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## Working Themselves Impure: A Life Cycle Theory of Legal Theories

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# Working Themselves Impure: A Life Cycle Theory of Legal Theories

Jeremy K. Kessler† & David E. Pozen††

*Prescriptive legal theories have a tendency to cannibalize themselves. As they develop into schools of thought, they become not only increasingly complicated but also increasingly compromised, by their own normative lights. Maturation breeds adulteration. The theories work themselves impure.*

*This Article identifies and diagnoses this evolutionary phenomenon. We develop a stylized model to explain the life cycle of certain particularly influential legal theories. We illustrate this life cycle through case studies of originalism, textualism, popular constitutionalism, and cost-benefit analysis, as well as a comparison with leading accounts of organizational and theoretical change in politics and science. And we argue that an appreciation of the life cycle counsels a reorientation of legal advocacy and critique. The most significant threats posed by a new legal theory do not come from its neglect of significant first-order values—the usual focus of criticism—for those values are apt to be incorporated into the theory. Rather, the deeper threats lie in the second- and third-order social, political, and ideological effects that the adulterated theory’s persistence may foster down the line.*

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## INTRODUCTION

When originalism burst onto the scene in the 1970s and 1980s, it promised to stabilize constitutional law and rein in judges by tying interpretation to the Framers’ “original intentions.” Critics complained that this approach slighted the Constitution’s popular character and could justify intolerable outcomes, such as racially segregated schools. Originalism subsequently reoriented itself around “original public meaning” and the interpretation/construction distinction—blunting some of the earlier criticisms and broadening the theory’s appeal, but at significant cost to its motivating principles of certainty and constraint.<sup>1</sup>

When cost-benefit analysis (CBA) burst back onto the scene in the 1980s, it promised to rationalize the regulatory state and rein in administrators by demanding adherence to a scientifically informed, quantitative methodology. Critics complained that this approach slighted the importance of nonwelfarist concerns and could justify intolerable outcomes, such as gross violations of human dignity. CBA subsequently incorporated deontological and

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<sup>1</sup> See Part III.A.

distributive elements—blunting some of the earlier criticisms and broadening the theory’s appeal, but at significant cost to its motivating principles of efficiency and expertise.<sup>2</sup>

When popular constitutionalism burst onto the scene in the 2000s, it promised to democratize constitutional law by displacing the court-centered perspective of judges and scholars and returning the Constitution to the people. Critics complained that this approach slighted the role of courts in protecting minority rights and could justify intolerable outcomes, such as mob rule. Popular constitutionalism subsequently shifted its focus from ordinary citizens to government institutions—blunting some of the earlier criticisms and broadening the theory’s appeal, but at significant cost to its motivating principles of lay participation and control.<sup>3</sup>

In this Article, we argue that these episodes reflect a general tendency of prescriptive legal theories, when they blossom into intellectual movements or schools of thought, to shed many of the core commitments that made the theories attractive in the first place. As they develop over time, that is, these theories become not only increasingly complicated but also increasingly *compromised*, by their own normative lights. Maturation breeds adulteration. The theories work themselves impure.

The tendency of prescriptive legal theories<sup>4</sup> to work themselves impure mirrors the tendency of legal rules to evolve into standards.<sup>5</sup> It also has analogues in political science and the history and philosophy of science.<sup>6</sup> Yet while we will suggest that the process of impurification can affect nearly all prescriptive projects

<sup>2</sup> See Part III.D.

<sup>3</sup> See Part III.C.

<sup>4</sup> By “prescriptive,” we mean “[e]xpressing what must or should be done” by official actors in a given area of regulation, interpretation, or enforcement. *Black’s Law Dictionary* 1374 (West 10th ed 2014) (defining “prescriptive”). See also Part I.B (identifying conditions under which ostensibly descriptive theories may undergo the life cycle). By “legal theories,” we mean coherent groups of propositions that are put forward to guide or explain particular sets of legal practices. This understanding of theory is broader than the understandings that prevail in some other disciplines, which emphasize testability and falsifiability, but it is consistent with legal academic usage. See Lee Epstein and Gary King, *The Rules of Inference*, 69 U Chi L Rev 1, 61 n 188 (2002) (criticizing legal scholarship for defining theory more expansively than other disciplines). But see H.M. Collins, *Changing Order: Replication and Induction in Scientific Practice* 34–46 (Sage 1985) (questioning the significance of falsifiability for theorizing in the natural sciences); Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* 91–94 (Routledge 2d ed 1990) (questioning the significance of falsifiability for theorizing in the social sciences). We consider the relationship between legal and scientific theory development in Part IV.C.

<sup>5</sup> See Part IV.A.1.

<sup>6</sup> See Parts IV.B–C.

(and many ostensibly descriptive projects) to some extent,<sup>7</sup> there is a subset of legal theories that are *especially* likely to work themselves *very* impure: those theories that seek to negotiate highly politicized legal conflicts through the introduction of decision-making frameworks that abstract away from the central values in contention. Thus, originalism appealed to the authority of a univocal constitutional text in response to the conflict sparked by the Warren and Burger Courts' expansion of the rights of minorities, women, criminal defendants, and the poor. CBA turned to the language of economics in response to the conflict sparked by the activism of agencies tasked with protecting health, safety, and the environment. And popular constitutionalism heralded the emergence of a demotic formalism—"the people themselves"—in response to the conflict sparked by the Rehnquist Court's rollback of federal regulatory power.

We submit that the prescriptive legal theories that have gained the broadest support in public law fields over the past several decades have shared these features of abstraction and proceduralism, together with a common life cycle:<sup>8</sup>

**Birth**—At T<sub>1</sub>, the theory<sup>9</sup> introduces a decision procedure or criterion for judgment that seeks to resolve a highly politicized legal conflict in terms that are relatively alien to the main points of political contention; in so doing, the theory differentiates itself from preexisting legal theories used to negotiate the conflict.

**Critique**—At T<sub>2</sub>, critics of the theory highlight its failure to secure certain values that gave rise to the conflict in the first place.

**Reformulation**—At T<sub>3</sub>, the theory responds to these critiques by *internalizing* them—supplementing or modifying its approach so as to better serve the initially ignored values. As a

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<sup>7</sup> Among theories with staying power, the principal exceptions either do not seek to resolve politically contentious legal debates or seek to do so directly, by offering arguments that on their face support one side of the debate or the other. We discuss these exceptions in Part I.B.

<sup>8</sup> We are grateful to John Danaher for suggesting names for the stages of the life cycle in an insightful blog post. John Danaher, *The Life Cycle of Prescriptive (Legal) Theories* (Philosophical Disquisitions, May 26, 2016), archived at <http://perma.cc/V6D9-P6C8>.

<sup>9</sup> "The theory" invoked here is a shorthand for the overlapping efforts of an array of theorists, whose individual arguments and motivations may differ and whose identities may change over time. We explain why this internal heterogeneity does not defeat the possibility of an overarching life cycle, and on the contrary facilitates it, in Parts I.C and II.

result, the theory's constituency expands, but at the price of normative and conceptual purity.

Iteration—At T<sub>4</sub>, this process of criticism and response recurs.

Maturity—At T<sub>5</sub>, the theory has come to reflect the conflict-ridden political and theoretical field it had promised to transcend. To the extent the theory ever posed a direct threat to particular participants in the underlying conflict, that danger has dwindled.

Death or Adulterated Persistence—At T<sub>6</sub>, the theory either falls out of favor with mainstream legal actors, at least for the time being, or persists in substantially adulterated form.<sup>10</sup>

If this life cycle model accurately captures the developmental history of some of the most influential public law theories in recent memory—including not only originalism, CBA, and popular constitutionalism but also the new textualism and possibly others—then a number of conclusions follow. First, legal theory entrepreneurs are, in general, too optimistic about the transformative power of their theories. Theories of the sort we describe are unlikely to escape the horizon of the conflicts in which they intervene. Instead, the theories are likely to be transformed by the conflicts, eventually recapitulating rather than resolving the underlying political disputes.

Second, critics of new prescriptive legal theories are, in general, too pessimistic about the impact such theories will have. Any theory that successfully attracts a large number of adherents is

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<sup>10</sup> In a short essay from 1982, Professor Duncan Kennedy suggested that all fundamental distinctions that “constitute the liberal way of thinking about the social world,” such as public versus private and freedom versus coercion, undergo “an invariant sequence of six stages . . . from robust good health to utter decrepitude.” Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U Pa L Rev 1349, 1349–50 (1982). We follow Kennedy in combining internalist and externalist modes of analysis to account for the transformation of legal concepts over time. For an explanation of these terms, see Mark Tushnet, Book Review, *The New Deal Constitutional Revolution: Law, Politics, or What?*, 66 U Chi L Rev 1061, 1061 (1999) (explaining that “[e]xternalists describe developments outside the law and the courts to explain [legal] change,” while “internalists . . . emphasize the role that reasoned distinctions . . . play”) (emphases omitted). We focus, however, on a different set of transformations and a different set of external factors. Whereas Kennedy sought to explain what he took to be the decline of the liberal legal worldview as such, our life cycle theory aims to explain the divergent fates of contemporary prescriptive legal theories—all of which operate within the tenets of the liberal legal worldview, however “decrepit” those tenets might appear from other perspectives.

liable to undergo a process of refinement and revision, if not outright appropriation, that will come over time to undermine its formative goals. An appreciation of these dynamics clarifies connections between legal theorizing and other types of theorizing, and it might help to lower the temperature of some of the legal academy's most heated debates.

Third, the belief that law can “work itself pure” ironically underwrites the contradictions and compromises of prescriptive legal theories.<sup>11</sup> Those theories that suggest that a divisive legal practice can be redeemed, and political debate quieted, through the adoption of proper decisionmaking techniques always already contain the seeds of their own decay. There may be an inescapable trade-off between a legal theory's ambition to transcend social conflict and its susceptibility to impurification.

And fourth, the persistence of ever-more-adulterated legal theories cannot be explained by broad acceptance of their initial normative commitments, for the price of persistence is the unraveling of those commitments. When such theories endure, we can expect to find them serving interests or ideals exogenous to their stated aims. The continuing bipartisan embrace of originalism, for instance, may be bolstered by its tendency to enhance the political prestige of lawyers or the moral prestige of American nationalism. In any event, the real basis for the persistence of an adulterated prescriptive legal theory—and the real stakes of that theory's persistence—will be only dimly illuminated by the theory itself.

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<sup>11</sup> The idea that law, and the common law in particular, “works itself pure” is at least as old as Lord Mansfield's declaration from the bench in *Omychund v Barker*, 26 Eng Rep 15, 23 (Ch 1744) (Mansfield) (emphasis omitted). Two centuries later, Professor Lon Fuller made this idea famous within the American legal academy. See Lon L. Fuller, *The Law in Quest of Itself* 140 (Foundation 1940) (“[T]he common law works itself pure and adapts itself to the needs of a new day.”). See also Frederick Schauer, *Thinking like a Lawyer: A New Introduction to Legal Reasoning* 105 (Harvard 2009) (noting Fuller's influence). Fuller's effort to incorporate legal realism's understanding of the social function of law within a procedural account of legal autonomy has, in turn, been recognized as an important contributor to the rise of the legal process school. See Neil Duxbury, *Patterns of American Jurisprudence* 261 & n 383 (Clarendon 1995). As discussed in Part I.A, today's leading public law theories have important affinities with process jurisprudence in their aspiration to resolve politically contentious legal conflicts by means of politically neutral procedural norms. Today's theories likewise share with earlier accounts of the common law a belief in the internal rationality of law, although they break with the common-law model in seeking to fix a unified decision procedure at the outset rather than refine legal doctrine in an incremental, case-by-case fashion.

In making these claims, we are aware that theories are not conscious agents with goals, motivations, or the like. Public law scholars frequently anthropomorphize the ideas and institutions they study,<sup>12</sup> so to a certain extent our association of legal theories with intentional states simply follows common parlance. But given that our life cycle model places special emphasis on a theory's departure from "its own" earlier-in-time commitments, some further clarification is in order. The life cycle model depends on the empirical claim, defended in Part III, that participants in early debates on originalism, textualism, popular constitutionalism, and CBA shared common understandings regarding what the theories were about: the reasons they were introduced and the reforms they would entail. Proponents and opponents of these theories disputed a great deal, but they agreed on the theories' central purposes and prescriptions. That agreement is what made debates over the theories' merits intelligible. Such common understandings about a theory in its formative years can be recovered and held up to scrutiny in light of subsequent developments.

We are also keenly aware that the evolutionary process we describe may produce benefits for law and knowledge, a point addressed in Part V. In light of these potential benefits, the language of "impurity" may strike some readers as unduly pejorative. But we do not contend that impure theories are bad theories. We use the language of impurity, instead, to invite the comparison with accounts of the common law working itself pure and to underscore the loss of normative and decisional clarity that attends theoretical maturation. A theory that has become impure in our sense, with an increasingly complex decision procedure and contested normative valence, may well be more attractive than its "purer" predecessors. Alloys are often stronger than base metals. It is nonetheless important to keep track of what gets lost over the course of this progression if prescriptive legal theorists are to understand the structure of the practice in which they are engaged.

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<sup>12</sup> See, for example, Barry Friedman and Scott B. Smith, *The Sedimentary Constitution*, 147 U Pa L Rev 1, 33 (1998) ("Originalism seeks to keep faith with our Founders, while living constitutionalism seeks to keep pace with the times."); Douglas A. Kysar, *It Might Have Been: Risk, Precaution and Opportunity Costs*, 22 J Land Use & Envir L 1, 42 (2006) ("CBA aspires to achieve complete agent-neutrality."). See also David E. Pozen, *Self-Help and the Separation of Powers*, 124 Yale L J 2, 13 (2014) ("[T]he anthropomorphization of the branches is a standard move in constitutional theory.").



## I. THE OBJECT OF THE LIFE CYCLE THEORY

The life cycle outlined in the Introduction is not equally applicable to all legal theories. Rather, it best captures those theories marked by *proceduralism* and *depoliticization*: theories that seek to negotiate highly politicized legal conflicts through the introduction of decisionmaking frameworks that abstract away from the central values in contention. This Part proposes to answer why such theories should be privileged objects of analysis, why they are so susceptible to the impurification process, and why it is reasonable to treat each such theory as a unitary phenomenon.

### A. Proceduralism and Depoliticization in Contemporary Legal Theory

We focus on theories that promise depoliticization through proceduralism not only because such theories are especially prone to the life cycle but also because, in our view, this style of theorizing is especially prominent in contemporary legal scholarship. Although nothing critical hangs on the exact chronology, one plausible candidate for dating the (re)emergence of this theoretical style is the 1980s. That decade began with the publication of Professor John Hart Ely's landmark book, *Democracy and Distrust*. The book developed a justification for "representation-reinforcing" judicial review that attempted to square the Warren Court's apparent revival of natural law jurisprudence with the late-stage legal process theory of Ely's mentor, Professor Alexander Bickel.<sup>13</sup> Within a few years, law review articles were heralding the advent of a "new legal process" or "new public law" program that sought to expand upon Ely's defense of individual rights protection, while also modernizing process theory's account of the administrative state in light of increasingly pointed critiques from public choice, law and economics, and critical legal studies (CLS).<sup>14</sup> Even though

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<sup>13</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 101–02 (Harvard 1980).

<sup>14</sup> See generally William N. Eskridge Jr and Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 Mich L Rev 707 (1991); Daniel B. Rodriguez, Book Review, *The Substance of the New Legal Process*, 77 Cal L Rev 919 (1989); A. Michael Froomkin, Book Review, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process*, 66 Tex L Rev 1071 (1988); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 Stan L Rev 213 (1983). Scholars identified in the foregoing articles as participants in the new legal process include such diverse figures as Judge Guido Calabresi and Professors Bruce Ackerman, Robert Cover, William Eskridge, Owen Fiss, Philip Frickey, Gerald Frug, Jonathan Macey, Jerry

new legal process failed to coalesce as a coherent movement, it signaled a renewed interest in theories that attempt to vindicate select high-level values by perfecting the means by which government officials reach legal decisions.

Looking back further in time, one could argue that much contemporary legal theory is best understood as a development within the older legal process school of the 1950s and 1960s.<sup>15</sup> Or one might argue that the “[p]uzzling [p]ersistence” of process-based theories<sup>16</sup> reflects a basic tendency within American legal culture, if not within law itself, to seek nominal reconciliation of competing views about the content of public policy; legal theorists are perpetually redescribing these first-order political conflicts as—and rerouting them into—comparatively esoteric debates about the allocation of institutional authority and the rationality of decisionmaking methods.<sup>17</sup> Despite the plausibility of these two longer narratives, we find the 1980s origin story more felicitous because the immediately preceding decades remain the last era in which moralistic argument flowered in American public law.<sup>18</sup>

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Mashaw, Frank Michelman, Andrzej Rapaczynski, Susan Rose-Ackerman, Richard Stewart, and Cass Sunstein. On the mainstreaming of law and economics within the legal academy in the 1970s, see Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* 97–101 (Princeton 2008).

<sup>15</sup> See, for example, Guido Calabresi, *A Common Law for the Age of Statutes* 87 n 20 (Harvard 1982) (arguing that “most current legal scholars, consciously or not, have followed [the] path” of “the legal process school”); Eskridge and Peller, 89 Mich L Rev at 708 (cited in note 14) (“[T]he legal process focus on institutional relationships, the process of lawmaking, and an overriding standard of purposive coherence continues to dominate public law scholarship.”). Cutting against this story of continuity is the fact that the very notion of a “process school” was mooted only in 1976. See G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* 404 n 2 (Oxford 1976). See also Duxbury, *Patterns of American Jurisprudence* at 206 n 3 (cited in note 11) (identifying Professor G. Edward White as “[t]he writer who first suggested the existence of a process school”). This late historicization of process theory suggests that the concept itself may have been an artifact of critique and rehabilitation in the 1970s and 1980s.

<sup>16</sup> Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L J 1063, 1063–65 (1980).

<sup>17</sup> See Morton J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* 271 (Oxford 1992) (“The 1950s search for ‘neutral principles’ was just one more effort to separate law and politics in American culture, one more expression of the persistent yearning to find an olympian position from which to objectively cushion the terrors of social choice.”).

<sup>18</sup> The 1980s also witnessed a growing prominence and institutionalization of public law argument by the political right—for example, through the rise of “second generation” conservative public interest law firms, see Teles, *The Rise of the Conservative Legal Movement* at 220–64 (cited in note 14)—although our life cycle account is by no means limited to “conservative” legal theories.

The failure of the legal process synthesis to supply generally accepted standards for legal decisionmaking had become undeniable by the late 1960s, and in the wake of this failure came a series of “[a]ttempts to reinfuse constitutional law with principles of justice [that] persisted into and throughout the 1970s.”<sup>19</sup> Representative of this shift were the many efforts made during this period to ground constitutional law in Rawlsian political philosophy.<sup>20</sup>

But then the pendulum swung back.<sup>21</sup> The public law theories that have gained the most traction since the 1970s have retreated from the open pursuit of justice in favor of a more formalistic, institutionalist orientation. Rawlsian theories of constitutional law are now a dim memory. So are Marxist and nihilist theories, for that matter.<sup>22</sup> Like their counterparts in the “new legal process” fold,<sup>23</sup> originalism, textualism, popular constitutionalism, and CBA eschew natural law notions and seek to transcend ordinary political divides—including the academic divide between “right-wing” versions of law and economics and “explicitly leftist CLS”—through the establishment of “particular procedures for reaching decisions about the terms of social life.”<sup>24</sup>

Today’s leading public law theories depart from the old legal process in acknowledging the normativity of legal decisionmaking

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<sup>19</sup> Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 *Tex L Rev* 1307, 1316 (1979).

<sup>20</sup> See *id.* at 1316–21 (discussing the turn to Rawls). While Professor John Rawls sometimes characterized his theory of “justice as fairness” as “procedural,” John Rawls, *A Theory of Justice* 120 (Belknap 1971), it is generally understood to incorporate principles of substantive justice. See Joshua Cohen, *Pluralism and Proceduralism*, 69 *Chi Kent L Rev* 589, 595–97 (1994). See also John Rawls, *Political Liberalism* 422 n 68 (Columbia 1996) (embracing Professor Joshua Cohen’s account of how “procedural justice depends on substantive justice”).

<sup>21</sup> See Parts II.C, IV.A.2 (discussing connections between the life cycle of individual legal theories and the larger cycles and epicycles of public law theory).

<sup>22</sup> See Tushnet, 57 *Tex L Rev* at 1309 (cited in note 19) (discussing the choice between “nihilism” and “Marxis[m]” that CLS would face in the 1980s).

<sup>23</sup> Rodriguez, Book Review, 77 *Cal L Rev* at 919 n 2 (cited in note 14) (including theories of representation reinforcement, public choice, reconstitutive law, pragmatism, and republicanism within the ambit of new legal process).

<sup>24</sup> Eskridge and Peller, 89 *Mich L Rev* at 762–63 (cited in note 14) (discussing a range of “recent public law work” circa 1991). That this centrism mirrored traditional legal process in its search for a middle ground between anti–New Deal formalism and pro–New Deal legal realism was not lost on proponents of new legal process. See *id.* at 763–64 (stating that both sets of process-oriented theories “embody the attempt to mediate the ideological polarization of legal discourse”).

and accepting that “no issues are *simply* ‘procedural.’”<sup>25</sup> For instance, popular constitutionalism and originalism generally locate their legitimacy in popular sovereignty or popular ratification of the Constitution, while CBA generally privileges the substantive norm of social welfare. Yet in their focus on the manner in which legal authority is exercised, these theories have resurrected the process school’s founding commitment to the autonomous validity of law.<sup>26</sup> Such theories are proceduralist to the extent that they define valid legal decisions as those reached by appropriate procedures or persons. Such theories are depoliticized to the extent that the decisionmaking models they recognize as valid abstract from the politically divisive values at stake in a given legal conflict.

