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Originalism as Fable (Reviewing Eric Segall, Originalism as Faith)

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ORIGINALISM AS FABLE (REVIEWING ERIC SEGALL, *ORIGINALISM AS FAITH*)

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Eric Segall's Originalism as Faith *provides both a history of the originalist movement in constitutional interpretation and a critique of that movement from the perspective of legal realism. This Review Article summarizes Segall's main argument: as originalism has abandoned deference to the political branches, it has become indistinguishable from its nemesis, living constitutionalism. Emptied of substance, originalism becomes nothing more than an expression of faith. Segall makes his argument very convincingly, evidencing both his knowledge of originalism, in all its variants, and his mastery of constitutional doctrine.*

This Article offers two ways in which Segall's exemplary work might be supplemented. First, it teases out the various meanings that "faith" can have in this context, ranging from quasi-religious belief to myth to ideology to political credo. Second, it offers two alternative narratives as supplements to Segall's legal realist critique. Originalists insist that their approach has "bite," which they contend distinguishes it from unprincipled living constitutionalism. In the alternative, Jack Balkin reconciles originalism and living constitutionalism. Legal decision-makers, following his "living originalism," may be legal realists, but their construction of the Constitution must be constrained by their duties of good faith and fidelity to the Constitution.

Originalism with bite and living originalism provide theoretical responses to Segall's challenges, but their positions must also accord with the reality of constitutional adjudication. Segall challenges originalists to reconcile their faith in unelected judges with a

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Constitution designed to provide governmental accountability through democratic processes. If they cannot do so, originalism is not a true account of our judicial processes but a fable designed to disguise a new version of legislation by the judiciary as the neutral application of legal rules.

I. INTRODUCTION

Those who advocate for originalism in constitutional interpretation agree on two principles. First, the "fixation thesis" affirms that the meaning of each constitutional clause "is fixed at the time [it] is framed and ratified."[1] Second, the "constraint principle" stands for the view that the meaning of the constitutional text should constrain those who interpret, implement, and enforce constitutional doctrine.[2] Eric J. Segall has been among originalism's most prolific, engaged, and insightful critics. Segall's new book, *Originalism as Faith*,[3] collects in one volume his many contributions to the debate regarding originalism in constitutional interpretation. It also provides the first book-length critical history of originalism as an intellectual movement.[4]

Segall, who endorses the legal realist view that "the justices' decisions are driven primarily by their personal values,"[5] is not an originalist. Nevertheless, he admires the first generation of originalists,[6] whose calls for judicial restraint were a response to the perceived

1. Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1941 (2013).

2. *Id.* at 1942.

3. ERIC J. SEGALL, ORIGINALISM AS FAITH (2018) [hereinafter SEGALL, FAITH].

4. Partisans of originalism have produced their own histories, which do not all advertise themselves as histories of originalism, but present the history of constitutional jurisprudence in the United States as a history of the rise, fall, and hoped-for renewal of originalism. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363-72 & nn.1-41, 408 (Harvard Univ. Press 1977) (1901) (arguing that the Supreme Court is not a continuing constitutional convention but has a more modest role bound by the Framers' original intentions); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 28-33, 77-78, 348-49 (1990) (chronicling the politicization of the Supreme Court and the movement away from courts that apply neutral principles); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 51-57, 233-35 (1986) (contrasting the nineteenth-century tradition of judicial "interpretation" with judicial "legislation" beginning in the *Lochner* Era). Johnathan O'Neill's book provides the most even-handed historical treatment of the history of originalism. *See* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 12-42, 94-95 (2005) (analyzing the development of originalism as a political and constitutional idea).

5. SEGALL, FAITH, *supra* note 3, at 4.

6. Segall calls them "Original Originalists." *Id.* at 10. They include Raoul Berger and Lino Graglia. *See id.* at 8.

excesses of the Warren and Burger Courts.[7] For Segall, originalism has to be a mechanism for constraining judges.[8] Because contemporary originalism does not constrain judges, it is, for Segall, no different from the living constitutionalism that originalists denounce.[9] As he puts it, "Originalism today, as opposed to the kind advocated by Judge Bork and Raoul Berger, is simply living constitutionalism by another name."[10] As originalists have departed from deference to the political branches, Segall thinks originalism has become a matter of "faith,"[11] but by "faith," he means something more like myth, con, swindle, sham, scam, or fable.

Dean Erwin Chemerinsky's "Prologue" to *Originalism as Faith* succinctly lays out the originalists' dilemma as Segall sees it.[12] If originalism really did constrain judges, it would yield unacceptable results.[13] It would require courts to overturn judicial decisions that now enjoy overwhelming support.[14] Originalists accept the Court's broad equal protection jurisprudence and protections of privacy rights, as do most Americans,[15] despite the consensus that those doctrines expand federal protections beyond the original intent or meaning of the relevant constitutional provisions.[16] However, by adhering to non-originalist precedent, contemporary originalists promote the very judicial practices that first-generation originalists condemned. Today, despite originalism's promise of constraint, Segall finds, originalist judges decide cases in accordance with their policy preferences with the same frequency as do non-originalist judges.[17] It is unfair, Segall says, for "justices to sternly lecture us (and other justices), about the importance of adhering to text and original meaning when they, whenever they deem it important enough, also stray from those principles."[18]

Segall's approach implies a somewhat surprising hierarchy of normatively desirable judicial and academic practice. For Segall, living

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7. *See id.* at 6.
8. *See id.* at 7, 10, 13, 99-101, 179-91.
9. *See id.* at 81, 185.
10. *Id.* at 185.
11. *See id.* at 83, 185-86.
12. *See* Erwin Chemerinsky, *Prologue* to SEGALL, FAITH, *supra* note 3, at xiii-xvi.
13. *Id.* at xiv.
14. *See id.* at xiv-xvi.
15. *See* SEGALL, FAITH, *supra* note 3, at 122-24, 127-30; *The State of Privacy in Post-Snowden America*, PEW RES. CTR. (Sept. 21, 2016), http://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america (surveying American attitudes towards privacy law).
16. *See* SEGALL, FAITH, *supra* note 3, at 128, 157.
17. *See id.* at 5.
18. *Id.* at 135.

constitutionalism is the best approach because it provides the most accurate description of what judges always have done.[19] Next comes first-generation originalism, which is principled but descriptively inaccurate. Finally, contemporary originalism is neither principled nor accurate. The hierarchy is surprising because contemporary originalism is closer to living constitutionalism than was first-generation originalism. Where others might see careful scholars responding flexibly to new challenges to their explanatory paradigm, Segall sees adherents desperately flailing as they attempt to cling to the tattered remnants of their moth-eaten faith.

In Segall's view, legal realism accurately describes how judges decide cases, and honest jurists and academics should acknowledge that their own policy preferences determine their views on how cases should be decided.[20] Living constitutionalists accept that policy preferences determine outcomes in hard cases, and Segall assumes that almost all constitutional cases that come before the Supreme Court are hard.[21]

First-generation originalists were admirably principled in their commitment to judicial deference to the political branches. Segall admires this approach and thinks that courts should uphold laws created through democratic processes unless those laws are clearly incompatible with the Constitution.[22] However, courts have never applied that standard, and so first-generation originalism, while admirable, is descriptively inaccurate. Segall contends that "our Supreme Court has not employed such deference in many constitutional areas in well over 150 years, and it is most unlikely it will do so in the future."[23]

Contemporary originalism, says Segall, is neither descriptively accurate nor honest.[24] Contemporary originalists claim the moral high ground of deferring to the original meaning of the text or the original intentions of its Framers.[25] In fact, contemporary originalists are just as likely to reason to a pleasing conclusion as are living constitutionalists, and they camouflage their policy preferences behind their declarations of adherence to the originalist "faith." Segall suggests that originalists act

19. *See id.* at 35.

20. *See id.* at 4-6.

21. *See id.* at 13, 175 (arguing that the constitutional cases that get litigated involve "vague text" that "must be constructed in ways that originalist inquiries cannot answer").

22. *See id.* at 187 (arguing for the advantages of something analogous to the "clearly erroneous" standard applicable to appellate review of trial courts' factual determinations). Segall explored this theme in a previous book. *See* ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 1-9 (2012).

23. SEGALL, FAITH, *supra* note 3, at 187.

24. *Id.* at 11, 105-06.

25. *See id.* at 6-7.

in bad faith when they camouflage their policy preferences with the false judicial modesty of originalism.[26] At least non-originalists are transparent and openly acknowledge that judges exercise constitutional powers of legal discretion.

