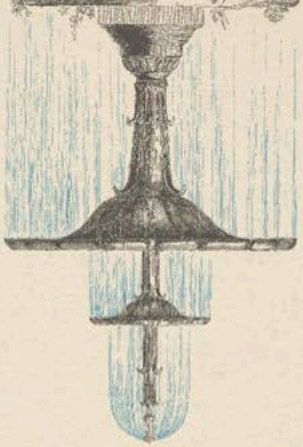

WORSE THAN NOTHING

THE DANGEROUS FALLACY OF ORIGINALISM

ERWIN CHEMERINSKY

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CONTENTS

Preface *ix*

Chapter 1: The Rise of Originalism 1

Chapter 2: The Allure of Originalism 25

Chapter 3: The Epistemological Problem 44

Chapter 4: The Incoherence Problem 75

Chapter 5: The Abhorrence Problem 92

Chapter 6: The Modernity Problem 115

Chapter 7: The Hypocrisy Problem 139

Chapter 8: In Defense of Non-Originalism 166

Chapter 9: We Should Be Afraid 186

Notes *209*

Acknowledgments *239*

Index *241*

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Chapter 1

THE RISE OF ORIGINALISM

Beginning on September 15, 1987, and continuing for an amazing twelve days, the hearings over the confirmation of Judge Robert Bork for the United States Supreme Court mesmerized the nation. Presiding over them was a telegenic young senator from Delaware who was chair of the Senate Judiciary Committee: Joe Biden. Bork, then sixty years old and heavy-set with a scraggly beard, was as qualified to serve on the Court as any nominee in American history. He had been a professor at Yale Law School, focusing on antitrust law. He had also been the solicitor general of the United States, the lawyer in the Department of Justice responsible for representing the federal government before the Supreme Court. At the time of his nomination, Bork was a judge on the United States Court of Appeals for the District of Columbia Circuit. No one, not even the fiercest opponents of his confirmation, questioned his golden resume or his stunning intellect. Throughout the hearings, he demonstrated thorough knowledge of every aspect of constitutional and statutory law and spoke enthusiastically of his desire to be a justice, describing it as an "intellectual feast."

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Yet despite Bork's impeccable credentials and careful, well-informed answers to every question thrown at him, the United States Senate rejected his nomination by a vote of forty-two in favor and fifty-eight against. It was one of the most resounding defeats for a Supreme Court nominee in American history.

What happened? It was not just that Bork was politically conservative; no one was surprised that President Ronald Reagan would appoint a conservative to the Supreme Court to replace retiring Justice Lewis Powell. The year before, the Senate had confirmed William Rehnquist to be the new chief justice and Antonin Scalia to take his place as associate justice. Both were known to be conservative. Liberal groups at the time, feeling they had a chance to defeat only one of them, went after Rehnquist. They believed that they could make a better case against him because of his very conservative record in sixteen years as an associate justice. Moreover, they had a devastating weapon: Rehnquist had lied at his earlier confirmation hearings about a memo he wrote as a law clerk for Justice Robert Jackson, urging the reaffirmation of *Plessy v. Ferguson* and the constitutionality of segregation.[1] Rehnquist nonetheless was confirmed to be chief justice by a vote of sixty-five to thirty-three, receiving what was to that point the largest number of no votes against a confirmed justice in U.S. history. (Later, there would be forty-eight votes against the confirmations of Clarence Thomas, Brett Kavanaugh, and Amy Coney Barrett.) Scalia, because liberals had made a strategic choice to target only one of that year's nominees, was confirmed unanimously.

Part of the reason for Bork's rejection is that Powell had been seen as a swing justice on the Court, and liberals worried that his replacement could tip the ideological balance, especially on constitutional protection of abortion rights. Overall Powell was quite

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conservative. He had been nominated by President Richard Nixon, who had promised to end the Warren Court's liberalism and fill the bench with "strict constructionists." Powell appealed to Nixon as a nominee for many reasons. As a lawyer in Virginia, he had opposed school desegregation and loudly condemned college student protests. He had written a memorandum describing environmental and workplace regulations as an "attack on free enterprise." As a justice, Powell had been a consistent vote against the rights of criminal defendants and authored key conservative opinions, including one rejecting a constitutional right to education.[2] But he had been in the majority in *Roe v. Wade,* and there was fear that his replacement could be a fifth vote to overrule that landmark decision.[3]

Protecting abortion rights was only one part of the story of Bork's defeat. Much of the opposition to Bork could be tied to his judicial philosophy of originalism, then relatively new and little mentioned outside of law review articles by constitutional law professors.

