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INTRODUCTION

The original title for the conference talk on which this brief article is based, hand-picked by the excellent Jack Balkin, was, "What Was Originalism." While characteristically clever and provocative, the suggestion of originalism's death captures my position only imperfectly. I believe that originalism—in a broad, generic sense, encompassing any belief that the text is the baseline and that its authors' expectations count for *something*—will become more orthodox than ever. And, like many participants at Jack's wonderful conference, I suspect that his *Living Originalism*[1] will hasten that trend: already, originalism's conservative sentinels have predictably attempted to pocket the "originalism" part and to dismiss the "living" elements.[2] However, a certain *kind* of conservative originalism, or perhaps several positions in originalism's "logical space,"[3] has or have become unsustainable—partly for theoretical, academic reasons, but in much larger part on account of changes in the broader political context in which originalism operates. Originalism will live, but its dominant forms will have a different tone and orientation.

The originalism that in my estimation has outlived its usefulness has three central, interrelated features. First, it is Court-centered and preoccupied with legal interpretation. Second, it is positivist: judges must follow the constitutional rules because they are what they are and because the 1788 sovereign said so; any talk about *why* he, or we, or she the people said so is for interpretive purposes off limits. And third, it is clause-bound and rights-focused: its principal focus is to cabin the judicial

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1. JACK M. BALKIN, LIVING ORIGINALISM (2011).

2. *See, e.g.*, Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663 (2009).

3. *See* Mitchell Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 9-16 (2009) (finding "at least" seventy-two positions in originalism's "logical space," and arguing that originalism has several dimensions, which define the space).

interpretation of open-ended constitutional provisions from due process to cruel and unusual punishment. Because those traits have characterized the dominant forms of originalism over the past generation, I will call this form of originalism "conventional" originalism.

However, Court-centeredness, positivism, and clause-boundedness are neither necessary nor even compelling features of a plausible originalist jurisprudence. Conventional originalism owes them largely to the circumstances of its historical origin and its intended political function as a bulwark against the Warren-Brennan Court's "activism." For a host of reasons and in many important respects, the political and intellectual context has changed, and originalism is bound to adjust accordingly. In fact, that process is well underway.

I. THEORY

As an initial matter, there are sound theoretical reasons to jettison originalist commitments to Court-centeredness, positivism, and rights-focused clause-boundedness. Taking the features in order: "Court-centeredness"—that is, the notion that Supreme Court decisions and opinions constitute, by and large, the sum and substance of constitutional discourse—was a principal target of Bruce Ackerman's *We the People* lo these many years ago,[4] and it is fair to say that Ackerman has won this debate hands down. One need not embrace Ackerman's idiosyncratic account of informal, extra-textual constitutional amendments, nor even the "democratic constitutionalism" that resonates in Balkin's theory, to recognize that constitutional development has been shaped, powerfully and legitimately, by forces outside the Court; or to acknowledge that the universe of intelligent and intelligible constitutional debate is much wider than the subfield of judicial interpretation. Much non- or anti-progressive scholarship in recent years has recognized and emphasized these points. Some contributions in this vein have an institutional bent; Keith Whittington's *Constitutional Construction* is an example.[5] Other accounts, including my own, emphasize the Constitution's political economy.[6] And a leading constitutional casebook, authored by prominent originalists, is heavy on high-level constitutional theory and comparatively light on constitutional case law.[7]

4. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); *see also* Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 964, 1002-03 (1998) (criticizing the clause-boundedness of constitutional law teaching).

5. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (2001).

6. *See* MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION (2012).

7. *See* MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI, MICHAEL W. MCCONNELL & SAMUEL L. BRAY, THE CONSTITUTION OF THE UNITED STATES: TEXT, STRUCTURE, HISTORY, AND

Conventional originalism's positivist streak has suffered a similar fate. We must stick to the text and nothing but the text, say originalists committed to this position, because the sovereign said so two-hundred-plus years ago and because otherwise judges will start making things up. However, as Michael McConnell notes,[8] textual interpretation can get you only so far. Insist that there is no law and only politics beyond the text, and it becomes very difficult to articulate a coherent account of well-accepted and irreversible constitutional developments. The test case, because the debate is still alive, is the New Deal;[9] but the difficulty is much more fundamental. Never mind *Marbury v. Madison*,[10] which invites "it's all politics" teaching: you could teach *McCulloch v. Maryland*[11] and *Gibbons v. Ogden*[12] and *Dartmouth College v. Woodward*[13] that way, too. And if you are an originalist Justice, you can opine and rule that way.[14] You might even have a point. But it is not a persuasive point.

