by Meese for a jurisprudence of originalism is that it is the interpretive method best suited to preserving the permanence and fixity of the written Constitution.⁷² It is evident, however, that the political practice of originalism seeks to *change* the meaning of the Constitution by mobilizing the political energy necessary to limit the precedents of the Warren Court and align them with a conservative vision of the American polity. Although the jurisprudence of originalism focuses on the Constitution as a written document, there is nothing in the political practice of originalism that particularly privileges constitutional text. The strong emphasis of contemporary originalists on preserving the traditional family,⁷³ for example, is utterly without textual warrant. The jurisprudence and practice of originalism are consistent only if it is assumed that originalists have politically mobilized in order to preserve the fixed text of the Constitution in an unaltered state. For reasons just discussed, there is little or no reason to credit this assumption.⁷⁴

67. Meese, *The Supreme Court*, *supra* note 7, at 463. “Nowhere else has the principle of Federalism been dealt such a politically violent and constitutionally suspect blow as by the theory of incorporation.” *Id.* at 463-64.

68. Meese seems to have flirted with this position in 1987. *See* Meese, *supra* note 15, at 194-95.

69. Meese, *supra* note 23, at 931.

70. *See* Post, *supra* note 17, at 29 (“While historical interpretation seemingly presents itself as a self-denying submission to the identity of past ratifiers, closer analysis reveals that that identity is authoritative only insofar as we can be persuaded to adopt it as our own.”).

71. *See* Siegel, *supra* note 18 (manuscript at 36-40) (analyzing how constitutional adversaries express partisan vision by appealing to the principles and memories of a shared tradition).

72. *See supra* notes 34-38 and accompanying text.

73. *See, e.g., supra* note 54; *infra* note 114 and accompanying text.

74. Thus, for example, Robert Bork recently observed a propos of the Roberts nomination that “[o]nly the depoliticization of the Court by a return to originalism can end” the “intense” political controversy enveloping Supreme Court nominations. “The question that may be answered in the upcoming hearings is how far Justice John Roberts will prove to be a man to begin the process of restoring the Constitution’s integrity and hence the Court’s long-lost legitimacy.” Robert Bork, *The Uphill Fight*, *Nat’l Rev.*, Aug. 29, 2005, at 32, 34,

There is thus a deep tension between the jurisprudence and practice of originalism. As a political practice that developed in the 1980s, originalism seeks, more or less blatantly, to alter the Constitution so as to infuse it with conservative political principles. The obvious tension between the jurisprudence and the practice of originalism is resolved by a conviction of authenticity, which produces the belief that contemporary conservative values vindicate fundamental constitutional principles in ways that transcend political dispute and correspond exactly to past expressions of democratic will. This conviction reflects what we may call a politics of “restoration” which aims to restore an imagined past magically “secure from the ravages of history and a turbulent time.”⁷⁵ The coherence of originalism, as it developed in the late twentieth century, is sustained by a fierce drive to inhabit a particular imaginative reconstruction of the past.⁷⁶

available at <http://www.nationalreview.com/comment/bork200508190819.asp>. Bork’s prescription for restoring nonpolitical integrity is remarkable in its candor:

The destruction of generally held morals and customs (the sense that some things are not to be approved), along with encouragement of identity politics, weakens the bonds that make a cluster of individuals a society. These are the crucial issues implicated in appointments to the Supreme Court. But they are rarely addressed. Instead, we are subjected to incessant harping on the question of whether the nominee is a liberal or a conservative or, best of all, a moderate. . . . We are told that it is important whether Roberts is antiabortion, whether he was a member of the Federalist Society, and whether he takes his Catholicism seriously, and so on, ad infinitum.

Not one of these questions should be regarded as relevant to Roberts’s or anyone’s confirmation. The distinction that matters is whether the nominee will prove to be an originalist or an activist. *Roe v. Wade* is a travesty as constitutional law whether you are pro- or anti-abortion. The Federalist Society, which is being portrayed by liberals as a sinister force, is composed of conservatives and libertarians who have in common only a dislike of the activism of the current Court. In contrast to the ACLU, the Society takes no positions on public issues and engages in no litigation. Its speakers and panelists represent conservative, libertarian, and liberal points of view. . . . (I should add that Sen. Orrin Hatch and I are national co-chairmen of the Society.) My real question for John Roberts is not whether he was an active member of the Federalist Society but why he wasn’t.

Id. Bork’s comments are illustrative in their candid commitment to the restoration of “generally held morals and customs (the sense that some things are not to be approved),” rather than to the original fixed meaning of constitutional text. *Id.* Bork’s utterly incredulous denial of any connection between this commitment and a political agenda is also illustrative.

75. Said, *supra* note 58, at 177. It has rightly been said, for example, that Robert Bork advances a version of originalism that proposes “a reverence towards what amounts to a comprehensive mythology predicated on the importance of stability and order.” James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 *Yale J.L. & Human.* 263, 310 (1991). Bork presents “a mythologized version of the tradition of constitutional governance, of family life, of ‘natural’ hierarchies, and of the morality of middle America.” *Id.*

76. See Daniel Levin, *Federalists in the Attic: Original Intent, The Heritage Movement, and Democratic Theory*, 29 *Law & Soc. Inquiry* 105 (2004).