Part II of this Article summarizes Segall's argument, which highlights the relationship between judicial restraint and originalist theory.[27] For Segall, federal courts have not exercised restraint since the Civil War.[28] First-generation originalists correctly diagnosed the problem, but contemporary originalists exacerbate it with their increasingly capacious concepts of originalism. Part III explores four different meanings the term "faith" could have in the context of Segall's critique of originalism.[29] As the title of this Article suggests, Segall is inclined to treat originalism as a myth or a fable. This Part sketches out different resonances of "faith" as it might be applied to originalism. Part IV suggests two alternative stories that one might draw out of Segall's narrative, which I am calling, following Will Baude and Stephen Sachs, "originalism with bite" and, following Jack Balkin, "living originalism."[30] Part V offers a brief conclusion.[31]

I propose these competing narratives in Part IV as supplements not correctives to Segall's engaging and persuasive narrative.[32] It would be hard to improve on Segall's description of originalism from the perspective of legal realism. Segall's thesis is clear and consistent, his prose is direct and unadorned, and he knows his material thoroughly. Those already in Segall's camp will find the book exemplary. His account may well convince the uninitiated that no judges are originalist and that academics should stop peddling the fable that judges can be originalist. However, although Segall attempts to present originalist ideas as their authors would present them, partisans of originalism likely will find that he has not done justice to their theories, and they will reject his claim that contemporary originalism has become indistinguishable from living constitutionalism. While Segall offers criticisms to which originalist theory has yet to provide convincing answers, the keepers of

26. *See id.* at 12 (arguing that originalists do harm by pretending that original meaning actually informs judicial decision-making and that originalism is a "mistaken faith"). Segall quotes approvingly Justice Brennan's critique of first-generation originalism as "arrogance cloaked as humility." *Id.* at 73.

27. *See infra* Part II.

28. SEGALL, FAITH, *supra* note 3, at 25.

29. *See infra* Part III.

30. *See infra* Part IV.

31. *See infra* Part V.

32. *See infra* text accompanying notes 199-205.

that faith continue to strive towards such answers even as their paths diverge from judicial restraint.

II. THE LAST ORIGINALIST

In addition to its introduction and conclusion, Segall's book has three main parts. In Chapters Two and Three, Segall gives us a sweeping narrative prelude covering constitutional adjudication from the Early Republic until the advent of originalism in the 1960s.[33] Chapters Four through Six cover academic originalism: the first-generation originalism of the 1960s and 1970s; the new originalism, which began in the 1990s; and contemporary originalism of the twenty-first century.[34] Chapters Seven through Nine focus on constitutional adjudication in the Supreme Court and contend that the Supreme Court's interpretive practices have never conformed with originalism.[35]

Although Segall is not an originalist, for much of the book he comes across as a defender of first-generation originalism, chastising contemporary originalists for their acceptance and even encouragement of judicial activism.[36] In Segall's ideal world, judges would defer to the political branches' determinations of constitutionality.[37] First-generation originalists believed that they could contribute to the convergence between their ideal world and the reality of judicial practice. But that world has never existed, and Segall sees no likelihood that it will ever exist.[38] Moreover, originalism, which once sought to curtail judicial caprice, now encourages it and provides it ideological shelter. Segall reminds originalists of how to be a proper originalist,[39] as though he were the last academic to grasp the political sentiments and the theory of judicial modesty that sparked the movement for originalism in constitutional interpretation.

A. Pre-History: The Decline of Judicial Deference from the Early Republic to the Rise of Originalism

In the beginning, there was deference. Segall finds ample evidence that the Framers intended that courts should strike down legislation only,

33. *See* SEGALL, FAITH, *supra* note 3, at 15-55 (Chapters 2-3).

34. *See id.* at 56-121 (Chapters 4-6). Segall's names for these three groups are "Original Originalists," "New Originalists," and "New, New Originalists." *Id.* at 56, 82, 103. There is some overlap in the groups.

35. *See id.* at 122-70 (Chapters 7-9).

36. *See, e.g.*, *id.* at 103-15.

37. *See id.* at 29.

38. *See id.* at 121, 177-86.

39. *See id.* at 12-14, 24, 29, 177-86.

as Alexander Hamilton put it in *Federalist No. 78*, in cases of "irreconcilable variance" between the challenged legislation and the Constitution.[40] *Dred Scott*[41] was the first case after *Marbury v. Madison*[42] in which the Court struck down a federal enactment under that standard.[43] Segall, who characterizes *Dred Scott* as an originalist opinion,[44] concludes that judicial review remained highly deferential to legislatures throughout the antebellum period, with only two instances in which the Supreme Court struck down federal legislation.[45]

After the Civil War, the Supreme Court largely continued the tradition of judicial deference to legislators. Segall notes a few exceptional areas in which the Supreme Court struck down federal legislation in the postbellum era.[46] Although Segall recognizes that these areas were very significant, including civil rights, dormant commerce, federal income tax, and paper money, he does not see them as indicative of a general decline in judicial deference.[47] Rather, Segall maintains, the real movement away from deference occurred during the *Lochner* Era from the end of the nineteenth century until 1937.[48]

Segall associates the *Lochner* Era with the demise of judicial deference to legislatures and also with the rise of hypocritical invocations of original intention.[49] During the *Lochner* Era, the Supreme Court "struck down hundreds of state and federal laws."[50] This was, for Segall, the worst of all possible worlds, because the Court invoked original meaning as it struck down progressive legislation but "the justices rarely relied on originalist evidence to reach their legal conclusions."[51] Thereafter came a fifteen-year lull, during which the

40. *See id.* at 15-16.

41. Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393 (1857).

42. 5 U.S. (1 Cranch) 137 (1803).

43. *Id.* at 178-80.

44. SEGALL, FAITH, *supra* note 3 at 26-28. Segall acknowledges that originalists claim that Justice Taney "misapplied" originalism in *Dred Scott*. *Id.* at 28. He does not address the originalist argument that *Dred Scott* is a living constitutionalist opinion that gave rise to the doctrine of substantive due process—an argument of which originalists are highly skeptical. *See, e.g.*, BORK, *supra* note 4, at 28-33 (describing *Dred Scott* as illustrating the worst consequences of the substantive due process doctrine); William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 700-02 (1976) (describing *Dred Scott* as a classic example of living constitutionalism).

45. *See* SEGALL, FAITH, *supra* note 3, at 24-26 (discussing Keith Whittington's research, which shows that review of legislation was common, but that legislation was generally upheld).

46. *Id.* at 36.

47. *See id.*

48. *See id.* at 36-38.

49. *See id.*

50. *Id.* at 38.

51. *See id.*

tamed Court struck down very little legislation.[52] However, after World War II, courts again showed less deference to the political branches than had pre-Civil War courts;[53] of the leading decisions of the 1960s and 1970s, Segall notes that each "likely would have shocked those who wrote and ratified either the original Constitution or the Reconstruction Amendments."[54]

In chronicling the demise of originalist influence on Supreme Court opinions, Segall relies heavily on a remarkable series of articles that Jacob tenBroek published in the *California Law Review* in 1938 and 1939.[55] tenBroek's research showed that, while Justices from the founding era through the New Deal would often cite original meaning or original intent, they rarely consulted any documentary evidence that would have helped them discover the original meaning of the Constitution.[56] Rather, Justices exercised "independent judgment" and cherry-picked evidence of original meaning to suit their purposes.[57] Segall also cites to Frank Cross's more recent research, which suggests that while the Warren Court was more likely than previous Courts to consult original sources, such sources did not power the Court's decision-making process.[58] A recent empirical study of the Supreme Court's constitutional decisions confirms these findings.[59]

Segall's historical chapters very successfully show that originalism has not consistently informed the Supreme Court's constitutional

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52. *Id.* at 43.

53. *See id.* at 43-51 (discussing the Court's remarkable refusal to back Truman's decision to nationalize the steel industry during the Korean War, as well as the work of the Warren and early Burger Courts).

54. *See id.* at 52-53.

55. *See id.* at 40 & 201 n.22, 41-43 (citing Jacobus tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CALIF. L. REV. 287 (1938); Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: Debates and Proceedings of the Constitutional and Ratifying Conventions*, 26 CALIF. L. REV. 437 (1938); Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The History of the Times of the Convention*, 26 CALIF. L. REV. 664 (1938); Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: Contemporary Exposition*, 27 CALIF. L. REV. 157 (1939); Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CALIF. L. REV. 399 (1939) [hereinafter *Extrinsic Aids, Intent Theory*]).

56. *Id.* at 41; *see Extrinsic Aids, Intent Theory*, *supra* note 55, at 403-06 (describing the documents used by the Court to identify original intent as "ungeneralizable and superficial").

57. *See* SEGALL, FAITH, *supra* note 3, at 41.

58. *See id.* at 54 & 204 n.97 (citing Frank B. Cross, *Originalism—The Forgotten Years*, 28 CONST. COMMENT. 37 (2012)).

59. *See* Lorianne Updike Toler & J. Carl Cecere with the assistance of Don Willett, *Pre-"Originalism,"* 36 HARV. J.L. & PUB. POL'Y 277, 298-320 (2013) (finding that the Supreme Court rarely cited to original sources in constitutional cases until the Warren and Burger Courts).

jurisprudence. Unlike many originalist scholars, he recognizes that the Court often references original intent or original meaning, but undertakes no genuine inquiry into either.[60] As a result, Segall does not think that appeals to original meaning in any way constrain the judiciary.[61] The conservative Courts of the *Lochner* Era revised constitutional law to conform to their beliefs; the liberal Warren and Burger Courts did likewise.[62] Both invoked original meaning without making any significant efforts to discover that meaning.

In these chapters, Segall presents a highly readable history of constitutional adjudication in the United States. He is willing to meet his readers where he finds them. He reviews the facts and holdings of cases with which an academic audience will already be familiar. His book can be useful to law students or to undergraduates studying constitutional history and seeking a narrative history of constitutional developments. His more academically-inclined readers may skim over Segall's reviews of familiar case law and focus on his characterization of the holdings. Segall presents familiar cases in the context of his thesis about the decline of deferential judicial review, and thus even readers familiar with the case law will see it in a new light.

