

# How Originalism Became “Our Law” And Why That Matters

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## ABSTRACT

*From the positivist’s perspective, originalism is “our law.” As a matter of social fact, our constitutional practices—the way we adjudicate constitutional cases and justify our constitutional decisions—are originalist.*

*This positivist account is, by its nature, limited. It just tells us that originalism is our law today. It takes an empirical snapshot of today’s social facts: It says, “Originalism is just how we do things around here.” It doesn’t set out to tell us why we should be originalists. It doesn’t give us normative justifications for embracing or accepting originalism in the first place.*

*But normative justifications are not unimportant. The discipline of jurisprudence has long recognized that laws can be embraced by a society for a panoply of reasons—including normative ones. In other words, people can begin to embrace rules because they believe those rules do good things. And only after those rules have gained widespread acceptance can a positivist look around and say that, as a matter of social fact, those rules are now law.*

*That’s exactly what happened with originalism. After the Warren Court’s policy-laden approach to jurisprudence, prominent public figures, like Robert Bork, Edwin Meese, and Justice Scalia, provided normative justifications for originalism—like judicial restraint. Those justifications made originalism attractive. They led to its widespread acceptance. And because of that widespread acceptance, positivists can now say that originalism is “our law.”*

*This Article tells this story: the complete story of our law. Positivists have told us what our law is. But this Article makes clear how, why, and when our law came to be. And it explains why telling this story matters.*

*Today, originalists have either ignored or rejected these normative justifications. Positivists don’t need them because they don’t help tell us what our law is. And the so-called “New Originalists” justify originalism on other grounds and explicitly reject the justifications given by Bork et al.*

*But originalists might want to pause before casting aside these normative justifications. These normative accounts led to originalism’s acceptance. They made originalism our law. But things don’t have to be this way. Any positivist would agree that, as a theoretical matter, a new methodology could gain widespread acceptance and supplant originalism as our law.*

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*Originalism’s status as our law is not etched in stone. Originalists, then, shouldn’t take it for granted.*

*So originalists might want to ensure that the methodology is continuously accepted so that it remains our law. If that’s the case, they should understand the reasons why originalism was embraced in the first place. That is, if they want originalism to remain our law today, they should ensure that originalism still promotes and furthers the normative justifications of yesterday. And, in fact, as originalism has recently found itself under attack, originalists have defended the methodology on precisely these grounds.*

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INTRODUCTION

Originalism has taken a positivist turn.<sup>1</sup> Spearheaded by Professors Stephen Sachs<sup>2</sup> and William Baude,<sup>3</sup> this new flavor of originalist theory has also found favor at the Supreme Court—most notably with Justice Barrett.<sup>4</sup>

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1. See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015).

2. See generally, e.g., Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817 (2015).

3. See generally, e.g., Baude, *supra* note 1.

4. See *United States v. Rahimi*, 602 U.S. 680, 737 (2024) (Barrett, J., concurring) (“Ratification is a democratic act that renders constitutional text part of our fundamental law, . . . and that text ‘remains law until lawfully altered.’” (citation omitted) (quoting Stephen Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 782 (2022))).

The positivist view of originalism goes something like this: “To ask whether the written Constitution and the original interpretive rules are the law today is to ask a question about *modern social facts*.”<sup>5</sup> And today, it’s a social fact that “our constitutional practice can and should be understood as originalist.”<sup>6</sup> In other words, originalism is just “how we do law around here.” It’s a social fact that when we debate or justify the “content of our law,”<sup>7</sup> we do so in an originalist manner: We “expect our legal rules to have an ultimate pedigree in Founding-era law.”<sup>8</sup> In fact, we “refuse ‘to acknowledge, and indeed reject, any official legal breaks or discontinuities from the Founding.’”<sup>9</sup>

The positivist theory of originalism rests, of course, on the “jurisprudential major premise”<sup>10</sup>—most often associated with H.L.A. Hart’s positivism<sup>11</sup>—“that law is determined by certain social practices.”<sup>12</sup> It then finds its footing on “an *empirical* minor premise about the practice we happen to have.”<sup>13</sup> And as an empirical matter, the “official story of our law”<sup>14</sup> is an originalist one.

That last part is important. The positivist view of originalism “grounds” itself in empirics—that is, it’s based on observations and descriptive accounts of how things are. It tells us that originalism *is* our law. It does not argue that we *should be* originalists because the methodology is normatively preferable or otherwise desirable.

But others have made those latter sorts of arguments. Indeed, in the second half of the twentieth century, prominent figures, like then-Professor Robert Bork, former Attorney General Edwin Meese, and Justice Scalia, offered normative justifications for originalism.<sup>15</sup> They argued that we should embrace originalism, in part, because it did good things: It restrained judges, promoted democracy, and enhanced predictability.

The positivist picture doesn’t necessarily contend that these arguments are untrue. It just considers them beside the point. To the positivist, we don’t need to

5. Baude, *supra* note 1, at 2364.

6. *Id.* at 2365.

7. Sachs, *supra* note 4, at 790 (quoting William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1458 (2019)).

8. *Id.*

9. *Id.* (quoting Baude & Sachs, *supra* note 7, at 1477).

10. *Id.*

11. See H.L.A. HART, THE CONCEPT OF LAW 100–01 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012).

12. Sachs, *supra* note 4, at 790.

13. *Id.* (emphasis added); see also Baude, *supra* note 1, at 2365 (“Instead, it will make a preliminary effort to show our constitutional practice can and should be understood as originalist. *This is ultimately an empirical question, of a sort.*” (emphasis added)).