III. THE POLITICAL PRACTICE OF ORIGINALISM ON THE BENCH

We have so far argued that the political practice of originalism uses ordinary political tools, like appointments and litigation, to alter constitutional meaning to reflect conservative political beliefs. It might be said, however, that the goal of political actors like Ronald Reagan and Edwin Meese was to appoint judges who would follow the jurisprudence of originalism. Because jurisprudence is a guide to judicial decision making, and is not designed to regulate the conduct of politicians, it should come as no surprise that Reagan and Meese engaged in the political practice of originalism. The true test of originalism, so an objection might run, ought to depend upon what originalist judges do.

If Justices Thomas and Scalia are exemplars of the kinds of originalist judges that the political practice of originalism seeks to appoint, then originalism has been as much a political practice on the bench as off it. Of Justice Thomas it has been said that “[h]is originalism in major cases generally buttresses conservative policy preferences. . . . No good reason exists why he believes conservative historians when historians clash or why he discards originalism completely when that philosophy is hostile to certain conservative interests.”⁷⁷ As one commentator analyzes Justice Thomas’s decisions,

History guides only some of his judicial opinions. He votes to declare affirmative action policies unconstitutional, even though scholars believe that such practices were accepted by the persons responsible for the Fourteenth Amendment. He votes to strike down restrictions on commercial speech even though no scholar claims that the persons responsible for the First Amendment intended to protect advertising. A principled originalist eager to overrule ancient precedents might rethink precedents, dubious on historical grounds, treating corporations as persons under the Fourteenth Amendment. Justice Thomas has not. The originalist foundations of *Bush v. Gore* remain a judicial mystery.⁷⁸

Originalism for Thomas is a vehicle for appropriating and deploying aspects of the past that make sense to him, given his conservative beliefs. In a speech delivered to the Federalist Society in 1989, for example, Thomas earnestly offered an account of the nation’s history full of omissions that any credentialed historian would immediately recognize, candidly acknowledging that his purpose was to paint a picture of the nation’s past to which conservatives could give fealty. Thomas announced that “I take my stand firmly with Frederick Douglass, who defied

77. Mark Graber, *Clarence Thomas and the Perils of Amateur History*, in Rehnquist Justice: Understanding the Court Dynamic, *supra* note 1, at 70-71.

78. *Id.* at 88 (citation omitted). Compare the verdict of Edwin Meese: “[H]e has remained true to the highest ideals of his judicial philosophy by carefully interpreting the Constitution and always being cognizant of its limitations on a judge’s authority. This combination of high achievement and commendable restraint makes Clarence Thomas an outstanding jurist for all ages.” Meese, *supra* note 10, at 364.

Americans to find a single pro-slavery clause in the [Constitution],”⁷⁹ and he declared that

[t]he conservatism I know has appeal because it reflects a belief in the good sense and decency of the American people and, hence, in freedom as the main source of all that is good politically.

And what can be more conservative than the revolutionary principle that America was founded on—that all men are created equal?⁸⁰

Thomas’s originalism selectively chooses elements of the nation’s constitutional past to enforce; it also actively reinterprets the integral thrust of American constitutional history so as to render it compatible with contemporary conservative beliefs. Thomas is unembarrassed about this ambition. His originalism appears as neither hypocrisy nor a cynical manipulation of the past, but instead as a sincere expression of passionate ideological commitment.

Much the same can be said of Justice Scalia,⁸¹ who, like Thomas, uses

79. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol’y 63, 64 (1989).

80. *Id.* at 69.

81. See, e.g., Robert Post, *Justice for Scalia*, N.Y. Rev. of Books, June 11, 1998, at 57-62. The disparity between the original meaning of the Takings Clause and the legal use that Scalia makes of the Clause in order to advance his conservative goal of protecting property is especially striking:

In several prior opinions and articles, Justice Scalia insisted that constitutional provisions should be construed in light of the “original intent” of the persons who drafted and ratified them. In his dissenting opinion in *Lucas*, Justice Blackmun points out that the drafters of the Takings Clause believed that it proscribed only formal expropriations of private property, and that its reach “did not extend to regulations of property, whatever the effect” of those regulations on the value of the property. In his majority opinion, Justice Scalia agrees with this characterization of the clause’s original meaning but proclaims it “entirely irrelevant.”

Justice Scalia offers two arguments in support of his remarkable assertion. First, he contends that, prior to 1897, when the Supreme Court “incorporated” into the Fourteenth Amendment’s Due Process Clause the Fifth Amendment’s ban on uncompensated takings, “[t]he practices of the States . . . were out of accord with any plausible interpretation of those provisions.” From this he apparently concludes that the Framers’ intent in drafting those provisions does not merit our deference. Second, he contends that fidelity to the original understanding of the Takings Clause would require us to “renounce” virtually the entire body of twentieth century constitutional doctrine construing the provision. He concludes by noting that even Justice Blackmun does not propose such a radical course. In the end, Justice Scalia falls back upon a generous version of a textualist theory of interpretation: Because “the text of the Clause *can* be read to encompass regulatory as well as physical deprivations,” the Court is not disabled from doing so. Whatever one thinks of these arguments, they plainly diverge from the originalist theory to which he formerly pledged his allegiance.