These chapters may frustrate readers sympathetic to originalism. Segall's political judgments drive the narrative, and he does not always note when his readings could be subject to challenge. For example, he criticizes the *Hammer v. Dagenhart* Court for inadequate attention to the Commerce Clause despite the case being about "commerce among the states."[63] But *Hammer* was about regulation of child labor, which the Court believed related to manufacture and not to commerce.[64] Some contemporary originalist scholarship relies on precisely this distinction, among others, to argue that Congress's Commerce Clause powers should

60. *See* SEGALL, FAITH, *supra* note 3, at 1-5, 84-89.

61. *See id.* at 3-6.

62. *Compare id.* at 38 (making reference to Hammer v. Dagenhart, 247 U.S. 251 (1918), as one of the many cases in the *Lochner* Era where "the [conservative] Court struck down hundreds of state and federal laws dealing with workers' rights, unions, and safety conditions in factories and other places of employment"), *with id.* at 52-53 (making reference to some of the "landmark decisions" of the liberal Warren and Burger Courts and identifying "ten of the most important liberal decisions decided during [that] time" as: Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Reynolds v. Simms, 377 U.S. 533 (1964); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Griswold v. Connecticut, 381 U.S. 479 (1965); Miranda v. Arizona, 384 U.S. 436 (1966); Loving v. Virginia, 388 U.S. 1 (1967); Katz v. United States, 389 U.S. 347 (1967); Brandenburg v. Ohio, 395 U.S. 444 (1969); and Roe v. Wade, 410 U.S. 113 (1973)).

63. *See id.* at 38.

64. *See Hammer*, 247 U.S. at 273-76 ("The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.").

be curtailed.[65] Similarly, Segall stresses that *Brown v. Board of Education*, which he justifiably calls "one of the most important decisions in Supreme Court history," was not reached based on originalist evidence.[66] That is true but unremarkable, as Segall's discussion of tenBroek's work makes clear.[67] Segall does not acknowledge the originalist scholarship that nonetheless claims *Brown* as an originalist decision.[68]

These oversights are understandable given page limitations and Segall's desire to tell a story without stopping to answer every imaginable objection. Still, Segall glosses over some weighty historical debates in which one would like to see him engage. Originalist arguments that *Dred Scott* and *Plessy* are living constitutionalist while *Brown* is originalist may be self-serving, but they still need to be addressed.

B. Academic Originalism: From Restraint to Incoherence

The central chapters of Segall's book tell a story of decline. Originalism got its initial impetus as an angry response to perceived judicial overreach in the 1960s and 1970s. First-generation originalists made an impassioned plea for judicial deference to legislative action. When that first generation came under attack for its misplaced focus on the original *intentions* of the Framers, originalism took a textualist turn. However, textualists quickly realized that it was not always possible to reconstruct original meaning. They acknowledged that, at times, constitutional decision-makers must engage in constitutional construction.

Ever since, in Segall's view, originalism has lost the characteristics that distinguish it from living constitutionalism.[69] New Originalists and contemporary originalists embrace constitutional construction, and they

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65. *See, e.g.*, Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 853-62 (2003) (surveying uses of "commerce" in the *Pennsylvania Gazette* in the eighteenth century and finding that the term referred to trade, not manufacture); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 111-25 (2001) (arguing that the Framers meant for the Commerce Clause to regulate trade, not manufacture).

66. SEGALL, FAITH, *supra* note 3, at 49-51.

67. *See id.* at 40-43.

68. *See, e.g.*, William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2380-81 (2015) (providing evidence that the *Brown* Court wrestled with evidence of the original meaning of the Fourteenth Amendment) [hereinafter Baude, *Our Law?*]; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 984-86, 1131-40 (1995) (arguing that most of the politicians who enacted the Fourteenth Amendment believed that school segregation violated the Equal Protection Clause).

69. *See* SEGALL, FAITH, *supra* note 3, at 35, 82-102.

are, at times, willing to adhere to non-originalist precedent. Their allies on the bench, self-proclaimed originalist Justices, do not apply originalism to every realm of constitutional adjudication. For Segall, the only thing that separates contemporary originalism from the liberal judicial activism that the first-generation originalists opposed is that judicial activism now serves conservative, libertarian goals, rather than liberal, progressive ones; what remains, says Segall, is originalism as faith.[70]

Robert Bork, a conservative, and Raoul Berger, a liberal, epitomize first-generation originalism for Segall.[71] They urged deference to legislatures based on a commitment to democracy. A handful of unelected judges ought not to be empowered to negate the will of the people's representatives.[72] Originalism encourages judges to give effect to the Constitution's original meaning, rather than seeking to effectuate through their judgments their own policy preferences.[73] It thus calls on judges to defer to the democratically accountable political branches. If the political branches stray from the constitutional consensus, the sovereign people can vote them out of power, but only a constitutional amendment can address the courts' constitutional errors, and the Framers expressly rejected any notion of entrusting the judiciary with a policymaking role.[74]

There is only one problem with this form of originalism, says Segall—it does not describe the practice of our judiciary at any point in U.S. history: "For all their brilliance and legal acumen, both Berger and Bork were advancing an article of faith more than a realistic appraisal of the Court's past behavior or a pragmatic blueprint the justices would ever adopt."[75]

But Bork's message, especially as filtered through the Reagan administration's Department of Justice and then disseminated by the Federalist Society, had a far greater impact than any single judge or scholar could realistically hope for. As Segall notes, the Federalist Society now has chapters at every accredited law school in America, and

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70. *See id.* at 171-91.

71. *See id.* at 56-62.

72. *See id.* at 57-61.

73. *See id.* at 3.

74. *See* BERGER, *supra* note 4, at 300-11 (recounting that the Constitutional Convention rejected the suggestion that the judiciary might be empowered as a counsel of revision and noted the limited notion of judicial review in 1787); BORK, *supra* note 4, at 3 ("When the Supreme Court invokes the Constitution, whether legitimately or not, as to that issue the democratic process is at an end.").

75. *See* SEGALL, FAITH, *supra* note 3, at 61.

five Supreme Court Justices are (or were) members.[76] The Federalist Society's agenda in the 1980s pushed originalism, states' rights, separation of powers, and judicial restraint, and its members still push for that agenda in the U.S. heartland as well as within the beltway.[77]

However, first-generation originalism, with its focus on the Framers' original intentions, was a methodological dead-end. Paul Brest, H. Jefferson Powell, and others subjected it to a withering critique.[78] New Originalism saved originalism by changing originalism's goals from the discovery of original intention to original meaning. Segall is only partially persuaded. As Larry Solum has conceded, one looks to much the same evidence to discover original meaning as one would to discover original intentions.[79] Moreover, Segall cites three major criticisms that survive the transition from original intentions to original meaning. First, Segall maintains, originalism remains susceptible to the claim that its practitioners engage in "law office history," combing the historical record for cherry-picked evidence.[80] In addition, even New Originalism lacks democratic legitimacy because women and minorities were excluded from the Framing.[81] Finally, to the extent that originalism purports to describe actual judicial practice rather than prescribe best practices, it mischaracterizes our constitutional jurisprudence.[82]

I would add a fourth criticism of intentionalism that applies equally to textualism and supports Segall's general argument. Paul Brest called it the problem of specificity.[83] Brest takes as an example the Constitution's prohibition on cruel and unusual punishment.[84] The Framer's intention might have been along the lines of what we now call "original expected applications."[85] They may have intended to prohibit

76. *Id.* at 64. Segall counts four Justices, but the addition of Justice Kavanaugh makes five.

77. *Id.* The extent to which the Federalist Society still advocates judicial restraint is unclear. Segall's book does not explore the growing disconnect between popular originalism and originalism on the bench and in the academy. While the former remains concerned with the judicial activism of unelected judges, the latter increasingly promotes activism in service of originalism.

78. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 *passim* (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 *passim* (1985). Writing in 1999, Randy Barnett described Brest and Powell's critiques as having "trounced" intentionalism and "[driven a stake] through its heart." Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 612-13 (1999).

79. *See* SEGALL, FAITH, *supra* note 3, at 87; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459-67 (2013).

80. *See* SEGALL, FAITH, *supra* note 3, at 88.

81. *Id.* at 88-89.

82. *See id.* at 89.

83. *See* Brest, *supra* note 78, at 216-17.

84. *Id.* at 216 (referring to U.S. CONST. amend. VIII).