In short, for all of its internal diversity, mainstream public law theory has operated within a certain template since at least the 1980s. This template seeks to accommodate normative conflict, linguistic indeterminacy, and regulatory complexity by means of proceduralism and depoliticization. The result is a recipe for impurification.

## B. Susceptibility to the Life Cycle

Ever since the New Deal shifted the center of gravity in American law toward federal regulation, public law conflicts have garnered the lion’s share of political attention.<sup>27</sup> Accordingly, one

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<sup>25</sup> *Id.* at 762 (emphasis added). As critics noted, traditional process jurisprudence itself depended on an implicit normative account of the appropriate means and ends of legal process: “*principle[d]*” reasons of decision and “*valid human wants.*” Duxbury, *Patterns of American Jurisprudence* at 262–64 (cited in note 11) (emphases added).

<sup>26</sup> In other words, today’s leading public law theories aim both to shore up weaknesses of the old legal process and to resist those intellectually extreme forms of law and economics and CLS that threaten the very enterprise of conventional legal scholarship and education. See Horwitz, *The Transformation of American Law* at 269–70 (cited in note 17) (describing law and economics, CLS, and various natural rights theories as the three main challengers to traditional legal process between 1960 and 1990). On the institutional and vocational imperatives that favored process jurisprudence, both at mid-century and during the 1980s, see Laura Kalman, *Legal Realism at Yale: 1927–1960* 226–31 (North Carolina 1986).

<sup>27</sup> See Grant Gilmore, *The Ages of American Law* 81–88 (Yale 2d ed 2014). See also Charles D. Breitel, *The Lawmakers*, 65 *Colum L Rev* 749, 766 (1965) (contrasting the adjudication of private law disputes with “the public and political controversy engendered by issues involved in public law”); Harold Hongju Koh, *The Globalization of Freedom*, 26 *Yale J Intl L* 305, 308 (2001) (noting “the major shift in the focus of American law school curriculum and scholarship after the New Deal [ ] away from the teaching of private law toward the teaching of public law”).

can expect a large and interested audience for any theory promising resolution of a significant public law controversy. And that is the implied promise of the theories we describe: by reorienting official practice around new methods or criteria for public law decisionmaking, such theories hold out the hope of resolving politically contentious legal conflicts without reference to the primary values in contention.

These theories are so susceptible to being compromised because of the way in which they seek to forge compromise. On the one hand, these theories inject reformist ideas into debates that are perceived to matter a great deal. Participants are likely to be sensitive to such efforts and to register their discontent if they suspect any given proposal of privileging certain interests at the expense of their own agendas. On the other hand, these theories intervene in an abstract fashion, without speaking directly to the issues that animate participants on either side. Originalism and popular constitutionalism, for example, supply guidance about how the Constitution should be interpreted and by whom, but they have nothing explicit to say about which substantive goods society should prioritize or what the legal rules should be regarding abortion, health care, or any other public policy matter. This abstraction may reduce backlash in the short term, but it also creates conceptual space *within* the terms of the theory to incorporate competing perspectives on the underlying conflict.

A fundamental tension emerges. The goal of proceduralism and depoliticization is to overcome, or appear to overcome, the divisions within a preexisting legal conflict. To achieve this goal, a theory must build a broad base of support that minimizes partisan taint. And so proceduralist, depoliticized theories must respond to at least some of the criticisms that their initial formulations engender. At the same time that this responsiveness allows the theories to broaden their bases, however, it leads them down the path of adulteration. The theories will become less purely procedural and more obviously charged with politically divisive meanings as newer iterations seek to appease constituencies that insist on the inviolability of various first-order commitments.

Generally speaking, then, we have reason to predict (and case studies to suggest) that the legal theories most susceptible to the life cycle will be those that seek to negotiate highly politicized legal conflicts by prescribing decisionmaking methods that abstract away from the central values in contention. Theories that do *not* seek to intervene in such conflicts—ones that address, say, an

overlooked body of doctrine—are less likely to face critical audiences that demand adulteration or to feel the same need to appease such critics. For the historically contingent reason given above, this suggests that *private* law theories may be less likely to experience the life cycle; the balance of highly politicized legal conflicts occur today in public law.<sup>28</sup>

At least three types of prescriptive legal theories that do intervene in politically contentious legal conflicts may also depart from our paradigm and avoid the life cycle. First, some may endorse decision procedures that are so fluid or underspecified that partisans cannot tell which values or interests their adoption would ultimately favor, disfavor, or displace. Examples here might include theories of experimentalism in public administration<sup>29</sup> and theories of pluralism or multiple modalities in constitutional interpretation.<sup>30</sup> A theory that is highly open-ended at the outset—agnostic on key questions of procedure as well as substance—will have few, if any, foundational goals to be compromised. It is impure by design.

Second, other theories may engage with a political conflict in a direct and substantive manner, rather than in an abstract, procedural register. In consequence, they may escape the critique that they have ignored the values most salient to the conflict, as well as the obligation to seek consensus validation. Examples here might include Professor Robin West's theory of progressive constitutionalism and Professor Randy Barnett's and Professor Richard Epstein's theories of libertarian constitutionalism, each of which is grounded in contested normative commitments.<sup>31</sup>

<sup>28</sup> See note 27 and accompanying text.

<sup>29</sup> See generally, for example, Charles F. Sabel and William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 *Georgetown L J* 53 (2011); James S. Liebman and Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 *NYU Rev L & Soc Change* 183 (2003).

<sup>30</sup> See generally, for example, Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford 1982); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 *Tex L Rev* 1753 (1994); Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv L Rev* 1189 (1987).

<sup>31</sup> See generally Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* (Duke 1994); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton 2004); Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* (Harvard 2014).

These openly ideological arguments will face other, potentially severe, challenges in the marketplace of legal ideas, but impurification is less likely to be one of them.

And third, a prescriptive legal theory that fails to gain an early base of support will not be perceived as a threat by key participants in any conflict. Its purity will be maintained at the expense of marginalization. Examples here are endless. The vast majority of proposed legal theories never leave the realm of the obscure.

All that we have said so far concerns prescriptive legal theories; what of their descriptive counterparts? To the extent that any legal theory can be considered purely descriptive,<sup>32</sup> we suspect that it will prove relatively impervious to the life cycle. Because such a theory will not seek to dictate particular legal outcomes, it will have less of a need to expand its constituency and will be less likely to receive pushback from the many parties opposed to those outcomes. In the absence of such wide-ranging resistance, a descriptive theory could avoid significant impurification and still survive (although, like all theories, it might undergo a certain amount of transformation in response to critique). And while a descriptive legal theory, like any theory, needs commentators to affirm its worth, a prescriptive theory will generally need more, and more influential, supporters to bring about a desired change in the law. In pursuit of these supporters, concessions must be made, adulterations admitted.

That being said, our model is open to the possibility that the descriptive/prescriptive distinction is better conceived of as a spectrum than as a hard-and-fast dichotomy. Many positive theorists have prescriptive motivations. Many descriptive theories entail, or may be seen as entailing, certain sorts of legal outcomes that are subsequently “exposed” and critiqued on moral or policy grounds. Law and economics is perhaps the most significant example of an ostensibly descriptive theory of law (at least as classically formulated) that has been understood by both proponents

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<sup>32</sup> See Jack Goldsmith and Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U Chi L Rev 153, 155 (2002) (arguing that legal scholarship characteristically melds “[d]octrinal, interpretive, and normative” elements and primarily “seeks to persuade”); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 Mich L Rev 1835, 1847 (1988) (arguing that the distinguishing “feature of standard legal scholarship is its prescriptive voice, its consciously declared desire to improve the performance of legal decisionmakers”).

and opponents to have a normative thrust.<sup>33</sup> In such cases, descriptive theories may experience life cycle effects—as indeed has happened with law and economics.<sup>34</sup> In general, susceptibility to the life cycle turns on whether a given theory is widely perceived as likely to *influence*, and not just diagnose, official legal practice through the introduction of a depoliticized decision procedure.<sup>35</sup>

### C. An Adulterated Theory or Multiple Theories?

This Article treats as single objects of analysis legal “theories” the contents of which are, at this writing, highly contested. Would it not be more appropriate to treat theoretical terms such as originalism or textualism as names designating sets of legal theories that share a family resemblance, but not necessarily a common life cycle? This question has more than semantic significance, as our own theory contends that the very capaciousness of originalism and textualism is attributable to a process of adulteration rather than elective affinity.

Nonetheless, we think that the question has two relatively simple empirical answers. First, theories and theoretical terms have origins. And at its origin, as Part III.A discusses, “originalism” meant something fairly specific to its supporters and critics. To be sure, individual supporters and critics disagreed with each

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<sup>33</sup> See, for example, Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies*, in Peter Newman, ed, 2 *The New Palgrave Dictionary of Economics and the Law* 465, 471 (Macmillan 1998) (describing increasingly bipartisan efforts to bend “the apparently value neutral, technocratic discourse of efficiency” invoked by law and economics toward preexisting political ends); Michael W. McConnell, *The Counter-Revolution in Legal Thought*, 41 *Pol Rev* 18, 23–24 (1987) (arguing that while law and economics “has no overt ideological element,” “law and economics scholars will—with only rare exceptions—take positions compatible with libertarian conservatives”).

<sup>34</sup> We will soon turn to the specific life cycle of CBA, a prescriptive public law theory with roots in law and economics. See Part III.D. As that story suggests, the law and economics movement’s original focus on maximizing efficiency or wealth, as well as its association with deregulation and conservative politics, has yielded over time to much more complex formulations. For some early efforts to move law and economics in a liberal direction, see Susan Rose-Ackerman, *Progressive Law and Economics—and the New Administrative Law*, 98 *Yale L J* 341, 341 (1988) (advocating “the development of a reformist law and economics”); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *Stan L Rev* 387, 387 n 1 (1981) (collecting sources from “the ‘liberal’ law and economics school”).

<sup>35</sup> Accordingly, our own life cycle model—if it were to become popular and perceived as likely to influence legal practice—would also be susceptible to impurification through exceptions and modifications that come to blunt whatever prescriptive force it was initially thought to possess.



other on numerous levels. But even to have these debates required the existence of some minimal consensus view of the emerging theory: an understanding of its basic assumptions, prescriptions, and goals that few participants would have disputed. This consensus is a social and historical fact about the legal community at a particular moment in time. It is precisely because of the intellectual and political setbacks and successes experienced by this original "originalism" that the term—and the theoretical school that embraced it—gradually became more complex, capacious, and even at times self-contradictory.

Second, however diverse a given theoretical school may become and however disparate the motivations of those operating within it may be, members of the theoretical school generally remain committed to the theory's initial decisional formalism. Originalists do not abandon the decisional centrality of the constitutional text; textualists do not abandon the decisional centrality of the statutory text; cost-benefit analysts do not abandon the decisional centrality of a calculus of trade-offs; and popular constitutionalists do not abandon the decisional centrality of "the people," even as they locate "the people" in more rarified institutional settings. This fixation on a theory's initial formalism, despite increasingly significant intellectual and political differences among its proponents, belies an account of family resemblance or elective affinity.<sup>36</sup> This fixation strikes us, instead, as strong evidence of the adulteration of a common source—which is to say, strong evidence of life cycle effects.

We should note that in assessing the development of these theoretical schools, our method is to examine the claims made in a theory's name not only by law professors but also by government officials, public intellectuals, and movement activists. Such a broad description of a theory's social base is open to the objection that it stacks the deck in favor of a finding of adulteration. For instance, by sharply distinguishing academic from judicial and popular invocations of a theory, one might be able to redescribe internal diversity and discord as the existence of multiple, relatively harmonious theoretical schools.

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<sup>36</sup> This fixation on a theory's initial formalism may also help to explain the persistence of a theory long after its other initial assumptions and prescriptions have been abandoned and no longer constitute part of the consensus view of the theory. See Part V.B.

This objection strikes us as misplaced. Even within the confines of the academy, all of the theories under discussion have become highly adulterated.<sup>37</sup> Furthermore, any effort to segregate academic from nonacademic invocations of a given theory would be in considerable tension with the structure of prescriptive legal theorizing. Such theorizing necessarily seeks, at some level, to attract *nonacademic* adherents: government officials in particular, as well as those who have the power to influence those officials. To restrict the inquiry to any single discursive community would be to miss the interpenetration of scholarly, governmental, and popular discourses that drives the development of these theories.

## II. THE STRUCTURE OF THE LIFE CYCLE

We now turn to the life cycle itself. It bears emphasis at the outset that our model is the product of an induction over a limited number of cases: those theories that have achieved widespread popularity in American public law during the past several decades. We do not claim to have identified any precise metric for assessing a theory's popularity or "impurity," much less any transcendent truth about law. Nevertheless, given the significance of the examples we have included and the historical trend they appear to represent, we feel reasonably confident that our model has predictive as well as descriptive power. At least for the foreseeable future, any process-oriented public law theory that attracts extensive support can be expected to arrive at a state of impurity. This Part elaborates on the stages of the life cycle, including the drivers and dynamics of the impurification process.

### A. Stage One: Theory Birth

At  $T_1$ , the theory introduces a decision procedure or criterion for judgment that seeks to resolve a highly politicized legal conflict in terms that are relatively alien to the main points

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<sup>37</sup> One could argue, of course, that what we call "adulteration" within the academy is better explained as the splintering of one theory into multiple theories, even in cases in which all of the relevant academics claim to adhere to a single theory. In this vein, some self-proclaimed originalists contend that other self-proclaimed originalists are not truly originalists. This kind of argument, although often couched in descriptive terms, is really an argument about which rules an originalist *ought* to follow or promote. The best a descriptive (meta-)theory such as ours can do is to acknowledge and assess this disagreement from an external perspective. For our purposes at least, any effort to reinterpret the disagreement in terms of the existence of multiple, internally consistent prescriptive legal theories would produce a less accurate description of the theoretical field.

of political contention; in so doing, the theory differentiates itself from preexisting legal theories used to negotiate the conflict.

As noted above, the theories we see as most prone to the life cycle arise out of specific sociolegal conflicts. These conflicts are about legal questions, such as the best way for judges to interpret the Constitution or for administrators to implement statutes, but they have clear political stakes and identifiable political blocs. When originalism emerged as a theory of constitutional interpretation, for instance, it was widely understood to reflect “conservative frustration with the broad, rights-expansive decisions of the Warren and Burger Courts” in areas such as criminal procedure and reproductive choice.<sup>38</sup> When popular constitutionalism emerged some two decades later, it was widely understood to reflect liberal frustration with the broad, rights-constrictive decisions of the Rehnquist Court in areas such as antidiscrimination law.<sup>39</sup> The market for a new prescriptive legal theory begins to expand as the leading theories of the day come to be seen either as partial to one side of the conflict or as unresponsive to both sides—as doing too much political work or too little. By the time originalism arrived on the scene in the 1970s, “fundamental values” and other explicitly moral theories of constitutional interpretation had become associated with liberal and Democratic projects,<sup>40</sup>

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<sup>38</sup> Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *Georgetown L J* 713, 716 (2011). See also, for example, Robert Post and Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *Fordham L Rev* 545, 554–55 (2006) (“No politically literate person could miss the 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.”); Keith E. Whittington, *The New Originalism*, 2 *Georgetown J L & Pub Pol* 599, 601 (2004) (“[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.”).

<sup>39</sup> See, for example, Jamal Greene, Book Review, *Giving the Constitution to the Courts*, 117 *Yale L J* 886, 918 (2008) (“Just as many conservatives sought refuge from the individual rights decisions of the Warren and Burger Courts in a jurisprudence of original intent, some liberal academics have sought to rebut the Rehnquist Court’s structural critique by resort to popular constitutionalism in all its sundry guises.”).

<sup>40</sup> See Johnathan G. O’Neill, *Raoul Berger and the Restoration of Originalism*, 96 *Nw U L Rev* 253, 268–69 (2001) (discussing Professor Raoul Berger’s critique of the “fundamental values” approach favored by “legal liberals”); Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 *Yale L J* 453, 544 (1989) (noting “the familiar view of [*Griswold v Connecticut*] as a paradigmatic example of an ‘activist’ Court seeking to keep the living constitution up to date by imposing its own idea of ‘fundamental values’”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U Cin L Rev* 849, 863 (1989) (criticizing fundamental

whereas prominent alternatives such as structuralism had never aligned closely with any ideological camp.<sup>41</sup>

Against this backdrop, the new theory introduces an approach to legal decisionmaking that purports to advance a certain high-level end, such as democracy, judicial constraint, or social welfare, without committing to any of the political blocs that constitute the poles of the conflict. The theory may be inaugurated by one side or the other, as with the conservative push for originalism or the liberal push for popular constitutionalism. But its prescriptions are held out as uniquely attractive and legitimate *regardless* of which groups or which values end up winning in any given case. While proponents do not necessarily tout the theory's substantive "neutrality"—conventional CBA, for example, was openly oriented around the pursuit of economic efficiency<sup>42</sup>—they do claim a kind of relative neutrality. They promise an approach that allows official decisionmakers to avoid choosing directly among the competing political blocs and their first-order preferences. People of all stripes, it is claimed, should be willing to accept the theory in principle.

The precise date of birth for these theories can be difficult to pinpoint. The theory may be introduced (or reintroduced in modern form) in a foundational work or set of works, on which sympathetic commentators seek to build: Judge Robert Bork's 1971 article *Neutral Principles and Some First Amendment Problems*<sup>43</sup> and Professor Raoul Berger's 1977 book *Government by Judiciary*<sup>44</sup> are often said to have played this role in the case of originalism,

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values and related theories as an invitation to "judicial personalization of the law" and contending that "[m]ost if not all" such theorists "would strike down the death penalty").

<sup>41</sup> See Wayne A. Logan, *Constitutional Collectivism and Ex-offender Residence Exclusion Laws*, 92 Iowa L Rev 1, 30 n 210 (2006) (noting that structuralism of the sort theorized by Professor Charles Black "has been a staple in conservative and liberal commentary and judicial opinions alike"). See also generally Charles L. Black Jr, *Structure and Relationship in Constitutional Law* 3–32 (Louisiana State 1969).

<sup>42</sup> See, for example, Sidney A. Shapiro and Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 Harv Envir L Rev 433, 446–50 (2008) (observing that the adoption of CBA in the 1980s and in earlier periods was justified as a means "to promote economic efficiency"); Matthew D. Adler and Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 Yale L J 165, 186 (1999) ("The purpose of CBA, as typically understood, is to separate out the distributional issue and isolate the efficiency issue, so that the agency will evaluate projects solely on the basis of their efficiency.").

<sup>43</sup> See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1 (1971).

<sup>44</sup> See generally Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard 1977).

which crystallized as a distinctive interpretive approach in the 1980s.<sup>45</sup> Alternatively, the theory may be propounded in a range of contemporaneous works, leaving its pedigree more obscure. Among those who help to launch a prescriptive legal theory, some may be motivated by broad moral goals, some by narrow policy goals, some by professional advancement or personal renown, some by intellectual curiosity, some by the pursuit of truth, and some by a complicated mix of each of these factors and perhaps others as well. It may be the case that legal commentators face especially strong incentives to offer ambitious new theories, which will then have to be scaled back, on account of the preferences of law review editors or the dynamics of legal intellectual influence.<sup>46</sup> But we need not delve too deeply into the determinants of legal theory entrepreneurship, as our focus is on aggregate sociological effects rather than individual behaviors. No matter what accounts for their genesis, all theories with the formal features we identify are susceptible to the life cycle. Once such a theory is born, its parents cannot control its ultimate life path.

#### B. Stages Two through Five: The Dialectic of Impurification

At T<sub>2</sub>, critics of the theory highlight its failure to secure certain values that gave rise to the conflict in the first place.

At T<sub>3</sub>, the theory responds to these critiques by *internalizing* them—supplementing or modifying its approach so as to better serve the initially ignored values. As a result, the theory's constituency expands, but at the price of normative and conceptual purity.

At T<sub>4</sub>, this process of criticism and response recurs.

At T<sub>5</sub>, the theory has come to reflect the conflict-ridden political and theoretical field it had promised to transcend. To the extent the theory ever posed a direct threat to particular participants in the underlying conflict, that danger has dwindled.

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<sup>45</sup> See Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 Notre Dame L Rev 253, 267 n 78 (2011) (“[O]riginalism’s modern incarnation beg[an] in the 1970s, with the publication of [Bork’s article and Berger’s book].”). Another work cited in this vein is William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex L Rev 693 (1976). As these examples reflect, the theoretical turn toward legal process that we have associated with the 1980s, see Part I.A, had some important antecedents in the 1970s.

<sup>46</sup> This Article certainly does not dispel the possibility.