14. See William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OX. J. L. STUD. 178, 181 (2023).

15. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971); Edwin Meese III, U.S. Att’y Gen., Speech Before the American Bar Association 6 (July 9, 1985), available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf> [<https://perma.cc/ZTL5-H97T>] [hereinafter Meese, *American Bar Association*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

know why originalism was embraced to know that today, as a matter of social fact, it's our law. But some modern originalists—so-called “New Originalists”—take it a step further and cast aside these normative justifications. They have instead given other, non-normative reasons—like those rooted in the philosophy of language—to explain why we should be originalists.<sup>16</sup>

This Article argues, however, that originalists might want to remain mindful of the normative justifications popularized by Bork, Meese, and Justice Scalia. Why?

Well, we should care about—and pay attention—to those arguments because they *contributed* to originalism becoming our law. They made originalism seem attractive, sensible, and defensible. And, in turn, originalism soon enjoyed widespread acceptance—so much so that we can say now that, as an empirical matter, it *is* our law.

Put simply, the positivist picture tells us *what* our law is today. That's all well and good. But being mindful of these normative justifications shows us *how*, *why*, and *when* our law came to be.

Telling this story—of how originalism became our law—matters. If originalists care about the vitality of the methodology—if they want originalism to *continue* to be our law—they might want to take stock of the reasons originalism was accepted in the first place. Because things don't have to be this way.

Positivist accounts just take a snapshot of current practices. So, we know that originalism is our law *today*. But, as Baude notes, “it is surely possible to argue that some other methodology that is not the law” could sooner or later enter the picture.<sup>17</sup> And if that “new methodology” garnered more “widespread” acceptance than originalism receives today, “then that methodology [would] be the law instead.”<sup>18</sup>

In other words, originalism's status as law is not etched into stone. If originalists want it to remain our law, they need to ensure its continued acceptance by society. And that project requires taking stock of the normative justifications that led to originalism's acceptance in the first place—even if, or perhaps especially because, they have now fallen out of favor.

This Article makes that case. It proceeds in three parts. Part I briefly sketches the positivist account of originalism that's already been discussed. Part II has a few sections. The first describes the normative justifications given for originalism in a bit more detail, paying particularly close attention to the arguments made by Bork and Justice Scalia. To them, originalism promoted judicial restraint and neutrality.<sup>19</sup> But the methodology was also defended on the grounds that it furthered stability and democracy, too.<sup>20</sup>

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16. See *infra* note 166 and accompanying text.

17. Baude, *supra* note 1, at 2396.

18. *Id.*

19. See, e.g., Bork, *supra* note 15, at 7–8; Scalia, *supra* note 15, at 864.

20. See, e.g., Bork, *supra* note 15, at 6; Scalia, *supra* note 15, at 864.

After that, I describe how those normative justifications led to originalism’s acceptance. I begin by making the jurisprudential point that rules can be accepted by society for a panoply of reasons—including normative ones.<sup>21</sup> Then, I start to fill out the story of our law a bit more. I describe how many of those justifications sprouted up in the 1970s and 1980s: the years after the “Warren and early Burger Court[s]” took a reputedly policy-laden approach to deciding constitutional cases.<sup>22</sup>

In that historical moment, those normative arguments made originalism more attractive to a country perturbed by the Warren Court’s excesses. I show that these justifications contributed to originalism’s widespread acceptance not only by exploring some scholarship but also—and more importantly—by examining Supreme Court nomination hearings from the late 1980s and early 1990s. Those hearings evince that, by then, originalism had already taken root. It was the gold standard for constitutional interpretation. But even more notably, whenever the methodology was discussed, it was—almost invariably—conceptually linked to the normative justifications popularized by Bork et al.

This section also makes clear what this Article does *not* attempt to argue. I’m not arguing that, as an empirical matter, originalism was not part of our law before 1980. In the same vein, I am not arguing that originalism only became widely accepted after the Warren Court-era. That can’t be right. From the early years of the republic<sup>23</sup> to the 1800s<sup>24</sup> and even to the mid-twentieth century,<sup>25</sup> jurists have argued within an originalist frame and used an originalist vernacular. For the most part, it has always been the case that we have “expect[ed] our legal rules to have an ultimate pedigree in Founding-era law.”<sup>26</sup> Put simply, then, originalism has been our law for a lion’s share of our history—before folks like Bork entered into the fold.

But this section offers two qualifications to that picture.

First, even if originalism has always been our law, it could have been widely accepted as our law for different reasons at different points in history. So, originalism might have been our law after the Founding because “the origin [of our

21. See *infra* notes 59–63 and accompanying text.

22. See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 392 (2013) (“The first wave of the modern originalist literature came in response to the constitutional decisions of the Warren Court and early Burger Court and was developed from a critical stance. The Supreme Court justices were seen as unduly activist—too willing to exercise the power of judicial review and nullify state and federal policies. Originalism was seen by many to be a solution to that problem.” (footnote omitted)).

23. *E.g.*, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 423 (1793) (“But, the framers of the Constitution could never have thought thus.”).

24. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 14 (2009).

25. See Baude, *supra* note 1, at 2376–86.

26. Sachs, *supra* note 4, at 790.

law] had been so recent.”<sup>27</sup> But today it might be widely accepted and embraced for the normative reasons mentioned above.

Second, it’s likely the case that during the Warren Court-era, originalism was only *partially* our law.<sup>28</sup> Indeed, the Warren Court’s shift away from grounding judicial decisions in originalist principles likely engendered the rise of modern originalism. That is, when the Warren Court turned away from originalism, people didn’t like what they saw. Enthusiasm for originalism in response to the Warren Court-era is what *re*-cemented the methodology as our law. So, even if originalism has always been our country’s law *for the most part*, it might have slipped away a bit during the Warren Court-era. Thus, focusing on the normative accounts that made it widely embraced and accepted in the years that followed is an important task. Doing so explains why and how originalism is our law *today*.