85. Jack Balkin criticizes Justice Scalia for his adherence to original expected applications and argues that most originalists believe, as Balkin does, that the Constitution establishes general

punishments thought cruel and unusual at the time of the Framing. However, Brest suspects that the Framers did not believe themselves omniscient and would have wanted later generations to determine for themselves what constitutes cruel and unusual punishments.[86] If we generalize the Framers' attitudes towards constitutional interpretation based on this example, one can see why Jack Balkin might conclude that there really is no opposition between originalism and living constitutionalism.[87] The Framers chose vague language, so the argument goes, expecting future generations to determine the meanings of the Constitution's "majestic generalities" for themselves.[88]

One might think that a critic of originalism would applaud the movement from intentionalism to textualism. New Originalists embrace constitutional construction; they acknowledge that, within the "construction zone," law is made based on the judges' "normative commitments."[89] New Originalists offer defenses of liberal Supreme Court decisions, such as those upholding constitutional protections for same-sex marriage,[90] and, in the case of Jack Balkin, for abortion rights.[91] These arguments ought to appeal to a liberal non-originalist like Segall, and yet Segall's heart remains with the first-generation originalists and their commitment to judicial restraint.[92]

Having acknowledged that courts decide constitutional cases within the zone of construction, New Originalists really have only two options, according to Segall.[93] They can endorse judicial deference to the political branches, as did the first-generation originalists, but very few New Originalists adopt this approach.[94] Most New Originalists choose the alternative option and become living constitutionalists *sub silentio*. They can get there directly by purporting, in Larry Solum's words, "to

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principles, whose applications the Framers expected to evolve to meet new circumstances and social change. *See* JACK M. BALKIN, LIVING ORIGINALISM 6-12 (2011) [hereinafter BALKIN, LIVING ORIGINALISM].

86. *See* Brest, *supra* note 78, at 216-17.

87. *See* BALKIN, LIVING ORIGINALISM, *supra* note 85, at 3 (arguing that living constitutionalism and originalism, properly understood, are compatible).

88. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638-40 (1943) (writing with trepidation of the judge's task of translating majestic generalities into concrete restraints on state officials).

89. SEGALL, FAITH, *supra* note 3, at 91 (emphasis omitted) (quoting Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69-70 (2011)). Barnett is a New Originalist.

90. *Id.* at 92-93 (discussing the arguments of Ilya Somin and Steven Calabresi).

91. *Id.* at 95-97.

92. *See id.* at 97-101.

93. *See id.* at 99-100 (presenting a list of three options, of which the last two both end up at the same position—that is, living constitutionalism).

94. *Id.* at 99.

derive guiding purposes or principles . . . to search for the values that are immanent in the specific provisions and overall structure of the Constitution."[95] In the alternative, they can get there indirectly through a commitment to "original methods originalism," to be discussed below, which Segall also thinks results in a pluralistic approach indistinguishable from living constitutionalism.[96]

In the New Originalism, Segall sees only hypocrisy. Their methodological sophistication provides the means by which any outcome can be reconciled with originalism, but because almost all originalists are conservative, originalism becomes a way to make conservative policy-driven judicial opinions seem apolitical. In Part IV of this Article, I present multiple originalist arguments that map out compromise paths between first-generation originalism and living constitutionalism.[97]

The past decade has seen the rise of new versions of originalism, which build upon and move beyond New Originalism. Segall's chapter on what he calls "The New, New Originalists" discusses William Baude and Stephen Sachs's positivist defense of originalism and John McGinnis and Michael Rappaport's original methods originalism.[98] Segall is highly critical of both of these recent originalist innovations.[99] For Segall, Baude and Sachs's "inclusive originalism" preserves so much discretion for legal decision-makers that they are no different from living constitutionalism; Segall hammers away at this conclusion, repeating it like a mantra on page after page.[100]

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95. *Id.* at 99-100 (quoting ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 152 (2011)).

96. *See id.* at 100 (citing Barnett, *supra* note 89, at 71).

97. *See infra* Part IV.

98. *See* SEGALL, FAITH, *supra* note 3, at 103-21 (discussing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013) [hereinafter MCGINNIS & RAPPAPORT, GOOD CONSTITUTION], Baude, *Our Law?*, *supra* note 68, and William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 103 (2016) [hereinafter Baude & Sachs, *Originalism's Bite*]).

99. *See, e.g.*, *id.* at 103-04, 114-15, 121.

100. *See, e.g.*, *id.* at 105 (predicting that Ed Meese, Robert Bork, and other originalists would not recognize Baude's "inclusive originalism" as originalist); *id.* at 105-06 (calling Baude's definition of originalism "[virtually] indistinguishable from living constitutionalism"); *id.* at 106 (calling Baude's originalism "indistinguishable from 'living constitutionalism'"); *id.* at 108 (calling Baude's approach to interpretation "no different than the form embraced by living constitutionalists (and liberals)"); *id.* at 109 (contending that, if Baude is right that originalism is our law, "there is no substantial difference between originalism and non-originalism"); *id.* at 112 ("If [Baude] is right, there is no meaningful difference between originalism and living constitutionalism (at least to judges)."); *id.* at 114 (calling Sachs's approach "originalism disguised as living constitutionalism"); *id.* at 115 (calling Baude and Sachs's originalism "not 'originalism' at all").

McGinnis and Rappaport's work has different problems. They argue that the supermajoritarian processes by which the Constitution was adopted and amended make it likely that our Constitution is a good constitution.[101] In developing their argument for why a supermajoritarian constitution is a good constitution, McGinnis and Rappaport make use of a modified version of Condorcet's Jury Theorem,[102] a modified version of John Rawls's veil of ignorance,[103] and a heavy dose of welfare consequentialism.[104] They conclude that enactments approved by supermajorities are far more likely to lead to welfare maximization than enactments approved by simple majorities.[105] Simple majoritarian processes will produce worse results. Judges thus ought to interpret the Constitution according to the original methods that the Framers anticipated would be used on the document.[106] Such original-methods originalism best preserves the original constitutional design, according to McGinnis and Rappaport.[107]

Segall raises two objections to original-methods originalism. First, Segall quite rightly rejects McGinnis and Rappaport's blithe claim that the Constitution's worst flaws have been addressed through the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments.[108] McGinnis and Rappaport view liberal judicial activism as unnecessary and even counterproductive because our country's history of discrimination based on race and gender are better addressed through the Constitution's formal amendment process.[109] However, no constitutional mulligans can, as Segall puts it, "make up for the reality that the experiences and values of people of color and women were completely absent from the process."[110] Segall also objects to the authors' refusal to apply their original methods theory to any contemporary constitutional issues.[111] If they attempted to do so, Segall contends, they might have to

101. *Id.* at 116 (quoting MCGINNIS & RAPPAPORT, GOOD CONSTITUTION, *supra* note 98, at 3, 11).

102. *See* MCGINNIS & RAPPAPORT, GOOD CONSTITUTION, *supra* note 98, at 48-49.

103. *See id.* at 42-44.

104. *See id.* at 19-20 (introducing their view of the ideal constitution as "one that produces the maximum net benefits for the nation").

105. *See id.* at 3 (contending that originalism will generate beneficial results because "it captures the meaning that passed through the supermajoritarian process"); *id.* at 11 (reducing their supermajoritarian argument to three logical steps).

106. *See id.* at 116-38 (discussing their arguments in favor of original methods originalism).

107. *See id.* at 116.

108. *See* SEGALL, FAITH, *supra* note 3, at 116-21 (referencing their argument as set forth in MCGINNIS & RAPPAPORT, GOOD CONSTITUTION, *supra* note 98, at 106-12).

109. *See* MCGINNIS & RAPPAPORT, GOOD CONSTITUTION, *supra* note 98, at 90-94.

110. SEGALL, FAITH, *supra* note 3, at 119.

111. *Id.* at 120.

confront the inherent contradictions of their original-methods originalism.[112] As Kurt Lash, a fellow originalist, has pointed out, the Framers had no preconceptions of how the Constitution ought to be interpreted, as the Constitution was the first of its kind.[113] It may well be that the actual original methods included interpretive approaches that McGinnis and Rappaport reject, such as constitutional construction and living constitutionalism.[114]

C. Potemkin's Village on the Potomac: The Supreme Court's (Non) Originalist Practice

Segall devotes a chapter to the jurisprudence of Justices Scalia and Thomas, the Supreme Court's two most prominent self-proclaimed originalists.[115] As I have argued elsewhere,[116] Justice Scalia practiced originalism under the motto, "[A] thing worth doing is worth doing badly."[117] Clarence Thomas expressed more confidence in his abilities, saying that being a Supreme Court Justice was a thing worth doing and invoking his grandfather's adage, "Any job worth doing is worth doing right."[118]

These very different mottos suggest two very different versions of originalism. Justice Scalia invoked his motto in the context of acknowledging that originalism requires historical research and that Supreme Court Justices have neither the time nor the training to undertake thorough historical research.[119] Still, Justice Scalia maintained that even with its flaws, originalism remains a "lesser evil" when compared to living constitutionalism.[120] In the same article, perhaps the

112. *Id.*

113. *Id.* at 121, 217 nn.98-100 (citing Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149, 158-66 (2015)).

114. *See id.* at 120. I have provided some evidence that original methods included both construction and something like living constitutionalism in another article. *See* D. A. Jeremy Telman, *John Marshall's Constitution: Distinguishing Originalism from* Ipse Dixit *in Constitutional Adjudication*, *in* VAL. U. L. SCH. LEGAL STUD. RES. PAPER SERIES 58, 58-59 n.256 (Sept. 2018) (draft), http://ssrn.com/abstract=3249726.

115. *See* SEGALL, FAITH, *supra* note 3, at 122-40 (Chapter 7, "The Non-Originalism of Justices Scalia and Thomas").

116. *See* D. A. Jeremy Telman, *Originalism: A Thing Worth Doing . . .*, 42 OHIO NORTHERN U. L. REV. 529, 532 (2016) [hereinafter Telman, *Originalism*].