Most theories that are introduced each year go nowhere. Even if they manage to attract attention, they fail to spark follow-on inquiry, much less develop into a recognizable school of thought.<sup>47</sup> The question of why certain legal theories develop into intellectual and social movements is highly contextual and largely beyond the scope of this study.<sup>48</sup> The one point we wish to raise in this regard is that, in the current legal process-inflected era, those prescriptive theories that lack an abstract, procedural orientation start with a competitive disadvantage.<sup>49</sup> The susceptibility of a theory to the life cycle, that is, may be not only a *product* of its success in gaining a wide range of adherents but also a *condition precedent* for achieving such success in the first place.<sup>50</sup>

Whatever propels them forward, some prescriptive theories of the sort we describe do blossom into intellectual movements. And when this happens, impurification follows. Through an iterative process of contestation and reformulation, the theories become increasingly unmoored from the goals that were articulated to justify their adoption, adrift from their *raison d'être*. The details of this evolutionary process are also highly contextual, to be sure, but the process itself is not so complex or contingent as to preclude a stylized model. The key development occurs at T<sub>3</sub> (and may recur numerous times thereafter), when normative objections to the theory are not simply parried by those speaking in the name of the theory but rather are incorporated into the theory itself, through refinements designed to address the objections. This is the moment, to put it provocatively, when the theory begins to cannibalize itself.

Why and how do these self-defeating shifts occur? In a typical case, several mechanisms combine to produce the phenomenon. Some of these mechanisms may affect individual theorists who

<sup>47</sup> See Thomas A. Smith, *The Web of Law*, 44 San Diego L Rev 309, 336 (2007) (reporting that “[f]orty-three percent of [law review] articles are not cited at all, and about 79% get ten or fewer citations”).

<sup>48</sup> For an analysis of the conditions under which “scientific/intellectual movements” are most likely to emerge and succeed, see generally Scott Frickel and Neil Gross, *A General Theory of Scientific/Intellectual Movements*, 70 Am Sociological Rev 204 (2005).

<sup>49</sup> See Part I.A. In light of the greater political salience of public law disputes, see notes 27–28 and accompanying text, we think this point holds especially true in public law fields.

<sup>50</sup> See Jamal Greene, *How Constitutional Theory Matters*, 72 Ohio St L J 1183, 1199 (2011) (“A protean disposition is necessary for a [constitutional] methodology to successfully validate a diverse set of political objectives with equilibria in both our past and our future.”).

modify their views over time, while others rely on an influx of new commentators who continually criticize and revise the theory. Key impurifying agents include:<sup>51</sup>

*Political feedback effects.* As the new theory encounters criticism about morally relevant information that it excludes or about substantive values and social groups that it disfavors, notwithstanding its ostensibly depoliticized character, proponents may suggest revisions intended to broaden or maintain the theory's appeal. Early versions of originalism that seemed hard to reconcile with *Brown v Board of Education of Topeka*,<sup>52</sup> for example, were jettisoned in part to "make originalism safe for *Brown*" and the principle of racial equality that the canonical case embodies.<sup>53</sup> The theory of originalism thereafter became harder to typecast as radical or right leaning in its methodological demands and policy implications.

*Professional feedback effects.* While impurification is partly driven by the need to incorporate discordant political views, it also follows from epistemic and practical weaknesses of the theory that only become apparent over time. As the new theory encounters criticism about such weaknesses, proponents may suggest revisions intended to make the initial idea not just more politically palatable but also more intellectually and institutionally sound or a better fit with prevailing legal norms, in ways that redound to their reputational benefit and attract partisans of alternative theoretical approaches. The theory becomes more sophisticated and less grandiose.<sup>54</sup> Early versions of originalism that relied on idiosyncratic notions of the Framers' intent, for example, were jettisoned in part to make the theory more coherent, if less constraining.<sup>55</sup> What we are calling a process of impurification can thus be seen as a process of purification from another perspective: the very moves that undermine the theory's initial normative aspirations may be ones that make it conceptually richer and more refined.

<sup>51</sup> For a discussion of additional adaptive behaviors that facilitate the life cycle, see text accompanying notes 215–19.

<sup>52</sup> 347 US 483 (1954).

<sup>53</sup> Jed Rubenfeld, *Reply to Commentators*, 115 Yale L J 2093, 2098 (2006).

<sup>54</sup> See Clifford Geertz, *The Interpretation of Cultures: Selected Essays* 3–4 (Basic Books 1973) (observing that certain ideas that seem to "resolve [ ] many fundamental problems at once" periodically "burst upon the intellectual landscape with a tremendous force" and then, with the exception of "zealots," commentators "settle down after a while to the problems the idea has really generated").

<sup>55</sup> See Part III.A.

*Fragmentation and co-optation.* As the new theory is elaborated by more and more commentators, differences of opinion may emerge and eventually crystallize into competing versions of the theory, further compromising the objectives of its founders. Some of the second- and third-generation commentators who speak in the theory's name may not share those objectives at all, and may even wish to subvert them. Originalism, as Professor James Fleming observes, has now experienced both *balkanization* into rival camps and *Balkinization*, or "what happens when originalism becomes so inclusive that even Yale law professor Jack Balkin, hitherto a pragmatic living constitutionalist, becomes an originalist."<sup>56</sup>

Churches can excommunicate those who peddle false versions of their creed. Political parties may be able to withhold endorsements and financial support from those who defy the party line. Intellectual movements have no comparable tools to weed out saboteurs from sympathizers or to ensure internal discipline—perhaps especially if they are led by professors whose compensation derives largely from fixed, school-specific salaries (as in law) rather than competitive, centralized grants. As a prescriptive legal theory becomes increasingly influential, the universe of people who identify with the theory not only expands in size but also changes in composition, becoming more ideologically diverse and representative of the overall population of lawyers. Purists are absorbed into the crowd.

### C. Stage Six: Theory Death and Theory Persistence

At  $T_6$ , the theory either falls out of favor with mainstream legal actors, at least for the time being, or persists in substantially adulterated form.

The life cycle reaches its end once a prescriptive legal theory, as expressed by prominent commentators and applied by public officials, becomes incapable of fulfilling the distinctive normative functions—including decisional clarity—it was created to fulfill. But life and law go on. One of two basic fates awaits a theory at  $T_6$ .

The first is theory death. Legal thinkers and decisionmakers may gradually set aside an adulterated theory as a needless complication or obfuscation of the initial conflict, until at some point

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<sup>56</sup> James E. Fleming, *Fidelity to Our Imperfect Constitution: For Moral Readings and against Originalisms 2* (Oxford 2015).



the theory ceases to claim new adherents. Such a slide toward irrelevance seems to be happening at this moment to popular constitutionalism.<sup>57</sup> Although the impurification process we describe may have a dialectical cast, it does not necessarily yield durable syntheses.<sup>58</sup>

Importantly, however, abandonment of a theory may be only temporary. Today's originalism is the successor to last generation's "interpretivism."<sup>59</sup> Today's CBA is the latest successor to versions of CBA dating back to the New Deal era.<sup>60</sup> Both theories have older intellectual roots. A prescriptive legal theory may fade away at T<sub>6</sub> only to be reborn, years later, in a slightly revised and relabeled form.<sup>61</sup> And then the impurification process starts again. Our life cycle theory is thus consonant with a larger *epicyclical* account of legal theory development.

The second fate is that of stubborn persistence. Even if it no longer serves its motivating purposes, an adulterated theory may continue to command allegiance because it serves social interests that are unrelated to those purposes. There are many reasons, for instance, why contemporary left liberals may wish to associate themselves with originalism and CBA, as we explore in Part V.

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<sup>57</sup> See Helen J. Knowles and Julianne A. Toia, *Defining "Popular Constitutionalism": The Kramer versus Kramer Problem*, 42 S U L Rev 31, 55–56 (2014) (finding that usage of the term "popular constitutionalism" in law journals has dropped precipitously over the past five to ten years). We will have more to say about popular constitutionalism's decline in Parts III.C and V.B.

<sup>58</sup> For this reason, among others, we do not find it useful to draw on a formal theory of dialectics, whether Hegelian or Marxist. We do note an affinity between our model and the dialectical vision of Professors Theodor Adorno and Max Horkheimer, insofar as their vision suggests that assertions of rational progress have a built-in tendency to revert to struggles over power. See generally Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment* (Continuum 2d ed 1988) (John Cumming, trans). Here too, though, the connection is so tenuous that it does not seem worth developing.

<sup>59</sup> See Dennis J. Goldford, *The American Constitution and the Debate over Originalism* 90–121 (Cambridge 2005) (describing "the evolution of the interpretivism debate into the originalism debate").

<sup>60</sup> See Daniel H. Cole, *Law, Politics, and Cost-Benefit Analysis*, 64 Ala L Rev 55, 56 (2012) ("Formal CBA has been around since the New Deal when President Roosevelt's National Planning Board . . . began commissioning economic analyses of public works projects.").

<sup>61</sup> Such revising and relabeling of faded theories need not be self-conscious and, on the contrary, may be facilitated by lack of familiarity with prior scholarship. See, for example, Mark Tushnet, *Harry Kalven and Kenneth Karst in The Supreme Court Review: Reflections after Fifty Years*, 2010 S Ct Rev 35, 35 (suggesting that many of "the questions that [constitutional] scholars today regard as deep were already present, though sometimes submerged, in [] articles" published fifty years ago).

But those reasons have little to do with disciplining judges or administrators or with maximizing economic efficiency or fidelity to the constitutional text.

### III. CASE STUDIES

Having laid out the general framework of our model, we now turn to case studies to help illustrate its workings. This Part reviews the intellectual history of several prominent legal theories through the lens of the life cycle. As suggested above, there is a conventional narrative regarding when theories such as originalism and textualism emerged and what they were “about” during this formative period. We sketch these origin stories, which establish a baseline for understanding what the theories were meant to accomplish, and then trace the theories’ development in the years that followed. These case studies proceed in a necessarily summary fashion; a detailed version of any one of them would be an article unto itself. Nevertheless, we believe that the discussions below (and the more exhaustive historical treatments on which some of them draw) are sufficient to demonstrate that the life cycle model plausibly fits the evidence—that it provides a parsimonious and consilient account not only of why these theories have evolved in the manner that they have, but also of how these seemingly disparate episodes in public law reform are in fact closely connected.<sup>62</sup>

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<sup>62</sup> We focus on four episodes that strike us as particularly important and revealing, but the life cycle model might be applied to numerous other theories as well. We suspect, for example, that judicial minimalism of the sort advocated by Professor Cass Sunstein, see generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard 1999), experienced impurification as theorists following Sunstein sought to characterize various exercises of judicial power either as legitimate exceptions to minimalism or (more commonly) as appropriate applications of minimalism, properly understood. See Michael S. Greve, *Atlas Croaks. Supreme Court Shrugs.*, 6 *Charleston L Rev* 15, 32 n 79 (2011) (complaining that “judicial minimalism in theory means maximalism in fact”). Looking ahead, Sunstein’s influential theory of “nudging,” see generally Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale 2008), may be an interesting candidate for impurification. If the prescribed nudging strategies become increasingly transparent and private choice respecting (and thus politically popular) in response to criticisms of excessive paternalism and manipulation, they may also become increasingly ineffective at pushing people toward regulators’ desired outcomes. Outside of law, Danaher has suggested that the theory of effective altruism fits our model. See generally Danaher, *The Life Cycle of Prescriptive (Legal) Theories* (cited in note 8).

### A. From Old Originalism to New Originalism

The story of originalism's theoretical evolution has been told numerous times in recent years,<sup>63</sup> so we will aim to be as concise as possible here. As already indicated, contemporary originalist theory arose out of conservative frustration with the "activist" constitutional rulings of the Warren and Burger Courts;<sup>64</sup> received influential articulations in the 1970s from Professor Berger, Judge Bork, and then-Associate Justice William Rehnquist;<sup>65</sup> and rose to public prominence in the mid-1980s following the advocacy of Attorney General Edwin Meese.<sup>66</sup> In these early years, originalists urged a "jurisprudence of original intention,"<sup>67</sup> according to which judges would be required to follow "the specific intentions of the Framers . . . regarding how a specific provision was meant to apply to specific issues."<sup>68</sup> This methodology was defended on

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<sup>63</sup> Useful histories of contemporary originalist theory include Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* 111–216 (Johns Hopkins 2005), Colby, 99 *Georgetown L J* at 716–36 (cited in note 38), Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in Grant Huscroft and Bradley W. Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* 12, 13–27 (Cambridge 2011), Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 *Duke L J* 239, 247–62 (2009), and Vasan Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *Georgetown L J* 1113, 1134–48 (2003). But see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *Fordham L Rev* 453, 462 (2013) ("A comprehensive history of originalist theorizing has yet to be written."). Professor Lawrence Solum has recently begun to sketch a revisionist account of originalism's history, according to which originalism emerged as a coherent theory of constitutional interpretation only in the 1980s and thenceforth evolved from an inchoate and indeterminate "mélange" of ideas into an increasingly consistent view. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 *Notre Dame L Rev* 1, 4 (2015). This Article relies largely on the standard story of originalism's development. While Solum's revisionist account may call into question aspects of this story with regard to a specialized scholarly literature, we continue to believe that the story well captures the trajectory of originalism in academic, judicial, and popular commentary more broadly. See Part I.C (defending our decision to consider non-academic as well as academic invocations of a theory).

<sup>64</sup> See note 38 and accompanying text.

<sup>65</sup> See notes 43–45 and accompanying text.

<sup>66</sup> See O'Neill, *Originalism in American Law and Politics* at 146–60 (cited in note 63); Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 *Stud Am Polit Dev* 61, 75–82 (2009).

<sup>67</sup> This was the famous phrase used in Meese's first originalism speech. See Edwin Meese III, *Speech before the American Bar Association*, in Steven G. Calabresi, ed, *Originalism: A Quarter-Century of Debate* 47, 50–54 (Regnery 2007).

<sup>68</sup> Kesavan and Paulsen, 91 *Georgetown L J* at 1135 (cited in note 63). "[E]xtrapolations from that intention" could be used when dealing with "modern issues not within the specific contemplation of the Framers or the Ratifiers." *Id.*

democratic and rule of law grounds. But the “primary commitment” of originalist theory in the 1970s and 1980s, as many have observed, “was to judicial restraint.”<sup>69</sup> Constraining judges through text and history was held out to be the theory’s central virtue and objective. “Originalist methods of constitutional interpretation were understood as a means to that end.”<sup>70</sup>

Original intent originalism met with a variety of objections. One line of critique called attention to the difficulties of recovering and applying the Framers’ (possibly quite varied) intentions.<sup>71</sup> Another line of critique claimed that the Framers did not intend for their own subjective intentions to be controlling.<sup>72</sup> A third line of critique emphasized that a jurisprudence of original intent might be at odds with celebrated decisions such as *Brown*, as some of originalism’s early proponents had openly acknowledged.<sup>73</sup>

In response to these objections, originalism underwent a series of transformations. The focus of inquiry moved from the intentions of the Framers to the understandings of the ratifiers to the “original public meaning” of the constitutional text, or how the words of the Constitution “would have been understood by an ordinary, reasonably well-informed user of the language, in context, at the time, within the relevant political community that adopted them.”<sup>74</sup> Justice Antonin Scalia helped catalyze this move in a 1986 speech that called on originalists “to change the label from the Doctrine of Original Intent to the Doctrine of Original

<sup>69</sup> Whittington, 2 *Georgetown J L & Pub Pol* at 602 (cited in note 38). See also, for example, Colby, 99 *Georgetown L J* at 717 (cited in note 38) (“It would be difficult to overstate the extent to which the Old Originalism was characterized by its own proponents as a theory that could constrain judges.”); Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner and Constitutional Historicism*, 85 *BU L Rev* 677, 690 (2005) (“The old originalism was designed to promote judicial restraint and criticize the judicial innovations of liberal judges.”).

<sup>70</sup> Whittington, 2 *Georgetown J L & Pub Pol* at 602 (cited in note 38).

<sup>71</sup> See, for example, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *BU L Rev* 204, 209–22 (1980). A parallel line of critique emphasized that it was the Constitution’s manifold ratifiers, not the forty-odd delegates in Philadelphia, who conferred legal and democratic legitimacy on the document. *Id.* at 214–15.

<sup>72</sup> See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv L Rev* 885 (1985).

<sup>73</sup> See, for example, Berger, *Government by Judiciary* at 117–33 (cited in note 44); Earl Maltz, *Some New Thoughts on an Old Problem—the Role of the Intent of the Framers in Constitutional Theory*, 63 *BU L Rev* 811, 846–50 (1983).

<sup>74</sup> Kesavan and Paulsen, 91 *Georgetown L J* at 1144–45 (cited in note 63) (citation omitted).

Meaning.”<sup>75</sup> In addition to the turn to public meaning, originalists generally came to embrace a distinction between “constitutional interpretation” (understood as the effort to discern the text’s communicative content) and “constitutional construction” (understood as the process by which that text is given legal effect).<sup>76</sup> In the many instances in which the communicative content of the constitutional text does not fully determine a legal result, these originalists allow, a judge must engage in the “essentially normative” practice of construction.<sup>77</sup> As a result of these and related shifts, the so-called new originalism that predominates today is conceptually sophisticated, richly elaborated, and substantially immune from the sharpest objections leveled against its predecessors.

It is also highly impure, in the sense we use that term. As Professor Thomas Colby has explained at length, the theoretical adjustments that have enhanced originalism’s academic credibility and broadened its political appeal have “effectively sacrificed the Old Originalism’s promise of judicial constraint.”<sup>78</sup> The same developments credited with helping originalism “work itself pure”<sup>79</sup> in a scholastic sense, that is, have compromised its foundational (and still often touted<sup>80</sup>) aim to limit judicial discretion and bring clarity and predictability to constitutional law. A number of internal schisms have opened up along the way, as some self-identified originalists seek to justify and facilitate its convergence with living constitutionalism,<sup>81</sup> some seek to recast the theory

<sup>75</sup> Antonin Scalia, *Address by Justice Antonin Scalia before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986)*, in *Original Meaning Jurisprudence: A Sourcebook* 101, 106 (Office of Legal Policy 1987).

<sup>76</sup> See Solum, 82 *Fordham L Rev* at 458–75 (cited in note 63) (explicating the interpretation/construction distinction and its role in “the New Originalism”).

<sup>77</sup> *Id.* at 472. For a suggestion that the interpretation/construction distinction collapses, see Frederick Schauer, *Is Law a Technical Language?*, 52 *San Diego L Rev* 501, 511–12 (2015).

<sup>78</sup> Colby, 99 *Georgetown L J* at 714 (cited in note 38). See also D.A. Jeremy Telman, *Originalism: A Thing Worth Doing . . .*, 42 *Ohio N U L Rev* 529, 543 (2016) (“Originalism now enacts judicial activism rather than resisting it.”).

<sup>79</sup> Kesavan and Paulsen, 91 *Georgetown L J* at 1127, 1133 (cited in note 63). See also Lee J. Strang, *Originalism’s Promise, and Its Limits*, 63 *Cleve St L Rev* 81, 84 (2014) (explaining that originalism has evolved to “meet[] the various criticisms that have been leveled against it” and thereby made itself “better”).

<sup>80</sup> See Eric Berger, *Originalism’s Pretenses*, 16 *U Pa J Const L* 329, 330 (2013) (noting that while “originalism has changed many times,” proponents continue to “tout[] its ability to constrain judges”).

<sup>81</sup> See generally, for example, Jack M. Balkin, *Living Originalism* (Belknap 2011); Bernadette Meyler, *Towards a Common Law Originalism*, 59 *Stan L Rev* 551 (2006).

in less normative and more positivistic terms,<sup>82</sup> and some seek to fend off the foregoing efforts—and save originalism’s “soul”<sup>83</sup>—through additional methodological modifications<sup>84</sup> or a return to “[o]ld-time”<sup>85</sup> ideas such as intentionalism.

Yet while Colby is correct that originalism has “sacrificed” some of its original ideals as it has become increasingly refined, he errs in assuming that this theoretical trajectory (or this trade-off) is peculiar to originalism.<sup>86</sup> On the contrary, the process of adulteration through maturation is endemic to legal theorizing. It is the life cycle. The failure to understand originalism’s development in this broader context, furthermore, distorts Colby’s reading of the evidence that he so sensitively assembles—leading him both to overstate the “inconsistency” and “incoherence” of the originalist movement,<sup>87</sup> and to understate the real-world effects that its adulterated products may be having on the legal system.<sup>88</sup> To make headway on the “bedeviling” phenomenon that Colby has observed,<sup>89</sup> it is necessary to generalize, and theorize, his observations.

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<sup>82</sup> See generally, for example, William Baude, *Is Originalism Our Law?*, 115 *Colum L Rev* 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *Harv J L & Pub Pol* 817 (2015).

<sup>83</sup> Steven D. Smith, *That Old-Time Originalism*, in Huscroft and Miller, eds, *The Challenge of Originalism* 223, 230 (cited in note 63).

<sup>84</sup> See, for example, Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 204–06 (Kansas 1999) (advocating deference to the political branches on matters of constitutional construction); John O. McGinnis and Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 *Nw U L Rev* 751, 752 (2009) (arguing that “the Constitution should be interpreted based on the enactors’ original methods” of interpretation).

<sup>85</sup> Smith, *That Old-Time Originalism* at 232 (cited in note 83).

<sup>86</sup> See Colby, 99 *Georgetown L J* at 714, 776 (cited in note 38) (describing originalism’s sacrifice of judicial constraint as an “unheralded,” “ironic,” and “bedeviling” phenomenon).

<sup>87</sup> Colby and Smith, 59 *Duke L J* at 249 (cited in note 63). In Colby and his coauthor Professor Peter Smith’s telling, originalism is “not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.” *Id.* at 244. Solum has persuasively rebutted this claim and demonstrated that virtually all self-identified originalists agree in principle on certain core ideas of “fixation” and “constraint.” See Solum, 82 *Fordham L Rev* at 459–62 (cited in note 63).

<sup>88</sup> Colby provocatively ends his article with the suggestion that “[o]riginalism seems to be having its cake and eating it too,” Colby, 99 *Georgetown L J* at 778 (cited in note 38), but he does not explore any specific consequences. For our own thoughts on the causes and consequences of originalism’s adulterated persistence, see Part V.B.