I end this section by discussing why this all matters in 2026. As discussed above, modern originalist theories have either ignored or deliberately cast aside these normative justifications. But the “New” originalists might want to think again. Originalism is our law today. But it doesn’t have to be this way. If a new methodology jumps in and gains widespread acceptance, originalism could be supplanted. So, if originalists want to ensure their methodology continues to be accepted, they might want to be mindful of why it was embraced in the first place. That would require taking stock of and promoting the values—the normative justifications—that contributed to originalism’s rise.

Part III discusses how the current originalist Justices on the Supreme Court are, perhaps, mindful of the need to justify originalism on normative grounds. The Roberts Court’s use of history—and its “history-and-tradition” test for assessing the constitutionality of certain laws, in particular—has been under fire lately.<sup>29</sup> Some think that the current Court is using history as a smokescreen—a purportedly “neutral” tool that, in reality, is enlisted to deceptively aggrandize the Court’s own power and enact its own will. Sound familiar? Modern originalist Justices are facing the exact same accusations leveled against the Warren Court.

Against this backdrop, Justice Kavanaugh took space in a recent concurrence to defend the Court’s recent practices—particularly its increased reliance on history.<sup>30</sup> When he did so, he invoked Bork and Scalia by name and called upon the same normative justifications they had popularized nearly forty years ago.<sup>31</sup> This case study shows us that originalists today recognize that, if originalism is to continue to be accepted, the methodology must continue to further and promote the

27. See John Harrison, *On the Hypotheses that Lie at the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL’Y 473, 474 (2008).

28. Thanks to William Baude for flagging that I should make this distinction clear.

29. See, e.g., Emily Bazelon, *How “History and Tradition” Rulings are Changing American Law*, N.Y. TIMES MAG. (Apr. 29, 2024), <https://www.nytimes.com/2024/04/29/magazine/history-tradition-law-conservative-judges.html> [<https://perma.cc/26CS-CXK3>]; Cary Franklin, *History and Tradition’s Equality Problem*, 133 YALE L.J.F. 946, 947–49 (2024).

30. See *United States v. Rahimi*, 602 U.S. 680, 714 (2024) (Kavanaugh, J., concurring).

31. See *id.* at 718 (Kavanaugh, J., concurring) (quoting Bork, *supra* note 15).



normative justifications that led to its original rise. As originalism becomes more sophisticated and as its contours change, that’s an important lesson to keep in mind. If they wish originalism to remain our law, originalists may want to follow Justice Kavanaugh’s lead.

### I. THE POSITIVIST PICTURE, BRIEFLY

This Article accepts as given the argument made by Professor William Baude in *Is Originalism Our Law?*<sup>32</sup> He answers that question in the affirmative: “[T]he original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision.”<sup>33</sup> That’s an empirical statement: Nowadays, we judge answers to constitutional questions against whether or not they line up with the Constitution’s original meaning. And empirical conclusions matter to Baude because he approaches this debate from a positivist angle. For Baude, “To ask whether the written Constitution and the original interpretive rules are the law today is to ask a question about *modern social facts*.”<sup>34</sup> In other words, as a matter of social practice, is originalism how we do law around here? If the answer is yes, then originalism is our law—the same test can be used for identifying the *legality* of any practice or rule.

And when Baude looked around, he found that “our current legal commitments” are originalist ones.<sup>35</sup> He “look[ed],” in part, at “how the Supreme Court *justifies* its rulings, as evidence of what counts as a legally sufficient justification in our current system of constitutional law.”<sup>36</sup> And after doing so, he concluded that “our constitutional practice can and should be understood as originalist.”<sup>37</sup>

Much more can be said about Baude’s piece. But, for our purposes, that’s all that really matters—at least for now. To sum up, Baude’s analysis was a positivist one: He tried to figure out, as an empirical matter, how we justify constitutional decisions. After collecting and surveying social facts—including how the Supreme Court itself decides cases—he concluded that originalism is our law.

Given that his treatment was a positivist one, Baude didn’t justify originalism’s status as our law on “conceptual” or “normative” grounds.<sup>38</sup> The former contends that “originalism is inherent in ‘the nature’ of constitutions or interpretation.”<sup>39</sup> The latter defends “originalism [as] the first-best legal arrangement as a normative matter,”<sup>40</sup> often focusing on “originalism’s ability to serve various values,

32. See Baude, *supra* note 1.

33. *Id.* at 2352.

34. *Id.* at 2364.

35. *Id.* at 2371.

36. *Id.*

37. *Id.* at 2365.

38. *Id.* at 2352.

39. *Id.*

40. *Id.*

like ‘democratic self-governance, the rule of law, stability, predictability, [and] efficiency.’”<sup>41</sup> These values are the subject of this Article’s next part.

## II. WHAT TO DO WITH THESE NORMATIVE JUSTIFICATIONS

This section focuses on those normative accounts. To be sure, Baude’s positivist account provides a place—albeit a limited one—for these justifications (We’ll get there eventually).<sup>42</sup> But this Article thinks they are independently noteworthy—and deserve our attention—because they help explain *how* and *why* originalism became our law in the first place. If these normative values contributed to originalism’s widespread acceptance, then originalists might want to be mindful of them today. That’s especially true because modern originalist theory has largely defended originalism on other terms—not normative ones. But the normative justifications led to originalism’s acceptance: They made originalism our law. So, if those justifications lose salience and fall away, originalism could fall away, too. But before we get there, let’s sketch out these normative accounts.

### A. Normative Justifications Explained, Briefly

So-called “normative” justifications for originalism argue that we should embrace the methodology because it does “good things.” Those “good things” will be familiar to those in originalist circles.

For instance, then-Professor Robert Bork defended an early version of originalism on the grounds that history and text provided courts with neutral principles for adjudication.<sup>43</sup> As then-Dean John Manning notes: “Bork once wrote that ‘a legitimate Court must be controlled by principles exterior to the will of the Justices.’”<sup>44</sup> For Bork, then, originalism was preferable and should be embraced because it necessarily constrained judges by requiring them to use neutral criteria when deciding cases.