William W. Fisher III, *Symposium: The Trouble with Lucas*, 45 Stan. L. Rev. 1393, 1394-95 (1993) (footnotes omitted); see also Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. Colo. L. Rev. 953, 969-70 (1999) (“In *Printz*, Justice Scalia faced a powerful historical claim directly refuting his proffered rule. But

“history to serve instrumentalist goals.”⁸² Scalia and Thomas are each committed to expansively interpreting the sovereign immunity established by the Eleventh Amendment, even though each has acknowledged that they have interpreted the Amendment “to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms.”⁸³ They have each affirmed that the Equal Protection Clause of the Fourteenth Amendment is to be interpreted in light of the principle that “[t]he Constitution abhors classifications based on race . . . because every time the government . . . makes race relevant to the provision of burdens or benefits, it demeans us all.”⁸⁴ Yet there is historical evidence strongly suggesting “that the framers of [the Fourteenth Amendment] could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.”⁸⁵

rather than give in, he put his head down and pressed on—explaining at every turn why the lessons of the founding period have nothing to offer. This, admittedly, has not been Scalia’s typical pattern. Usually when history is inconvenient, he simply ignores it. Justice Scalia’s takings jurisprudence, for example, is completely inconsistent with the original understanding that only a physical invasion presents a constitutional violation. He does not seem to care. His wholesale revision of the jurisprudence of the Free Exercise Clause in *Employment Division Department of Human Resources v. Smith* was accomplished without even a nod toward the original meaning of the provision. In *Lujan v. Defenders of Wildlife*, Scalia fashioned a powerful new Article III doctrine to invalidate a federal grant of statutory standing. Neither the text of the Constitution nor historical practice supported his bolstered injury requirement. So he simply did not talk about them. The act of Congress was invalidated because he and his colleagues thought it was a bad idea.” (footnotes omitted)); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 Emory L.J. 1377, 1414 n.190 (1999); Jeffrey Rosen, *Originalist Sin*, New Republic, May 5, 1997, at 26, 29. For a good discussion of Scalia’s jurisprudence of originalism, see Ralph A. Rossum, *Text and Tradition: The Originalist Jurisprudence of Antonin Scalia*, in Rehnquist Justice, *supra* note 1, at 34.

82. *Smith*, *supra* note 16, at 280. Jack Rakove remarks, “The forms of historical argumentation employed on both the right and left margins of contemporary scholarship (and politics) are not driven, of course, by the historian’s old-fashioned and perhaps naive desire to get the story right for its own sake. They represent, instead, only another chapter in the saga of the American search for a usable past.” Rakove, *supra* note 59, at 22.

83. *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991) (Scalia, J.); see *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) (Thomas, J.) (“Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to ‘address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision.’ As a result, the Eleventh Amendment does not define the scope of the States’ sovereign immunity; it is but one particular exemplification of that immunity.” (quoting *Alden v. Maine*, 527 U.S. 706, 723 (1999) (internal citation omitted))). For actual historical understandings of the Eleventh Amendment, see Akhil Reed Amar, *America’s Constitution: A Biography* 332-36 (2005); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); Diane P. Wood, *Our 18th Century Constitution in the 21st Century World*, 80 N.Y.U. L. Rev. 1079, 1086-87 (2005).

84. *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part).

85. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754 (1985); see also Jed Rubenfeld, *Affirmative Action*,

If the actual practice of Scalia and Thomas is to remold the Constitution to express contemporary conservative political values such as federalism and color blindness, originalism can hardly be said to preserve the fixity of a pristine democratic will. Although Scalia purports to condemn as “idiots” those who believe that the Constitution “will become brittle and break” if it does not “change with society,” in fact his own judicial practice well exemplifies the “living constitutionalism” that he so condemns.⁸⁶ Both Scalia and Thomas reinterpret the past in order to serve conservative ends. The political practice of originalism is alive and well on the bench, as well as in the representative branches of government.

For politicians, the political practice of originalism is a means of mobilizing conservative constituencies. Even though originalism purports to apply a single, fixed, and unchanging text, the political practice of originalism actually serves to unite distinct constituencies with distinct constitutional visions. Even those groups who believe that “the words of the Constitution have a fixed meaning” that reflects “Judeo-Christian religious/theological values and views, revolving around a theistic God,”⁸⁷

107 Yale L.J. 427, 428-30 (1997); Jeffrey Rosen, *Moving On*, New Yorker, Apr. 29, 1996, at 73. Scalia has been especially candid about the sources of his interpretation of the Fourteenth Amendment:

I share the view expressed by Alexander Bickel that “[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.”

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (alteration in original) (quoting Alexander M. Bickel, *The Morality of Consent* 133 (1975)).