More important perhaps is a point that Balkin tees up and then, as I see it, whiffs. Conventional originalism, he says, can never celebrate great constitutional innovations like *Brown v. Board of Education*;[15] it can only explain them away, grudgingly accept them, or modify its jurisprudential commitments to accommodate them.[16] Maybe. But then, conventional originalism doesn't have to apologize for such masterpieces of "living" originalism as *Dred Scott*[17] or *Roe v. Wade.*[18] That, I should have thought, is the point. Conventional originalism's defect is more fundamental: it cannot explain what's so great about constitutionalism and the Constitution in the first place. It wants to be parasitic on what Bruce Ackerman calls "dualism"[19]—that is to say, our contractarian constitutional tradition: the Constitution in its original public meaning warrants respect because it was ordained by the democratic sovereign and

PRECEDENT (2010). In particular, see the authors' Preface at v.

8. Michael W. McConnell, Richard and Frances Mallery Professor of Law, Stanford Law School, Originalism and Precedent: Panel Presentation at the Constitutional Interpretation and Change Conference at Yale Law School (Apr. 27, 2012).

9. *See generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (arguing that New Deal institutions and doctrines are irreconcilable with originalism).

10. 5 U.S. (1 Cranch) 137 (1803).

11. 17 U.S. (4 Wheat.) 316 (1819).

12. 22 U.S. (9 Wheat.) 1 (1824).

13. 17 U.S. (4 Wheat.) 518 (1819).

14. *See* GREVE, *supra* note 6, at 371-72 (arguing that contemporary originalist opinions effectively repudiate *Gibbons*).

15. 347 U.S. 483 (1954).

16. BALKIN, *supra* note 1, at 116-19.

17. Dred Scott v. Sandford, 60 U.S. 393 (1856).

18. 410 U.S. 113 (1973).

19. ACKERMAN, *supra* note 4, at 3-33.

because that sovereign did so ordain. However, conventional originalism does not want to defend the contractarian tradition (let alone respond to those who attack it), for fear that the enterprise might pull judges away from a readable text into natural law abstractions and aspirations. In the words of a justly famous jurist, though, "we must never forget that it is a *constitution* we are expounding,"[20] and that cannot be done without (among other things) some account of what the instrument is supposed to do. That account, in turn, requires a theory of politics—a theory of constitutional politics, and a theory of "normal" (or, as public choice theorists say, "in-period") politics. And at the end of the day, that two-part theory has to be a normative theory, albeit one that must remain closely tied to constitutional text, structure, and historical understanding.

Finally, clause-boundedness and rights-focus. Conventional originalism's paradigm of constitutional practice is a case in which judicial interpretation meets the raw, unmediated text of a specific constitutional clause. However, this is a very impoverished account of judicial practice at least in *constitutional* adjudication, where courts and lawyers meet the pure text only once in a blue moon. *District of Columbia v. Heller*[21] (and *McDonald v. City of Chicago*[22] after it) is that rare case—which explains why it has prompted a torrent of blog and law review commentary, mostly of a methodological, interpretive bent and wholly out of proportion to the practical interest and significance of the case. The common move of enriching originalism with a theory of precedent does not help the situation very much. Wholly apart from the familiar difficulties (does a well-accepted but non-originalist precedent dominate the text, or is it the other way around?), judicial practice and Supreme Court practice in particular isn't really dominated by either text or precedent but by doctrine—that is, the reasoning that makes text and precedent hang together.

In a contemporary and comparative context, clause-boundedness seems to be a peculiar feature of American constitutional practice.[23] However, this uniqueness is a product of modern-day originalism, not of an "exceptional" American constitutional tradition. Go read cases from the nineteenth century, when everyone was an originalist: they are *not* clause-bound. For example, contemporary readers will often find it difficult to tell whether this or that case was decided "under" *Swift v. Tyson*[24] or

20. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).
21. 554 U.S. 570 (2008).
22. 561 U.S. 3025 (2010).
23. *Cf.* Kim Lane Scheppele, *Jack Balkin Is an American*, 25 YALE J.L. & HUMAN. 23 (2013).
24. 41 U.S. 1 (1842).