In 1971, Bork had published an article in the *Indiana Law Journal* about what speech should be protected by the First Amendment.[4] He urged a restrictive view, contending that only political expression deserves constitutional protection. The article set out the philosophy that came to be called originalism, though that label would not develop for another decade. At the time, the theory was known as "interpretivism."[5] Robert J. Delahunty and John Yoo have written that "if contemporary originalism can be assigned a definite starting point, that point must be the publication of Robert Bork's" article.[6]

In the article, Bork argued that the Supreme Court should protect only those rights that are explicitly stated in the Constitution or were clearly intended by its drafters. "When the constitutional

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materials do not clearly specify the value to be preferred," he wrote, "there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights."[7] He added that under this judicial philosophy, the Supreme Court was wrong to protect a right to privacy – including a right to purchase and use contraceptives – because these rights are not mentioned in the Constitution and were not intended by the Framers.[8]

Although Bork's article was written two years before the Supreme Court decided *Roe v. Wade,* opponents of abortion rights quickly latched on to his theory in explaining why that decision was wrong: the Constitution is silent about abortion rights and the Framers obviously did not intend to protect it.[9]

Soon after President Reagan nominated Bork for the Supreme Court, Senator Edward Kennedy set the terms of the debate over the confirmation. "Robert Bork's America," said Kennedy, "is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is – and is often the only – protector of the individual rights that are the heart of our democracy."[10]

This put Bork in a difficult situation for his confirmation hearings. He could embrace originalism, but his opponents would focus on the implications: no protection of privacy rights under the Constitution, no protection for women under equal protection because the Fourteenth Amendment was not meant to apply to them, no First Amendment protection for any speech other than political

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expression. These all were positions Bork had himself espoused as implications of originalism. Or he could try to soften these positions, but then he would be seen as insincere and accused of a "confirmation conversion."

In the hearings, Bork tried to have it both ways. He expressed his originalist views but tried to reassure the senators that as a Supreme Court justice he would follow precedent. He admitted, for example, that under his originalist approach, the Court was wrong to order the desegregation of the District of Columbia public schools because no constitutional provision says that the requirement of equal protection applies to the federal government.[11] He also thought the Court was wrong to hold that malapportionment, in which legislative districts within a state had enormous differences in population, was a denial of equal protection. Under Bork's philosophy, the Court's ruling that the principle of "one person, one vote" required all votes to have approximately equal weight was incorrect and overreaching.[12] He acknowledged that under his originalist view, the guarantee of equal protection cannot be used to limit sex discrimination; the Framers of the Fourteenth Amendment were focused solely on race discrimination. And he admitted that under his approach, there is no constitutional protection of privacy.

Bork was simply being honest about the implications of originalism, but he tried to reassure the Judiciary Committee that he would not overrule precedents even when they went against his philosophy. The senators were not convinced. Hearing Bork describe the implications of originalism confirmed the fears that Senator Kennedy expressed.

Later conservatives would say that Bork was treated unjustly. They even turned his name into a verb. The *Merriam-Webster Dictionary* defines to "bork" as "to attack or defeat (a nominee or

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candidate for public office) unfairly through an organized campaign of harsh public criticism or vilification."[13]

This revisionist history completely misapprehends what occurred. More than any Supreme Court nominee in history, Bork answered questions about his judicial philosophy in a thorough and honest manner. Subsequent nominees learned to say as little as possible about their views on specific constitutional issues. But that option was not available to Bork because in his 1971 law review article, he had told the world that "it follows . . . that broad areas of constitutional law ought to be reformulated."[14]

Bork's only chance at his confirmation hearings was to convince the senators that he would not radically change constitutional law. He failed because his views indeed would dramatically change the law, and the senators knew it. He was rejected by the Senate not because his positions were mischaracterized but precisely because he had set them out so clearly. The senators saw his originalist views as too dangerous for constitutional rights.