86. Jonathan Ewing, *Scalia Dismisses “Living Constitution,”* ABC News, Feb. 14, 2006, <http://abcnews.go.com/Politics/wireStory?id=1616835&CMP=OTC-RSSFeet0312>. As Ewing’s article reported,

In a speech Monday sponsored by the conservative Federalist Society, Scalia defended his long-held belief in sticking to the plain text of the Constitution “as it was originally written and intended.”

“Scalia does have a philosophy, it’s called originalism,” [Scalia] said. “That’s what prevents him from doing the things he would like to do[.]” . . .

According to his judicial philosophy, he said, there can be no room for personal, political or religious beliefs.

Scalia criticized those who believe in what he called the “living Constitution.”

. . . .
Proponents of the living constitution want matters to be decided “not by the people, but by the justices of the Supreme Court.”

“They are not looking for legal flexibility, they are looking for rigidity, whether it’s the right to abortion or the right to homosexual activity, they want that right to be embedded from coast to coast and to be unchangeable,” he said.

Id.

87. Virginia C. Armstrong, *The Constitutionalist Manifesto*, http://www.eagleforum.org/court_watch/alerts/2003/may03/Manifesto.shtml (last visited Oct. 9, 2006) (“The ultimate foundation of the Constitution is not the Humanistic world view, demanding that a human agent or group of human agents (i.e., judicial elite) ravage the Constitution with Humanistic

can be inspired by the politics of restoration to respond to the rallying cry of originalism. Political proponents of originalism speak to and incite such groups in order to solidify their political mandate to reconstitute the Court.⁸⁸ What is truly remarkable in assessing the performance of originalist judges is that they also engage in this same process of political mobilization.

We are not referring here to the rousing talks that Thomas and Scalia routinely give to organized political constituencies like the Federalist Society,⁸⁹ although such performances are remarkable for Justices who so forcefully declare that constitutional law must be insulated from contemporary social values.⁹⁰ We mean instead to call attention to the way

perspectives, purposes, and values. Indeed, our constitutional republic will increasingly malfunction and eventually collapse if severed from its Judeo-Christian foundation.”).

88. “[Harriet Miers] shares my belief that judges should strictly interpret the Constitution and laws, not legislate from the bench. She understands that the role of a judge is to interpret the text of the Constitution and statutes as written, not as he or she might wish they were written.” President George W. Bush, President’s Radio Address (Oct. 8, 2005), available at <http://www.whitehouse.gov/news/releases/2005/10/20051008.html>; see also Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. Times, Mar. 29, 2002, at A24; Deborah Sontag, *The Power of the Fourth*, N.Y. Times, Mar. 9, 2003, § 6 (Magazine), at 38 (noting that Justices Scalia and Thomas are “President Bush’s self-proclaimed favorites” on the Supreme Court).

89. See Hope Yen, *Scalia Eyes Job of Chief Justice*, Ventura County Star (Cal.), Feb. 6, 2005, at 3, available at <http://web.venturacountystar.com/archives> (search “Scalia Eyes Job of Chief Justice”); Janice Law, *Isn’t the U.S. Constitution Good Enough Anymore?*, World Net Daily, Oct. 27, 2005, http://worldnetdaily.com/news/article.asp?ARTICLE_ID=47074; Ewing, *supra* note 86; see also Antonin Scalia, *Is There an Unwritten Constitution?*, 12 Harv. J.L. & Pub. Pol’y 1 (1989); Antonin Scalia, *The Two Faces of Federalism*, 6 Harv. J.L. & Pub. Pol’y 19 (1982); Thomas, *supra* note 79; Clarence Thomas, *Keynote Address*, 1 Mich. L. & Pol’y Rev. 269 (1996); Clarence Thomas, Assoc. Justice, U.S. Supreme Court, On Judicial Independence, Address Before the Federalist Society National Lawyers Convention (Nov. 12, 1999), available at <http://www.fed-soc.org/Publications/Transcripts/justicethomas.htm>.

90. Scalia, for example, has argued,

Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes. That power is, however, reasonably implicit because, as Marshall said in *Marbury v. Madison*, (1) “[i]t is emphatically the province and duty of the judicial department to say what the law is,” (2) “[i]f two laws conflict with each other, the courts must decide on the operation of each,” and (3) “the constitution is to be considered, in court, as a paramount law.” Central to that analysis, it seems to me, is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of “law” that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a “law,” but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? One simply cannot say, regarding *that* sort of novel enactment, that “[i]t is emphatically the province and duty of the judicial department” to determine its content. Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and *its* determination that a statute is compatible with the Constitution should, as in England, prevail.

in which these Justices use their judicial opinions as conscious tools to excite the anger, fears, and resentments of conservative constituencies, and thus to fan the fires of political mobilization.