<sup>89</sup> Colby, 99 *Georgetown L J* at 776 (cited in note 38).

## B. From New Textualism to *New New Textualism*

When the theory of “new textualism” emerged in the 1980s, it too promised to discipline judicial behavior—in the realm of statutes.<sup>90</sup> New textualism took aim at the broadly purposive approach to statutory interpretation that had come to dominate theory and practice in the wake of the New Deal.<sup>91</sup> Displacing an earlier textualist tradition that sought to locate legislative intent in the “plain meaning” of statutes,<sup>92</sup> mid-century purposivists urged interpreters to “[c]arry [o]ut the [p]urpose” of statutes as best they can, on the assumption “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”<sup>93</sup> The distinguishing features of this purposive approach included the extensive use of legislative history and a “soft plain meaning rule,” according to which “the plainest meaning [could] be trumped by contradictory legislative history.”<sup>94</sup>

By the 1980s, however, this approach had led courts into a nettle of politically charged debates about the validity of new regulatory schemes.<sup>95</sup> The judges’ “willingness to consider *almost anything* that was said about or happened to a legislative proposal that becomes a statute” only highlighted the political stakes of their interpretive methods.<sup>96</sup> Drawing on modern public-choice

<sup>90</sup> For a broad overview of the new textualist movement during the 1980s, see generally William N. Eskridge Jr., *The New Textualism*, 37 *UCLA L Rev* 621 (1990). See also Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 *Wash U L Q* 351, 355–57 (1994) (tracking the rise of textualism in the Supreme Court during the 1980s).

<sup>91</sup> See Caleb Nelson, *A Response to Professor Manning*, 91 *Va L Rev* 451, 455 (2005) (“[T]extualism arose as a challenge to a reigning ‘orthodoxy’ that dominated American jurisprudence after World War II, and that encouraged judges to take a ‘purposivist’ approach to the interpretation of statutes.”) (citation omitted).

<sup>92</sup> On the textualism that predominated during the pre–New Deal period, see Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 *Yale L J* 266, 271–75, 302–06 (2013); Harry Willmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 *Wash U L Q* 2, 5 (1939).

<sup>93</sup> Henry M. Hart Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law 1378–80* (Foundation 1994) (William N. Eskridge Jr and Philip P. Frickey, eds).

<sup>94</sup> Eskridge, 37 *UCLA L Rev* at 626–28 (cited in note 90). On the normalization of legislative history as an interpretive tool in the 1940s, see Parrillo, 123 *Yale L J* at 287–300 (cited in note 92).

<sup>95</sup> See Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims 1–11* (Yale 1983); Edward L. Rubin, *Due Process and the Administrative State*, 72 *Cal L Rev* 1044, 1048–81 (1984).

<sup>96</sup> Eskridge, 37 *UCLA L Rev* at 632 (cited in note 90).

scholarship as well as a classically formalist conception of the separation of powers, new textualists attacked the entire enterprise of “imaginative[ly] reconstruct[ing]” legislative intent.<sup>97</sup> Purposivism, they argued, underestimated the complexity and opacity of the legislative process, overestimated the ability of judges to recover shared aims from biased committee reports and floor debates, and elevated judicial inclinations over the sovereign decisions embodied in legislative enactments.<sup>98</sup> The most prominent new textualists, such as Scalia and Judge Frank Easterbrook, contended that these enactments—the statutory texts themselves—provided the sole legitimate source of law.<sup>99</sup> “To favor a statute’s purposes over its text, they argued, was to ignore the constitutionally prescribed lawmaking procedures and to aggrandize the judiciary’s role in the constitutional design.”<sup>100</sup>

It followed that exacting attention to a statute’s wording was the sole acceptable method by which judges could determine what the law required. Engagement with the relatively raw, value-laden language surrounding the passage of bills was both unnecessary and improper. By directing judges to focus on the semantic structure of statutory texts rather than the policy debates surrounding their passage, new textualism thus proposed to rescue the legitimacy of courts from the politically contentious chaos of modern lawmaking. Consistent application of interpretive canons to determine statutory meaning, moreover, would bring order to that chaos by spurring Congress to engage in more careful legislative drafting.<sup>101</sup>

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<sup>97</sup> Id at 630–31.

<sup>98</sup> See, for example, Frank H. Easterbrook, *Statutes’ Domains*, 50 U Chi L Rev 533, 544–51 (1983); Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 Duke L J 371, 375–79.

<sup>99</sup> See, for example, *Immigration and Naturalization Service v Cardoza-Fonseca*, 480 US 421, 452–53 (1987) (Scalia concurring in the judgment) (“Judges interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.”); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv J L & Pub Pol 59, 60 (1988) (“The words of the statute, and not the intent of the drafters, are the ‘law.’”).

<sup>100</sup> Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum L Rev 1, 27 (2006).

<sup>101</sup> See *Finley v United States*, 490 US 545, 556 (1989) (Scalia) (“What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”).



The theory of new textualism was suspected from the start of being a political project aimed at restraining judicial and legislative efforts to create a more liberal administrative state.<sup>102</sup> Although these suspicions helped prompt a rapid scholarly response, critics generally engaged new textualism on its own depoliticized and proceduralist terms, focusing on the nuances of public choice and constitutional design. Professors Daniel Farber and Philip Frickey, for instance, argued that the public-choice analysis so popular with new textualists was “compatible with a more respectful attitude toward legislative intent,”<sup>103</sup> while their four corners approach to statutory interpretation belied their own commitment to being “honest agents of the political branches.”<sup>104</sup> A series of internal critiques soon followed. New textualists, it was alleged, assumed without warrant that courts treat nonstatutory legislative materials as sources of law rather than sources of evidence.<sup>105</sup> New textualists undermined their own program by relying on a range of nonstatutory materials (from dictionaries to canons of construction to past precedents) to say what the law is;<sup>106</sup> they also imputed intentions to Congress when deploying interpretive devices such as the absurdity doctrine.<sup>107</sup> New textualists’ unprecedented refusal to consider legislative history actually aggrandized courts at the expense of Congress, given that legislators write laws against a backdrop of past judicial practice.<sup>108</sup>

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<sup>102</sup> See, for example, Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 Wm & Mary L Rev 827, 834 (1991) (“Is this retreat to the text merely a conservative plot to undermine liberal statutes?”); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv L Rev 892, 912 (1982) (arguing that textualist methodology supports an “implicit resurrection of laissez-faire individualism” that “undermines the legitimacy of congressional legislation”). See also Molot, 106 Colum L Rev at 25 (cited in note 100) (observing that the new textualism could be seen as “one prong of a multipronged backlash against what was perceived to be a liberal and activist Warren Court era”).

<sup>103</sup> Daniel A. Farber and Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va L Rev 423, 424 (1988).

<sup>104</sup> Id at 459, quoting Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 Harv L Rev 4, 60 (1984).

<sup>105</sup> See Mashaw, 32 Wm & Mary L Rev at 844 (cited in note 102).

<sup>106</sup> See Eskridge, 37 UCLA L Rev at 674–76, 679–83 (cited in note 90); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673, 702–05 (1997).

<sup>107</sup> See Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 Harv J L & Pub Pol 401, 422 (1994); William D. Popkin, An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation, 76 Minn L Rev 1133, 1163 (1992).

<sup>108</sup> See Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 Am U L Rev 277, 306–07 (1990).

New textualists quickly adapted to these critiques, and gave up a good deal of ground in the process. As early as 1989, Scalia acknowledged that various interpretive canons used by textualists required courts to engage in purposive analysis and to consider public policy.<sup>109</sup> The legitimacy of these canons, he would later explain, rests on a theory of implicit delegation of interpretive authority from Congress to the courts (or to agencies).<sup>110</sup> By 1994, Easterbrook was prepared to concede that “[p]lain meaning’ as a way to understand language is silly”<sup>111</sup> and to embrace the importance of contextual evidence.<sup>112</sup> Three years later, leading textualist theorist Professor John Manning proposed that Scalia’s sweeping bicameralism-and-presentment argument against legislative history be replaced with a much narrower proposition: that nonstatutory materials such as committee reports could not *authoritatively* settle statutory meaning, as this would imply an impermissible “self-delegation” of legislative authority from Congress to an entity under its control.<sup>113</sup> Manning’s argument not only was more esoteric than Scalia’s; it also contemplated and indeed championed recourse to legislative history as a means to “add substantial value to the interpretive process by supplying a well-informed, contemporaneous account of the relevant background to the enactment.”<sup>114</sup> Surveying the theory’s development a decade after Manning wrote those words, Professor Jonathan Molot concluded that textualists “have been so successful . . . [at] distinguishing their new brand of ‘modern textualism’ from the older, more extreme ‘plain meaning’ school, that

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<sup>109</sup> See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 515 (discussing the canon of avoiding “absurd” results).

<sup>110</sup> See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 35 (Princeton 1997) (“Whatever Congress has not *itself* prescribed is left to be resolved by the executive or (ultimately) the judicial branch.”).

<sup>111</sup> Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv J L & Pub Pol 61, 67 (1994).

<sup>112</sup> *Id.* at 64 (“Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts.”).

<sup>113</sup> Manning, 97 Colum L Rev at 710–19 (cited in note 106).

<sup>114</sup> *Id.* at 732. See also John F. Manning, *Second-Generation Textualism*, 98 Cal L Rev 1287, 1289–90 (2010) (arguing that “[r]ather than focusing primarily on the broader question of whether to use legislative history generally, second-generation textualism emphasizes that judges in our system of government have a duty to enforce *clearly worded* statutes as written”). Manning has suggested an evolutionary narrative largely complementary to our own, in which critics of “first-generation textualism” ultimately “improved, perhaps even saved, textualism by calling into question its early reliance on deeply cynical arguments about the legislative process”—thus pushing textualists away from public-choice theory and toward more palatable constitutional justifications. *Id.* at 1289.

they no longer can identify, let alone conquer, any remaining territory between textualism's adherents and nonadherents."<sup>115</sup> New textualism had worked itself impure.

Molot oversimplifies, however, in attributing this development to the new textualists' quick and canny responses to criticisms (or graceful concessions of defeat).<sup>116</sup> An additional impetus to impurification came from the other side—from the efforts of the theory's critics to adapt it to their own normative ends. For even as they rejected new textualism's rigid conception of the separation of powers and its specific applications by judges like Easterbrook and Scalia, left-leaning skeptics increasingly came to view the theory as a useful corrective to purposivism's own conservative tendencies. New textualism developed in parallel with a literature challenging overly "archeological"<sup>117</sup> or "static"<sup>118</sup> approaches to statutory interpretation, which assumed that the meaning of a statute was fixed at the time of its passage.<sup>119</sup> On both democratic and hermeneutic grounds, a range of liberal scholars supported a more "dynamic" approach, and some of them argued that new textualism, properly understood, did so as well.<sup>120</sup> Whatever its original political connotations, new textualism helpfully dispelled the fetishism of legislative intent and provided reasons to set aside legislative history, at least when such history was contrary to interpretations that were textually plausible and socially preferable. The vitality of this connection between a liberal commitment to judicial-legislative dynamism and a liberal openness to textualism (in highly adulterated form) can be seen today in scholarship that identifies and endorses new

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<sup>115</sup> Molot, 106 Colum L Rev at 2 (cited in note 100).

<sup>116</sup> See id at 34 ("Textualists have been able to win over new adherents and influence nonadherents in large part because they have updated textualism and broadened its appeal").

<sup>117</sup> T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich L Rev 20, 21 (1988).

<sup>118</sup> Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 S Ct Rev 429, 436–37.

<sup>119</sup> For examples of works advocating a more dynamic approach, see generally Calabresi, *A Common Law for the Age of Statutes* (cited in note 15); Ronald Dworkin, *Law's Empire* (Belknap 1986); James Willard Hurst, *Dealing with Statutes* (Columbia 1982); William N. Eskridge Jr, *Dynamic Statutory Interpretation*, 135 U Pa L Rev 1479 (1987).

<sup>120</sup> See, for example, Eskridge, 37 UCLA L Rev at 625 (cited in note 90) ("Notwithstanding reservations about the new textualism, I endorse its critique of the 'archaeological' rhetoric used by the Court."); Mashaw, 32 Wm & Mary L Rev at 835–36 (cited in note 102) (stating, "I am not at all convinced that we should so easily dismiss textualism," as "the exclusion of legislative history is more likely to increase the flexibility of statutes than to render them static or rigid").

fields of federal common law, along with the proliferation of novel interpretive canons.<sup>121</sup>

To be sure, one can still find “old” new textualists who, at least some of the time, seek to maintain the purity of the theory’s aversion to purposivism and intentionalism.<sup>122</sup> But if the Roberts Court’s recent jurisprudence is any indication, these efforts represent a rearguard action, and a highly adulterated new textualism reigns supreme. *King v Burwell*<sup>123</sup> supplies a particularly significant example.<sup>124</sup> In *King*, Chief Justice John Roberts’s opinion for the Court cites no legislative history in construing the Affordable Care Act<sup>125</sup> (ACA)—apparently basing its interpretation of an “ambiguous” statutory provision on a reading of that provision in the context of the statutory text as a whole and the application of several traditional interpretive canons.<sup>126</sup> As just described, the Court’s approach sounds like a stringent form of textualism. Yet, as Scalia emphasized in dissent, the degree to which the provision was ambiguous was itself unclear.<sup>127</sup> Roberts discerned from the “long history of failed health insurance reform” leading up to the

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<sup>121</sup> See Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 Wm & Mary L Rev 753, 806 (2013) (arguing that conceptualizing interpretive canons as a form of “federal common law . . . could facilitate the kind of interpretive feedback loop between the Court and Congress that many have desired but some have thought impossible”); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 Geo Wash L Rev 1293, 1351 (2012) (defending the legitimacy of administrative common law on the ground that, “given its constitutional underpinnings,” it “bears a close resemblance to the use of constitutionally based canons of interpretation and clear statement rules”).

<sup>122</sup> See, for example, John F. Manning, *The Absurdity Doctrine*, 116 Harv L Rev 2387, 2393–2431 (2003) (criticizing the absurdity doctrine for overestimating judicial understanding of legislative purpose). Professor Jonathan Siegel has proposed that “textualism’s fundamental axiom, combined with the tendency of the law to work itself pure,” inexorably lead textualism “to make itself progressively more radical and, therefore, less workable.” Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U Pa L Rev 117, 120–22 (2009). We believe Siegel has things backward. In focusing on the logic of textualism’s internal “axioms,” Siegel misses all of the external dynamics that allow such axioms to be reconceptualized or reformulated in response to criticism—and that prevent mainstream prescriptive legal theories, more generally, from tending toward radicalism.

<sup>123</sup> 135 S Ct 2480 (2015).

<sup>124</sup> Professor Richard Re has identified several other cases that fit this mold in addition to *King*, including *Yates v United States*, 135 S Ct 1074 (2015), and *Bond v United States*, 134 S Ct 2077 (2014). See Richard M. Re, *The New Holy Trinity*, 18 Green Bag 2d 407, 409–15 (2015).

<sup>125</sup> Patient Protection and Affordable Care Act, Pub L No 111-148, 124 Stat 119 (2010).

<sup>126</sup> *King*, 135 S Ct at 2491–96.

<sup>127</sup> *Id* at 2501–03 (Scalia dissenting).

ACA<sup>128</sup> a “legislative plan” to expand access to coverage.<sup>129</sup> In light of this plan, the meaning of the disputed provision became ambiguous, as its most literal interpretation would result in the failure to provide subsidies to millions of people legally obligated to purchase insurance.<sup>130</sup> Roberts then resolved the ambiguity in a manner that was both permitted by the ACA’s text and accorded with its goals.<sup>131</sup>

Distinguishing itself from the old purposivism, the Court’s decision in *King* goes out of its way to establish that its interpretation “can fairly be read” from the statutory text.<sup>132</sup> Yet the Court’s “key move,” as Professor Richard Re observes, is to integrate purposive considerations into the threshold “identification of textual clarity or ambiguity.”<sup>133</sup> It has been suggested that the remaining divide between textualists and nontextualists generally reduces to disagreements over whether a particular statutory provision is or is not unambiguous.<sup>134</sup> In its highly adulterated form, however, new textualism encompasses *both* poles of this debate: just compare the majority and dissenting opinions in *King*. As the *King* litigation further demonstrates, the original political controversy that new textualism sought to resolve—about how judges should respond to the growth of the administrative state—is now being reprised within the terms of the theory.

### C. From Popular Constitutionalism to Democratic Constitutionalism

Compared to originalism and textualism, popular constitutionalism has passed through the stages of the life cycle at an accelerated pace. It burst on the intellectual scene and then was quickly reworked. The story of popular constitutionalism’s impurification is also comparatively straightforward, in our view, so we will tell it quickly.

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<sup>128</sup> *Id.* at 2485.

<sup>129</sup> *Id.* at 2496.

<sup>130</sup> See *King*, 135 S Ct at 2490.

<sup>131</sup> See *id.* at 2494–95.

<sup>132</sup> *Id.* at 2496.

<sup>133</sup> Re, 18 Green Bag 2d at 417 (cited in note 124). See also Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 Harv L Rev 62, 64 (2015) (observing that *King*’s references to “Congress’s ‘plan’” send “a strong message about Congress’s rationality and the inherent purposiveness and functionality of legislation”).

<sup>134</sup> See Molot, 106 Colum L Rev at 45–46 (cited in note 100).

Although its basic themes have been explored many times since the Founding, the emergence of popular constitutionalism as a distinctive contemporary theory is often pegged to the publication of works such as Professor Mark Tushnet's book *Taking the Constitution Away from the Courts*<sup>135</sup> and Professor Larry Kramer's article *We the Court*<sup>136</sup> around the turn of the millennium.<sup>137</sup> Alarmed by the conservative "activism" of the Rehnquist Court and the ethic of "judicial supremacy"<sup>138</sup> that enabled it, Kramer and Tushnet drew on history to argue for a relocation of authority over constitutional interpretation and enforcement to "the people themselves." Both their rhetoric and their reform ideas were bracing. Americans should consider "doing away with judicial review."<sup>139</sup> When the Court becomes "overly assertive," Congress and the president should stand ready to "slash[ ]" its budget, impeach its members, "strip it of jurisdiction," and "ignore its mandates."<sup>140</sup> The occasional rowdy mob might be useful too.<sup>141</sup>

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<sup>135</sup> See generally Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton 1999).

<sup>136</sup> See generally Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 Harv L Rev 4 (2001). Kramer subsequently expanded his foreword into a book. See generally Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford 2004).

<sup>137</sup> See, for example, Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 Wis L Rev 159, 160 n 1, 163 (describing Kramer's and Tushnet's writings as among "the leading normative theories of popular constitutionalism" and Kramer as "popular constitutionalism's 'Founding Father'"). For a fuller list of scholars associated with the emergence of contemporary popular constitutionalism, see Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 Georgetown L J 897, 897–99 (2005) (highlighting the contributions of Professor Richard Parker in particular).

<sup>138</sup> See, for example, Tushnet, *Taking the Constitution Away from the Courts* at 6–32 (cited in note 135) (criticizing "judicial supremacy"); Kramer, 115 Harv L Rev at 128–69 (cited in note 136) (condemning the Rehnquist Court's "[a]ssault on [p]opular [c]onstitutionalism," and its "philosophy of judicial sovereignty"); Larry D. Kramer, *No Surprise. It's an Activist Court*. (NY Times, Dec 12, 2000), online at <http://www.nytimes.com/2000/12/12/opinion/no-surprise-it-s-an-activist-court.html> (visited Sept 27, 2016) (Perma archive unavailable) ("[C]onservative judicial activism is the order of the day. The Warren Court was retiring compared to the present one."). "Popular constitutionalists reserve[d] their fiercest criticism for the Rehnquist Court's 'Section Five' decisions," such as *City of Boerne v Flores*, 521 US 507 (1997), which limited Congress's power to regulate discrimination under § 5 of the Fourteenth Amendment. John F. Preis, *Constitutional Enforcement by Proxy*, 95 Va L Rev 1663, 1725 (2009).

<sup>139</sup> Tushnet, *Taking the Constitution Away from the Courts* at 154 (cited in note 135).

<sup>140</sup> Kramer, *The People Themselves* at 249 (cited in note 136).

<sup>141</sup> See David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 Colum L Rev 2047, 2062 (2010) (noting that "Kramer repeatedly and sympathetically refers to [mobbing] in *The People Themselves*").

Leading popular constitutionalists such as Kramer and Tushnet did not specify any single decision procedure—they differed in this regard from their counterparts in the originalism, textualism, and CBA movements—but their prescriptions likewise concentrated on the manner in which legal questions are resolved, in view of an overriding high-level goal (here, popular sovereignty).

Critics on the political left as well as the right quickly mounted a range of objections. Popular constitutionalism, many worried, would debilitate judicial authority and jeopardize minority rights<sup>142</sup> and individual rights.<sup>143</sup> Its judgments rested on overly pessimistic premises about the aloofness of the Court<sup>144</sup> and overly optimistic premises about the capacities and interests of ordinary citizens.<sup>145</sup> Ironically, popular constitutionalism would prove unpopular in practice, given the American public's long-standing

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<sup>142</sup> See, for example, Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U Ill L Rev 673, 690 (“Popular constitutionalism’s central flaw is its failure to recognize that the protection of minorities and their rights cannot rely on the majority.”). See also Donnelly, 2012 Wis L Rev at 166 & n 24 (cited in note 137) (collecting sources arguing that “Kramer’s brand of popular constitutionalism” is “too radical” and will “result in majoritarian tyranny”).