"under" the Contract Clause;[25] or whether this or that turn-of-the-twentieth century case was "a due process case" or "a dormant Commerce Clause case." (Both doctrines then embodied the general understanding that states must not extend their jurisdiction beyond their borders.[26]) The "what clause" question misses the point: nineteenth-century jurists were not terribly concerned with putting cases into boxes. To their minds, the individual clauses and doctrines all hung together in the constitutional architecture and its bedrock principles. Some contemporary originalist accounts reflect a similar, structural understanding. Akhil Amar's account of *The Bill of Rights as a Constitution* is an example;[27] Michael McConnell's take on the Contract Clause is another.[28] Nor do I believe that anything in Balkin's originalism commits him to clause-boundedness. If anything, his "framework originalism" cuts against that conventional-originalist orientation.

To rephrase and press the point a bit further: a deliberately minimalist constitution like the United States' Constitution invites and indeed requires—to employ the fighting words—a common law constitutionalism. This is illustrated even by rare, text-and-history-only rights cases like *Heller* and *McDonald*: if you want to operationalize the Second Amendment right to bear arms, you need a federal common law of gun possession.[29] And what is true of rights is even truer of the constitutional structure: it needs construction and doctrine. There is no other way to make the Constitution work.

Politics, constitutional theory, common law construction: all this sounds very open-ended, very "Yale." And, in fact, there is no gainsaying the very real danger that a constitutional understanding that makes room for those modes of argument and reasoning also creates breathing space for a nominal originalism in which the text disappears and just about anything goes. To no one's great surprise, I am inclined to think that Balkin's "living" originalism illustrates the peril. It brings to mind Lon L. Fuller's account of a famous riddle in Wittgenstein's *Investigations*. To wit, a mother of small children tells the babysitter, "While I'm gone, teach my children a game." When the mother returns, the kids have learned to duel with kitchen knives and to shoot dice for money. The question is whether

25. *E.g.*, Rowan v. Runnels, 46 U.S. 134 (1847). The case can be read either way.

26. *See, e.g.*, Western Union Telegraph Co. v. Kansas, 216 U.S. 1 (1910); Pullman v. Kansas, 216 U.S. 56 (1910).

27. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

28. Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267 (1988).

29. J. Harvey Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 279-88 (2009). This, it seems to me, is the rational core of Judge Wilkinson's emphatic critique of *Heller*.

the mother would be entitled to say, "That is not what I meant," even if those particular infractions had never occurred to her.[30] Living originalism does not engage this type of "c'mon, now" problem; and in fact, it is not meant to engage it. What living originalism says instead is, "Babysitters of the world unite! Let's start a social movement and invent some more games." This is what it *means* in Balkin's universe to move "off-the-wall" propositions and causes "on the wall,"[31] and it is playing with a stacked deck. Mom is no longer around to object that she did not mean knife fights and dice; and in any event, framework originalism pretty much discards objections arising from "original expected applications."[32] In so doing, critics might claim, Balkin sleights a central purpose of constitutionalism—the purpose of keeping stuff off the wall even if you cannot exactly envision what future generations might think of.

Again, I am inclined to agree with this criticism, though I hasten to add that the drive-by critique just sketched for expositional purposes hardly does justice to Balkin's subtle position. In the present context, however, the more salient observation is that constitutional and common law construction, done right, is actually quite constricting—in some forms, arguably more constricting than conventional originalism. For example, the hoary *Marbury v. Madison* notion that *every* clause in the Constitution must be given force and independent meaning[33] is a tenet of conventional originalism (as preached, though not as practiced by Justices);[34] it gains additional and special force against the backdrop presumption that each clause is part of an architecture whose coherence and logic merit respect. For another example, conventional originalism would roundly deny that the Constitution contains a "right to education."[35] A deeper, structural originalism might hold that even if a right to education were adopted by

30. LON L. FULLER, THE MORALITY OF LAW 138-39 (rev. ed. 1969). Wittgenstein's original, less colorful riddle can be found in LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 38 (P.M.S. Hacker & Joachim Schulte eds., rev. 4th ed. 2009).

31. BALKIN, *supra* note 1, at 17-18. The limit to this "constitutional" dynamic, to the extent that I can determine it, is the assurance that most crackpot and off-the-wall arguments "go nowhere." *Id*. at 18. Knives and dice, then. But not plastic explosives, maybe: the kids weren't interested.

32. "Original expected applications," Balkin says, can serve as a "resource" and help us discover "permissible constructions." *Id*. at 258. "Permissible," however, seems to be just about anything the text can (barely) bear, and "[w]e use history to see whether the issues or problems that concerned the framing generation are structurally or analogically similar to the ones we face today." *Id*. at 267. That, it seems to me, is not a very restrictive limiting principle.

33. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect.").

34. For examples and discussion, see GREVE, *supra* note 6, at 298-302 (discussing wholesale evisceration of the Compact Clause, U.S. CONST. art. I, § 10, cl. 3). *See also id*. at 305-06 (discussing the idea that the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, is unenforceable with respect to public acts).

35. *Cf*. Sara Aronchick Solow & Barry Friedman, *How To Talk About the Constitution*, 25 YALE J.L. & HUMAN. 69 (2013).

formal Article V amendment, it would have to be repealed—much like the Eighteenth Amendment was eventually explicitly *repealed*, in recognition of the fact that it never belonged in the Constitution in the first place.[36] For yet another example, conventional originalism has embraced a wide range of federalism doctrines that spring from the notion of a constitutionally mandated "balance" between Washington and the states. As I have tried to show at painful length, that supposed principle is completely made up, and it has led conventional originalists to engineer doctrines that are antithetical to the Constitution's logic and structure.[37] One can, I think, recover the actual constitutional structure—but only by abandoning conventional originalist (and especially clause-bound) pretensions and by starting with the premise that there actually *is* a structure and logic to discover.

II. POLITICAL CONTEXT

Conventional (Court-centered, positivist, clause-bound) originalism, I have suggested, owes its debilities to its historical origins and its intended political function.[38] First, originalism arose as a conservative response to what two wags (and superb lawyers) have called "Marxist-Brennanism"—that is, "that pulsating, action-inspiring, elitist dream of socialist utopia brought about not by the blood and rubble of proletarian revolt but by the sophistry and assurances of a bloodless, velvet, judicial usurpation."[39] Deference would not do as a response: Alexander Bickel (and, on the bench, Felix Frankfurter) had articulated that position for decades, and it had failed to work.[40] So there had to be a more ambitious theory. Second, originalism had to unite conservatives under a common banner (and behind a common commitment that could find assent among a wide, somewhat unwieldy array of constituencies and causes). And third, originalism had to tie legal and constitutional concerns to a broader conservative agenda.

What is originalism's record, in a practical-political frame of reference?

36. For an argument to this effect, see Robert R. Gasaway & Ashley C. Parrish, *Structural Constitutional Principles and Rights Reconciliation*, *in* CITIZENSHIP IN AMERICA AND EUROPE: BEYOND THE NATION-STATE? 206, 213-14 (Michael S. Greve & Michael Zöller eds., 2009).

37. GREVE, *supra* note 6.

38. *Id*. For a more extended discussion, see Michael S. Greve, *Conservatives and the Courts*, *in* CRISIS OF CONSERVATISM? THE REPUBLICAN PARTY, THE CONSERVATIVE MOVEMENT AND AMERICAN POLITICS AFTER BUSH 237 (Joel Aberbach & Gillian Peele eds., 2011). In the text below, I will often drop the cumbersome "conventional" qualifier. Unless otherwise indicated, however, I have that originalism in mind.

39. Gasaway & Parrish, *supra* note 36, at 211.

40. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1978).

In the first dimension, originalism has manifestly failed to stem the flow of postmodern "mystery" rights.[41] (Some of the political implications are noted below.) In the second dimension, it has succeeded spectacularly, quite probably beyond its originators' wildest imagination: even Balkin is an originalist now. Of course, there is some cost to an originalism that is sufficiently latitudinarian to embrace folks with a wide range of conflicting political agendas, just as there is a cost to the fact that a Supreme Court nominee, in recognition of originalism's public orthodoxy, can switch from "wise Latina" to judicial "umpire" without missing a beat, let alone her appointment.[42] On the whole, however, conservatives would rather have *that* fight than a fight over equality or decency or aspirations in the abstract. Conventional originalism's true problem, it seems to me, is the third dimension: it has become disconnected from politics and from conservative politics in particular. Four quick-and-dirty observations illustrate the point.