117. *See id.* at 532, 552-56 (discussing Justice Scalia's decontextualized adoption of an adage from G.K. Chesterton).

118. *See id.* at 557 & n.192 (noting Justice Thomas's recollection of his sentiments upon being confirmed as a Supreme Court Justice (quoting CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 26 (2007))).

119. *See* Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-61 (1989) [hereinafter Scalia, *Lesser Evil*].

120. *Id.* at 864; *see also id.* at 849, 862-64 (likening originalism to "the librarian who talks too

most eloquent, honest, and transparent originalist credo ever composed, Justice Scalia called himself a "faint-hearted originalist"; that is, one willing to adhere to some non-originalist precedent.[121] Justice Thomas expresses much greater faith in his own ability to discern original meaning and much less respect for established but non-originalist precedent.[122] However, Segall sees no significant difference between the Court's self-proclaimed originalists.[123] They both consult original meaning when it suits their purposes and ignore it when it does not.[124]

Justices Scalia and Thomas both joined in opinions striking down campaign finance restrictions, regarding giving money to campaigns as forms of political speech protected under the First Amendment.[125] Both opposed affirmative action[126] and "dogmatically insisted that every plaintiff in every federal case must allege a unique personal injury."[127] Justice Scalia articulated idiosyncratic views on the Fourth Amendment.[128] Their positions on these matters, Segall maintains, lack support in "persuasive arguments from either text or original meaning."[129]

In the case of the Court's anti-commandeering and Eleventh Amendment jurisprudence, the situation is worse. The Rehnquist Court adopted the anti-commandeering rule, which prohibits the federal government from directing the states to help it implement federal laws.[130] As Segall points out, this rule contradicts Alexander Hamilton's explication of the Constitution in the *Federalist Papers*.[131] The rule is also inconsistent with the structural interpretation of the Constitution, derived from the Supremacy Clause, that informed the Supreme Court's prior rejection of an anti-commandeering doctrine in the 1930s.[132] Justices Scalia and Thomas made very good policy arguments in support

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softly").

121. *See id.* at 864.

122. *See, e.g.*, Timothy Sandefur, *Clarence Thomas's Jurisprudence Unexplained*, 4 N.Y.U. J.L. & LIBERTY 535, 553-56 (2009) (praising Thomas for his willingness to overrule non-originalist precedent); Lee J. Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 876-78 (2011) ("Justice Thomas frequently advocates overruling nonoriginalist precedent, and his calls are frequently made without any other justices joining him.").

123. *See* SEGALL, FAITH, *supra* note 3, at 122-23.

124. *See id.* at 123-25.

125. *Id.* at 125-27.

126. *Id.* at 127-30.

127. *Id.* at 135.

128. *See id.* at 138-39.

129. *Id.* at 124.

130. *See, e.g.*, New York v. United States, 505 U.S. 144, 187-88 (1992).

131. *See* SEGALL, FAITH, *supra* note 3, at 131-32.

132. *See id.* at 130, 132-33.

of their opinion, but originalist Justices are not supposed to rely on policy arguments. They are supposed to defer to legislators' reasonable constructions of the Constitution.

Justices Scalia and Thomas also joined in the Court's Eleventh Amendment jurisprudence, which flatly contradicts the Amendment's clear language.[133] Despite the text's prohibition on the exercise of federal jurisdiction over a suit between a state and a citizen *of another state*,[134] the Court has interpreted the Amendment to prohibit jurisdiction over cases between states *and their own citizens*.[135] The originalist Justices ignored Justice Souter's persuasive originalist arguments for why this construction of the Amendment should not be extended to federal question jurisdiction.[136] Segall concludes that Justices Scalia and Thomas have no interest in originalism when originalism does not promote their policy goals.[137]

Segall devotes a chapter to *District of Columbia v. Heller*,[138] a reasonable decision, as originalists often cite the case as evidence of originalism conquest of the mainstream.[139] Both the majority and the dissenters, the argument goes, used originalist methods in determining that the Second Amendment protects, in the majority view, or has nothing to do with, in the dissenters' view, the individual right to bear arms.[140] For Segall, the case "reflects how dangerous, incoherent, and misleading the doctrine [of originalism] can be in the hands of Supreme Court Justices who are not competent at historical analysis."[141] Justice Scalia's "lesser evil" chickens have come home to roost. Perhaps originalism, like brain surgery, is not the sort of thing that is worth doing even if done badly.[142]

On Segall's reading, *Heller*, with Justice Scalia's made-up list of "presumptively lawful regulatory measures,"[143] does not evidence

133. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 46, 53-58, 72-73 (1996).

134. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

135. Here the interpretation dates back to the nineteenth century case, *Hans v. Louisiana*, 134 U.S. 1, 9-10, 20-21 (1890).

136. SEGALL, FAITH, *supra* note 3, at 134.

137. *See id.* at 134-35.

138. 554 U.S. 570 (2008).

139. *See* SEGALL, FAITH, *supra* note 3, at 141-55 (Chapter 8, "Originalism Without Strong Deference Cannot Work").

140. *See id.* at 141.

141. *Id.* at 143.

142. *See* Telman, *Originalism*, *supra* note 116, at 553-56 (noting that Chesterton's adage, which Scalia adopted, referred to leisure activities, not to professions).

143. SEGALL, FAITH, *supra* note 3, at 145.

originalism's ascendency; it is an instance of judicial lawmaking and living constitutionalism.[144] As Segall notes, Circuit Judge Harvie Wilkinson, whose originalism still adheres to the principle of deference, viewed *Heller* as the conservative *Roe*.[145] The outcome pleased conservatives, but the Justices overreached their authority.[146] For Segall, *Heller* illustrates the dangers of originalism unaccompanied by great deference.[147] Judges are not historians, and the evidence that Segall presents indicates that, absent a culture of deference, originalist judges will use historical materials selectively to achieve their desired results or will ignore such materials if they point to an undesirable outcome.[148]

In his chapter on Justices Scalia and Thomas, along with his chapter on *Heller*, Segall argues that originalism cannot provide a coherent theory of interpretation that escapes the pull of personal policy preferences.[149] In his last substantive chapter, Segall delivers a final illustration of his claim that originalism also does not provide an accurate description of the Supreme Court's jurisprudence.[150] He discusses the Court's rulings on: paper money, aid to parochial schools, free speech generally and commercial speech in particular, and interstate commerce.[151] In all of these areas and others detailed in other chapters, the Court's rulings have shifted with the political winds. Segall concludes:

> The Supreme Court has updated, backtracked, or dramatically changed its views on most of the litigated constitutional law issues of the last one hundred years. Most of these alterations have been sparked by changes in societal and judicial values, modern technologies, and political considerations. Judicial analysis of text and original meaning has not played a major role in these developments other than to support decisions quite likely made on other grounds.[152]

144. *Id.*

145. *See id.* at 145-47. *See generally* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009) (likening the activism informing the *Heller* decision to that of *Roe v. Wade*).

146. *See* SEGALL, FAITH, *supra* note 3, at 145-46.

147. *See id.* at 141-45.

148. *See id.* at 147-55.

149. *See id.* at 122-24, 139-41, 144-45, 147-55.

150. *See id.* at 156-70.

151. *See id.* at 157-69.

152. *Id.* at 169.

Today, Segall argues, academics and judges can no longer defend originalism as an intellectual movement.[153] They can only defend it as an article of faith.[154]

III. WHAT IS THIS ORIGINALIST FAITH?

Segall first introduces his notion of the originalist faith as an analogue to religious belief—to have faith is to accept a belief or system of belief without reference to empirical evidence.[155] At other times, however, Segall uses "faith" to mean something akin to myth or fable.[156] Segall is too careful a scholar to impute to originalists beliefs they never express. He never asserts that originalists do not really believe that original meaning can be recovered or can bind constitutional interpretation. However, he sometimes presents their views as too farfetched to be taken seriously.[157] They promote their originalist "faith," it seems, as a political strategy, not because they are committed to discovering the Framers' true vision nor because they would feel bound by that vision even if it led to unacceptable results.

To the extent that Segall implies that academic and judicial originalists do not really believe in the myth they have created or the fables they recount, Segall uses "faith" in a third way, to mean something akin to ideology or false consciousness.[158] Originalist ideology prevents its non-specialist adherents from seeing the ways in which they are manipulated by the originalist myth. Finally, Segall uses "faith" to mean something like credo.[159] One announces one's allegiance to originalism in order to signal to others one's political commitments, which tend to be a mix of conservatism and right-wing libertarianism. This is originalism at its most cynical, a purely instrumental originalism indifferent to its substantive similarities to living constitutionalism.

A. Faith as Quasi-Religious Belief

Americans' reverence for their Constitution borders on religious fervor.[160] Originalism is like religion in that it attempts "to render an

153. *See id.* at 169-70, 190-91.

154. *Id.* at 170, 191.

155. *See id.* at 1 (quoting *Faith*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/faith (last updated Oct. 15, 2018)).

156. *See, e.g.*, *id.* at 185-86.

157. *See id.* at 186-91.

158. *See id.* at 187-91.

159. *See id.* at 191.