On September 18, 2020, Justice Ruth Bader Ginsburg died at age eighty-seven. Ginsburg had served on the Supreme Court since 1993 and was a hero to the left. She had become an iconic public figure unlike any other justice in American history. Shy and soft-spoken, Ginsburg had been a law professor and the head of the ACLU Women's Rights Project. In 1980, President Jimmy Carter named her to be a judge on the United States Court of Appeals for the District of Columbia Circuit. (Bork would become her colleague there in 1982.) As a justice she was unabashedly liberal, and in pop culture she became "Notorious RBG." Her picture appeared on T-shirts and mugs; several movies were made about her.

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With a presidential election just weeks away, President Trump wasted no time in naming a replacement. On September 26, he nominated federal court of appeals judge Amy Coney Barrett to take Ginsburg's place. A month later, on October 26, Barrett was confirmed by a vote of fifty-two to forty-eight. Every Democratic senator voted against her confirmation. Every Republican senator but one, Susan Collins from Maine, voted in favor.

The Republicans' hypocrisy in rushing through the Barrett confirmation was stunning. Just four years earlier, they had refused even to hold hearings on President Barack Obama's nomination of Chief Judge Merrick Garland to replace Justice Antonin Scalia, who died in February 2016. Garland was nominated in March, almost seven months before the presidential election. No one questioned Garland's professional credentials, which were as impressive as Bork's and included twenty-three years as a judge on the United States Court of Appeals for the District of Columbia Circuit. There was nothing the least bit controversial about Garland. He was perceived as a moderate Democrat, left of center but not very liberal. Some progressives complained because Obama had not picked someone further to the left.

But starting on the day Justice Scalia died, Senate Republicans, who held the majority, made clear that they would not consider Garland's nomination. Majority Leader Mitch McConnell said, "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president."[15] Many other Republicans, including some on the Judiciary Committee, said the same thing.

Undaunted by their earlier position, the same senators pushed through Barrett's confirmation at lightning speed. Barrett, a graduate of Notre Dame Law School, had clerked for Justice Scalia, and

after a time in private practice, she had become a law professor at her alma mater. She was unabashed about her right-wing views and a frequent speaker at Federalist Society events. In 2017, President Trump named her to the United States Court of Appeals for the Seventh Circuit, where she compiled a very conservative record.

When Justice Anthony Kennedy retired in 2018, conservatives pushed Trump to nominate Barrett to the Court rather than Brett Kavanaugh.[16] As political commentator Ruth Marcus noted, Barrett had "a compelling personal and legal story that proved irresistible to social conservatives."[17] Barrett is the mother of seven children, including one with Down syndrome and two adopted from Haiti. She is a deeply committed Catholic and part of a very conservative group called the People of Praise. Her writings as a law professor and her opinions as a judge left no doubt as to her ideology. Conservatives who feared that Kavanaugh might not be far enough to the right championed Barrett.

With Kavanaugh already on the Court in 2020, Barrett was the immediate favorite to take Ginsburg's seat. This allowed Trump to replace Ginsburg with a woman, while Barrett's deep conservativism pleased the Trump political base in the weeks before the election. Barrett had already been vetted two years earlier, which would facilitate a quick confirmation. Trump and the Republicans had no time to spare.

Like Bork more than a quarter century earlier, Barrett is a self-proclaimed originalist. She has repeatedly said that her approach to the Constitution follows that of Antonin Scalia, another originalist, and she reaffirmed this position during her September 26 nomination ceremony at the White House, where she said of Scalia, "His judicial philosophy is mine too."[18] At her confirmation hearings, she explicitly described herself as an originalist, explaining: "So in

English, that means that I interpret the Constitution as a law, that I interpret its text as text and I understand it to have the meaning it had at the time people ratified it. So that meaning doesn't change over time. And it's not up to me to update it or infuse my own policy views into it."[19] This is the classic definition of an originalist.