Justice Scalia hummed a similar tune. He argued that “[o]riginalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”<sup>45</sup> Later on in his judicial career, Justice Scalia emphasized, like Bork, how his preferred method of interpretation constrained judges. “[S]ound interpretive conventions,’ [he and his co-author wrote], ‘will narrow the range of acceptable judicial decision-making and acceptable argumentation’

41. *Id.* at 2351 (quoting Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 38 (2009)).

42. See *United States v. Rahimi*, 602 U.S. 680, 734 (2024) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring)).

43. Bork, *supra* note 15, at 8.

44. John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 754 n.36 (2017) (quoting Bork, *supra* note 15, at 6); see also *id.* (“Justice Rehnquist, for example, also argued that unless judicial review ‘is somehow tied to the language of the Constitution that the people adopted,’ judges would become just ‘a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.’” (quoting William H. Rehnquist, *Observation, The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976))).

45. Scalia, *supra* note 15, at 864.



and ‘will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences.’”<sup>46</sup> Indeed, Manning notes that some have insisted that Scalia’s “concern with ‘discretion’ centered more upon limiting free-form judicial policymaking than upon rooting judicial decisions in legitimate external authority.”<sup>47</sup>

At least in this respect, Bork and Scalia were in lockstep. Both thought originalism—that is, requiring judges to ground their decisions in history—restrained the judge. It made it less likely that personal policy preferences could seep into the judicial task. This virtue of originalism was also heralded by former Attorney General Edwin Meese—who I’ll discuss at length later on when I talk about *when* these arguments were made.<sup>48</sup>

“[O]ther originalists have argued that adherence to original meaning is justified by the rule of law values of predictability, certainty, and stability.”<sup>49</sup> Judge Easterbrook, Justice Scalia, and other scholars seem to have made forms of these arguments.<sup>50</sup>

Other normative justifications sound in popular sovereignty. Professor Kurt Lash, for example, argues that the “most common and most influential justification for originalism” is “popular sovereignty and the judicially enforced will of the people.”<sup>51</sup> On his read, “Founders, including James Madison, expressly grounded their interpretive theories on the sovereign authority of the people, and originalist jurists generally do the same.”<sup>52</sup>

46. William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2214 (2017) (alteration in original) (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxviii (2012)).

47. Manning, *supra* note 44, at 749.

48. See *infra* notes 66–80 and accompanying text.

49. Lawrence Solum, *Legal Theory Lexicon 019: Originalism*, LEGAL THEORY BLOG (May 7, 2023), [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/01/legal\\_theory\\_le\\_1.html](https://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html) [<https://perma.cc/SW6B-GVRD>].

50. See Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1122 (1998) (“Stability in a political system is exceptionally valuable. Someone who loses a legislative battle today accepts that loss in exchange for certainty that next year’s victory on some other subject will be accepted by other losers in their turn. People accept old contracts and old laws because they know that this is the only way to ensure that promises to *them* are kept; if all is up for grabs, they are apt to lose both coming and going.”); Scalia, *supra* note 15, at 864; John O. McGinnis, *Originalism Contributes to Legal Stability as Much as Precedent*, LAW & LIBERTY (Oct. 5, 2018), <https://lawliberty.org/originalism-contributes-to-legal-stability-as-much-as-precedent> [<https://perma.cc/M9UB-6QQ3>]. For a contrary view on stability, see Victoria F. Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CAL. L. REV. 1, 12 n.51 (2018) (“I reject the term ‘living constitutionalism’ as verging on the oxymoronic. ‘Living’ suggests instability and constitutionalism denotes stability. This is a very poor term to describe what I believe to be the most stable theory of constitutional methodology, pluralism.”).

51. Kurt T. Lash, Essay, *Originalism, Popular Sovereignty and Reverse Stare Decisis*, 93 Va. L. Rev. 1437, 1440 (2007); see also Harvard Law and Philosophy Society Podcast, *Is Our Law Originalist? A Conversation with Professor Stephen Sachs*, SPOTIFY, at 4:00–5:00 (Oct. 25, 2022), <https://open.spotify.com/episode/6Z8lyQ9uRqcDGW8gbXKTlk> [<https://perma.cc/M4VP-XNT2>].

52. Lash, *supra* note 51, at 1440.

Another flavor of the popular sovereignty justification is the argument that originalism “preserv[es] the ability of democratic institutions—of ‘We the People’—to make meaningful decisions about their constitutions by [facilitating the] enact[ment of] provisions with relatively definite and fixed meanings.”<sup>53</sup>

Finally, “others [have] ma[de] the claim that adherence to original meaning is justified because it will produce better decisions in the long run than the alternative methods of constitutional interpretation and construction.”<sup>54</sup>

These are the normative justifications given for originalism. And the import of such arguments is straightforward: People argued that we should be originalists because originalism does good things—because it accomplishes goals we care about.

Before we talk about how these arguments relate to the positivist picture outlined in Part I, we should make note of the *nature* of these justifications: These arguments are “contingent.”<sup>55</sup>

Contingent arguments make originalism not necessary—that is, if underlying rationales for originalism (like stability, democracy, or neutrality) are shown to be incorrect, then a person who based her originalism on such rationales would have to switch teams. One’s commitment to originalism is *contingent* on the viability of the normative justification.

For example, if it can be shown that originalism does not promote stability—because, for instance, it leads to the overturning of precedent<sup>56</sup>—then the “stability justification” for originalism would no longer ring true. And if that were the case, one who previously rooted their originalism in its stability-promoting quality, would have to go shopping for another theory of constitutional interpretation. Likewise, if one embraced originalism because she believed it to be democracy enhancing, then originalist decisions that withdrew issues from the democratic process might spell trouble.<sup>57</sup> Such an originalist would have to trade in originalism and swap it out for a different, more democratic interpretive approach.<sup>58</sup>

53. Steven D. Smith, *That Old-Time Originalism*, in *THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY* 223, 230 (Grant Huscroft & Bradley W. Miller eds., 2011).

54. Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM*, *supra* note 53, at 35.

55. See *Is Our Law Originalist? A Conversation with Professor Stephen Sachs*, *supra* note 51, at 4:00–4:52; see also Baude, *supra* note 1, at 2399 (“[I]f the case for originalism rests on normative claims like the Constitution’s association with liberty or desirable enactment procedure, or the need to constrain unelected federal judges, these facts may be contingent.”).

56. See Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1712, 1730 (“Treating the Supreme Court’s constitutional precedent as always subject to revision risks undermining the stability of constitutional law.”).

57. See Melissa Murray & Katherine Shaw, Dobbs and Democracy, 137 HARV. L. REV. 728, 759 (2024) (“And yet, despite the wide variation in legislative responses across jurisdictions, the Court in *Heller* and *Bruen* interrupted this active debate over gun rights and gun safety to recognize a muscular and expansive right to keep and bear arms.”).

58. Of course, in a different sense, the positivist account is contingent, too. See Baude, *supra* note 1, at 2252. And he’s right. If originalism is based on social fact, then when those social facts change, so does our law. Positivism—insofar as it merely snaps a picture of what our law is—doesn’t tell us what

What, then, do these normative and contingent justifications have to do with the positivist assertion that, as a matter of social *fact*, originalism is our law? I have a theory—and a take on why that theory matters today.

### *B. Normative Accounts Lead to Acceptance*

#### 1. Filling Out the Story of Our Law

Normative justifications made originalism attractive, and in turn, led to its widespread acceptance. And, as we know, widespread acceptance, in a positivist framework, makes something “our law.” This is the main thrust of this section. It is a straightforward argument, but, thus far, has been overlooked in the existing literature.

This section fills that void. It recounts *when* and *why* many began to enlist these normative justifications—after the Warren Court-era. It then describes how those normative justifications led to originalism’s widespread acceptance.

But before we get to that story, let’s talk a bit about theory. The jurisprudential premise of this section—that laws can be accepted or embraced for normative or *non-law-y* reasons—is a familiar one.

Indeed, Baude and Sachs have noted that “[r]ules may be accepted in specific contexts and for specific reasons.”<sup>59</sup> For instance, “[a]s [Professor] Scott Shapiro colourfully puts it, ‘Judges might apply the law simply to pick up their paychecks.’”<sup>60</sup> Similarly, as Professor Leslie Green notes: “Parliamentary supremacy in the United Kingdom . . . might ‘rest, not only on a common practice of treating [statutes] as supreme, but also on a belief that this practice is democratic or is central to our culture.’”<sup>61</sup> In other words, scholars have already noted that the “acceptance” of certain rules<sup>62</sup> can be rooted in or motivated by “many different considerations.”<sup>63</sup>

So, when it comes to originalism, contingent and normative arguments could be the very “considerations” that led to its acceptance. In this sense, this Article doesn’t break any new theoretical ground. Instead, its contribution is the application of this jurisprudential observation to originalism and its rise.

Let’s get back to the historical story.

Normative justifications for originalism didn’t come from nowhere. They appeared at a particular moment in time. As Professor Keith Whittington notes:

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our law always will be. It especially doesn’t tell us what our law should be. I’ll talk about Baude’s observation at length—and why it matters—later on. *See infra* notes 159–60.

59. Baude & Sachs, *supra* note 14, at 184.

60. *Id.* at 185 (quoting Scott J. Shapiro, *What is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157, 1162 (2006)).

61. Sachs, *supra* note 2, at 851 (quoting Leslie Green, *Introduction* to HART, *supra* note 11, at xxiii (3d ed. 2012)).

62. *See* Baude & Sachs, *supra* note 14, at 185.

63. *Id.* (quoting HART, *supra* note 11, at 203).

The first wave of the modern originalist literature came in response to the constitutional decisions of the Warren Court and early Burger Court and was developed from a critical stance. The Supreme Court justices were seen as unduly activist—too willing to exercise the power of judicial review and nullify state and federal policies. Originalism was seen by many to be a solution to that problem.<sup>64</sup>

Professor Lawrence Solum, too, traces “originalism’s [origins] as a movement in constitutional theory and practice” to the late 1970s, as scholars reacted to the Warren Court’s free-wheeling and reputedly unrestrained jurisprudential approach.<sup>65</sup>

And then, of course, there’s former Attorney General Edwin Meese III. Two prominent originalist scholars have credited Meese with contributing to the “rise of originalism”—so much so that, “without” Meese, originalism’s rise would “surely . . . not [have] happen[ed].”<sup>66</sup>

In a famous 1985 speech, Meese explicitly called out the Warren Court and made clear what the originalist gripe with that Court actually was. He viewed the Warren Court as embracing “radical egalitarianism and expansive civil libertarianism”—both of which were a “threat to the notion of limited but energetic government.”<sup>67</sup>

To be clear, Meese did *not* take issue with substantive decisions of the Warren Court. He wasn’t saying that it reached liberal outcomes and that he would have preferred conservative ones. Indeed, he was explicit that he didn’t want a jurisprudence that was “conservative [or] liberal” or “right or left.”<sup>68</sup> Instead, he just wanted “one that care[d] about committing and limiting to each organ of government the proper ambit of its responsibilities.”<sup>69</sup>

In his eyes, however, that wasn’t *how* the Warren Court had been deciding cases. To him, the Warren Court<sup>70</sup>—and even the Supreme Court in its 1984 Term—made “arguments[] [that] reveal[ed] a greater allegiance to what the

64. Whittington, *supra* note 22, at 392 (footnote omitted).

65. Solum, *supra* note 49; see also Smith, *supra* note 53, at 230 (“Originalism has been proposed and defended for various purposes . . . [including because it] provid[ed] a basis for criticizing ‘activist’ decisions of (or in the spirit of) the Warren Court, such as *Griswold v. Connecticut* and *Roe v. Wade*.”).