160. *See, e.g.*, Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294-95 (1937) (contending that the Constitution has become America's "totem and its fetish" and that

otherwise chaotic order coherent" and supplies "a set of beliefs capable of channeling our conduct."[161] Jamal Greene has characterized originalism as "conspicuously commingled with an evangelical movement that tends to disfavor departures from the original meaning of God's word."[162] Greene has analogized originalism to the Christian theological notion of the fall.[163] "In the originalist narrative the Founding Era is a prelapsarian state, a pure source of constitutional meaning and legal authority. Originalism promises a return to this state and a cleansing of the corrupting influence of unelected judges over constitutional law."[164]

Originalism and fundamentalism are linked because originalists elevate the status of the Constitution to that of a sacred text.[165] Jamal Greene and Peter Smith have produced empirical evidence of the correlation between those who favor originalism in constitutional interpretation and those who favor Biblical literalism.[166] They provide a basis for that connection in their explorations of the two movements' similar approaches to reading and understanding texts.[167] The connection between Biblical literalism and "strict construction" are easily conjured, but it is harder to understand why originalism would appeal to sophisticated practitioners of legal hermeneutics.

With respect to first-generation originalists, Segall provides an explanation. They do not provide a description of what courts actually do; rather, they provide a belief about what courts could do. However,

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American culture has replaced an authoritarian Bible with an authoritarian Constitution and established a state church in secular form); Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123, 123-25, 130-37, 150 (1979) [hereinafter Levinson, *The Constitution*] (discussing our tradition of treating the Constitution as the sacred scripture of the United States' civil religion but questioning whether such treatment of the Constitution can lead to unity).

161. Levinson, *The Constitution*, *supra* note 160, at 136.

162. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 7 (2009) [hereinafter Greene, *Origins of Originalism*].

163. *Id.* at 81.

164. *Id.*

165. *See, e.g.*, SANFORD LEVINSON, CONSTITUTIONAL FAITH 9-53 (1988) (attributing to the Constitution a central role as a "sacred text" in the United States' "civil religion"); Greene, *Origins of Originalism*, *supra* note 162, at 7-8 (suggesting that many Americans are uncomfortable with the work of judges who decide constitutional cases through the use of reason and creativity "in the exegesis of sacred texts"); Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 85 (2000) (arguing that the Constitution has become the "sacred scripture" of American politics).

166. *See* Jamal Greene et al., Essay, *Profiling Originalism*, 111 COLUM. L. REV. 356, 370-73, 372 tbl.5, 385-86, 406-07 tbl.9d (2011); Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 721-50 (2011).

167. *See* Greene et al., *supra* note 166, at 385-86, 400-07; Smith & Tuttle, *supra* note 166, at 721-25, 737-50.

for Segall, originalism's historical inaccuracy is no accident.[168] We can never expect judges to adhere to original meaning, and anyone who tells you differently is promoting a belief system, not a scholarly perspective.[169] The belief system can be pernicious because it suggests that originalist judges constrain their own discretion. They claim to imitate Odysseus and fetter themselves to the mast of original meaning in order to restrain their own caprice. Lay people adopt the faith that only originalism can constrain judges.[170] Originalists stress constraint because without it, judges act as unelected legislators. In order to avoid the politicization of the courts, judges must simply apply the law, and, originalists claim, adherence to original meaning is the best, if not the only, way to ensure judicial adherence to the rule of law.[171] Segall well understands that people need to have faith in the courts.[172] However, he thinks they should have faith not in the mythical ability of judges to discern original meaning but in the integrity of the judges and the judicial process itself.[173]

B. Faith as Myth or Fable

For some, it seems, originalism is a quasi-religious belief, associated with the sanctity of the Founding and the saint-like quality of particular Framers. For others, it may be little more than a useful myth that can be deployed to battle objectionable judicial practices. In modern parlance, however, myths are not true. For Segall, originalism is not true; it is nothing but a myth or a fable.[174]

Although there can be overlap, myth and fable are generally something less exalted than faith. Faith, such as belief in the Immaculate Conception or the divine inspiration of scripture, can provide a basis for one's social orientation and value system. Faith may also encompass myths or fables. However, one may subscribe to a myth, like the urban legend that cell phones cause gas stations to explode, without organizing one's life around them. Fables are moral tales. They are edifying even if we do not accept them as literal truth. Segall at times treats originalism

168. *See* SEGALL, FAITH, *supra* note 3, at 56-61.

169. *See id.* at 61.

170. *Id.* at 179.

171. *Id.* at 180, 183.

172. *See id.* at 185-86.

173. *See id.* at 187-88 (advocating reliance on the Supreme Court to "decrease our passions on many fundamental questions" and contending that it has done so "reasonably well" on most issues since the Civil War).

174. *See, e.g.*, *id.* at 185-88.

like a fable.[175] The people who tell the tale know that it may not be true. Originalists know that appeals to original meaning or original intent have never effectively constrained judges. Still, they "pretend that text and original meaning are important to constitutional cases because we need that myth to justify the Court's strong role in enforcing constitutional rules."[176]

When scholars advocate originalism as the only means of ensuring judicial restraint, they embrace a myth.[177] Judges actually cannot be constrained by originalism, says Segall, because its current versions all devolve into living constitutionalism.[178] There are other mechanisms for constraining judges, most of which are not very effective. If originalists were truly interested in judicial restraint, they would encourage judges to exercise "extreme deference to the elected branches."[179] Originalists no longer encourage such deference.

Segall faults originalism for its lack of realism.[180] Judges inevitably "make decisions based on their own values, priorities, and politics, as well as the culture they grew up in and reside in."[181] Rather than adopting the originalist myth that we can correct the errors of the past and set constitutional adjudication on the righteous path, Segall counsels acceptance.[182] Originalism is neither an accurate description of judicial practice nor a coherent interpretive strategy that will guide future courts. As it is used today, Segall claims, it "is only a matter of faith."[183] In this instance, I take him to be saying that originalism is both a myth and a fable. It is a false narrative, like a bedtime story, with a soothing, if soporific, effect.

C. Faith as Ideology or False Consciousness

If we put together Segall's implied narratives of faith and myth, we get something potentially more sinister. When people who know better, or should know better, peddle originalism, they seek to mislead. They inculcate law students and lay people into an ideology that then plays an insidious role in our political culture. Faith in originalism prevents,

175. *See id.* at 180, 187-88.

176. *Id.* at 187-88.

177. *See id.* at 114-15 (suggesting that Will Baude and Stephen Sachs "need to maintain the faith that judging . . . is separate from ordinary politics" in order to maintain "their faith in constitutional law").

178. *See id.* at 112-14.

179. *See id.* at 29.

180. *See id.* at 190-91.

181. *Id.* at 191.

182. *See id.*

183. *Id.*

Segall tells us, "a fruitful discussion of how the highest Court in the land engages in its most critical function – the resolution of constitutional cases often implicating our most fundamental values."[184] At the same time, originalism props up the Justices' prestige and authority as guardians of a culture that treats the Framers and the constitutional text as sacred objects of reverence.[185]

According to Segall, "The American people pay a large price for this mistaken faith that the original meaning of the text drives Supreme Court decisions."[186] It obscures judicial processes, and permits judges who cite originalism as the inspiration for their legal rulings to dodge inquiry into their actual motivations.[187] Personal values, not commitment to original meaning, drive judicial opinions, says Segall.[188] To believe otherwise is to be blinkered by "an overly optimistic, but wholly unrealistic, and ultimately dangerous, article of faith."[189] Judges and academics promote originalism to make themselves appear like neutral guardians of the law; lay people who adopt originalist ideology suffer from a form of false consciousness that prevents them from seeing originalism for what it really is, right-wing judicial activism.

D. Faith as Political Credo

Segall's characterization of originalism as a faith exists in some tension with his insistence that contemporary originalism is no different from living constitutionalism.[190] One wonders what the content of such a faith could be or why originalists would insist on their commitment to such a malleable set of beliefs. The answer may be that originalism is a useful political tool that one uses to bolster one's political allies and cudgel one's adversaries. Segall illustrates this sense of originalism as faith through a discussion of Larry Solum's congressional testimony in support of Judge (now Justice) Neil Gorsuch.[191] Solum vouched for Judge Gorsuch's originalist credentials and urged Senators to confirm his appointment to the Supreme Court.[192] He further develops this sense

184. *Id.* at 7.

185. *See id.* at 12 (crediting originalist faith with allowing "justices to maintain their prestige and authority for many Americans who believe strongly in the sanctity of text").

186. *Id.*

187. *See id.*

188. *See id.* at 14.

189. *Id.* at 194.

190. *See id.* at 96-98, 101-02, 185-86.

191. *See id.* at 171-77.

192. *See id.*

of originalism as a political faith in a section called "Why Pretend Originalism Matters?"[193]

Segall characterizes Solum's testimony as a "dogmatic" defense of originalism.[194] Dogmatism is not what one would expect from Solum, a New Originalist who embraces constitutional construction[195] and thus is, for Segall, no different from a living constitutionalist.[196] Solum's testimony is "dogmatic" because it attempts to draw clear lines "between originalist judges and [living constitutionalist] judges who believe that they have the power to impose their own values on the nation."[197] Solum's scholarship and the history that Segall recounts suggest exactly the opposite. The "faith" that Solum promotes is not a method of constitutional interpretation; it is a political faith embodied by the Supreme Court's current conservative majority.