Justice Scalia is a particular master of this genre.⁹¹ In his dissent in *Lawrence v. Texas*,⁹² for example, Scalia sought to discredit the Court's opinion as the mere "product of a law-profession culture[] that has largely signed on to the so-called homosexual agenda."⁹³ Despite the Court's elaborate efforts to refrain from deciding the question of same-sex marriage, Scalia urged his audience not to "believe" the Court's profession of openness,⁹⁴ charging that

[t]oday's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ?⁹⁵

These are inflammatory words. They seem explicitly addressed to the general public and designed to mobilize political resistance to the Court's decision.⁹⁶ Their import is that citizens must organize to counter the Court's illegitimate encroachments, and they have successfully inspired such resistance. Within days Scalia's words were quoted by right wing activist Randall Terry in a letter seeking to raise funds for the impeachment of the Justices who had joined the *Lawrence* opinion.⁹⁷ Opposition to

Scalia, Originalism, *supra* note 9, at 854 (footnote omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803)). Do Scalia and Thomas imagine that the Federalist Society does not exemplify one strand of "current social values"?

91. For an example of Justice Thomas writing in this way, see *Grutter v. Bollinger*, 539 U.S. 306, 366 (2003) (Thomas, J., dissenting) ("Apparently where the status quo being defended is that of the elite establishment . . . rather than a less fashionable Southern military institution, the Court will defer without serious inquiry . . .").

92. 539 U.S. 558 (2003).

93. *Id.* at 602 (Scalia, J., dissenting).

94. *Id.* at 604 ("Do not believe it.").

95. *Id.* at 604-05.

96. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 107-08 (2003); Siegel, *supra* note 18, at 24 ("In condemning the majority opinion for authorizing same-sex marriage, Justice Scalia's dissent was implicitly, but urgently warning opponents of gay rights that if they did not mobilize to protest the Court's decision in *Lawrence*, then the *Lawrence* opinion would soon be read to authorize gay marriage.").

97. The letter was displayed on Terry's website, *twistedsix.com*, which no longer exists. However, contemporaneous reports about the site remain. See *Randall Terry Denounces Election of Gay Bishop, Says Militant Homosexuals Want to Destroy Marriage and the Church*, U.S. Newswire, Aug. 6, 2003, <http://releases.usnewswire.com/GetRelease.asp?id=19465>; see also *Founder of Operation Rescue, Launches Plan to Oppose 'Homosexual Marriage': Stop 'Gay Marriage,' Impeach the Twisted Six*, U.S. Newswire, July 31, 2003, <http://releases.usnewswire.com/printing.asp?id=19315>. Terry uses similar language and the same Scalia quote in an online petition to impeach Justices Stephen G.

same-sex marriage has since become a major site of political mobilization for conservative groups,⁹⁸ and “[s]parking this mobilization was Justice Antonin Scalia’s warning, made in his dissent in the Supreme Court sodomy case, that extending privacy rights to gay relationships would inevitably lead to same-sex marriage.”⁹⁹

Scalia’s *Lawrence* dissent was brilliant in its execution. It mobilized conservative constituencies to bring political pressure to bear on the development of constitutional law. This practice is in tension with the central tenet of the jurisprudence of original intent that constitutional law should be insulated from contemporary social values except when deciding whether to ratify Article V amendments.¹⁰⁰ Scalia’s dissent demonstrates that even as a sitting Justice he is prepared deliberately to deploy the political practice of originalism. Scalia is willing to stimulate political support for changing constitutional law to make it more consistent with his conservative vision.

IV. ORIGINALISM, THE LIVING CONSTITUTION, AND THE LEFT

Viewed as an abstract jurisprudence, originalism seems diametrically opposed to the idea of living constitutionalism that has been at the core of

Breyer, Ruth Bader Ginsburg, Anthony Kennedy, Sandra Day O’Connor, David H. Souter, and John Paul Stevens. See Randall Terry, *Stop ‘Gay Marriage’! Impeach the ‘Twisted Six’ on U.S. Supreme Court*, Conservative Petitions.com, July 24, 2003, <http://www.conservativepetitions.com/petitions.php?id=222>. Terry is the founder of Operation Rescue, an antiabortion group known for its civil disobedience and targeting of individuals who provide abortion services. See Dan Barry, *Icon for Abortion Protesters Is Looking for a Second Act*, N.Y. Times, July 20, 2001, at A1.

98. As reported in Mary Leonard, *Gay Marriage Stirs Conservatives Again: Right Wing Braces for Mass. Ruling*, Boston Globe, Sept. 28, 2003, at A1,

Using pulpits, petitions, and political action committees, conservative activists are mobilizing a grass-roots political movement against gay marriage that they say is more intense and urgent than their campaigns against abortion.

....

Alarmed by the US Supreme Court’s June decision striking down Texas’s anti-sodomy law, prominent religious and social conservatives say they are redirecting resources from the anti-abortion movement and the school voucher fight to a new effort to stop the expansion of gay rights. They are using websites, e-mail, and direct mail to seek donations and warn, as Focus on the Family founder James Dobson did in a newsletter this month, that “the homosexual activist movement . . . is poised to administer a devastating and potentially fatal blow to the traditional family.