<sup>143</sup> See, for example, Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 Vand L Rev 1067, 1071 (2008) (criticizing popular constitutionalism for failing to see “that judicial review, robustly practiced, is an indispensable mechanism for protecting the individual rights guaranteed by the Constitution”).

<sup>144</sup> See, for example, Barry Friedman, *Mediated Popular Constitutionalism*, 101 Mich L Rev 2596, 2598–99 (2003) (arguing that “there is substantial congruity between popular opinion and the decisions of constitutional judges,” which “suggests that popular constitutionalists may be getting what they want” indirectly).

<sup>145</sup> See, for example, Neal Devins, Book Review, *The D’oh! of Popular Constitutionalism*, 105 Mich L Rev 1333, 1335 (2007) (“[T]he people are uninterested in the Constitution and the Supreme Court.”); Gewirtzman, 93 Georgetown L J at 899 (cited in note 137) (criticizing popular constitutionalism for romanticizing “the People” and ignoring evidence that “participation and interest in politics are declining” and “popular interpretive opinions are often based on limited information, and are highly susceptible to manipulation by elites”). See also Richard A. Posner, Book Review, *The People’s Court*, *New Republic* 32, 35 (July 19, 2004) (“The very concept [of popular constitutionalism] is barely intelligible. . . . There is no federal town meeting at which 200 million adult Americans could deliberate and then take a vote.”).

support for judicial supremacy.<sup>146</sup> If the theory somehow were to take hold, might it not lead to anarchy?<sup>147</sup>

Scholarship identified with popular constitutionalism began to splinter. One strain sought to deepen the case against judicial review.<sup>148</sup> A much larger and more conciliatory strain, however, attempted to parry the first wave of objections by softening popular constitutionalism's conception of the "popular." Kramer himself led the way. Responding to his critics, Kramer explained in 2006 that he was not calling for "direct action" or the abolition of judicial review, but rather for richer constitutional deliberation and the "mediation" of popular will "through formal institutions of government."<sup>149</sup> While devices such as "ignoring mandates, budget cutting, jurisdiction stripping, court packing, and the like" may be preferable to "nothing," Kramer suggested, there are many subtler ways of exerting political pressure on the courts and thereby ensuring popular control over constitutional law.<sup>150</sup>

As Tom Donnelly has noted, "[i]t is unclear whether this [was] simply a clarification of [Kramer's] original intended position, a reevaluation based on thoughtful criticisms, or something in between."<sup>151</sup> Regardless, the message was clear that popular constitutionalism does not necessarily require populism in any

<sup>146</sup> See, for example, Larry Alexander and Lawrence B. Solum, Book Review, *Popular? Constitutionalism?*, 118 Harv L Rev 1594, 1637 (2005) ("[T]he idea that the judicial branch should act as the final and authoritative interpreter of the Constitution has been a profoundly popular one."); Greene, Book Review, 117 Yale L J at 919 (cited in note 39) (submitting that constitutional theorists "who would make [the case against judicial review] must confront the possibility that the people have spoken and that [the theorists] just do not like the answer").

<sup>147</sup> See, for example, Alexander and Solum, Book Review, 118 Harv L Rev at 1611, 1613 (cited in note 146) (contending that certain versions of popular constitutionalism could lead to "naked power struggles" or "anarchy").

<sup>148</sup> See generally, for example, Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L J 1346 (2006). In discussing the prior literature, Professor Jeremy Waldron lumps together Kramer's and Tushnet's books as especially pertinent works "attacking judicial review in America." Id at 1350.

<sup>149</sup> Larry Kramer, *Response*, 81 Chi Kent L Rev 1173, 1175 (2006). See also Larry D. Kramer, *The Interest of the Man: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 Valp U L Rev 697, 749 (2006) (advocating a "restrained" system of Madisonian "departmentalism," which "works only if there is enforced discipline within the respective branches").

<sup>150</sup> Kramer, 41 Valp U L Rev at 749 (cited in note 149).

<sup>151</sup> Donnelly, 2012 Wis L Rev at 168 (cited in note 137). See also Knowles and Toia, 42 S U L Rev at 43 (cited in note 57) ("Since the publication of *The People Themselves*, Kramer has not helped the definitional cause of 'popular constitutionalism.' He has continued to move away from the language of his foreword which lobbied for 'an ever-shrinking role for the Court.'").



recognizable form; rather, it can and should be effectuated through democratically accountable institutions. Sympathetic scholars increasingly began to migrate away from Kramer's terminology in favor of the more decorous label of "democratic constitutionalism" proposed by Professors Robert Post and Reva Siegel.<sup>152</sup> Foreshadowing this shift, Kramer slipped without explanation from "popular constitutionalism" to "democratic constitutionalism" in the penultimate sentence of a 2006 response piece.<sup>153</sup>

Once the key adulterating move to "mediating" structures was made, it turned out that popular constitutionalism was everywhere. Scholars began to locate the practice of, or potential for, popular constitutionalism in an ever-growing list of institutions, from the federal Congress<sup>154</sup> and executive branch,<sup>155</sup> to state judicial elections<sup>156</sup> and attorneys general,<sup>157</sup> to the lower federal courts.<sup>158</sup> Even the Supreme Court could be recast as an agent rather than an enemy of popular constitutionalism, given the empirical evidence showing that its opinions tend to stay within the

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<sup>152</sup> Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv CR-CL L Rev 373, 374 (2007).

<sup>153</sup> Kramer, 81 Chi Kent L Rev at 1182 (cited in note 149). Although its populist credentials are disputed by some, the Tea Party movement's subsequent emergence seems to have pushed liberal scholars still further away from "pure" versions of popular constitutionalism. See, for example, Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 Nw U L Rev 1807, 1808–10 (2011) (arguing that the Tea Party movement's "militantly nationalist" constitutional vision "calls into question" the idea that popular constitutionalism advances "democratic values"); Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 Denver U L Rev 523, 525–26 (2011) (suggesting that the Tea Party challenges the "underlying assumption behind much of the scholarship on popular constitutionalism" that popular claims on the Constitution will tend to promote liberal causes).

<sup>154</sup> See generally, for example, Robert C. Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L J 1943 (2003). See also Donnelly, 2012 Wis L Rev at 177–86 (cited in note 137).

<sup>155</sup> See generally Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 Fordham L Rev 1837 (2009).

<sup>156</sup> See Pozen, 110 Colum L Rev at 2064–86 (cited in note 141); David E. Pozen, *What Happened in Iowa?*, 111 Colum L Rev Sidebar 90, 91–93 (2011).

<sup>157</sup> See generally Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 Harv L Rev F 108 (2011).

<sup>158</sup> See generally Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U Mich J L Ref 971 (2010); Katie Eyer, *Lower Court Popular Constitutionalism*, 123 Yale L J Online 197 (2013).

mainstream of public opinion.<sup>159</sup> Indeed, even Supreme Court decisions striking down progressive federal laws for exceeding the scope of Congress's enumerated powers—the very paradigm of judicial activism that stirred Kramer to such righteous anger—might be recast as victories for popular constitutionalism, given their arguable benefits to democratic deliberation.<sup>160</sup>

Popular constitutionalism has thus crossed the political aisle and become increasingly self-contradictory. The theory has not simply failed to dispel controversy over the Court's constitutional jurisprudence or to make any appreciable dent in judicial supremacy. It has given *proponents* of robust judicial review a new language of legitimation—just like originalism.

#### D. From Quantitative CBA to “Qualitative” CBA

While CBA is an expansive term with a long intellectual and political history,<sup>161</sup> CBA as a *prescriptive theory of public law* emerged as a distinct discourse in the legal academy in the 1980s. It did so in response to the growth of CBA in judicial review of

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<sup>159</sup> See Friedman, 101 Mich L Rev at 2596–2613 (cited in note 144) (developing this argument at length). See also generally, for example, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv L Rev 191 (2008) (analyzing the Court's originalist decision in *District of Columbia v Heller*, 554 US 570 (2008), as the product of popular constitutionalism).

<sup>160</sup> See, for example, Roderick M. Hills Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 Geo Wash L Rev 888, 903 (2006) (“[T]he Rehnquist Court's restriction of Congress's power to redefine Fourteenth Amendment liberty . . . is not suppression of popular constitutionalism: it is judicial *promotion* of popular constitutionalism because these decisions protect nonfederal debate from the jurisprudential tendencies of federal legislation to curtail such debate.”). Some scholars on the left, meanwhile, began to argue that mechanisms of direct democracy such as constitutional ballot initiatives do *not* count as popular constitutionalism. See, for example, Raphael Rajendra, “*The People*” and “*The People*”: *Disaggregating Citizen Lawmaking from Popular Constitutionalism*, 27 L & Inequality 53, 84–91 (2009). See also Pozen, 110 Colum L Rev at 2122 n 296 (cited in note 141) (questioning “whether the vocabulary of ‘popular constitutionalism’ has ceased to advance comprehension”).

<sup>161</sup> CBA developed out of early twentieth-century welfare economics and has played an intermittent role in administrative decisionmaking since the New Deal. See Adler and Posner, 109 Yale L J at 169–72 (cited in note 42) (discussing welfare economics as the theoretical origin of CBA and the early use of CBA in New Deal flood-control projects). But CBA first achieved sustained attention in the legal academy via the law and economics movement, which focused initially on private law. See, for example, Kennedy, 33 Stan L Rev at 387 (cited in note 34) (describing law and economics in 1981 as “the body of literature and taught tradition that proposes and elaborates cost-benefit analysis as a way for a policy maker to decide what private law rules to recommend to judges, legislators or administrators”).

administrative action<sup>162</sup> and, more significantly, the increasing use of CBA by administrators themselves.<sup>163</sup> The latter trend reached its initial, controversial culmination in the Reagan administration's 1981 executive order directing agencies to implement regulations only when "the potential benefits to society . . . outweigh the potential costs."<sup>164</sup> This requirement marked a decisive intervention in the long-running—and, by 1981, increasingly politically contentious—debate over the efficacy and legitimacy of the administrative state.<sup>165</sup>

Most participants in this debate agreed that the administrative state was beset by "regulatory failure," but their diagnoses and proposed solutions differed sharply.<sup>166</sup> Some argued that the central problem was capture of agencies by regulated industries and the consequent harm to regulatory beneficiaries.<sup>167</sup> Others argued that the key problem was agencies' heedless advocacy on behalf of putative beneficiaries, at the expense of regulated industries

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<sup>162</sup> See, for example, *Industrial Union Department, AFL-CIO v American Petroleum Institute*, 448 US 607, 644–45 (1980) (finding that the Occupational Safety and Health Administration failed to perform adequate CBA when regulating benzene levels in the workplace); *Mathews v Eldridge*, 424 US 319, 348–49 (1976) (employing a form of CBA to resolve a welfare recipient's procedural due process claim). See also Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U Chi L Rev 28, 48 (1976) (criticizing "the utilitarian balancing analysis" used by the Court in cases such as *Mathews*).

<sup>163</sup> See Adler and Posner, 109 Yale L J at 167, 170–71 (cited in note 42) (describing the reemergence and routinization of CBA in government agencies in the 1980s). See also Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J Legal Stud S351, S355–58 (2014) (tracing the origins of public law CBA to the movement of "health-and-safety regulation [ ] from the decentralized tort system to the centralized administrative system of the modern regulatory state" during the 1970s and 1980s).

<sup>164</sup> Executive Order 12291 § 2(b) (1981), 3 CFR 127, 128.

<sup>165</sup> See Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U Chi L Rev 1, 3–6 (1995) (discussing the controversy engendered by Executive Order 12291 and a follow-on order); Cass R. Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 Ariz L Rev 1267, 1268 (1981) ("Although there are historical antecedents for [Executive Order 12291], no other President has gone nearly so far. In particular, no other President has provided that regulatory action may not be initiated unless the benefits exceed the costs.") (citation omitted). On the politics of administrative governance in the preceding decades, see generally Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 Vand L Rev 1389 (2000).

<sup>166</sup> Sunstein, 23 Ariz L Rev at 1269 (cited in note 165) (reviewing this debate).

<sup>167</sup> See, for example, George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J Econ & Mgmt Sci 3 (1971) (suggesting a causal link between regulated party pressure and administrative outcomes). See also Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics since the New Deal 195–250* (Cambridge 2012) (discussing the origins of capture theory).

and the economic welfare of the nation as a whole.<sup>168</sup> A third camp suggested that forces of bureaucratic entrenchment and self-aggrandizement were leading agencies further and further away from their statutorily imposed missions.<sup>169</sup>

The Reagan administration's CBA policy was seen to take sides in this dispute. As Professor Cass Sunstein noted shortly after the publication of the executive order, its implicit diagnosis of regulatory failure was that "regulation has been unduly intrusive on the private sector."<sup>170</sup> The administration's solution, moreover, was undergirded by a particular "normative conception" of the administrative state: namely, that "the purpose of regulation—at least as a general rule—is to promote economic 'efficiency,' or to increase production, by compensating for free rider effects and transactions cost barriers to bargaining."<sup>171</sup> The executive order did not define "costs" and "benefits" in explicitly economic terms. Yet, as Sunstein concluded, "the language of the order, as well as the rhetoric used during its implementation, indicate[d] that it [was] intended to ensure that regulatory decisions will promote economic 'efficiency.'"<sup>172</sup>

Interpreted in this way, as imposing a "wealth maximization" requirement on the administrative state,<sup>173</sup> the 1981 order instantiated a potentially inflammatory prescriptive theory of public law. It ignored the leading alternative accounts of regulatory failure: capture and self-aggrandizement. And it appeared to endorse a rigidly welfarist version of CBA, one that economists and lawyers had spent more than a decade attacking for its theoretical refusal or practical inability to accommodate distributional concerns and other "soft" variables.<sup>174</sup> Nonetheless, Sunstein offered a qualified

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<sup>168</sup> See generally, for example, Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* (Harcourt Brace Jovanovich 1979).

<sup>169</sup> See, for example, Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J Legal Stud 305, 305–12 (1972).

<sup>170</sup> Sunstein, 23 Ariz L Rev at 1270 (cited in note 165).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1277.

<sup>173</sup> *Id.* at 1272.

<sup>174</sup> Laurence H. Tribe, *Ways Not to Think about Plastic Trees: New Foundations for Environmental Law*, 83 Yale L J 1315, 1318–19 (1974). See also I.M.D. Little, *A Critique of Welfare Economics* 95 (Oxford 2d ed 1957) (proposing a distributional constraint on the standard Kaldor-Hicks efficiency analysis); Adler and Posner, 109 Yale L J at 170–71 (cited in note 42) (describing midcentury critiques of welfarism by theoretical economists, as well as the practical obstacles to "obtaining relevant data, especially for the purpose of valuing environmental resources, human life, and other hard-to-measure goods," that both applied economists and government officials came to acknowledge during the 1970s); Laurence

defense of the executive order's implicit theory, insisting that "the conception of the regulatory process reflected in the order is peculiarly well-suited to the institutional competence of the executive branch."<sup>175</sup> Nor was Sunstein alone among progressive legal theorists in supporting the Reagan administration's initiative. As Professor Susan Rose-Ackerman summarized the state of affairs in the early 1980s:

At the level of broad substantive principle there was agreement between the Reagan administration and Progressivism on the need for regulatory reform. Both believed that government intervention in the economy should be justified by reference to market failures and that, insofar as possible, cost-benefit tests should be used to set regulatory policy.<sup>176</sup>

Of course, progressives were not blind to the deregulatory potential of CBA. Sunstein's support was premised on the argument that the Reagan administration's order contained an internal mechanism for taming the excesses of CBA, in its proviso that CBA be used "to the extent permitted by law."<sup>177</sup> What this meant, according to Sunstein, was that the CBA directive applied only to a subset of statutes: those whose efficiency-promoting implementation would not frustrate legislative purposes and thus compromise the separation of powers.<sup>178</sup> Given that "the questions faced by Congress . . . are predominantly distributional," Sunstein reasoned, many statutes would not be subject to efficiency maximization.<sup>179</sup> Other statutes, however, appear to seek efficiency—for example, certain antitrust laws and laws "protecting against an 'unreasonable risk' to health or safety"—and so would fit comfortably with the logic of CBA.<sup>180</sup> Still other statutes, including many antipollution laws, "have some effects which maximize wealth,

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H. Tribe, *Policy Science: Analysis or Ideology?*, 2 *Phil & Pub Aff* 66, 71, 78–106 (1972) (discussing theoretical and practical objections to CBA "[e]ither in its original form or as supplemented by a distributional constraint").

<sup>175</sup> Sunstein, 23 *Ariz L Rev* at 1270 (cited in note 165).

<sup>176</sup> Susan Rose-Ackerman, *Defending the State: A Skeptical Look at "Regulatory Reform" in the Eighties*, 61 *U Colo L Rev* 517, 518 (1990). For a similar, if notably less cheerful, reconciliation of progressive goals with interest balancing in the administrative due process context, see generally Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 *BU L Rev* 885 (1981).

<sup>177</sup> Sunstein, 23 *Ariz L Rev* at 1273 (cited in note 165), quoting Executive Order 12291 § 2, 3 *CFR* at 128.

<sup>178</sup> Sunstein, 23 *Ariz L Rev* at 1273 (cited in note 165).

<sup>179</sup> *Id* at 1274.

<sup>180</sup> *Id* at 1274–75.

and some that do not.”<sup>181</sup> In these cases, an agency could choose to enforce “only the efficiency-promoting applications” of the law, so long as this “exclusive implementation [did] not fundamentally conflict with legislative purposes.”<sup>182</sup> In addition, CBA could be used by agencies to select the most “cost-effective approaches” to implementation that vindicated Congress’s non-efficiency-maximizing aims, to “identify the costs and benefits of regulatory proposals with a view to statutory reform or ordering priorities,” and to “decline to act in exceptional cases of de minimis benefits and high costs.”<sup>183</sup>

By imposing a separation-of-powers decision procedure on top of CBA’s own decision procedure, Sunstein effectively delegated the task of resolving many of the traditional critiques of CBA to an idealized model of administrative decisionmaking. For instance, the complaint that CBA fails to consider distributional or deontological values became something of a non sequitur in Sunstein’s scheme. It was simply against the law for administrators to use CBA to implement statutes with solely distributional goals, or to implement a statute’s efficiency-promoting provisions in a manner that “fundamentally conflict[s]” with the statute’s other, non-efficiency-promoting purposes.<sup>184</sup>

Over the course of the 1980s, actual administrative practice would frustrate this idealized model. An “atmosphere of scandal” thickened around the Environmental Protection Agency (EPA) in particular, as rumors swirled that the president’s Office of Management and Budget (OMB)—responsible for oversight of the CBA initiative—had “illegally delayed EPA promulgation of regulations” and “subverted statutory standards.”<sup>185</sup> Mass resignations followed in 1983, and the new administrator, brought in to restore public confidence, fared little better. His “plan to propose a modest acid rain control program was vetoed after OMB Director David Stockman” determined “that it would cost several thousand dollars per pound of fish saved.”<sup>186</sup>

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<sup>181</sup> *Id.* at 1275.

<sup>182</sup> Sunstein, 23 *Ariz L Rev* at 1279–80 (cited in note 165).

<sup>183</sup> *Id.* at 1279.

<sup>184</sup> *Id.* at 1275, 1279–80.

<sup>185</sup> Robert V. Percival, *Checks without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 *L & Contemp Probs* 127, 152 (Autumn 1991).

<sup>186</sup> *Id.*

Against this political backdrop, academic criticism of public law CBA intensified. Scholars issued new challenges to CBA's elevation of economic efficiency to the status of a legal norm. No defensible theory of regulation, many argued, could justify the categorical privileging of efficiency over other public values or individual preferences.<sup>187</sup> CBA's exaltation of efficiency would lead, instead, to a "lack of balance."<sup>188</sup> The Reagan administration's CBA program, for example, allegedly "focused almost exclusively on reducing costs to industry."<sup>189</sup> Critics also questioned the ability of CBA to accurately price goods "not normally bought and sold on markets"—the sorts of goods that regulators so often have to take into account.<sup>190</sup>

By the 1990s, these criticisms (and the experience of two Republican presidencies) had chastened those politically progressive legal theorists who had been initially supportive of the Reagan administration's CBA initiative.<sup>191</sup> When the Clinton administration

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<sup>187</sup> See, for example, Richard S. Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 Stan L Rev 1169, 1169 (1984) ("Many observers have become concerned about th[e] growing importance of cost-benefit analysis. . . . They argue [] that in practice cost-benefit analysts tend to . . . use this technique to mask the real value choices that underlie judicial, administrative, or legislative decisions."); Mark Sagoff, *We Have Met the Enemy and He Is Us or Conflict and Contradiction in Environmental Law*, 12 Envir L 283, 292 (1982) ("[Cost-benefit] analysis leads, inevitably, to the question: Why efficiency? . . . Why should we assume beforehand that an efficient society is better than a less efficient one?").

<sup>188</sup> Percival, 54 L & Contemp Probs at 186 (cited in note 185).