Segall describes originalism as "an effective political tool" in the world of judicial politics.[198] It enables conservatives and libertarians to claim that the judges whom they support are constrained by text while liberals would superimpose their own values onto the Constitution.[199] Conservative radio hosts, such as Mark Levin and Rush Limbaugh, insisted upon this opposition between conservative judges who follow the law and activist liberal judges, creating what Jamal Greene has characterized as an originalist "aesthetic."[200] Justice Scalia also effectively spread the originalist gospel when he made national speaking tours pronouncing the Constitution "Dead, Dead, Dead."[201] But originalists generally pay very little attention to the text or ratification history of the Constitution in most circumstances. They too use constitutional interpretation as a means of inscribing their own personal values and normative judgments into the law.[202]

While Segall treats Jack Balkin as a New Originalist,[203] he clearly differs from most originalists in his political orientation. That may explain why, despite his methodological agreement with many contemporary originalists, he has not been universally welcomed into the

193. *See id.* at 179-86.
194. *Id.* at 171-72.
195. *See id.* at 97-98.
196. *See id.* at 100 (asserting that Solum fails to distinguish the way judges act in the construction zone from how a living constitutionalist judge interprets the Constitution).
197. *Id.* at 173 (internal quotations omitted).
198. *See id.* at 180.
199. *Id.*
200. *Id.* at 180-81.
201. *See id.* at 181.
202. *Id.* at 184-85.
203. *See id.* at 92, 95-97.

originalist camp.[204] Balkin's outsider status among originalists provides further evidence that the originalist faith is a political faith rather than a belief about the proper approach to constitutional interpretation.

IV. BEYOND DEFERENCE AND RESTRAINT

Since the rise of New Originalism in the 1980s, originalism and non-originalism have converged. Segall characterizes this convergence as capitulation: originalists are just like living constitutionalists.[205] In the space that remains, I would like to offer two alternative readings of the history that Segall presents. These alternatives are not intended as corrections to Segall's history, as if he had gotten something wrong. Rather, I maintain that the history of originalism is like an extended rabbit/duck image. Different people looking at the same narrative can view it very differently, depending on what one chooses to foreground and what one relegates to footnotes. Those who see a rabbit are not wrong; those who see a duck are not wrong. However, the ability to see both the rabbit and the duck may promote more dialogue between the rival camps.

Contemporary originalists think that their approach has become more refined and nuanced without abandoning its principles. This is what I will call, following Baude and Sachs, the "originalism with bite" reading of the facts. A completely different picture emerges from Jack Balkin's "living originalism" approach. While Segall regards New Originalism as stripping originalism of everything but its name,[206] Balkin thinks the opposition between originalism and living constitutionalism has always been based on a misunderstanding.[207] Judges can be committed to fidelity to the constitutional text and to the principles contained therein while also understanding that the application of that text and those principles can change as new circumstances arise.

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204. *See, e.g.*, Larry Alexander, *The Method of Text and ?: Jack Balkin's Originalism with No Regrets*, 2012 U. ILL. L. REV. 611, 613-21 (2012) (characterizing Balkin's "text and principle" approach as yielding the same results as non-originalism); James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL L. REV. 669, 675-81 (pointing out the similarities between Balkin's approach and Dworkin's "moral reading" of the Constitution and predicting that originalism might split into warring camps); John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 752-62 (2012) (rejecting Balkin's premise that constitutional provisions have an abstract meaning); Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 162-72 (2012) (expressing doubt as to whether Balkin's progressive image of constitutional redemption can be reconciled with fidelity to the constitutional text).

205. *See* SEGALL, FAITH, *supra* note 3, at 81, 185.

206. *See id.* at 82-102.

207. *See* BALKIN, LIVING ORIGINALISM, *supra* note 85, at 3; SEGALL, FAITH, *supra* note 3, at 95-96, 103.

A. Originalism with Bite

As Segall highlights, originalism is riddled with paradox.[208] Justice Scalia long ago recognized that little separated his version of originalism from moderate non-originalism.[209] Subsequent developments in academic originalism provide ample support for Justice Scalia's confessional observation. Insistent on original meaning as a constraint on judges, many originalists nonetheless acknowledge that in many constitutional areas, original meaning "runs out."[210] That is, linguistic and historical analyses do not resolve hard cases. Those cases are decided in what some originalists have called the "zone of construction,"[211] where judges have to decide cases according to their own reasons and principles.[212]

In addition, some originalists are willing to follow even non-originalist precedent,[213] further muddying the distinction between originalism and non-originalism. For example, Baude and Sachs's "inclusive originalism" entails: constitutional construction or liquidation;[214] presumptions, such as the presumption of constitutionality and common-law background rules, like waiver;[215] adherence to precedent;[216] widely accepted practices lacking originalist pedigrees;[217] and a recognition that judges exercise discretion in choosing which legal rules to apply and how to apply them.[218] With all of these interpretive

208. *See, e.g.*, SEGALL, FAITH, *supra* note 3, at 171-91.

209. *See* Scalia, *Lesser Evil*, *supra* note 119, at 861-62.

210. SEGALL, FAITH, *supra* note 3, at 16-18, 91-92; *see, e.g.*, Barnett, *supra* note 89, at 68-70 (acknowledging that the meaning of the Constitution sometimes runs out and that "[o]riginalism is not a theory of what to do when original meaning runs out"); Lawrence B. Solum, *Semantic Originalism* 19 (Univ. of Ill. Coll. of Law: Ill. Pub. Law & Legal Theory Research Papers Ser. No. 07-24, 2008).

211. *See* Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 121-23, 128 (2010) (arguing that once interpretive tools are exhausted, constitutional decision-makers operate within a zone of construction, where they undertake "a particularly political task, a creative task involving normative choices in a realm of constitutional indeterminacies").

212. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999) ("Constructions do not pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules.").

213. *See* Scalia, *Lesser Evil*, *supra* note 119, at 861-62.

214. Baude, *Our Law?*, *supra* note 68, at 2354, 2356-58.

215. *Id.* at 2357-60.

216. *Id.* at 2358-61.

217. *Id.* at 2361.

218. *Id.* at 2360.

tools and options available, it is hard to see how originalism provides much of a constraint on constitutional decision-making.

One incremental way to imagine originalism with bite is to regard the debate between originalism and non-originalism as a disagreement about how often original meaning "runs out"[219] or about the size of the "zone of construction." Originalists are much more optimistic than non-originalists about our ability to reach conclusions about the Constitution's original meaning. As a result, contemporary originalism does not become living constitutionalism just because it concedes that exceptional cases will be decided in a zone of construction. In addition, New Originalists do not think that judges working in the zone of construction operate free from constraint.[220] Admittedly, they have yet to articulate a satisfying theory of how constraint works within the zone of construction, and they need to confront Segall's and political scientists' findings that judges decide constitutional issues in a way that accords with their policy preferences. However, recognition of the zone of construction does not automatically mean that judges are not constrained by original meaning.

John McGinnis and Michael Rappaport's "original methods" originalism suggests that originalism can have bite because, while it can be open to numerous interpretive modalities available at the time of the Framing, it excludes modalities that the Framers would have rejected.[221] McGinnis and Rappaport include in the latter category both constitutional construction and living constitutionalism.[222] They also are quite confident that original methods originalism provides the method of resolving most disputes about the Constitution's meaning.[223] Even where textual meaning runs out, they think that originals interpretive methods can resolve ambiguity without recourse to construction.[224]

Will Baude and Stephen Sachs offer a functional argument in favor of what they call "inclusive originalism."[225] Their originalism comprises

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219. *See* Telman, *Originalism*, *supra* note 116, at 551 ("To some extent, the difference between originalists and non-originalists are differences with regard to the frequency with which original meaning runs out.").

220. *See, e.g.*, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 418-20 (2013) (noting that original meaning of the text constrains construction); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 294-95 (2017) (proposing techniques to ensure constraint within the construction zone).

221. *See* MCGINNIS & RAPPAPORT, GOOD CONSTITUTION, *supra* note 98, at 116-26.

222. *See id.* at 138-53.

223. *See id.* at 153 (arguing that original methods originalism provides "distinctive resources to address indeterminacy in the actual instances it occurs").

224. *See id.* at 140-44.

225. *See, e.g.*, Baude, *Our Law?*, *supra* note 68, at 2352-53, 2361-63 (advocating an "inclusive" originalism that captures the jurisprudential approaches of jurists as different as Justice

three elements. First, consistent with Solum's two principles, they regard the original meaning of the Constitution to be "the ultimate criterion for constitutional law."[226] Second, they embrace "the validity of other methods of interpretation or decision."[227] Finally, Baude and Sachs maintain that "[o]ur law is still the Founders' law, as it's been lawfully changed."[228] The change in question encompasses constitutional precedent (if "lawful") and even changed circumstances "to the extent that they lawfully derive from the law of the founding."[229] In their view, originalism is "our law," in that some judges openly embrace it, no judges disavow it in their constitutional opinions, and when originalist views clash with non-originalist views in constitutional cases, originalism wins out.[230] Originalism is our law, say Baude and Sachs, and everybody ought to abide by the law.[231] Judges especially should abide by the law, because they take an oath to uphold the Constitution and are professionally committed to the rule of law.[232]

Baude and Sachs view their enterprise as nuanced and sophisticated but still principled.[233] Their originalism has bite because, despite being "inclusive," it still excludes clearly non-originalist approaches.[234] They also have a ready list of doctrines that they do not think fit within their inclusive originalism.[235] It is not surprising that they reject *Blaisdell* and the doctrine that permits states to interfere with contracts in cases of economic emergency. Beyond that, they provide a breathtaking list of constitutional doctrines that they would revise or vacate:

> We likewise doubt the pedigree of modern cases on executive agreements; jury numbers or unanimity; counsel comment on failure to testify; one-person one-vote; diversity jurisdiction for D.C. citizens; "commerce" regulation of wholly intrastate activity; administrative

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Kagan and Justice Alito); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 819, 874-88 (2015) (describing original meaning as "the Founders' law, including lawful changes").