99. *Id.*

100. See Scalia, *Originalism*, *supra* note 9, at 862; see also Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 596 (1989-90) (“[C]hanges in the Constitution, when thought necessary, are to be proposed by Congress or conventions and ratified by the States. The Founders gave no such amending power to this Court. Our duty is simply to interpret the Constitution, and in doing so the test of constitutionality is not whether a law is offensive to our conscience or to the ‘good old common law,’ but whether it is offensive to the Constitution.” (quoting *Bell v. Maryland*, 378 U.S. 226, 341-42 (1964) (Black, J., dissenting))).

progressive constitutional thought since the 1970s.¹⁰¹ Yet for the past quarter century originalism has been animated less by its jurisprudence than by its political practice, which is deeply inconsistent with that jurisprudence. As a political practice, originalism does not preserve a fixed and unchanging Constitution; it does not transparently reproduce the democratic consent of the Constitution's ratifiers; it does not focus on process rather than outcomes. As a political practice, originalism seeks instead to forge a vibrant connection between the Constitution and contemporary conservative values.¹⁰²

This suggests a strange and unsettling thought. Although the jurisprudence of originalism could not be more hostile to the idea of living constitutionalism, the political practice of originalism actually exemplifies that idea. The political practice of originalism seeks to vivify the Constitution by infusing it with the outlook of an insurgent political movement. The political practice of originalism actually succeeds in the goal postulated by liberals for a living constitutionalism, which is to keep the Constitution in touch with contemporary values.¹⁰³

The most vivid illustration of this relationship between the practice of originalism and political mobilization is Meese's departmentalism, which insisted that a Supreme Court decision "does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forever more," because "constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government."¹⁰⁴ Through his departmentalism, Meese explicitly sought to legitimize interpretations of the Constitution that were responsive to

101. See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *Stan. L. Rev.* 703, 706, 709 (1975); Terrance Sandalow, *Judicial Protection of Minorities*, 75 *Mich. L. Rev.* 1162, 1184, 1193 (1977); see also William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 *S. Tex. L. Rev.* 433, 438 (1986). For an early use of the concept of a "living Constitution," see K.N. Llewellyn, *The Constitution as an Institution*, 34 *Colum. L. Rev.* 1, 16 (1934).

102. See generally Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 *Ind. L.J.* 363 (2003). Another example of originalists seeking to forge a connection between the Constitution and contemporary conservative values is *Focus on Social Issues: Position Statement on Federal Judicial Appointments*, *supra* note 54. For a discussion of the conservative politics in which originalism is now enmeshed, see Jeffrey Rosen, *How to Reignite the Culture Wars*, *N.Y. Times*, Sept. 7, 2003, § 6 (Magazine), at 48.

103. See Siegel, *supra* note 18, at 25 ("Justice Scalia and other avatars of the Reagan revolution regularly employ the language of originalism to exhort [present generations of] Americans to mobilize against the Court and seek constitutional change without the intermediation of constitutional lawmaking. . . . Since the 1970s, originalism's proponents have deployed the law/politics distinction and the language of constitutional restoration in the service of constitutional change—so successfully that, without Article V lawmaking, what was once the language of a constitutional insurgency is now the language of the constitutional establishment." (footnote omitted)).

104. Edwin Meese III, *The Law of the Constitution*, 61 *Tul. L. Rev.* 979, 983, 985 (1987); see generally Edwin Meese III, *The Tulane Speech: What I Meant*, 61 *Tul. L. Rev.* 1003 (1987).

contemporary political beliefs. Indeed, the very first issue of the conservative *Harvard Journal of Law and Public Policy* featured an article arguing that judicial usurpations made visible by originalism could be repudiated only by the ratification of a constitutional amendment that would “allow Congress and the President, acting together, to overrule a Supreme Court interpretation of the Constitution.”¹⁰⁵ The connection between originalism and popular mobilization could not be more transparent.

This connection is why scholarly analysis of the jurisprudence of originalism has missed the essential point. Since the creation of the Rehnquist Court, the real lifeblood of originalism has been its organization as a political practice, which forges a living connection between the Constitution and contemporary conservative ideals. Originalism will continue to thrive so long as this connection remains vibrant, no matter how insistently academics identify inconsistencies in the way originalism as a jurisprudence is theorized or applied. Originalism will flourish so long as voters are moved to elect politicians to appoint judges who will use originalism as a vehicle for altering constitutional law to reflect conservative principles.

Originalism’s strength demonstrates the interdependence of constitutional law and political culture.¹⁰⁶ When legal scholars evaluate originalism as if it were only a jurisprudence, they implicitly imagine constitutional law as a domain of professional rationality that is independent from politics. Constitutional law is, of course, in part constituted by, and responsive to, claims of autonomous professional reason. Yet the disparity between the jurisprudence and the political practice of originalism suggests that constitutional law consists of a good deal more than professional reason. Legal scholars seem to have difficulty acknowledging this, which is why legal scholars of all political persuasions tend to recognize the political practice of originalism, if they recognize it at all, merely as a phenomenon that should be disregarded because it taints the principled integrity of the jurisprudence of originalism.¹⁰⁷

We draw a different lesson from the political practice of originalism. We believe that its capacity to influence the actual substance of modern constitutional law illustrates how constitutional law is made in continuous dialogue with political culture. Its success illustrates that the authority of

105. Robert A. Kessler, *Redressing the Balance: A Proposed Constitutional Amendment*, 1 Harv. J.L. & Pub. Pol’y 87, 88 (1978). Kessler proposes this amendment “in the hope of at least partly restoring that original balance of powers on which the nation was founded.” *Id.* at 102; see *infra* note 111.