As a law professor, Barrett focused on the role of precedent. She emphasized that she believed a justice should follow the original meaning of the Constitution and not prior rulings. She wrote that justices should follow the original understanding of the original meaning of the Constitution, not Supreme Court precedents that are in conflict with it.[20] In fact, she argued, following precedent is unconstitutional: "rigid application" of stare decisis "unconstitutionally deprives a litigant of the right to a hearing on the merits of her claim."[21] Trump and conservatives could not do much better: they had found a law professor who had said explicitly that *Roe v. Wade* was wrongly decided and who believed in overruling precedents that conflicted with the Constitution's original meaning.

Although there was strong opposition to Barrett's confirmation and forty-eight Senators voted against her, neither the media nor the Senate Judiciary Committee paid much attention to her judicial philosophy. The very views that caused Bork to be rejected in 1987 did not draw nearly as much controversy in 2020. Why not?

To be sure, the context was different. In 1987, there was a Republican president, but Democrats controlled the Senate. In 2020, both the president and the Senate majority were Republican. Everyone knew that Barrett was going to be confirmed, almost no matter what she said at the confirmation hearings. Senator Lindsey Graham, then the chair of the Judiciary Committee, remarked at the beginning of the hearings that it was a foregone conclusion that almost every

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Republican senator was going to vote in favor of her confirmation and every Democratic senator was going to vote against. That is exactly what happened. The hearings were a mere formality.

Bork had to persuade a Democratic Senate not to reject him. He had no choice but to answer the senators' questions or face certain defeat. Barrett only had to be sure she said nothing that would give Republicans a reason to think twice. She did a masterful job of refusing to answer questions. She wouldn't even say that the president cannot change the date of the election. She was polite in saying nothing, but she took the art of the confirmation hearing to a new level of nonresponsiveness. And who can blame her? She knew she had the votes for confirmation and the key was to say nothing that could cause a problem. Saying nothing at all was the solution, and it worked.

But something else had changed, too. Originalism, which seemed radical in 1987, was mainstream by 2020. In addition to Justice Scalia, Justices Clarence Thomas and Neil Gorsuch describe themselves as originalists.[22] Gorsuch declared: "Judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."[23] For decades, the Federalist Society had championed originalism as the only appropriate method of constitutional interpretation. A flock of conservative law professors defended it, and some developed variations on it to try to increase its legitimacy.

But originalism is as radical and as undesirable today as it was when Robert Bork proposed it in 1971. A Court truly committed to originalism would reject a panoply of rights that are considered constitutionally protected even though they appear nowhere in the

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document's text: the right to marry, the right to custody of one's children, the right to keep one's family together, the right to control the upbringing of one's children, the right to procreate, the right to purchase and use contraceptives, the right to abortion, the right to engage in consensual sexual activity, and the right to refuse medical care. An originalist view of equal protection would provide no constitutional protection against discrimination based on sex or sexual orientation, or any limit on the ability of the federal government to discriminate.

Moreover, it is simply wrong to assume that any constitutional provision has an "original meaning" that can be discerned. Consensus as to the original meaning rarely exists, especially as that meaning applies to the constitutional issues that arise today. Originalist justices pretend to be doing something different, but they are just as likely to impose their values and views as non-originalist ones.

The primary defense of originalism, by Robert Bork and every subsequent supporter, is that it provides a constraint on judges so that constitutional law is not simply a reflection of the preferences of those who are on the Court. But this raises a paradox: originalism can be defined in a way that provides significant constraints on justices, but only at the price of unacceptable results. The only way to rescue originalism from unacceptable results is to define it in a way that eschews constraints. The meaning of constitutional provisions has to be stated so abstractly that originalism becomes indistinguishable from non-originalism. There is no middle ground: either originalism constrains at the price of unacceptable outcomes, or it offers no constraints and so is not really originalism at all.