<sup>189</sup> *Id.*

<sup>190</sup> Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 5 Reg 33, 36 (Jan/Feb 1981). See also Peter L. Strauss, *Regulatory Reform in a Time of Transition*, 15 Suffolk U L Rev 903, 930 (1981) ("As long as our responses [to questions of life and death] remain irrational the notion that cost-benefit analysis can produce clear answers to regulatory issues remains irrational along with them."); Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 Yale L J 1732, 1738 n 12 (2014) (collecting critical writings from the 1990s and 2000s on CBA's "pricing the priceless" and "incommensurability problem[s]"). In light of these practical challenges, some scholars proposed confining the use of CBA to a limited set of policy domains. See, for example, Colin S. Diver, *Policy-making Paradigms in Administrative Law*, 95 Harv L Rev 393, 431–32 (1981) (arguing that CBA is most appropriate in "relatively stable" policymaking environments, generally those in which a regulatory regime has reached a mature state after a long period of "incrementalism"). See also Thomas O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* 174–75 (Cambridge 1991) (concluding that CBA's ideal of "comprehensive analytical rationality" is attainable "only for the most important rules").

<sup>191</sup> See, for example, Rose-Ackerman, 61 U Colo L Rev at 518 (cited in note 176) ("Some of the fundamental positions of the past administration suggested that genuine reform might occur. Unfortunately, most have proved to be little more than simplistic slogans.").

introduced its own “Regulatory Planning and Review” executive order in 1993,<sup>192</sup> Sunstein and his coauthor Professor Richard Pildes characterized it as a “quite surprising step.”<sup>193</sup> President Bill Clinton’s order had retained the Reagan-era “emphasis on cost-benefit analysis as the basic foundation of decision,” they observed, but it also “include[d] a new, complex, and somewhat unruly set of substantive principles,” some of which “qualif[ied] the commitment to cost-benefit analysis, though in ambiguous ways,” and some of which were “of uncertain legality.”<sup>194</sup> In response to this continuation and complication of Reagan-era CBA policy, Pildes and Sunstein offered “a range of proposals designed” to “simultaneously promot[e] economic and democratic goals.”<sup>195</sup> These proposals amounted to a significant impurification of the theory of efficiency-maximizing CBA that Sunstein had defended fourteen years earlier. “Regulations should be evaluated not only in terms of aggregate costs and benefits,” Pildes and Sunstein wrote, “but also in terms that reflect democratic judgments about *qualitative* differences among *qualitatively* different risks”—including “an understanding of whether a risk is voluntarily incurred, especially dreaded, equitably distributed, potentially irreversible or catastrophic, faced by future generations, or incurred by discrete groups within the population.”<sup>196</sup>

No longer could formalistic separation-of-powers principles be relied upon to prevent CBA from suppressing values sounding in distribution, desert, and the like. Indeed, Pildes and Sunstein’s rejection of a “single metric” of analysis and their call for a “disaggregated system for assessing the qualitatively different effects of regulatory impositions”<sup>197</sup> strayed so far from traditional, efficiency-maximizing CBA that Professors Matthew Adler and Eric Posner argued the approach could not be properly characterized as CBA

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<sup>192</sup> See generally Executive Order 12866 (1993), 3 CFR 638.

<sup>193</sup> Pildes and Sunstein, 62 U Chi L Rev at 6 (cited in note 165).

<sup>194</sup> Id at 6–7.

<sup>195</sup> Id at 8.

<sup>196</sup> Id at 9 (emphases added). To implement these ideas, Pildes and Sunstein suggested that the executive branch experiment with approaches such as “a two-stage analytic process” that introduces qualitative considerations after “conventional cost-benefit balancing” and “different forms of citizen participation” that “build into the regulatory process an understanding of informed public judgments about how different risks should be treated.” Id at 9–10.

<sup>197</sup> Pildes and Sunstein, 62 U Chi L Rev at 65 (cited in note 165).



at all.<sup>198</sup> Pildes and Sunstein's approach resembled, rather, the sort of "procedure that agencies regularly seem to employ *in lieu of CBA*."<sup>199</sup>

Adler and Posner sought to ward off such impurification. Writing in 1999, they explained that the deontological, distributional, "desert-based," and "perfectionist" issues ("such as the purported intrinsic good of preserving endangered species") that troubled Pildes and Sunstein were "nonwelfarist considerations"—and "CBA does not capture, and is not meant to capture, nonwelfarist considerations."<sup>200</sup> The political controversy and normative anxiety that welfarist CBA had provoked, in Adler and Posner's telling, stemmed from a failure to appreciate that "CBA is a decision procedure, not a moral standard."<sup>201</sup> Adler and Posner allowed that CBA need not be "the exclusive choice procedure for government," and could be employed "as one part of the overall set of procedures and institutions by which projects are ultimately approved, rejected, or amended."<sup>202</sup> But they insisted that CBA retain its pure, welfarist form, as only in that form can it reliably "enabl[e] agencies to evaluate projects according to the extent that they contribute to overall well-being."<sup>203</sup>

But such is not the fate of process-oriented public law theories. Three decades after Sunstein penned his formalistic defense of the Reagan administration's imposition of efficiency-maximizing CBA on the executive branch, the Obama administration issued an order on "Improving Regulation and Regulatory Review."<sup>204</sup> By this time, Sunstein was serving as administrator of the Office of Information and Regulatory Affairs, and Executive Order 13563 reflected the adulterated conception of CBA that Pildes and he had proposed in the wake of the backlash to Reagan-era CBA. The order directs agencies to "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits

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<sup>198</sup> Adler and Posner, 109 *Yale L J* at 234 (cited in note 42). See also Richard O. Zerbe Jr and Allen S. Bellas, *A Primer for Benefit-Cost Analysis* 14–15 (Edward Elgar 2006) (describing wealth maximization under the Kaldor-Hicks criterion as "the mainstream view" of CBA, but noting the emergence of an alternative view that "includ[es] equity goods and those represented by moral sentiments").

<sup>199</sup> Adler and Posner, 109 *Yale L J* at 234 (cited in note 42) (emphasis added).

<sup>200</sup> *Id.* at 245. "The objection that CBA fails to capture" nonwelfarist considerations, Adler and Posner continued, "is really no objection at all." *Id.*

<sup>201</sup> *Id.* at 167.

<sup>202</sup> *Id.* at 245.

<sup>203</sup> Adler and Posner, 109 *Yale L J* at 245 (cited in note 42).

<sup>204</sup> See generally Executive Order 13563 (2011), 3 CFR 215.

(including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity).”<sup>205</sup> “Where appropriate and permitted by law,” the opening section continues, “each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”<sup>206</sup> The references to “fairness” and “human dignity” were new to this line of executive orders,<sup>207</sup> and their inclusion led some conservative commentators to ask sarcastically whether “a rule might pass Mr. Obama’s cost-benefit test if it imposes \$999 billion in hard costs but supposedly results in a \$1 trillion increase in human dignity.”<sup>208</sup> In practice, President Barack Obama has suggested that these “soft” variables have done little to disturb traditional, quantitative modes of analysis.<sup>209</sup> In the law on the books as in the academic literature, however, such variables have become increasingly integrated into the methodology of CBA.<sup>210</sup>

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<sup>205</sup> Executive Order 13563 § 1(b)(1), 3 CFR at 215.

<sup>206</sup> Executive Order 13563 § 1(c), 3 CFR at 216. These provisions implement the “non-sectarian” understanding of CBA that Sunstein began to articulate in the 2000s. See Robert W. Hahn and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U Pa L Rev 1489, 1498 (2002) (describing CBA’s core, and perhaps only, requirement as “a full accounting of the consequences of an action, in both quantitative and qualitative terms”).

<sup>207</sup> Bayefsky, Note, 123 Yale L J at 1735 & n 3 (cited in note 190).

<sup>208</sup> Id at 1735–36, quoting Editorial, *Obama’s Rule-Making Loophole* (Wall St J, Jan 24, 2011), online at <http://www.wsj.com/articles/SB10001424052748704881304576094132896862582> (visited Sept 29, 2016) (Perma archive unavailable). Rachel Bayefsky defends the inclusion of dignity and urges agencies to adopt a “*qualitative specificity*” model of CBA, pursuant to which regulators would aim to “clarify, in qualitative terms, the nature and gravity of the dignitary values at stake in a particular regulatory context.” Bayefsky, Note, 123 Yale L J at 1737 (cited in note 190).

<sup>209</sup> See *Remarks by the President to the Business Roundtable* (White House Office of the Press Secretary, Sept 16, 2015), archived at <http://perma.cc/MK3X-3H3L> (“[W]e don’t issue a regulation where the costs are not lower than the benefits. And if you look at the regulations we’ve generally put forward, the costs are substantially lower than the benefits that are generated.”). But see Jonathan S. Masur and Eric A. Posner, *Unquantified Benefits and the Problem of Regulation under Uncertainty*, 102 Cornell L Rev 87, 136 (2016) (finding that “[a]gencies regularly promulgate regulations for which they do not fully quantify costs and benefits” and that “[i]n many cases, these regulations [have] involved significant, measurable costs in excess of \$100 million and no quantified benefits”).

<sup>210</sup> There now exists a highly sophisticated literature, to which Sunstein has contributed, about how noneconomic values may be reconciled with CBA. See, for example, Eyal Zamir and Barak Medina, *Law, Economics, and Morality* 3 (Oxford 2010) (describing the book’s project as examining “the possibility of combining economic methodology and deontological morality through explicit and direct incorporation of moral constraints (and options) into economic CBA”); Cass R. Sunstein, *The Limits of Quantification*, 102 Cal L Rev 1369, 1380–85 (2014) (discussing Executive Order 13563 and suggesting various regulatory strategies for dealing with “nonquantifiable” values).

By the lights of Adler and Posner, this is no longer CBA. It certainly is not the version of CBA that Sunstein endorsed in 1981 as “peculiarly well-suited to the institutional competence of the executive branch.”<sup>211</sup> As reflected in the governing executive orders and in Sunstein’s own writings, mainstream CBA has now internalized the very same “impossible to quantify”<sup>212</sup> values of distribution, fairness, and dignity that hounded the administrative state throughout the 1970s and that the Reagan-era proponents of CBA had hoped to transcend.

#### IV. ANALOGUES TO THE LIFE CYCLE THEORY

The claim that prescriptive legal theories such as the ones just discussed tend to become impurified has numerous analogues, both in academic research and in the real-world operation of law and politics. Before we examine the implications of our claim for legal practice, this Part briefly examines parallels to the life cycle model elsewhere in law, political science, and the philosophy of science. Investigating these parallels helps to place our model in a larger conceptual context and further establish its plausibility. A comparison with the work of Professor Thomas Kuhn, in particular, helps to illuminate ways in which the progress of “legal science” does and does not resemble other fields of scientific endeavor.

##### A. Analogues in Law

###### 1. Rules/standards convergence.

Legal theorists in general, and constitutional theorists in particular, have posited life cycle-like processes before. On the jurisprudential side, scholars such as Professors Pierre Schlag and Frederick Schauer have argued that the putatively fundamental distinction between legal rules and legal standards turns out to be unstable over time, as rules tend “to evolve or degenerate, depending upon our perspective, into standards, and standards to evolve or degenerate into rules.”<sup>213</sup> Rules are designed to be precise,

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<sup>211</sup> Sunstein, 23 *Ariz L Rev* at 1270 (cited in note 165).

<sup>212</sup> Executive Order 13563 § 1(c), 3 *CFR* at 216.

<sup>213</sup> Pierre Schlag, *Rules and Standards*, 33 *UCLA L Rev* 379, 429 (1985). In a less nominalist and more empirical vein than Schlag, Schauer likewise suggests a general tendency for rules and standards to converge. See Frederick Schauer, *The Convergence of*

offering clear ex ante guidance to interested parties. Standards are designed to be imprecise, leaving much of their content to be worked out on a case-by-case basis pursuant to an overarching principle or policy.<sup>214</sup> And yet, in practice, these regulatory strategies gradually bleed into one another, as rules become riddled with qualifications and exceptions that reduce their clarity and standards become concretized through interpretations and understandings that reduce their flexibility.

The literature on rules/standards convergence relates to our own theory in at least two noteworthy ways. First, this literature sheds some light on the drivers of the life cycle. According to Schauer, whenever legal decisionmakers can “permissibly or legitimately or professionally” exercise discretion—and they usually can—they will be tempted to deploy “rule-avoiding strategies” to prevent the seemingly unjust or unreasonable application of a given rule to a given case.<sup>215</sup> At the same time, many decisionmakers will be tempted to rein in the “uncomfortable vagueness”<sup>216</sup> of standards through “rulification” techniques: “More choice is not always better than less, and not every decisionmaker has the time, energy, or inclination to engage in the ‘from the ground up’ process that unconstrained discretion and unspecified standards require.”<sup>217</sup> The upshot of these paired processes of “adaptive behaviour”<sup>218</sup> is the de facto merger of rules and standards.

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*Rules and Standards*, 2003 NZ L Rev 303, 311–21. See also Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 *J Contemp Legal Issues* 803, 806 (2005) (arguing that “the rulification of standards is as common a phenomenon as is the standardization of rules”). Scholars have also identified a pendulum swing between rules and standards in a variety of specific fields of law. See, for example, Aziz Z. Huq and Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *Yale L J* 346, 349 (2016) (describing the Supreme Court’s “oscillat[ions] between using rules and using standards” in separation-of-powers cases); Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 *Cornell L Rev* 341, 346 (1991) (describing “a pattern of ceaseless oscillation, from rules to balancing and back again,” in tort law); Carol M. Rose, *Crystals and Mud in Property Law*, 40 *Stan L Rev* 577, 580 (1988) (describing “the blurring of clear and distinct property rules with the muddy doctrines of ‘maybe or maybe not,’ and [ ] the reverse tendency to try to clear up the blur with new crystalline rules”).

<sup>214</sup> See Jessica Bulman-Pozen and David E. Pozen, *Uncivil Obedience*, 115 *Colum L Rev* 809, 842–43 (2015) (discussing leading definitions of rules and standards in the legal literature).

<sup>215</sup> Schauer, 2003 NZ L Rev at 315 (cited in note 213).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 316 (citation omitted).

<sup>218</sup> *Id.* at 317.

While the subjects of Schauer's account are official legal decisionmakers, its behavioral assumptions would seem to apply, at least in part, to the reasoning in which legal scholars engage when they elaborate prescriptive theories. Presented with a certain set of rules or standards that a theory appears to endorse ("Judges should aspire to promote vague principle X," "Agencies must forswear concrete practice Y"), scholars may similarly seek to recalibrate the degree of discretion that the theory affords by loosening or tightening its initial formulation. And they may take these rule-avoiding or rulifying steps for similar reasons: to arrive at more normatively or empirically satisfying legal frameworks, to prevent undesirable outcomes in specific cases, to ease their analytic burden, to signal restraint, and so on. Such adaptive behavior may also help explain how prescriptive legal theories can experience significant adulteration without departing from their original formalisms. A theory's core set of rules or standards may remain accepted by all those who hold to it, even if different blocs of theorists would construe those rules or standards in significantly more or less constraining ways.<sup>219</sup>

The second point of contact between theories of rules/standards convergence and our theory is that some extreme versions of the former could be read to anticipate or even subsume the latter. From Schlag's point of view, for instance, the life cycle model may simply describe one instance of the "omnipresent" and "irreducible" dialectic between rules and standards that haunts legal discourse.<sup>220</sup> Schlag contends that virtually *all* legal argumentation embodies this dialectic and thus follows a predictable path toward "refinement or entropy"—but never resolution.<sup>221</sup> We are skeptical about the sweep of Schlag's claim.<sup>222</sup> But if he were right, then it

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<sup>219</sup> More speculatively, in a legal culture in which officials who apply legal rules in standard-like ways (and standards in rule-like ways) never seem to acknowledge that they are effectively transforming the initial directive, scholars who seek to move legal theories up or down the rules/standards spectrum may find it natural to see their interventions as fleshing out—rather than breaking faith with—the initial theory.

<sup>220</sup> Schlag, 33 *UCLA L Rev* at 426, 430 (cited in note 213).

<sup>221</sup> *Id.* at 429.

<sup>222</sup> For critical responses, see Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 *Duke L J* 557, 560 n 5 (1992) (suggesting that Schlag's reductive conclusions are driven by his "refusal to consider routine applications of the law"); Cass R. Sunstein, *Problems with Rules*, 83 *Cal L Rev* 953, 965 (1995) (defending the conventional view that "[t]he contrast between rules and standards is quite useful," notwithstanding the potential for slippage between the two concepts).

may seem rather unsurprising to find certain legal theories becoming impurified; what demands explanation is the way in which this dynamic appears to unfold so much more slowly and subtly, if at all, for other sorts of theories. In general, though, the jurisprudential literature's various accounts of rules/standards convergence complement our account insofar as each suggests a basic instability in efforts to channel legal decisionmaking into a relatively pure framework, as well as a concomitant need to analyze such efforts in dynamic terms. Whether embedded in an authoritative directive or an academic theory, the initial manner in which a legal prescription is formulated matters less than is commonly supposed.<sup>223</sup>

## 2. Cycles of constitutional theory.

Beyond these abstract theories about the development of rules and standards, we also find analogues (or, at least, adjuncts) to our life cycle model in scholarship that identifies a tendency for constitutional theory, writ large, to experience politically driven cycles. The most sustained argument to this effect appears in Professor Barry Friedman's article *The Cycles of Constitutional Theory*.<sup>224</sup> At any given time, according to Friedman, those constitutional scholars who share the Supreme Court's political orientation will tend to formulate theories that legitimate broad judicial review, while those scholars who disapprove of the Court's

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<sup>223</sup> Schlag's analysis also helps to clarify why the life cycle that we describe does not necessarily entail a devolution of rules into standards. As Schlag explains, rules can be redescribed as standards and vice versa depending on the context, Schlag, 33 UCLA L Rev at 407–18 (cited in note 213), so nothing critical hangs on the apparent rule-ness of a particular theory's decision procedure in the abstract. Nevertheless, opponents of the decision procedure may well fault it for being too rule-like or standard-like—legal critiques perpetually take this form—and thereby drive its life cycle forward.

<sup>224</sup> See generally Barry Friedman, *The Cycles of Constitutional Theory*, 67 L & Contemp Probs 149 (Summer 2004). See also, for example, Whittington, 2 Georgetown J L & Pub Pol at 604 n 27 (cited in note 38) ("Constitutional theory regarding judicial activism and restraint, and relative authority of the various branches of government, is linked to long partisan cycles of reconstruction and affiliation with dominant constitutional norms and institutions."). Another partial analogue to our life cycle theory is Professor Balkin's theory of "ideological drift," which maintains that "legal ideas and symbols will change their political valence as they are used over and over again in new contexts." J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 Conn L Rev 869, 871 (1993). While the life cycles that we describe also involve changes in political valence over time, we focus on a more specific social phenomenon—and one that is more likely to end in an ideological muddle (with, for example, liberals and conservatives *both* claiming originalism simultaneously) than in the sort of ideological inversion that Balkin highlights (with originalism passing from the right to the left).

political orientation will tend to promote theories that do the opposite. As a result, a generation of “conservative” or “progressive” constitutional scholars may, over the course of their careers, shift from supporting restrictive to supporting expansive theories of judicial power (or vice versa).<sup>225</sup> Likewise, multiple generations of constitutional scholars with the same political orientation may adopt contradictory theories of judicial review.<sup>226</sup>

Friedman’s account operates on a longer timescale than ours; he is concerned with the oscillations across different theories rather than with the evolution of any given theory. Moreover, what cycles back and forth in Friedman’s narrative is a political bloc’s general attitude toward judicial review: pro or con. The actual content of the operative theories does not necessarily follow suit.<sup>227</sup> Whereas we seek to explain the trajectories of individual legal theories, Friedman seeks to specify the motives that drive theory choice.

Friedman’s account is nonetheless relevant for our purposes, both because it illustrates the degree to which public law theories are bound up with politics and because it helps place the life cycle in epicyclical context. We noted above that some highly adulterated theories that fall into senescence at  $T_6$  may reemerge at a later date.<sup>228</sup> Friedman contends that political blocs will find themselves in need of a new legal theory at predictable junctures, when their attitudes toward judicial review change in response to the changing composition of the Court. The churn of the life cycle ensures a reserve of institutionally oriented, ideologically ambiguous theories from which such blocs can draw. Indeed, the sorts of legal theories most likely to undergo the life cycle are just the sorts of theories that Friedman suggests the politics of judicial review favor: theories that purport to transcend politics through “wide-reaching,” “structural” solutions.<sup>229</sup>

If our life cycle model harmonizes with Friedman’s story in this way, it also gives reason to suspect that he overstates the “dilemma” of constitutional theory.<sup>230</sup> The many constitutional

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<sup>225</sup> Friedman, 67 *L. & Contemp. Probs.* at 157–64 (cited in note 224).

<sup>226</sup> *Id.* at 161–64.

<sup>227</sup> As Friedman notes, the legal basis of conservative support for judicial activism in the early twentieth century was theoretically distinct from the basis of progressive support for judicial activism in the 1960s and afterward. *Id.* at 157–59.

<sup>228</sup> See Part II.C.

<sup>229</sup> Friedman, 67 *L. & Contemp. Probs.* at 171–74 (cited in note 224).

<sup>230</sup> *Id.* at 164–67.

scholars who traffic in structural solutions, Friedman warns, must either abandon their earlier theories of judicial review when the Court turns over or else “betray their own ideological values.”<sup>231</sup> Yet as we have shown, the more wide-reaching and proceduralist a prescriptive theory, the more susceptible it will be to impurification. This dynamic allows for the sort of political responsiveness that Friedman predicts, but without the *replacement* of one theory by another that he assumes must accompany such responsiveness. A progressive scholar, for instance, may continue to endorse popular constitutionalism even if the Court turns sharply in a progressive direction, because legitimation by “the people themselves”—it will be claimed—can take any number of institutional forms. Similarly, large numbers of conservative originalists managed to adjust to the increasingly conservative composition of the Court without abandoning either originalism or their own ideological values, because legitimation by the constitutional text does not—it came to be claimed—require a commitment to judicial restraint.<sup>232</sup> The impurification process contributes to intergenerational repetition and revisionism in constitutional scholarship, but it reduces the need for any given group of scholars to cycle between different theories in response to shifts in institutional politics.