66. Lawrence Solum, *Legal Theory Bookworm: “The Meese Revolution” by Calabresi & Lawson*, LEGAL THEORY BLOG (Nov. 30, 2024, 9:15 AM), [https://solum.typepad.com/legaltheory/2024/11/\[https://perma.cc/WM93-W6T3?type=image\]](https://solum.typepad.com/legaltheory/2024/11/[https://perma.cc/WM93-W6T3?type=image]).

67. Meese, *American Bar Association*, *supra* note 15, at 6.

68. Edwin Meese III, U.S. Att’y Gen., Speech Before the D.C. Chapter of the Federalist Society Lawyers Division 13 (Nov. 15, 1985), available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/11-15-1985.pdf> [https://perma.cc/UJF3-XLKY] [hereinafter Meese, *Federalist Society*]; Edwin Meese III, U.S. Att’y Gen., Remarks of the Attorney General: Constitution Day – University of Richmond 13 (Sept. 17, 1986), available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-17-1986.pdf> [https://perma.cc/ZB34-9Y2T] [hereinafter Meese, *Constitution Day*] (“There is, as well, a growing realization that judicially created rights and remedial decrees based on them, bereft as they are of the support or principles found in the Constitution itself, are not sturdy expressions of principle and will be subject to whatever ideological breezes blow through the legal community, be those breezes liberal or conservative.”).

69. Meese, *Federalist Society*, *supra* note 68, at 13–14.

70. In a different speech, he also spoke approvingly of the work of “Alexander Bickel” who had delivered a “brilliant critique of the Warren Court.” Meese, *Constitution Day*, *supra* note 68, at 12.

Court [thought] constitute[d] sound public policy than a deference to what the Constitution—its text and intention—. . . demand[ed].”<sup>71</sup> In other words, he thought judges were deciding cases based on preferred “policies”—not “principles.”<sup>72</sup>

Meese thought such a practice perverted the judicial role: “To allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered.”<sup>73</sup> As he noted elsewhere, “judges” weren’t “legislators” and thus, shouldn’t “act like” them.<sup>74</sup> He thought that “[j]udicial legislation erodes democratic self government. It converts judges into an unelected and illegitimate policy-making elite. Indeed, its most radical exponents evince a deep antipathy for the democratic process. . . . Judges should resist the sincere but arrogant assumption that they know best.”<sup>75</sup> After all, “[a] Constitution that is viewed as only what [unelected] judges say it is, is no longer a constitution in the true sense.”<sup>76</sup> He also thought that a policy-laden approach to adjudicating cases led to incoherence in the law.<sup>77</sup>

But he had a solution: originalism. “[T]he Court could avoid both the charge of incoherence and the charge of being either too conservative or too liberal” if it embraced “[a] jurisprudence seriously aimed at the explication of [giving legal effect to the] original intention[s]” of the Framers.<sup>78</sup> Such a methodological tack would further the “sanctity of the rule of law and the proper limits of governmental power.”<sup>79</sup> Indeed, it would limit the “judicial power” just as much as it would the “executive and legislative.”<sup>80</sup>

Originalism, in Meese’s eyes, fostered values that were important to the health of the republic. It promoted democracy, stability, judicial restraint, apolitical adjudication, the rule of law, and the development of neutral principles.

A lot of what Meese talked about mirrors the arguments made by Justice Scalia and Bork. In an earlier section, I discussed Justice Scalia and Bork while sketching the types of normative justifications scholars have given for originalism. This Article’s discussion of Meese covers similar ground, but the more important take-away of this section is *why* and *when* those arguments were made. Bork wrote his seminal piece on the topic in 1971.<sup>81</sup> Meese gave the speeches quoted above in the mid-1980s. Justice Scalia’s famous speech on the topic—reprinted in the *University of Cincinnati Law Review*—was delivered in 1988 and published in 1989.<sup>82</sup>

71. Meese, *American Bar Association*, *supra* note 15, at 6.

72. *Id.* at 7.

73. *Id.*

74. Meese, *Constitution Day*, *supra* note 68, at 13.

75. *Id.* at 13 (quoting Stuart Taylor writing in *THE NEW REPUBLIC*).

76. Meese, *American Bar Association*, *supra* note 15, at 7.

77. *Id.* at 6 (“It is also safe to say that until there emerges a coherent jurisprudential stance, the work of the Court will continue in this ad hoc fashion.”).

78. *Id.* at 7.

79. *Id.* at 8.

80. *Id.* at 7.

81. Bork, *supra* note 15.

82. Scalia, *supra* note 15.

The timeline is clear: These scholars were responding to the “Warren and early Burger Court[’s]” approach to deciding cases.<sup>83</sup> Meese<sup>84</sup> and Bork<sup>85</sup> made that explicit.

And the normative justifications they offered played a significant part in originalism’s widespread acceptance. As mentioned above,<sup>86</sup> two prominent originalist scholars credit Meese with precipitating the “rise of originalism” to its current status as a “major force in the courts.”<sup>87</sup> Professor Thomas Colby argues that arguments regarding originalism’s ability to restrain judges gave the methodology “mass appeal.”<sup>88</sup> Indeed, he suggests that “it was ‘this potential for neutrality that account[ed] for the visceral appeal of originalism.’”<sup>89</sup> Colby also notes that in 1989 Professor Michael McConnell wrote that “[t]he appeal of originalism is that the moral principles so applied will be the foundational principles of the American Republic . . . and not the political-moral principles of whomever happens to occupy the judicial office.”<sup>90</sup> Professor Eric Posner similarly notes that originalism’s popularity was, in part, due to it being viewed as a response to the “politicization of the judiciary.”<sup>91</sup> The idea “that judges implement their political preferences,” Posner observes, is a perennial one—and originalism was the “antidote.”<sup>92</sup>

These scholars are right. Originalism’s normative justifications made it more popular and accepted in American life. And we can see that their observations are correct when we look at how American political and legal leaders talked about originalism and constitutional interpretation right after Bork, Meese, and Justice Scalia’s arguments came onto the scene.