This was true in 1987 and is no less true in 2022. But now originalism is ascendant and has made its way into popular discourse. Professor Jamal Greene notes that discussions of originalism

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are found "in newspaper editorials, on blogs, on talk radio" and that "consistently large numbers of Americans report in surveys that they believe that Supreme Court justices should interpret the Constitution solely based on the original intention of its authors."[24] Even Justice Elena Kagan, who is surely not one, has remarked, "We are all originalists."[25]

It easily could have been different. One of the consequences of the 2016 presidential election is that originalism lives on as an important approach to constitutional interpretation. If Hillary Clinton had won the presidency, she would have renominated Merrick Garland – or perhaps someone younger and more liberal – to replace Justice Antonin Scalia. There would have been a majority of Democratic-appointed justices for the first time since 1971. Justice Kennedy's and Justice Ginsburg's successors, too, would have been picked by Clinton. Even if the Senate was controlled by Republicans and Clinton had to select moderates to have them confirmed, these justices surely would have been significantly to the left of Kavanaugh and Barrett. With Clinton's nominations to the Court, a Democratic-appointed majority would have been secure, likely for many years to come.

Originalism would have been relegated to dissents, especially by Justice Thomas, who would have been the sole originalist on the Court. Neither Chief Justice Roberts nor Justice Alito describes himself as an originalist, even though Alito is one of the most conservative justices in American history. No Democratic appointee on the Court embraces originalism. Conservative law professors would continue to champion the idea and would use it to criticize liberal decisions. The academic debate would have continued, but originalism would at best represent a minority view of constitutional interpretation.

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Everything, though, is different because Donald Trump won the presidency and put Gorsuch, Kavanaugh, and Barrett on the Court. They are likely to be there a long time. At the time of her confirmation, Barrett was forty-eight years old. If she remains on the Court until she is eighty-seven, the age at which Ginsburg died, Barrett will be a justice until 2059. When she joined the Court, the other conservative justices were fifty-three (Gorsuch), fifty-five (Kavanaugh), sixty-six (Roberts), seventy (Alito), and seventy-two (Thomas). It is easy to imagine at least five of these justices lasting on the Court for another decade or two.

Originalism thus is likely to be more important than ever before and to dominate the Court's interpretation of the Constitution for a long time. This is why it is so important to understand this approach, see its deep flaws, and appreciate why it is so dangerous.

What Is Originalism?

Any understanding of what originalism is must start with the recognition that the intentionally broad language of the Constitution inevitably requires interpretation. What is "speech" or a "search" or "due process" or "cruel and unusual punishment"?

Even seemingly clear language must be interpreted. Article II says that the president must be a "natural born citizen." No one would think that this excludes someone born by Cesarean section or with the use of drugs in childbirth, but in other contexts that would not be thought of as a "natural" childbirth. But what about someone like John McCain or Ted Cruz, who were citizens at birth but were born outside the United States? People have debated whether they qualify as "natural born" citizens.

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The First Amendment says that Congress shall make "no law" abridging free exercise of religion or freedom of speech or of the press. But that cannot be taken literally; the Court has never said that any of these rights is absolute. There is no right to kill someone in the name of religion; lying under oath is not an exercise of free speech. We have to interpret what is speech and when it can be restricted. The Second Amendment says, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Is this amendment only about a right to have guns for militia service, or does it guarantee a right of individuals to have guns apart from that? The text provides no answer.

The examples are endless. Any text must be interpreted, and that is especially true of a short document like the Constitution that was written to provide a framework for government, not a detailed set of instructions. Long ago, Chief Justice John Marshall observed that the Constitution was not meant to have the "prolixity of a legal code," and that its "nature, therefore, requires, that only its great outlines should be marked."[26]

Originalism is a way of interpreting the Constitution. There are many variations of originalism, but all share a central belief that the meaning of a constitutional provision is fixed when it is adopted and can be changed only by amendment.[27] Professor Eric Segall says that an "originalist judge or scholar is one who believes in the following three propositions: (1) the meaning of the constitutional text is fixed at the time of ratification; (2) judges should give the meaning a primary role in constitutional interpretation; and (3) pragmatic concerns and consequences are not allowed to trump discoverable original meaning."[28] For an originalist, Article I of the Constitution means the same thing today as it did in 1787, when it

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was adopted; freedom of speech under the First Amendment has the same meaning as when the amendment was ratified in 1791; equal protection under the Fourteenth Amendment has the same meaning as in 1868, when it was added to the Constitution.

Non-originalists believe that the meaning of a constitutional provision can evolve by interpretation as well as by amendment. They, too, of course believe that the text of the Constitution is controlling. But they recognize that rarely does the document's language provide answers to the issues that are litigated before the Supreme Court.