First, originalism was self-consciously and deliberately formulated as a *democratic* originalism or *democratic* formalism. Judicial adherence to text and forms, its proponents argued, would allow democratic politics to operate where it ought to.[43] So understood, originalism hung together with a Reaganesque anti-elite story: once the righteous American people are entitled again to govern themselves, they will no longer be governed by effete elites from Harvard and Yale; by the Supreme Court and by the *New York Times*. Manifestly, that story has failed to pan out. Of course, the Court's role in the "culture war" domains has mobilized and consumed a great deal of energy on all sides. However, the demos at large has shown little interest in governing itself. Perhaps the public has proven indifferent to appeals to democracy because the Court has remained broadly responsive to "The Will of the People."[44] Or perhaps, the ready acceptance of "juristocracy"[45] signals that conventional originalism makes too much of a supposed dichotomy between democratic government and (soft, benign) tyranny and altogether too little of the fact that so much of

41. *Cf.* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."); Lawrence v. Texas, 539 U.S. 558, 574 (2003) (citing and quoting *Casey*'s "mystery" passage with approval).

42. *See, e.g.*, Robert Barnes & Paul Kane, *Sotomayor Repudiates "Wise Latina" Comment*, BOSTON.COM (July 15, 2009), http://www.boston.com/news/nation/washington/articles/2009/07/15/sotomayor_backs_off_wise_latina_quote.

43. For a fair-minded discussion and critique, see Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529 (1997).

44. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (arguing that, throughout American history, the Supreme Court has remained in sync with broad currents of public opinion).

45. The likely origin of the term is RAN HIRSCHL, TOWARDS JURISTOCRACY (2004).

our lives is already dominated by institutions with a highly attenuated democratic pedigree. The Federal Reserve has decimated old folks' retirement accounts, the better to lend to Congress at effectively zero interest. Government-sponsored enterprises dominate the markets for housing and student loans, to the point where it has become hard to find a security in the United States that is not issued or backstopped one way or another by the U.S. government. Federal agencies have re-engineered products from toilet tanks to light bulbs and shower heads, to the point where some of us might want the government out of their bathrooms and back into the bedroom, where it belongs.[46] All this has happened without a very plausible or direct democratic warrant—yet with a lot more direct effect on citizens' lives than a stranger's abortion or a gay union down the street, and without effective complaint about or challenge to public authority. The public response has been constant and in its own way rational: we are okay with the rules regardless of their progeny, provided they do not require any serious behavioral change on our part.[47]

The second, related way in which conventional originalism has become disconnected from politics has to do with the outcome of the culture wars. It would be too much to say that those wars are behind us. Even and especially as "evolving standards of decency"[48] have converged on postmodern morality as the governing public and constitutional norm, there remains the question of whether dissenters will still be permitted to have it their way—for example, by refusing to cover contraceptives and abortion under their health care plans[49] or by refusing to rent their homes to gay couples.[50] Liberals may well insist that (mostly religious) arguments that are patently impermissible in a fight *over* a public norm (for example, gay marriage) cannot then serve as a defense for a private exemption *from* that norm. Race is the paradigm of constitutional politics, and no quarter may be given until the Catholic Church suffers the fate of the Klan. To the extent liberalism pursues this course, and to the extent that religious constituencies are more resilient and self-confident than racist crackpots, the fight will go on and may even become harsher. However, it is not a distinctly originalist fight. Originalism insisted that the public norms themselves should be left to democratic judgment, and

46. I owe the joke to Kate O'Beirne.

47. On public agencies' inability to engineer behavioral change, see Christopher C. DeMuth, *Unintended Consequences and Intended Non-Consequences*, AM. ENTERPRISE INST. (June 8, 2009), http://www.christopherdemuth.com/unintended-consequences-and-intended-non-consequences.html.

48. Trop v. Dulles, 356 U.S. 86, 101 (1958).

49. *See, e.g.*, Editorial, *The Politics of Religion*, N.Y. TIMES, May 27, 2012, *available at* http://www.nytimes.com/2012/05/28/opinion/the-politics-of-religion.html?ref=contraception.

50. *See, e.g.*, Jennifer Sinco Kelleher, *Diane Cervelli and Taeko Bufford, Gay Couple, Sues Hawaiian B&B for Discrimination*, HUFFINGTON POST (Dec. 19 2011), http://www.huffingtonpost.com/2011/12/19/diane-cervelli-taeko-bufford-lawsuit_n_1159190.html.

that fight is over. In this important respect, conventional originalism can no longer engage cultural conservatives.