106. We have each stressed this point in previous writings. See Post, *supra* note 96; Siegel, *supra* note 18; Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 Harv. L. Rev. 1470 (2004); Siegel, *Rehnquist’s New Approach*, *supra* note 66; Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. Pa. L. Rev. 297 (2001).

107. See, e.g., Sean B. Cunningham, *Is Originalism “Political”?*, 1 Tex. Rev. L. & Pol. 149 (1997).

constitutional law does not derive merely from professional reason, but also from reason incarnate in the body politic.

Surprisingly, in recent years, it has been liberals, rather than conservatives, who have been unable to find ways to connect constitutional vision to living political values. In recent confirmation hearings, for example, liberals have defended the constitutional values of the Warren Court by invoking *stare decisis* and by emphasizing the importance of protecting constitutional law from the taint of politics.¹⁰⁸ “The new battle cry of the liberals,” Phyllis Schlafly recently observed contemptuously, “is their sanctimonious mantra that we must have an ‘independent’ judiciary. What they really mean is *independent from the Constitution*.”¹⁰⁹

It is telling that liberals invoke the authority of judges and cases, while conservatives invoke the Constitution itself. To advance their constitutional

108. See Robert C. Post & Reva B. Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, Yale L.J. (The Pocket Part), Jan. 2006, http://www.thepocketpart.org/2006/01/post_and_siegel.html; see also 151 Cong. Rec. S5373, 5383 (daily ed. May 18, 2005) (statement of Sen. Leahy); Ralph G. Neas, *Message from President Ralph G. Neas, in Courting Disaster 2005: America's Constitutional Freedoms and Legal Protections Are Threatened by the Radical Right* 5, 5 (2005), available at http://www.pfaw.org/pfaw/dfiles/file_533.pdf (“Americans deserve judges who are fair to all sides, guarding against abuses of power by the executive and legislative branches and protecting our rights and liberties. But today, thanks to an emboldened radical right and the allies in government they helped elect, the freedoms Americans hold dear are at severe risk. Unless progressives mobilize against this threat, we face a real danger of ending up with a court system whose independence has been sacrificed to politicians’ ambitions, and whose judges are chosen for their willingness to advance a political agenda that undermines constitutional protections for ordinary Americans.”); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5 (2006) (statement of Sen. Patrick Leahy), available at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.128&filename=25429.pdf&directory=/diskb/wais/data/109_senate_hearings; Nancy Pelosi, Remarks at Judge James R. Browning Courthouse Centennial Event (Aug. 29, 2005), available at <http://www.house.gov/pelosi/press/releases/Aug05/browning.html> (“We see remarkable and unmistakable progress of where we have come as a society in [the last] hundred years. And the one constant that made this progress possible was our constitutional framework—the rule of law and the protection of individual rights under the Constitution, secured by an independent judiciary, a mark of the checks and balances and three co-equal branches of government However, we gather here at a time of great challenge to this very independence [S]ome Congressional leaders inexcusably seek to undermine the independence of the judiciary and our separation of powers. They give imprimatur to incendiary rhetoric, and in the Terri Schiavo case threatened to impeach judges for their judicial decisions. Some have even tried to cut the funding of the Supreme Court in response to the Kelo decision that they did not like. These actions reflect a profound disregard of constitutional order The independence of the judiciary is essential to our free society. It bears repeating, I think. This courthouse, appropriately named for Judge Browning, contains the hopes and aspirations of a just society and a free people. Let us express gratitude to all judges serving in this courthouse, now and in the future, for your courage and your dedication. Let us honor our independent judiciary that nobly serves as our guardians, protects our Constitution and our liberties, and renders equal justice under the law.”).

109. Schlafly, *supra* note 11.

vision, progressives emphasize the importance of respecting precedent and assert the professional autonomy of judges. They have been maneuvered into upholding the very detachment of law from politics that is the central premise of the jurisprudence of originalism,¹¹⁰ thereby contradicting liberalism's own insight about the importance of a living constitutionalism. In this regard, progressives would be far better advised to learn from the political practice of originalism than from its jurisprudence. Concerns about defending professional reason are unlikely to motivate a political constituency that will remain mobilized long enough to appoint judges committed to a particular vision of constitutional law.

Originalism is so powerfully appealing because conservatives have succeeded in fusing contemporary political concerns with authoritative constitutional narrative. This fusion of political concern and constitutional narrative is driven by a politics of restoration, which encourages citizens to protect traditional forms of life they fear are threatened—threatened by modern mores and by a Court that has (mis)construed the Constitution to require social change. Originalism expresses the need to ward off an unremitting stream of dangers, whether experienced as threats to religious beliefs, sexual mores, gender roles, family, or property. The originalist vision of the Constitution is thin enough to conjoin many distinct conservative perspectives that share only a common repudiation of the menacing encroachments of modernity.