## B. Analogues in Politics and Political Science

For more than a century, political scientists and sociologists have studied the process of “goal displacement”<sup>233</sup> by which organizations that depend on mass support—political parties and trade unions in particular—tend to attenuate or abandon their initial policy objectives in order to broaden their membership.<sup>234</sup> A related phenomenon is the attenuation or abandonment of policy

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<sup>231</sup> *Id.* at 165.

<sup>232</sup> Friedman’s chief example of theorists whose ideological values have been “betray[ed]” by their intellectual views comes from the years immediately following the New Deal, when the commitment of left-leaning realists and process theorists to judicial deference put them out of step with an increasingly liberal Court and an increasingly conservative Congress. *Id.* at 165–67. But realism in its original, antilegalist purity is long dead, and process theory proved to be much more flexible than its early adherents anticipated.

<sup>233</sup> Darcy K. Leach, *The Iron Law of What Again? Conceptualizing Oligarchy across Organizational Forms*, 23 *Sociological Theory* 312, 318 (2005).

<sup>234</sup> See Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* 365–76 (Hearst’s International Library 1915) (Eden Paul and Cedar Paul, trans). See also Adam Przeworski, *Capitalism and Social Democracy* 102–03 (Cambridge 1985) (noting how the “combination of minority status with majority rule”



objectives *after* political parties have achieved electoral success and entered government; this phenomenon is generally attributed to the domination of party representatives by relatively autonomous state bureaucracies and their private-sector clients.<sup>235</sup> These processes of political moderation were first noted, and have remained especially acute, with respect to European social democracies,<sup>236</sup> but similar dynamics have been identified in the American political system.<sup>237</sup> The advent of an era of party polarization in the United States<sup>238</sup> has not necessarily blunted

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problem faced by class-based electoral parties results in the compromising of certain party values to broaden bases of support); Leo Panitch, *Social Democracy & Industrial Militancy: The Labour Party, the Trade Unions and Incomes Policy, 1945–1974* 235 (Cambridge 1976) (diagnosing the British Labour Party's trade union relationships as an indication of an "integrative" ideology beyond the party's representation of the working class).

<sup>235</sup> See, for example, Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System since the New Deal* 5–6 (Oxford 1993) (identifying an "inherent tension" between party politics and "an energetic executive" in the US system); Nicos Poulantzas, *State, Power, Socialism* 220–40 (NLB 2014) (Patrick Camiller, trans) (discussing the typical transformations of "parties of power" and noting how the "loosening of the ties of representation . . . accompanies changes in the institutional position of the parties of power") (emphases omitted); Max Weber, *From Max Weber: Essays in Sociology* 224–35 (Oxford 1946) (H.H. Gerth and C. Wright Mills, trans and eds) (describing the influence of bureaucratic structures on conservative and liberal parties alike).

<sup>236</sup> See, for example, Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* 60–73, 99–142 (Verso 2013) (assessing the decline of political parties and popular involvement in politics across western Europe). See also generally Panitch, *Social Democracy & Industrial Militancy* (cited in note 234) (analyzing the British Labour Party); Jonas Pontusson, *The Limits of Social Democracy: Investment Politics in Sweden* (Cornell 1992) (considering reform initiatives pursued by the Swedish labor movement in the 1960s and 1970s).

<sup>237</sup> See, for example, Milkis, *The President and the Parties* at 149–299 (cited in note 235) (evaluating the New Deal legacy for the American party system); Robert Brenner, *The Paradox of Social Democracy: The American Case*, in Mike Davis, Fred Pfeil, and Michael Sprinker, eds, *The Year Left: An American Socialist Yearbook, 1985* 32, 33–35 (Verso 1985) (noting the decline of radical liberal rhetoric since the 1960s in favor of more "realis[ti]c" responses to economic crises).

<sup>238</sup> See generally Alan I. Abramowitz, *The Disappearing Center: Engaged Citizens, Polarization, and American Democracy* (Yale 2010); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Cal L Rev 273 (2011). Largely in response to this evidence of polarization, American political scientists have begun to challenge the model of hierarchically organized parties that dilute their ideological commitments to expand their social bases. See generally, for example, Hans Noel, *Political Ideologies and Political Parties in America* (Cambridge 2013); Kathleen Bawn, et al, *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 Persp on Polit 571 (2012).

the tendency toward adulteration of policy agendas that accompanies the pursuit of party growth and the penetration of party representatives into government.<sup>239</sup>

Processes of party moderation offer an interesting if rather indirect analogue to the life cycle of prescriptive legal theories. On the one hand, the goal displacement experienced by political parties that seek to expand their base or enter government can be seen as the mirror image of the impurification experienced by theories such as originalism or popular constitutionalism. Parties initially hold themselves out as politically radical, but their policy objectives are gradually adulterated by the moderating forces of a mass electorate and an autonomous state bureaucracy. Prescriptive legal theories initially hold themselves out as above the political fray, but their proceduralist prescriptions are gradually adulterated as they accommodate a range of theoretical criticisms from participants in or around the political fray. Whereas adulteration in the first case proceeds through depoliticization, adulteration in the second case proceeds through politicization. On the other hand, processes of party-ideology and legal-theory adulteration can be seen as functionally identical. Both parties and theories adulterate their initial agendas in order to secure the support of broader constituencies (of voters or scholars) and particularly powerful groups of experts (entrenched bureaucrats and private-sector interests in the case of parties, official decisionmakers in the case of theories).

From either point of view, the comparison of political parties and legal theories highlights the fundamentally *sociological* orientation of our life cycle account. This account does not reduce legal theories to the communities of scholars who espouse them, but neither does it treat them as formal sets of propositions divorced from their shifting social bases. Prescriptive legal theories, much like political parties, are continually constituting and being reconstituted by the goals of their supporters.

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<sup>239</sup> See, for example, Vanessa Williamson, Theda Skocpol, and John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 *Persp on Polit* 25, 36 (2011) (noting the potential limits of Tea Party-driven Republican electoral success due to the “limited appeal to the broader American public” of the Tea Party’s conservative ideology, as well as the disaffection of Tea Party members with the failure of their “insurgent candidates” to achieve stated policy goals once in office).

### C. Analogues in the History and Philosophy of Science

The life cycle model also bears an interesting resemblance to some of the literature on theory change in the history and philosophy of science. We have in mind especially Kuhn's classic account of theory change in the natural sciences,<sup>240</sup> although the aspect of his account that is most analogous to our model is shared by many other accounts of scientific theory change.<sup>241</sup> This aspect is the claim that experimental falsifications of a given theory do not necessarily lead to the rejection of that theory so much as to the complication of its initial formulation.<sup>242</sup> According to Kuhn, scientific "discovery" is nothing other than the adjustment of a preexisting theory to account for an "anomaly," or "the recognition that nature has somehow violated the [ ] expectations" of the theory.<sup>243</sup> Confronted with such violations, scientists do not discard their theory but rather "devise numerous articulations and *ad hoc* modifications of their theory"<sup>244</sup> until "the anomalous has become the expected."<sup>245</sup>

This process of scientific discovery through theoretical adjustment can, in the long run, lead to the abandonment of one theory and the adoption of an alternative: that is, a scientific revolution. But first, the incumbent theory must enter a period of "crisis." During the critical phase of a theory's life, anomalies—and the theoretical adjustments they require—mount at such a rate and to such an extent that the "complexity" of the theory "increas[es]

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<sup>240</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago 2d ed 1970). See also generally Thomas S. Kuhn, *The Road since Structure*, in Thomas S. Kuhn, *The Road since Structure: Philosophical Essays, 1970–1993, with an Autobiographical Interview* 90 (Chicago 2000) (James Conant and John Haugeland, eds).

<sup>241</sup> See generally, for example, Barry Barnes, *Scientific Knowledge and Sociological Theory* (Routledge & Kegan Paul 1974); Collins, *Changing Order* (cited in note 4); Paul Feyerabend, *Against Method: Outline of an Anarchist Theory of Knowledge* (NLB 1975); Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in Imre Lakatos and Alan Musgrave, eds, *Criticism and the Growth of Knowledge* 91 (Cambridge 1970).

<sup>242</sup> Kuhn, *The Structure of Scientific Revolutions* at 52–53, 77–78, 146–47 (cited in note 240). This claim most directly challenged Professor Karl Popper's identification of "falsifiability" as the necessary condition of a properly "scientific" theory. See Karl R. Popper, *The Logic of Scientific Discovery* 17–20 (Basic Books 1959).

<sup>243</sup> Kuhn, *The Structure of Scientific Revolutions* at 52–53 (cited in note 240).

<sup>244</sup> *Id.* at 78.

<sup>245</sup> *Id.* at 53.

far more rapidly than its accuracy[,] and [] a discrepancy corrected in one place [is] likely to show up in another.”<sup>246</sup> For example, in the decades before Antoine Lavoisier’s oxygen theory of combustion displaced the earlier phlogiston theory,<sup>247</sup> “the net result of [combustion] experiments” had been a chemical typology “so elaborate that the phlogiston theory proved increasingly little able to cope with laboratory experience.”<sup>248</sup> While none of the leading chemists of the day “suggested that the [phlogiston] theory should be replaced, they were unable to apply it consistently.”<sup>249</sup> As a result, by the time Lavoisier came along, “there were almost as many versions of the phlogiston theory as there were pneumatic chemists” conducting combustion experiments.<sup>250</sup>

Kuhn notes that this “proliferation of versions of a theory is a very usual symptom of crisis.”<sup>251</sup> Another symptom is the increasing resemblance between the theory in crisis and earlier theories that were thought to have been superseded.<sup>252</sup> Such critical symptoms are not, however, sufficient to lead scientists to abandon the incumbent theory. “[A] scientific theory is declared invalid only if an alternate candidate is available to take its place. . . . The decision to reject one [theory] is always simultaneously the decision to accept another.”<sup>253</sup>

Our life cycle account of legal theories parallels Kuhn’s account of natural scientific theory change in significant ways, but sharply diverges from it in at least one crucial respect.<sup>254</sup> The most striking parallel is the idea that a theory develops through impurification—through the introduction of unexpected provisos and the modification, or even abandonment, of formerly central

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<sup>246</sup> Id at 68.

<sup>247</sup> Before oxygen was discovered, phlogiston theory held that a chemical called “phlogiston” was released when something was burned. See Kuhn, *The Structure of Scientific Revolutions* at 66–72 (cited in note 240).

<sup>248</sup> Id at 70.

<sup>249</sup> Id.

<sup>250</sup> Id.

<sup>251</sup> Kuhn, *The Structure of Scientific Revolutions* at 71 (cited in note 240). See also id at 74.

<sup>252</sup> Id at 72.

<sup>253</sup> Id at 77.

<sup>254</sup> Kuhn himself discussed the limited applicability of his account to the social or human sciences. In his view, the key difference between the natural and social sciences is that, in the former, there is a “relative scarcity of competing schools” at any given time. Id at 208–09. Whereas a mature natural science tends to be dominated by one “theory,” “paradigm,” or “disciplinary matrix,” a mature social science can flourish without a single governing paradigm. Id at 182–87.

tenets. This process might tend to be faster or more contentious in law than in natural science on account of factors such as the volume of legal scholarship, the adversarial nature of legal discourse, and the political stakes of public law. But the basic structure of theory change is similar. Furthermore, on both accounts, the process of impurification is occasioned by *resistance* to the theory as it exists at a given moment in time. In Kuhn's narrative, resistance comes from "nature" in the form of physical phenomena at odds with the theory's expectations.<sup>255</sup> In the life cycle, resistance comes from society in the form of legal, political, and moral objections leveled at the theory by other theorists and practitioners.

Although there is a logical symmetry between these two kinds of resistance, their ontologically distinct character leads to a sharp divergence between Kuhn's depiction of theory change and our own. For Kuhn, the boundary between periods of "normal science" and periods of "crisis"<sup>256</sup> is not only sharply drawn but also normatively significant; the validity of natural science depends on it. During periods of "normal science," the theoretical adjustments occasioned by "anomalous" physical phenomena produce scientific "discoveries" and are thus all to the good.<sup>257</sup> During periods of "crisis," however, a proliferation of anomalies leads to "pronounced professional insecurity" and an experience of "persistent failure" among scientists, as their theory becomes experimentally unwieldy and internally inconsistent.<sup>258</sup> Although it will not be discarded until a superior alternative emerges, such a "monster"<sup>259</sup> theory is felt to be fundamentally if indescribably at odds with nature and thus an embarrassment to the profession.

The life cycle of legal theories can admit no such sharp distinction between periods of normal science and crisis, between intrinsically legitimating and delegitimizing theoretical modifications. To be sure, the process of impurification may produce legal theories that increasingly fail to influence crucial decisionmakers or that are criticized for incoherence or bad faith.<sup>260</sup> But there is

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<sup>255</sup> Kuhn, *The Structure of Scientific Revolutions* at 52–53 (cited in note 240).

<sup>256</sup> *Id.* at 74–75.

<sup>257</sup> *Id.* at 62–65.

<sup>258</sup> *Id.* at 67–68.

<sup>259</sup> Kuhn, *The Structure of Scientific Revolutions* at 69 (cited in note 240).

<sup>260</sup> See David E. Pozen, *Constitutional Bad Faith*, 129 *Harv L Rev* 885, 918–39 (2016) (discussing the role of accusations of bad faith in constitutional debates generally); *id.* at 946 n 304 (discussing accusations of bad faith directed at liberal originalist scholarship specifically).

no truly external standard against which a theoretical modification can be deemed to have come up short. There are only other scholars and practitioners who may accept or reject the theory in its currently adulterated form. Normal science in the legal community—as perhaps in all social scientific and humanistic endeavors—is always in a critical phase.<sup>261</sup>

There are historians and philosophers of science who argue that this reflexivity characterizes the natural sciences as well—that we lack the epistemological resources to draw any fundamental distinction between the natural and social sciences on the basis of the existence of a nonhuman nature.<sup>262</sup> Kuhn is not one of them, though. He denies the falsifiability of natural scientific theories for the reason that no “anomalous” natural phenomenon will invalidate a scientific theory in the absence of a superior, alternative theory offered by human hands.<sup>263</sup> But he also rejects thoroughgoing social constructivism.<sup>264</sup> Nature is out there, Kuhn insists, a source of phenomena that can be described in a variety of different ways but that cannot be persuaded out of existence.<sup>265</sup> It is nature, in the last instance, that dictates a theory’s descent from normal science into crisis and therefore, potentially, supersession through revolution.

In the absence of such a dictatorial nature, the only force that can cause a highly adulterated legal theory to “go bad”—and be

<sup>261</sup> See Winch, *The Idea of a Social Science* at 88 (cited in note 4):

If we are going to compare the social student to an engineer, we shall do better to compare him to an apprentice engineer who is studying what engineering . . . is all about. His understanding of social phenomena is more like the engineer’s understanding of his colleagues’ activities than it is like the engineer’s understanding of the mechanical systems which he studies.

<sup>262</sup> See generally, for example, Barnes, *Scientific Knowledge and Sociological Theory* (cited in note 241); Collins, *Changing Order* (cited in note 4).

<sup>263</sup> Kuhn, *The Structure of Scientific Revolutions* at 77, 146–47 (cited in note 240).

<sup>264</sup> See, for example, Kuhn, *The Road since Structure* at 91 (cited in note 240) (criticizing “the excesses of postmodernist movements like the strong program [in the sociology of scientific knowledge]”). Calvin TerBeek reaches a different conclusion in his recent application of Kuhnian theory to constitutional theory, analogizing the current state of originalism to the critical phase of a natural scientific paradigm. See Calvin TerBeek, *Originalism’s Obituary*, 2015 Utah L Rev OnLaw 29, 33, 40.

<sup>265</sup> See, for example, Thomas S. Kuhn, *Reflections on My Critics*, in Lakatos and Musgrave, eds, *Criticism and the Growth of Knowledge* 231, 263 (cited in note 241) (“[N]ature cannot be forced into an arbitrary set of conceptual boxes. . . . [T]he history of developed science shows that nature will not indefinitely be confined in any set which scientists have constructed so far.”).

seen to require discarding—is the negative judgment of other legal theorists and practitioners. The next Part considers in further detail some of the reasons theorists and practitioners may have for making, or declining to make, such a negative judgment.

## V. LESSONS AND IMPLICATIONS

What does it say about a legal culture that its leading prescriptive theories tend to work themselves impure in the ways we have described? If the life cycle model captures something true about the development of legal movements, then this question warrants sustained investigation and reflection. We focus on two implications here. At a macro level, we suggest, the life cycle plays a generally salutary role in moderating the pace of legal change and maintaining a productive tension between law and politics. At a micro level, the life cycle underscores the need to look beyond the four corners of any given legal theory to understand the work it is doing. As the examples of originalism and CBA demonstrate in particular, adulterated theories may exert powerful disciplinary effects on legal scholarship and practice even after they have abandoned many of their initial assumptions and prescriptions, and even after they have failed to achieve their initial normative goals.

### A. The Conservatism of Legal Theory

When public law theorists propose to resolve a politically fraught legal conflict by advancing a new decision procedure or decisionmaking ideal, the stakes can seem quite high. The relationship between legal theory and legal practice is uncertain and complex, of course, and theorists may be inclined to overstate their influence. Nonetheless, as the case studies in Part III reflect, the sociological connections between the legal academy, the courts, and the administrative state are close enough to enable a prescriptive theory of public law, under the right conditions, to move quickly from the law reviews and lecture halls to the *United States Reports* and the *Federal Register*. Yet as our case studies also reflect, the ultimate impact of such a theory's adoption is unlikely to prove as normatively significant as one might assume at the outset. Prescriptive legal theories tend to succeed only after running the gauntlet of the life cycle; by the time they achieve widespread acceptance, their leading formulations look very

different from their initial formulations. The theories come to recapitulate rather than resolve the underlying conflict in which they intervened.

It follows that the early proponents and opponents of these theories may not be playing for stakes that are as high as they think. The former can hope to achieve only partial victory. As time goes by, theories such as originalism, textualism, popular constitutionalism, and CBA end up not so much displacing as *encompassing* rival approaches such as living constitutionalism, purposivism, departmentalism, and qualitative analysis. If proponents of prescriptive legal theories find this observation to be chastening, opponents might find it a source of comfort—and power. Critics of ascendant theoretical movements, we have seen, may be able to “win through losing”<sup>266</sup> by prompting concessions and tempering the perceived excesses of a disfavored theory. While an appreciation of the life cycle may counsel a certain realism about legal reform, it does not justify fatalism or quiescence.

The life cycle model also helps to illustrate why it is a fallacy of composition<sup>267</sup> to assume that if certain leading theorists or theories seem “radical” at any given time,<sup>268</sup> legal theory as a collective enterprise will be radical as well. The dialectic of impurification tends, instead, to push legal movements in more inclusive and conciliatory directions. To focus solely on a specific group of legal theory entrepreneurs or their specific proposals is to miss the myriad external forces that will inevitably rework their ideas, compromise their objectives, and condition their influence. A dynamic perspective is needed to understand the aggregate effects of such theorizing.

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<sup>266</sup> For a thoughtful analysis of “winning through losing” scenarios in public law litigation, see generally Douglas NeJaime, *Winning through Losing*, 96 Iowa L Rev 941 (2011).

<sup>267</sup> See Adrian Vermeule, *The Supreme Court 2008 Term—Foreword: System Effects and the Constitution*, 123 Harv L Rev 4, 44–72 (2009) (discussing the fallacies of composition and division commonly made by public law scholars).

<sup>268</sup> See, for example, Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* 9–34 (Basic Books 2005) (describing proponents of originalism as “radicals,” “extremists,” and “fundamentalists”); Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession: A Postscript*, 91 Mich L Rev 2191, 2199 (1993) (“Many, although not all, of the legal theorists would like to bring about a radical transformation of society.”); Kathryn M. Stanichi and Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 Berkeley Women’s L J 1, 3 n 2 (2001) (“The radicalism of American law professors is so legendary that it has led one commentator to joke that the only Marxists left in the ‘entire world’ teach in American universities.”).



The life cycle theory itself ought to be considered in a dynamic perspective. We have emphasized that the susceptibility of prescriptive public law theories to impurification is partly a consequence of the form they generally take: process oriented and silent on the values that animate the conflicts they seek to resolve. As discussed in Part I, an especially bullish market for public law theories that purport to offer a depoliticized proceduralism has existed since the 1980s. This market is attributable to a series of contingent historical events: the failure of New Deal-era legal realism to secure the autonomy and primacy of the legal profession within the administrative state; the critique of the legal process school's assumption of an underlying cultural consensus on the nature of rationality and democracy; and the backlash against the strongly normative legal theorizing of the 1960s and 1970s.<sup>269</sup> If mainstream public law theorizing were to become more openly ideological or outcome oriented, then the life cycle might no longer loom so large. Perhaps the tendency of prescriptive public law theories to work themselves impure will wane in the years ahead.

Perhaps, but we are doubtful. The norm—and the rhetorical utility—of claiming political neutrality has a long pedigree in American public law,<sup>270</sup> and we can detect few signs of a nascent retreat from proceduralism and depoliticization in current scholarship. The life cycle model could lose most of its descriptive and predictive power one day, but it would take a sea change in our legal culture.