226. Baude, *Our Law?*, *supra* note 68, at 2355; *see* Solum, *supra* note 1, at 1937-43.

227. Baude, *Our Law?*, *supra* note 68, at 2355.

228. Baude & Sachs, *Originalism's Bite*, *supra* note 98, at 104 & n.8 (quoting Sachs, *supra* note 225, at 838).

229. *Id.*

230. *See* Baude, *Our Law?*, *supra* note 68, at 2374-75.

231. *See id.* at 2391.

232. *Id.* at 2392-95.

233. *See id.* at 2351-63. *See generally* Baude & Sachs, *Originalism's Bite*, *supra* note 98.

234. Baude, *Our Law?*, *supra* note 68, at 2363 (distinguishing inclusive originalism from interpretive pluralism, which does not recognize the primacy or originalism as a mode of interpretation).

235. *See* Baude & Sachs, *Originalism's Bite*, *supra* note 98, at 108.

adjudication of private rights; and maybe even commandeering state officers or Article III limits on standing.[236]

The range of doctrines that Baude and Sachs revisit undermines Dean Chemerinsky's argument that originalism shies away from opposition to popular or long-standing legal doctrines. Nor is their list consistently conservative or libertarian in its political valence. Still, Baude and Sachs's recitation of cases and doctrines that they reject only gets us so far in understanding how they determine when legal and historical precedents satisfy inclusive originalism's requirement of "lawful change." Segall's work should inspire originalist scholars to specify how their approaches preserve the principle of judicial restraint.

B. The Convergence of Originalism and Living Constitutionalism

While academic originalists can look a lot like living constitutionalists, non-originalists concede that they also pay close attention to original meaning. The non-originalist Justice Kagan proclaimed that "we are all originalists now,"[237] and Jack Balkin defends abortion rights under the banner of "text and principle" originalism.[238]

Jack Balkin's living originalism, like Segall's realist approach, acknowledges that judges' values inevitably inform interpretive practices.[239] The aim of his version of constitutional faith is what he calls "redemptive constitutionalism," which entails "meeting the challenges of changing conditions in ways that seek to further the promises and commitments of the [constitutional] plan."[240] However, Balkin maintains that, for originalists and living originalists alike, the test of good judicial technique ought not to be adherence to some faith or the recitation of shibboleths.[241] Rather, constitutional decision-makers have an obligation of good-faith interpretation and fidelity to the Constitution.[242] Still, faith plays a crucial role in Balkin's work. He promotes faith not in the original meaning of the Constitution but, drawing on Sanford

236. *Id.* (footnotes omitted).

237. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing on S. 111-1044 Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan, Solicitor Gen. of the United States).

238. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293-95 (2007) [hereinafter Balkin, *Abortion*].

239. *See* BALKIN, LIVING ORIGINALISM, *supra* note 85, at 3-5; SEGALL, FAITH, *supra* note 3, at 186-91.

240. *See* BALKIN, LIVING ORIGINALISM, *supra* note 85, at 75.

241. *See* Balkin, *Abortion*, *supra* note 238, at 292-94.

242. *See id.* at 295 (defining "fidelity" to encompass an appreciation not only of the words of the Constitution understood in context and according to their original meaning but also of the principles that underlie the text).

Levinson's work, in "our faith in the constitutional project and its future trajectory."[243]

Much of Balkin's approach is consistent with Segall's. Sometimes the constitutional text leaves little room for doubt as to its original meaning. When it says that the President must be at least thirty-five years of age,[244] we all know what that means. With respect to such provisions, we are all originalists, but it hardly matters, because courts are not asked to adjudicate, for example, whether a five-year old can be President because she is thirty-five in dog years. Balkin identifies constitutional "standards," such as the prohibition on "unreasonable searches and seizures" and the "right to a 'speedy' trial."[245] Finally, there are what Balkin calls "principles," such as "freedom of speech" and "free exercise of religion."[246] The debate between living constitutionalists and originalists may come down to the extent to which one is willing to accept liberality in the construction of standards and principles. The differences are real and constitute the continuing battlegrounds separating those who think that originalism has bite from those who believe that the text of the Constitution cannot, and perhaps should not, constrain constitutional decision-makers.

Segall and Balkin both want to preserve freedom for each generation to construe rules and standards as they see fit.[247] Balkin thinks that constitutional decision-makers can be constrained by their duty of fidelity to the Constitution.[248] Segall appears to think that deference provides the only mechanism for constraining judges in constitutional adjudication.[249] But the emphasis on deference is not very helpful when the political branches make constitutional determinations. They have nobody to whom they ought to defer, and because of the case or controversy requirement, the initial determination on almost all constitutional issues comes from institutions other than courts.[250] Segall and his originalist interlocutors have surprisingly little to say about constitutional decision-making outside of courts, but that is where

243. *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 2 (2011).

244. U.S. CONST. art. II, § 1, cl. 5.

245. BALKIN, LIVING ORIGINALISM, *supra* note 85, at 6.

246. *Id.*

247. *See id.* at 6-7, 9-12; SEGALL, FAITH, *supra* note 3, at 14, 178, 187-91.

248. BALKIN, LIVING ORIGINALISM, *supra* note 85, at 13-16, 19-20.

249. *See* SEGALL, FAITH, *supra* note 3, at 7, 187.

250. To his credit, Balkin recognizes that "[a]ll three branches of government build institutions and create laws and doctrines that serve constitutional purposes, that perform constitutional functions, or that reconfigure the relationships among the branches of the federal government, the states, and civil society." BALKIN, LIVING ORIGINALISM, *supra* note 85, at 5.

the action is and so constitutional theorists ought to turn their attention thither.

When they do so, the question of deference will become a much smaller part of the originalist project. The tougher questions—and it is frankly curious that so few originalists are asking them—relate to constitutional interpretation in the political branches. If Balkin is right, and constitutional legitimacy turns on a political faith, that faith ought to apply to political actors beyond the courts. We ought to expect constitutional actors to act in good faith and commit themselves to fidelity to the Constitution. We ought to hold politicians accountable for their failure to do so and not shrug off self-serving, partisan, or Machiavellian tactics as politics as usual.

V. CONCLUSION

Segall's book is long overdue and will fill a huge gap in the literature. He ably tells the story of originalism's development as an academic theory, a judicial practice, and a popular movement. He pitches his writing at the perfect level, so that it can be read profitably by experts and novices alike. He provides a strong thesis equating contemporary originalism with its opposite number, living constitutionalism. He admires the first-generation originalists' principled embrace of judicial restraint, but he cautions that our Supreme Court has never approached their idea of good constitutional adjudication.

Segall thinks that legal realism accurately describes the real workings of the Supreme Court.[251] However, an accurate description of how an institution works provides only a useful starting point for a discussion of how the institution ought to work. Segall provides very little normative discussion of how future judges should decide constitutional cases. Originalists, on the other hand, offer numerous normative defenses of their method, sounding in democratic theory,[252] libertarianism,[253] Aristotelian ethics,[254] welfare consequentialism,[255] and

251. *See* SEGALL, FAITH, *supra* note 3, at 4.

252. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 127-59 (1999) (grounding originalist theory in popular sovereignty and democratic lawmaking).

253. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 358-59 (Rev. ed. 2014).

254. Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2028-39 (2012).

255. *See* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695 (2010) (arguing that "originalism advances the welfare of the present day citizens of the United States because it promotes constitutional interpretations that are likely to have better consequences today than those of nonoriginalist theories").

legal positivism,[256] to name just a few variants. Absent a principled defense of legal realism, people may well place their faith in the normative version of originalism that best suits them. The originalist fable retains its appeal, especially for those who have long hoped to awaken from what they regard as the standardless nightmare of legal realism.

Despite his critique of originalism as faith, Segall concedes that people "need to have faith that our Justices will do their best to reach sound decisions."[257] However, for Segall, that faith must arise from our trust in judges' "characters, judgments, and values," and not in "vague text or disputed historical accounts of the origins of that text."[258] Segall leaves us with a challenge. He provides persuasive evidence that judges decide cases according to their own policy preferences and not according to the law, and he implies that, regardless of the successes or failures of the originalist project, they will continue to do so.[259] Such a practice seems to doom our divided nation to a continued struggle over the make-up of the Court and to a Court in which only one-half of that nation can repose its faith while the other half decries its activism.

256. *See, e.g.*, Baude, *Our Law?*, *supra* note 68, at 2363-91.
257. *See* SEGALL, FAITH, *supra* note 3, at 193.
258. *See id.* at 14.
259. *See id.* at 12-14.

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