Although non-originalists are interested in the original meaning, if it can be known, they do not feel bound by it. Their interpretation of the text is not confined to the original understanding at the time a provision was adopted. Non-originalists look at many sources in interpreting a constitutional provision: the Constitution's structure, the Framers' intent, original meaning, precedents, traditions, foreign practices, and modern social needs.

Sometimes this gets expressed in a useful and evocative shorthand: non-originalists believe in a "living Constitution" in the sense of a document whose meaning changes over time as it is interpreted in specific cases. Justice Scalia, by contrast, was fond of saying that the Constitution is "dead, dead, dead."[29] Although it is an oversimplification, that really is the question: Is American society better off with a living Constitution or a dead one?

All of this is abstract, but it matters enormously when justices have to consider specific issues. To take a simple example: Does the Eighth Amendment's prohibition of cruel and unusual punishment make the death penalty unconstitutional? For a conservative like Scalia, the only relevant question is whether the Eighth Amendment, when it was adopted, would have been understood as

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outlawing the death penalty.[30] Since the answer is clearly no, an originalist rejects constitutional challenges to capital punishment. Scalia declared: "Historically, the Eighth Amendment was understood to bar only those punishments that added 'terror, pain, or disgrace' to an otherwise permissible capital sentence."[31]

But for a non-originalist the question is very different. The Supreme Court has said for well over a half century that the Eighth Amendment is to be interpreted based on "evolving standards of decency."[32] Several years ago, Justice Stephen Breyer applied this non-originalist approach to argue that the death penalty is probably unconstitutional. He focused on the lack of evidence that the death penalty deters violent crime, the arbitrariness with which it is imposed, the excessive delays in carrying it out, and the rarity in which it is used.[33]

For an originalist, the issue of whether the Constitution protects a woman's right to abortion is easy: the Constitution says nothing about abortion, and there is no evidence that it was originally meant to protect such a right. But for a non-originalist that is not determinative. The Constitution's text says that "liberty" cannot be deprived without due process. Liberty can be—and has been—interpreted to protect crucial aspects of autonomy even if they are not mentioned in the text of the Constitution. The Supreme Court's majority opinion in *Roe v. Wade* explained that laws prohibiting abortion infringed this fundamental aspect of liberty and that states could not outlaw them before the point at which the fetus is viable.[34]

These are easy examples to illustrate the chasm between originalism and non-originalism. But harder cases require that an originalist confront the question: How is the original meaning of a constitutional provision to be determined? There is disagreement

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among originalists on this, and their approaches have changed over time.

Early originalists such as Raoul Berger and Robert Bork focused on the Framers' intent as the basis for interpreting the Constitution.[35] The central question was: What did those who drafted the Constitution, or a constitutional amendment, have in mind when they wrote a particular provision? For the seven Articles of the Constitution, determining this entails looking at the records of the Constitutional Convention. Often it meant giving great weight to the Federalist Papers, a series of essays written primarily by Alexander Hamilton and James Madison to persuade New Yorkers to ratify the Constitution.

But critics pointed out the serious problems with this approach. To begin with, there is the difficulty of knowing who counts as a Framer. Is it just those who participated in the Constitutional Convention, or does the term also include the members of Congress who proposed amendments? Does it include members of state ratifying conventions and state legislatures, who approved the Constitution and then its amendments?[36] The larger the group of people involved, the harder it is to identify a common intent.[37] The interpreter must choose whose intent will count—a question that has no determinate, correct answer. Moreover, even if we arbitrarily specify some group as authoritative for purposes of constitutional decision-making, different members of the group undoubtedly had different, perhaps conflicting reasons for adopting any given constitutional provision. In teaching constitutional law, I always point to major issues of constitutional law concerning the scope of executive power and of Congress's spending power on which James Madison and Alexander Hamilton completely disagreed.[38] Each side of a case or a public debate about a constitutional issue can look for statements

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from Framers that support its position. Given the large number of people involved in drafting and ratifying constitutional provisions, it is a fiction to say that there was a clearly identifiable intent that is waiting to be discovered.