All of this may seem rather dispiriting insofar as it underscores the limits of legal theory and the obstacles to legal change. Those who believe that public law decisionmaking needs fundamental reform may be especially exasperated by the life cycle: one can hear this exasperation in the laments of “old-time” originalists that the theory has “lost its soul,”<sup>271</sup> or in the insistence of

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<sup>269</sup> See Part I.A.

<sup>270</sup> See, for example, John Denvir, *William Shakespeare and the Jurisprudence of Comedy*, 39 *Stan L Rev* 825, 825 (1987) (describing constitutional theory's “ceaseless search for a ‘neutral’ method of articulating and applying constitutional norms”). As explained in Parts I and II, prescriptive legal theories of recent vintage have not necessarily shied away from endorsing the primacy of a particular set of substantive values, such as wealth maximization or popular sovereignty; they have not reverted to the more fundamental search for “neutrality” associated with traditional legal process. What makes such theories “abstract” and “proceduralist” is their *relative* neutrality—their neutrality with respect to the values constitutive of a given politicized legal conflict.

<sup>271</sup> See notes 83–85 and accompanying text (quoting Professor Steven Smith). For examples of similar laments, see Nelson Lund, *Living Originalism: The Magical Mystery*

economically minded theorists that deontological considerations simply cannot be a part of CBA.<sup>272</sup> Yet while the impurification of any given theory is likely to strike many as suboptimal, the evolutionary pattern that we describe has some significant benefits for the legal system as a whole. The crises that felled legal realism and legal process are conventionally thought to have stemmed from a failure to manage the inextricable yet antagonistic relationship between law and politics; legal realism was insufficiently attentive to law, while legal process was insufficiently attentive to politics. The thoroughgoing politicization of law and the thoroughgoing legalization of politics both left lawyers in a protracted state of bad faith, either denying their own social and economic privilege as a distinctive professional class or denying the political conditions that underwrote that privilege. The contemporary mode of prescriptive legal theorizing, in contrast, allows lawyers to be lawyers even as it ceaselessly exposes them to the vicissitudes of politics. By proposing abstract theories about how legal decisions should be reached, lawyers exercise their core competencies. By having to adulterate these theories in response to politically charged critiques, lawyers are forced to acknowledge the empirical and normative limits of their capacity to solve public problems.

More importantly, through the life cycles (and epicycles) that legal theories undergo, law regenerates itself. Even if the controversies in which they intervene are ultimately irresolvable by law, legal theories' tendency to supply process-oriented solutions that then undergo impurification keeps law "in the game." Law is neither so powerful that it stifles major value conflicts, nor so inflexible that political actors demand an abandonment of it altogether. The dynamism of individual public law theories thus supports an overarching conservatism and stability in public law practice—not because the law itself is purified in a Burkean fashion through durable traditions that generate better and better

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*Tour*, 3 Tex A&M L Rev 31, 43 (2015) (“[T]o marry originalism and living constitutionalism . . . leaves originalism itself in a condition akin to the legal death married women experienced under the old rules of coverture. Quite a victory.”); Joel Alicea, *Originalism and the Rule of the Dead*, 23 Natl Aff 149, 161 (2015) (arguing that originalism’s legacy “is now imperiled by the rise of novel originalist theories”).

<sup>272</sup> See notes 198–203 and accompanying text.

judgments,<sup>273</sup> but rather because legal innovation is perpetually tempered by political and professional feedback, and political contest is perpetually rerouted through law.

While public law may not work itself pure, then, the impurification of influential prescriptive theories both reflects and reinforces its responsiveness to public deliberation and debate. This interpretation of the life cycle as part of a salutary, dialogic process of legal development echoes familiar accounts of the (passably) democratic character of Anglo-American common law.<sup>274</sup> The irony of contemporary prescriptive theories is that, in trying to cabin legal discretion through formalistic, high-level frameworks, these theories end up catalyzing the sort of incremental contestation and transformation celebrated by defenders of discretionary, common-law decisionmaking.

## B. The Double Life of Successful Legal Theories

In light of the life cycle, the persistence of the best-known prescriptive legal theories presents something of a puzzle. These theories manage to secure a broad following only after abandoning, or at least substantially modifying, the normative commitments and practical proposals that recommended the theories in the first place. At their inception, originalism, textualism, and CBA promised to simplify and constrain judicial, executive, and scholarly resolution of public law debates, while partly insulating decisionmakers from the war of first-order values that undergirded those debates. Today, these theories' decision procedures balloon with exceptions, metaprocedures, and side constraints. Not only do such baroque frameworks fail to simplify or constrain the work of decision; they actually dramatize the value-laden conflicts that the early proponents of these theories had promised to

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<sup>273</sup> See Michael S. Moore, *The Dead Hand of Constitutional Tradition*, 19 Harv J L & Pub Pol 263, 269 (1996) (drawing a connection between Edmund Burke's faith in incrementalism and in the wisdom of tradition and Lord Mansfield's idea that the common law works itself pure).

<sup>274</sup> See, for example, Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 Oxford U Commonwealth L J 1, 7–11 (2003) (discussing the classical understanding of common-law reasoning as deliberative, public, and shared); Matthew Steilen, *The Democratic Common Law*, 10 J Juris 437, 438 (2011) (arguing that "common-law adjudication mimics the deliberative process that gives enacted law its legitimacy").

defuse.<sup>275</sup> Such conflicts now take place *within* the highly adulterated procedural field of our most influential public law theories. The puzzle is why certain theories that fail to achieve their initial goals nonetheless gain and sustain such broad support, and what work this strange form of success accomplishes.

1. An exogenous hypothesis for theory persistence.

These questions suggest the outlines of a program of empirical research, one that we commend but cannot undertake here. We propose, however, that such a program begin with the following hypothesis: highly adulterated legal theories persist to a large degree because of the work they do “off the page”—serving interests and ideals that are exogenous to the theories’ stated norms. However elegant or powerful it might be, the internal logic of a theory like originalism or CBA is unable to provide a satisfying basis for explaining the theory’s persistence, given how compromised and contested that logic eventually becomes. It seems to us more likely that prescriptive legal theories have second-order (and third- and fourth-order) effects on the world that cannot necessarily be gleaned from their academic expositions, and that these effects are in fact what determine their fate at the end of the life cycle.

What might this look like in practice? CBA, some have suggested, tends to enhance the power and prestige of economists and their allies within the legal academy and the administrative state.<sup>276</sup> Even when seemingly noneconomic values such as dignity are incorporated within the cost-benefit calculus, the very form of the calculus exerts a disciplinary effect, privileging a certain mode of expertise and a certain vision of the administrative state that marginalizes alternative visions. Similarly, originalism and textualism may tend to enhance the power and prestige of

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<sup>275</sup> For its part, popular constitutionalism initially promised not just to constrain but to marginalize judicial resolution of constitutional debates, and yet it is now invoked by some to justify vigorous judicial review of unpopular or “jurispathic” federal legislation. See Part III.C.

<sup>276</sup> See, for example, Elizabeth Magill and Adrian Vermeule, *Allocating Power within Agencies*, 120 *Yale L J* 1032, 1051 (2011) (“[CBA] expands the range within which economists, scientists, and other nonlegal professionals effectively choose agency policy.”). See also *id.* at 1080 (“Once lawyers, scientists, or economists—or any other professionals—are employed to cope with a particular issue, they become major stakeholders within agencies, and their influence can seep out laterally to encompass issues other than the one for which they were originally conscripted.”).

lawyers as a privileged expert class, while raising barriers to entry for nonlegal actors. Originalism may also serve the interests of American elites more generally, at home and abroad, insofar as it implies that American power is constrained by an age-old set of universally appealing principles of good governance.<sup>277</sup>

Even the diversity and discord that frequently characterize highly adulterated legal theories may produce exogenous effects that favor their persistence. Take, for example, the potentially productive tension between byzantine academic defenses of a late-stage theory and the existence in popular discourse of a simpler, idealized version of that theory. Several scholars have posited just such a double life in the case of originalism.<sup>278</sup> On this account, the professional embrace of a theory, in an impure form, lends intellectual legitimacy to its popular variant.<sup>279</sup> In turn, the political appeal of the popular variant stimulates demand for the continuing professional use of the theory, however great the discrepancy between the popular and professional versions may be.<sup>280</sup>

In a related vein, there may be situations in which two mutually reinforcing versions of a theory, one much “purer” than the other, exist *within* the professional legal community. We noted in Part III, for example, that while CBA has become endlessly complicated and compromised in law journals and in high-profile legal documents such as Executive Order 13563, federal administrators may continue to deploy a relatively pure, efficiency-maximizing

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<sup>277</sup> See Jamal Greene, *Selling Originalism*, 97 *Georgetown L J* 657, 708, 714 (2009) (arguing that originalism’s success “in the methodologies market” is attributable in part to the theory’s “emphatic, irreducible ‘American-ness’”); Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 *Cal L Rev* 335, 352–81 (2015) (attributing the rise of “constitutionalism” in twentieth-century America to the efforts of internationalist lawyers and politicians to distinguish their expansionist projects from imperialism).

<sup>278</sup> See, for example, Greene, 72 *Ohio St L J* at 1192–93 (cited in note 50); Michael Dorf, *Canonical Case Skepticism and the Cartoon Version of Nonoriginalism* (Dorf on Law, Oct 28, 2015), archived at <http://perma.cc/4RK5-T6SC>.

<sup>279</sup> To the extent that prescriptive public law theorizing is trending toward the style of scholarly erudition that Professor Schlag has labeled “knowledge production,” the effects of intellectual legitimation may become all the greater as the distance between the academic and popular variants of a theory expand. See Pierre Schlag, *The Knowledge Bubble—a Diagnostic for Expertopia* \*2–4 (Colorado Law Legal Studies Research Paper No 15-19, Mar 4, 2016), archived at <http://perma.cc/CKY6-VBHW>.

<sup>280</sup> This dialectic may at times lead to the reintroduction of the normatively purer, popular variant into professional usage. For example, Professor Michael Dorf has suggested that the “more intellectually defensible versions of originalism,” which lack clear ideological content, “give[] cover to the conservative judges and politicians who invoke ‘originalism’ generically”—that is, in the vulgate. Dorf, *Canonical Case Skepticism* (cited in note 278).

variant of CBA in practice.<sup>281</sup> In this case, the presence of the adulterated form of CBA—which ostensibly incorporates dignity, fairness, and other such “soft” variables into the analysis—may help to legitimate and shield from scrutiny the continuing, controversial primacy of efficiency maximization within certain agencies.

## 2. Alternative hypotheses.

Other hypotheses deserve consideration. It is tempting to explain the persistence of highly adulterated legal theories in a much more deflationary manner, as a story of path dependence and transaction costs: once a theory wins sufficient popularity, its opponents feel compelled to engage with the theory on its own terms, which means learning the language. And once the relevant scholars and officials have learned the language, it is simply easier for everyone to go on speaking it, rearticulating their fundamental disagreements through its prism.<sup>282</sup> This deflationary account of theory persistence, however, is insufficient for at least two reasons.

First, it has few resources to explain why some highly adulterated legal theories flourish whereas others recede into obscurity. For instance, despite similar initial commitments to judicial restraint and popular sovereignty, and an equally if not more simplistic decisional formalism, popular constitutionalism seems to be waning at this time while originalism reigns supreme.<sup>283</sup> The best the deflationary account can do is demonstrate that originalism arrived on the scene first, and that a transition to popular constitutionalism therefore would have required new learning. Yet this explanation depends on the assumption that only one legal theory is dominant, or widely spoken, at a given time. While that assumption might well be warranted in the natural sciences, it is much less plausible in the social sciences.<sup>284</sup> Our suggested

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<sup>281</sup> See notes 204–12 and accompanying text.

<sup>282</sup> Such a dynamic likely reinforces theory persistence to some extent in all disciplines, but one would expect it to have the most bite in those disciplines in which the costs of theory change are so high that the theorists themselves cannot possibly afford them. See, for example, Collins, *Changing Order* at 160 (cited in note 4) (noting with regard to the physical sciences that “[i]n times of financial stringency the risky, extraordinary phase of science is likely to suffer disproportionately,” leading to a halt in “[t]he progress and development of scientific expertise”).

<sup>283</sup> See note 57 and accompanying text.

<sup>284</sup> See note 254 (discussing Professor Kuhn’s view that the natural sciences, in contrast to the social sciences, tend to be dominated by one theoretical school at any particular moment in time).

hypothesis, on the other hand, can explain the waning of popular constitutionalism in terms of the poor fit between its decision procedure—which even in its adulterated formulations continues to exalt “the people themselves”—and the interests of legal elites.

The second problem with the deflationary account is that a focus on path dependence and transaction costs ignores the dynamism of widely accepted prescriptive legal theories. As we have seen, these theories gain acceptance through an iterated process of adaptation and adulteration, which demands a constant openness to challenge and capacity for change. Yet the deflationary account explains the persistence of such theories on the ground that theoretical learning is prohibitively expensive. While it could be the case that learning is cheap until a theory succeeds and only then becomes prohibitively expensive, the successful theories we have surveyed do not demonstrate any sharp break between a period of experimentation and a period of entrenchment. Prescriptive legal theories continue to adulterate or they fade away.

While the deflationary account of theory persistence has little to recommend it, another alternative account deserves more serious consideration, and serves as a useful check on our hypothesis that exogenous factors are likely to explain which adulterated theories persist and which do not. This *internalist* account hypothesizes that (i) there exists in any persistent, highly adulterated theory a “hard core”—a durable set of propositions and practices—that remains relatively unaffected by impurification; and (ii) it is the practical utility or normative validity of this hard core that motivates the theory’s popularity and longevity. In other words, the internalist account suggests that when highly adulterated theories persist, they do so because they really have succeeded on their own initial terms, pared down to those terms’ most essential elements.<sup>285</sup>

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<sup>285</sup> This explanation of legal theory persistence in terms of a successful “hard core” mirrors the philosopher of science Imre Lakatos’s response to Kuhn’s account of theory change in the natural sciences. Lakatos accepted the contention that scientists will generally make ad hoc adjustments to their theory in the face of experimental falsification rather than abandon the theory altogether. But, he argued, there are always some theoretical propositions—a theory’s hard core—that are so essential to the theory that they cannot be abandoned; experimental falsification of these propositions, accordingly, would necessarily result in abandonment of the theory itself. Theories persist so long as their hard core is not falsified. See generally Lakatos, *Falsification and the Methodology of Scientific Research Programmes* (cited in note 241).

The plausibility of such an internalist explanation gains support from certain features of the life cycle model itself. As discussed in Part I.C, however adulterated a given theory may become, its increasingly diverse proponents generally remain committed to the theory's initial decisional formalism. (Originalists do not abandon the decisional centrality of the constitutional text; cost-benefit analysts do not abandon the decisional centrality of a calculus of trade-offs; and so forth.) It is because of this persistence of a theory's initial decisional formalism that we are able to identify the theory as persisting at all, as opposed to becoming some other theory or disappearing altogether.

Accordingly, internalists can argue, it is wrong to say that a theory has abandoned its initial normative commitments at  $T_6$ , as the theory remains committed to the norms intrinsic to its formalism. If this is the case, then the theory's persistence may be explained by broad acceptance of those norms, which in turn may be explained by their validity or utility in guiding legal decisionmaking. In the case of textualism, for instance, the resilient hard core might include a prescription such as "pay careful attention to statutory text when interpreting a statute." Textualists today may no longer share *most* of the normative commitments that the legal community associated with textualism in the 1980s. But the commitment to paying careful attention to statutory text remains. And the felicity of that commitment could explain why more and more people have become textualists over time.

Such an internalist explanation is intuitively appealing. We are happy to concede both the existence of such a minimal hard core and the likelihood that it plays some causal role in the persistence of otherwise-adulterated prescriptive legal theories. Nonetheless, we do not think this hypothesis offers an actual *alternative* to our own hypothesis. For one thing, we are skeptical about the extent to which minimal prescriptions such as "pay careful attention to statutory text when interpreting a statute" have normative or practical significance for legal decisionmaking. On the margins, such a prescription, if internalized by officials, could certainly affect their approach to legal questions. But it is hard to see how such an indeterminate norm could do more substantial work in guiding legal decision. One does not need to be a thoroughgoing skeptic about the concepts of legal "validity" and "utility" to wonder whether the appeal of such a maxim has less to do with its normative or practical payoffs than with its rhetorical power—its resonance with social expectations and self-conceptions



about the lawyer's or judge's role. To push the point further, explanation of an adulterated theory's persistence in terms of the appeal of its hard core of minimal prescriptions may just be explanation of that theory's persistence in terms of exogenous factors: the second-order benefits that accrue to those legal theorists and practitioners who commit to norms that are socially or professionally celebrated but legally indeterminate.

Moreover, even if one were to accept that an adulterated theory's unchanging, minimal prescriptions enjoy widespread support because of the work they do in guiding legal decision, the internalist explanation of theory persistence would still face another challenge. This challenge arises from the contrast between the overall complexity of an adulterated theory at  $T_6$  and the simplicity and generality of its hard core. Given this contrast, the internalist needs to explain why legal actors attracted to such a theory's minimal prescriptions would choose to take on board the theory as a whole. There is no need to adopt the theory of textualism to "pay careful attention to statutory text when interpreting a statute" or to believe that this prescription should be heeded throughout the legal community. This prescription predates the rise of modern textualist theory, and it is embraced by many scholars and judges who are not identified with that theory. "Pay careful attention to statutory text when interpreting a statute" may well be a normatively and practically appealing maxim, but this appeal does not itself explain why scholars and practitioners would affiliate themselves with the complex and even self-contradictory theory that textualism has become.

In responding to this challenge, we suspect the internalist would have to draw on some version of the deflationary hypothesis sketched above. It could be argued, for instance, that while textualism's minimal prescriptions may seem generic, they gained new prominence within the legal community thanks to the emergence of textualist theory, and as a result it would be more time-consuming or otherwise costly at this point to disavow the theory while maintaining its minimal prescriptions. In addition to the weaknesses of the deflationary hypothesis already identified, the problem with this argument from path dependency is that, given the complexity of a highly adulterated legal theory, it is difficult to imagine that it would be *more* costly to disavow the theory while maintaining its minimal prescriptions than to maintain both. However normatively or practically appealing such a

theory's hard core, it thus seems unlikely to be able to explain the persistence of the theory as a whole.

### 3. New directions for public law research (and resistance).

To summarize: in light of the weaknesses of alternative explanations, the exogenous hypothesis—that highly adulterated legal theories persist because they serve interests and ideals that are not compassed by the theories themselves—strikes us as the most useful starting point for further empirical work.

If this hypothesis proves correct, it would warrant an important caveat to Part V.A's relatively optimistic take on the life cycle. To whatever extent highly adulterated theories persist because they serve interests and ideals "off the page," such persistence will not *merely* recapitulate the legal and political status quo. Instead, it will subtly shift the balance of social and economic forces within the status quo. At  $T_6$  of the life cycle, some legal actors will be in a more powerful position than they were at  $T_1$ , and so will be better equipped to resolve the underlying dispute on favorable terms. Recapitulating a debate about the definition and enforcement of fundamental rights through an originalist lens could influence the ultimate outcome of the debate insofar as a bipartisan embrace of originalism enhances the persuasive authority of certain lawyers—for example, those steeped in Founding-era history—or links the question of rights to a certain vision of American nationalism or exceptionalism. On multiple levels, then, adulterated theories may exert disciplinary effects on the legal academy and the practice of law even when they fail to achieve their internal goals—altering not only which sorts of lawyers (and nonlawyers) are in or out, up or down, but also which styles of research, rhetoric, and justification have more or less currency. These effects operate at the level of ideas and institutions, not just individual reputations and aesthetics.

A new research program for public law scholarship might investigate these dynamics within the framework of the life cycle model. The life cycle suggests that systematic scrutiny of the *indirect* and *unintended* effects of prescriptive legal theories is integral to understanding why these theories succeed, and to assessing the costs of that success. At the same time, the life cycle does not suggest that it is misguided or vainglorious for legal theory entrepreneurs to think they can change the world, as well as their own professional and public standing, by introducing new "isms" that

gain a wide following. The vision of success that motivates such entrepreneurs, however, may be surprisingly unrelated—or even antagonistic—to the kinds of legal and political change that a widely accepted theory ends up producing.

For similar reasons, our account does not suggest that it is misguided for critics of prescriptive legal theories to resist them. Such resistance is what leads to impurification. Moreover, by taking a hard line against the adoption of disfavored theories, in any form, critics might be able to limit the indirect social and political transformations that are the most lasting effects of theoretical victory.

### CONCLUSION

In arguing that process-oriented legal theories tend to share a common life cycle, we do not mean to deny the place of contingency in legal development. We cannot predict what the next big prescriptive legal theory will be. But the analysis here does give a basis to predict that, whatever normative dividends this theory promises to deliver at the outset, it will become more ideologically amorphous and internally conflicted—and less dissimilar to the rival theories that preceded it—over the course of the years that follow.

If this Article's central argument is correct, it has broad implications both for how we should understand the function of legal theorizing and for how we should evaluate and engage the legal theories around us. To the extent that a process-oriented theory really does pose a significant threat to its opponents, we can now see that this threat does *not* stem from the significant normative values it initially neglects, as those values are apt to be incorporated into the theory. Rather, the deeper threat lies in the indirect—and often unintended—ways in which the theory's advancement may reshape legal culture. One upshot is a need for more externalist approaches to legal argument. When the next big public law theory comes along, commentators would do well to focus not only on the merits of its initial decisionmaking framework but also on the social, political, and ideological effects that such a framework's adulterated descendants could foster, down the line.