Third, conventional originalism has little to offer to constituencies that are worried about government overreach and abuse and, more broadly, the fate of the country's economic order. Those constituencies include libertarians who agitate and litigate against licensing laws and eminent domain abuses: Their slogan is judicial "engagement," not "restraint."[51] They want an originalism of rights, not of interest group democracy. Far more importantly, "more democracy" is not a plausible answer to the business community or perhaps more precisely, the diminishing number of business firms and organizations that have not yet resigned themselves to crony capitalism and to a life as regulated utilities. For example, the Chamber of Commerce is not terribly enamored with Justice Thomas's or Justice Scalia's ostentatiously originalist positions on the dormant Commerce Clause or federal preemption, which all too often commit interstate commerce to the tender care of Congress.[52] An originalism of this description threatens to split business constituencies from the rest of the conservative camp. Neither originalism nor conservatism can afford that result.

These brief observations converge on the fourth and to my mind most fundamental reason why originalism will be reformulated: democratic politics itself has lost its allure. "Make room for democratic politics" was a very plausible program in the Reagan era. The institutions would or could be made to work, conservatives thought, and social conservatives, free-marketeers, and businesses would all get their way. But that was then, and this is now. The crucial difference, it seems to me, is not that democratic politics hasn't quite yielded the results that conservatives expected: *that* possibility always came with the territory. The difference, rather, is that confidence in politics requires confidence both in the American people and in government institutions; and on both counts, the confidence has been very badly shaken. In conservatives' minds, the American people may still be more sensible and virtuous than the corrupt elites. Still, the *demos* appears to insist both on a really big transfer state and on not paying for it, and that disposition has brought the country to the edge of a financial abyss. Likewise, the notion that our public, democratic institutions might be capable of restoring a sensible political, legal, and economic order—if only we elect the "right" representatives—

51. *See Principles of Judicial Engagement*, INST. FOR JUSTICE CENTER FOR JUDICIAL ENGAGEMENT, http://www.ij.org/cje/facts.

52. *See, e.g.*, Tyler Pipe Indus., Inc. v. Wash. State Dept. of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting); Cuomo v. Clearinghouse Ass'n, 129 S. Ct. 2710 (2009); Wyeth v. Levine, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring).

has become very doubtful: the institutions look dysfunctional, regardless of who happens to occupy them. In both respects, conservatives harbor fears that are probably shared by large majorities of voters, except perhaps more so. In that environment, an *après nous le deluge* originalism that has nothing to say for itself or to anyone than "more democracy" is politically useless. It may live on in academic enclaves, but not in public debate and politics.

CONCLUSION

For conservatives, the present political constellation neither heralds nor requires an originalism that would have an imperial Supreme Court resurrect a pre-New Deal "Constitution in Exile."[53] What it does require is a jurisprudence that is coherent with the demands of conservative politics; resonant with public sentiments; and above all responsive to pressing problems—not the clatter and confusion of our daily politics, but the present-day manifestations of institutional dysfunctions that the Founders recognized and sought to redress. Originalism—broadly defined and understood as a form and expression of elite politics—has *always* reflected those sorts of forces and considerations; in Steven Teles's able telling, that nimbleness has a great deal to do with originalism's rise from quaint obsession to near-orthodoxy.[54] If that pattern holds, conventional originalism will be driven out by an originalism that gives a confident, positive account of the structure of the Constitution and its intended purpose of disciplining a wayward politics.

To the considerable extent that we are all originalists now, it is between Balkin's constitutional babysitters and the adults. Unlike another round of squabbles over eighteenth-century dictionary definitions, this brawl actually makes sense; and there isn't a more fun, erudite, and generous guy to have it with than my friend Jack Balkin.

53. *But see* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG., Apr. 17, 2005, *available at* http://www.nytimes.com/2005/04/17/magazine/17CONSTITUTION.html?_r=1; Jeffrey Rosen, *How New Is the New Textualism?*, 25 YALE J.L. & HUMAN. 43 (2013) (describing the powerful "Constitution in Exile movement" to overthrow the New Deal by judicial edict—a cabal of which this author is allegedly a ringleader). Rosen's articles answer themselves: a movement that has *me* as a leader is already in very big trouble. For more extended responses, see Orin Kerr, *Is "the Constitution in Exile" a Myth?*, VOLOKH CONSPIRACY (Dec. 29, 2004, 12:57 PM), http://www.volokh.com/posts/1104346631.shtml; and Michael S. Greve, *A Conspiracy So Vast*, LIBRARY OF LAW & LIBERTY (May 10, 2012), http://libertylawsite.org/2012/05/10/a-conspiracy-so-vast.

54. *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008) (describing strategic adjustments of conservative legal organizations, such as the Federalist Society and public interest law firms, in response to changing opportunities and in light of experience with unsuccessful or obsolete modes of operation).