To see that, let’s look at Supreme Court confirmation hearings that took place in the late 1980s and 1990s. These hearings evince that originalism was deeply embedded in the vernacular of the period. Originalism achieved an early dominance in the political and legal zeitgeist because people believed it was doing the “good things” that Bork, Meese, and Justice Scalia had identified: restraining judges and encouraging the development of neutral principles. Originalism was being accepted. But that was the case *because* of the normative justifications given for it.

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83. Whittington, *supra* note 22, at 392.

84. *See supra* notes 67–70 and accompanying text.

85. *See* Bork, *supra* note 15, at 1, 5 n.10, 6, and 7.

86. *See* Solum, *supra* note 66.

87. *Id.*

88. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 715 (2011).

89. *Id.* at 718 n.20 (quoting Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 794 (1987)).

90. *Id.* (quoting Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1525 (1989) (book review)).

91. Eric A. Posner, *Why Originalism is So Popular*, NEW REPUBLIC (Jan. 14, 2011), <https://newrepublic.com/article/81480/republicans-constitution-originalism-popular> [<https://perma.cc/E95S-DQKE>].

92. *Id.*



We will start with then-Judge Anthony Kennedy’s nomination to the Court in 1987.<sup>93</sup> During the hearing, Senator Grassley and Kennedy had a colloquy about “original intent” and the judicial role.<sup>94</sup>

With respect to originalism, Kennedy observed that the Framers of the Constitution “did do something. They made certain public acts. They wrote. They used particular words. They wanted those words to be followed.”<sup>95</sup> “So,” he concluded, “a study of the intentions and the purposes and the statements and the ideas of the Framers, . . . seem[ed] to [him] as a necessary starting point for any constitutional decision.”<sup>96</sup> Right after Kennedy finished that response, Grassley followed up. He asked Kennedy: “Is there any room for a judge to apply his or her own values and beliefs for the purpose of interpreting the text of the Constitution?”<sup>97</sup> Kennedy answered emphatically: “The judge must constantly be on guard against letting his or her biases or prejudices or affections enter into the judicial process.”<sup>98</sup> This exchange suggests, at the very least, that originalism was understood by 1987 as restraining judges—just like Meese and Bork had theorized.

During that exchange, Grassley also asked Kennedy about his thoughts on the “judicial activism the Supreme Court ha[d] practiced over the last 20 or 30 years”<sup>99</sup>—likely referring to the Warren Court era. Grassley wanted to know if Kennedy thought “that a good way to alleviate this problem would be for the Court to begin practicing a greater degree of judicial restraint?”<sup>100</sup> Kennedy agreed. First, Kennedy noted that he thought that “judicial restraint is important in any era.”<sup>101</sup> But then he made clear that “the courts [recently had been] more and more confronted with cases that involve the great, current public issues of our time. Therefore, judicial restraint [was] all the more an imperative.”<sup>102</sup>

In fact, Grassley explicitly asked Kennedy what he thought about Bork’s judicial philosophy. After all, Bork had himself been nominated to the Supreme Court but had been voted down in dramatic fashion.<sup>103</sup> Kennedy was later nominated for that same seat. Grassley asked Kennedy:

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93. *Confirmation Hearing on the Nomination of Hon. Anthony M. Kennedy to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. (1987). I will refer to the nominees as “then-Judge” once and then drop the title. I will do the same when I first introduce Senators.

94. *Id.* at 139–42 (statement of Sen. Grassley).

95. *Id.* at 139 (statement of then-Judge Anthony M. Kennedy).

96. *Id.* (statement of Sen. Grassley).

97. *Id.* (statement of Sen. Grassley).

98. *Id.* (statement of then-Judge Anthony M. Kennedy).

99. *Id.* at 141 (statement of Sen. Grassley).

100. *Id.* at 141 (statement of Sen. Grassley).

101. *Id.* at 141 (statement of then-Judge Anthony M. Kennedy).

102. *Id.* at 143 (statement of then-Judge Anthony M. Kennedy).

103. See *On This Day: Senate Rejects Robert Bork for the Supreme Court*, NAT’L CONST. CTR. (Oct. 23, 2023), <https://constitutioncenter.org/blog/on-this-day-senate-rejects-robert-bork-for-the-supreme-court> [https://perma.cc/5GPD-WUCW].

The previous nominee before this committee to fill this vacancy on the Supreme Court—Bork—was a strong advocate of the belief that rationale was more important than results. He criticized what he called result-oriented jurisprudence in which the rationale was made secondary to the actual result reached. . . . What is your position regarding this so-called result-oriented jurisprudence, and when, if ever, is it justified?<sup>104</sup>

Kennedy answered clearly: “I think if a judge decides a case because he or she is committed to a result, it destroys confidence in the legal system.”<sup>105</sup> In other words, Kennedy adopted Bork’s philosophy. Bork had been rejected by the Senate. But his philosophical and normative approach to judging lived on.

We can see many of the same conversations taking place during then-Judge Clarence Thomas’s 1991 confirmation hearings.