In response to these criticisms, a different version of originalism developed. This one focuses not on how the Framers or ratifiers understood the constitutional language but on the original public meaning of the constitutional language at the time of ratification.[39] Justice Scalia, who directed what he called a "campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning," explained that originalists now analyze "the original meaning of the text, not what the original draftsmen intended."[40] This was dubbed "New Originalism" or "Originalism 2.0."[41] This philosophy underpinned Scalia's view that the Equal Protection Clause does not safeguard women or gays and lesbians from discrimination because that was not part of the original public meaning of "equal protection." This approach is also how Barrett described her judicial philosophy when testifying before the Senate Judiciary Committee. Although other variations have developed over time, this New Originalism, which seeks to determine original intent based on the "original public meaning" at the time a constitutional provision was adopted, is now the dominant approach. For example, "corpus linguistics" – the use of large, computerized word databases as tools for discovering linguistic meaning – has emerged in recent years as another way to determine the original meaning of a constitutional provision.[42]

All of the different versions of originalism have in common the view that the meaning of a constitutional provision is fixed when it is adopted and can be changed only by amendment. However much they disagree on how to determine that original meaning or

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the level of abstraction at which to state it, all originalists accept this core idea.

The Myth of Judicial Restraint

One myth should be dispensed with at the outset: that originalism equates with judicial restraint and non-originalism is about judicial activism. This association likely developed because conservatives who attacked the judicial activism of the Warren Court, like Bork, also came to embrace originalism. Originalist constitutional theory developed as a response to the "activist" rulings of the Warren and Burger courts, and during the 1970s and 1980s, the primary commitment of originalists was to "judicial constraint."[43] But a few decades of having originalists on the Court leaves no doubt that they are as activist as non-originalists.

Although the terms "judicial activism" and "judicial restraint" are widely used, they are rarely defined. Conservatives continue to rail against "liberal judicial activism," even though for more than fifty years a majority of the justices on the Supreme Court have been appointed by Republican presidents. I often have the sense that "judicial activism" is just a label for the decisions that people don't like. But we can define judicial activism and restraint in functional terms: a decision is activist if it strikes down laws and restrained if it upholds them; it is activist if it overrules precedent and restrained if it follows precedent; it is activist if it rules broadly and restrained if it rules narrowly.

These criteria are purely descriptive. By this definition, *Brown v. Board of Education* was a very activist decision: it declared unconstitutional laws requiring segregation of the races in education, it overturned a fifty-eight-year-old precedent (*Plessy v. Ferguson*), and

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it eschewed the narrow approach of finding that the particular schools were separate and unequal.[44] No one, I hope, would question the imperative necessity of the Court's ruling in *Brown*. By contrast, one of the worst Supreme Court decisions in history, *Korematsu v. United States,* was the epitome of judicial restraint.[45] It deferred to the federal government's evacuation of Japanese Americans from the West Coast. As Chief Justice Roberts declared a few years ago: "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and . . . 'has no place in law under the Constitution.'"[46]

The point is that neither activism nor restraint is inherently good or bad. Moreover, it is simply wrong to equate originalism with judicial restraint. Originalist justices often are very activist in striking down laws, overruling precedent, and ruling broadly. In *District of Columbia v. Heller,* for example, the five conservative justices declared unconstitutional a thirty-five-year-old District of Columbia ordinance prohibiting private ownership or possession of handguns.[47] It was the first time in history that a law regulating firearms was found to violate the Second Amendment. Justice Scalia's majority opinion was very much written from an originalist perspective. In *Citizens United v. Federal Election Commission,* the five conservative justices struck down key provisions of the federal campaign finance law and protected the right of corporations to spend unlimited amounts of money in election campaigns.[48] Each of these decisions declared unconstitutional a law adopted in the legislative process; each overruled precedent; and each was a broad ruling when the Court could have decided the matter more narrowly. Each was five to four, with the five conservative justices, including all who purported to be originalists, in the majority. It was the liberal justices who, in dissent, urged deference to the political process and to precedents.

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Even originalists have stopped defending their theory primarily on the grounds of judicial restraint. Now the "primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism."[49] We can now firmly reject the notion that originalism is more aligned with judicial restraint than non-originalism. The originalists themselves have abandoned it.