The prominence and success of the Warren Court marked the Supreme Court as a preeminent symbol of these threats, so that an “activist” judiciary has become for conservatives a source and agent of the dislocations of modern life.¹¹¹ Contemporary originalism identifies the Constitution with the body politic that the Warren Court betrayed. The written Constitution has come to stand for a mythologically unified and homogeneous nation of the past, which must be safeguarded from the tumultuous contamination of the present. Motivated by this vision of the nation, conservatives feel authorized to judge judicial precedents in the name of the Constitution. They feel empowered to demand the appointment of judges who will be true to their vision.

These themes are vivid in the political literature of originalism. To pick only one example from what is now rapidly becoming a vast corpus, the mission of the Liberty Counsel, “a nonprofit litigation, education and policy organization”¹¹² with affiliations to Jerry Falwell's Liberty University,¹¹³ is

110. See Scalia, *A Matter of Interpretation*, *supra* note 9, at 38–40.

111. “[I]t cannot be denied that the Supreme Court has become the predominant organ of American government, and, in the area of constitutional law, a non-elected supreme legislature, thus upsetting the balance of powers among the three branches of government envisioned by the founding fathers.” Kessler, *supra* note 105, at 88.

112. Liberty Counsel, *About Us*, <http://www.lc.org/aboutus.html> (last visited Oct. 9, 2006).

113. *Id.* Liberty Counsel maintains the Center for Constitutional Litigation and Policy that is headquartered on the campus of Liberty University School of Law, part of Liberty University, which is founded and led by Jerry Falwell.

“Restoring the Culture One Case at a Time by Advancing Religious Freedom, the Sanctity of Human Life and the Traditional Family.”¹¹⁴ Mathew Staver, the President and General Counsel of Liberty Counsel, condemned President George W. Bush for nominating Harriet Miers, because she did “not respect the rule of law and she would not have been a conservative voice on the High Court.”¹¹⁵ Staver urged Bush “to keep his campaign promise to appoint Justices who respect the rule of law and who will remain loyal to the purpose and intent of the Constitution.”¹¹⁶ He cautioned the President not to “take your conservative base or people of faith for granted again. I urge you to continue the conservative movement to bring the High Court back to the Constitution.”¹¹⁷ Liberty Counsel praised the nomination of Samuel Alito because it signified that the President was “keeping his campaign promise to nominate candidates to the Supreme Court who respect the rule of law and will decide cases on a principled basis instead of imposing their will by judicial fiat.”¹¹⁸ Liberty Counsel regarded Alito as the kind of Justice who would

respect the Constitution and who will interpret the law, not legislate from the bench. . . . When the High Court issues decisions based purely on ideology, using international law or subjective sociological perceptions, it loses the respect of lower court judges, and most importantly, it loses the respect of the American people.¹¹⁹

In these passages “the purpose and intent of the Constitution” is explicitly identified with the specific substantive commitments of “the conservative movement.” These commitments are in turn defined in terms of the restoration of endangered traditional values of religion, gender, and family. “Respect” for the “Constitution” and for the “rule of law” is cashed out as fidelity to these traditional values, which are contrasted to the “subjective sociological perceptions” of those who would corrupt the Court and the Constitution with “ideology.”

These passages suggest why originalism cannot be dented by attacks on its jurisprudence. Originalism has appeal because it imbues citizens with motive and authority to assert their understanding of the Constitution. For

114. *Id.*

115. Posting of Liberty Counsel to Confirmation—A Judicial Blog, *Liberty Counsel Applauds the Withdrawal of Harriet Miers: Now the President Must Keep His Campaign Promise*, <http://juristblog.blogspot.com/2005/10/liberty-counsel-applauds-withdrawal-of.html> (Oct. 27, 2005, 13:23 EST).

116. *Id.*

117. *Id.*

118. Posting of Liberty Counsel to Confirmation—A Judicial Blog, *Liberty Counsel Praises Bush's Selection of Samuel Alito for the Supreme Court*, <http://juristblog.blogspot.com/2005/10/liberty-counsel-praises-bushs.html> (Oct. 31, 2005, 09:28 EST).

119. Posting of Liberty Counsel to Confirmation—A Judicial Blog, *Judge Alito Confirmed to the United States Supreme Court*, <http://juristblog.blogspot.com/2006/02/judge-alito-confirmed-to-united-states.html> (Feb. 7, 2006, 19:40 EST).

decades now, conservatives have viewed the Court as a threat to their vision of collective life and have found grounds and authority to resist that threat through a politics of restoration. To counter originalism, progressives need more than a logical critique. They need—as they have had at different junctures in our nation’s history—a vision of collective life able to generate constitutional claims of equal motive and authority, whether those claims sound in the register of restoration or redemption. When progressives have such a vision, it will arouse them to mobilize in defense of *their* understanding of the nation, which is to say in defense of *their* idea of the Constitution. When progressives have such a vision, it will animate and orient the development of a constitutional jurisprudence adequate to its vindication in both professional and popular arenas.