There is a more subtle and important point: both liberals and conservatives at times want activism and at times want restraint. They just disagree as to when. Two cases that came down on consecutive days in 2013 powerfully illustrate this. On Tuesday, June 25, the Court in *Shelby County v. Holder* declared unconstitutional key provisions of the Voting Rights Act of 1965.[50] These provisions required that states with a history of race discrimination in voting obtain prior approval – "preclearance" from the attorney general or a three-judge federal court – before making significant changes in their election laws. The formula for determining which states needed to get preclearance was adopted in 1982. In 2006, Congress voted almost unanimously to extend the act for another twenty-five years, and the extension was signed into law by President George W. Bush. But in a five-to-four decision, with Chief Justice John Roberts writing an opinion that was joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, the Court held that relying on old data and treating some states differently from others violated the Constitution. Justice Ginsburg, in one of her most famous dissents, vehemently objected and professed the need for judicial deference to Congress: "After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. . . . That determination of the body empowered to enforce

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the Civil War Amendments 'by appropriate legislation' merits this Court's utmost respect. In my judgment, the Court errs egregiously by overriding Congress' decision."[51]

The next day, Wednesday, June 26, the Supreme Court handed down its decision in *United States v. Windsor* and declared unconstitutional a provision of the federal Defense of Marriage Act which said that for purposes of federal law a marriage had to be between a man and a woman.[52] Justice Kennedy – joined by the four dissenters in *Shelby County,* Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan – found that the denial of marriage equality to gays and lesbians violated the constitutional guarantee of equal protection. The four dissenting justices urged deference to Congress in its decision to not recognize same-sex marriages. Scalia, in an opinion joined by Roberts and Thomas, declared: "This case is about power in several respects. It is about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today's opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased root: an exalted conception of the role of this institution in America."[53] Alito, in a dissent joined by Thomas, likewise urged deference to the political process. The Constitution, he argued, "leaves the choice to the people, acting through their elected representatives at both the federal and state levels."[54]

So on Tuesday, the conservatives declared a law unconstitutional and the liberal justices professed a need for judicial deference. On Wednesday, the liberal justices struck down a federal law and the conservatives decried the lack of deference to the political process.

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Only Justice Kennedy was in the majority in both cases. Both liberals and conservatives sometimes preach deference to the political process and sometimes show no deference. They just disagree on the merits and then phrase their objections in terms of judicial activism.

Why More About Originalism?

In the decades since the Bork hearings, originalism has gone from a fringe theory promoted by a few radicals to a mainstream theory espoused by a number of Supreme Court justices. But I want to argue that originalism is no more intellectually defensible, and no less radical, than when Bork was rejected for espousing it in 1987.

For the first hundred or more years of American history, there was a widespread belief in formalism. Although there is no universally accepted definition of formalism, it is generally understood to mean that judges discern the law in an "objective manner" and then apply it to the specific facts as deductively as possible. As the constitutional scholar Fred Schauer explains, "At the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decision making according to *rule*."[55] Justice Scalia often defended his originalist philosophy as a kind of formalism: "Of all the criticisms leveled against textualism, the most mindless is that it is formalist. The answer to that is, *of course it's formalistic!* . . . Long live formalism! It is what makes a government a government of laws and not of men."[56]

In the early twentieth century, Legal Realists attacked formalism with great success.[57] They explained that there are no neutral legal rules; all are value choices to favor some parties or principles over others. Legal rules do not exist apart from the choices of the people who create them. This is what Justice Oliver Wendell Holmes

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meant when he said, and Justice Felix Frankfurter repeated, that the "law is not a brooding omnipresence in the sky."[58] The content of the law and how it is applied, especially by the Supreme Court, is largely a function of who is on the bench and their values.

Most scholars thought that legal realism had largely vanquished formalism. But now, more than a century after the battle began, the fight between these two visions of law has resurfaced, and formalism, astoundingly, has gained enormously. The arguments against it are as overwhelming today as they were in the early twentieth century. My goal in this book is to show that originalism, like all formalism, is a deeply flawed and dangerous way of approaching constitutional law.

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