There, Senator Orrin Hatch expressed, in his opening statement, that he “share[d] President [George H.W.] Bush’s view that a Justice of the Supreme Court of the United States should interpret the law according to the *original meaning* and not legislate his or her own policy preferences from the bench.”<sup>106</sup> And, “[b]ased on a careful review of Judge Thomas’ writings and judicial opinions and [his] personal knowledge of the man, [he was] confident that Judge Thomas [would] interpret the law according to its original meaning, rather than substitute his own policy preferences for the law.”<sup>107</sup>

Grassley made a statement, too. He observed that “[t]o be faithful to our Constitution’s Framers, Judge Thomas will actually be required to step away, step back from his past involvement in the shaping of public policy. Being a judge . . . requires discipline.”<sup>108</sup>

Even the Democratic Chairman of the Senate Judiciary Committee—then-Senator Joseph Biden—hoped that Thomas would respect the “balance . . . that the Framers of the Constitution enshrined in that great document.”<sup>109</sup> He feared that Thomas’s reputed “natural law” commitments would lead him to “strike down a whole series of Government actions.”<sup>110</sup> In other words, Biden worried that Thomas would judge in an unrestrained manner; he didn’t want America to return to the “so-called Lockner [sic] era,”<sup>111</sup> where judges purportedly prioritized natural law over the constitutional text. Instead, Biden urged Thomas to embrace the “balanced liberty” enshrined in the

104. *Confirmation Hearing on the Nomination of Anthony M. Kennedy to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 144 (1988) (statement of Sen. Grassley).

105. *Id.* at 144 (statement of then-Judge Anthony M. Kennedy).

106. *Confirmation Hearing on the Nomination of Clarence Thomas to Be Associate Justice of the Supreme Court of the United States, Part 1: Hearing Before the S. Comm. on the Judiciary*, 102nd Cong. 40 (1991) (emphasis added) (statement of Sen. Hatch).

107. *Id.* (statement of Sen. Hatch).

108. *Id.* at 65 (statement of Sen. Grassley).

109. *Id.* at 4 (statement of Sen. Biden).

110. *Id.* at 2 (statement of Sen. Biden).

111. *Id.* at 3 (statement of Sen. Biden).

constitutional text by the “Framers.”<sup>112</sup> That’s the type of argument that would make Bork proud.

The same sorts of conversations took place once again in then-Judge Ruth Bader Ginsburg’s 1993 nomination to the Supreme Court.

For example, Hatch echoed familiar themes when he argued that judges shouldn’t ask “whether [they] are ahead of society or not.”<sup>113</sup> Instead, judges should ask “whether [they] are actually interpreting the laws in accordance with the original meaning.”<sup>114</sup> That led him to ask the following question of Ginsburg: “The judge’s authority derives entirely from the fact that he or she is applying the law, not his or her personal values. Do you agree or disagree with that?”<sup>115</sup> She did agree. “No judge,” she replied, “is appointed to apply his or her personal values, but a judge will apply the values that come from the Constitution, its history, its structure, the history of our country, the traditions of our people.”

Hatch would continue to conceptually link original meaning and limitations on judicial policymaking. Hatch commented that “so long as the judge’s or Justice’s starting point is the *original meaning of the text*, then it seems to me that [the] judge is seeking to fulfill his or her constitutional duty.”<sup>116</sup> Then he asked if Ginsburg agreed with the following statement: “If a judge abandons the intention of the lawmakers as his or her guide, there is no law available to the judge and the judge begins to *legislate a social agenda for the American people*. That goes well beyond his or her legitimate power.”<sup>117</sup>

Ginsburg replied that when judges confront “a law—whether it is a statute that Congress passed or our highest law, the Constitution[]”—they must “construe, . . . interpret, and . . . try to be faithful to the provision.”<sup>118</sup> She concluded that the judge’s job “is always to relate to the intent of the lawgiver or the lawmaker.”<sup>119</sup> Hatch was satisfied with that answer: “I like your statement that the judge has an obligation to be faithful to the provisions of the law, and you have explained that I think very well.”<sup>120</sup>

Later on, Hatch would reiterate that he didn’t approve of “judges just do[ing] whatever they want to do,” “ignor[ing] the statutes or the Constitution and the laws as they are written and as they were originally meant to be interpreted.”<sup>121</sup> Hatch was especially dubious of judges reading into the Constitution “an amorphous constitutional right of privacy” because “whether or not conduct is

112. *Id.* at 4 (statement of Sen. Biden).

113. *Confirmation Hearing on the Nomination of Ruth Bader Ginsburg, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103rd Cong. 126 (1993) (statement of Sen. Hatch).

114. *Id.* (statement of Sen. Hatch).

115. *Id.* at 127 (statement of Sen. Hatch).

116. *Id.* (emphasis added) (statement of Sen. Hatch).

117. *Id.* (emphasis added) (statement of Sen. Hatch).

118. *Id.* (statement of then-Judge Ruth Bader Ginsburg).

119. *Id.* at 128 (statement of then-Judge Ruth Bader Ginsburg).

120. *Id.* at 128 (statement of then-Judge Ruth Bader Ginsburg).

121. *Id.* at 275 (statement of Sen. Hatch).

protected does not depend on any neutral principle of adjudication but on the subjective predilection of the judge deciding the case.”<sup>122</sup> To him, that “[was] not the rule of law. That [was] government by judiciary.”<sup>123</sup> Hatch worried that Ginsburg might adjudicate in a way that Bork, Meese, and Justice Scalia had warned against.

But Biden defended Ginsburg. He thought that Ginsburg had “laid out very clearly from the outset the basis upon which the right of privacy has been found to exist under our Constitution. . . . [She] talked about the liberty clause; [she] talked about the ninth amendment [sic]; [she] talked about the common law and the common-law traditions.”<sup>124</sup>

Biden’s defense is telling. First, it’s significant that Biden felt the need to jump in and make clear that Ginsburg would not decide cases based on her own “subjective predilection.” But *how* Biden defended her is notable, too. He insisted that Ginsburg’s views were textually and historically rooted. He and Hatch might have disagreed on the interpretive question—is there a right to privacy in the Constitution?—but they agreed that legitimate opinions about such a right had to be moored in the Constitution’s text and history. This is because they believed text and history would ensure judges were not merely lawmakers in robes.

In another exchange, Senator Arlen Specter pressed Ginsburg on an article she had written. In that piece, then-Professor Ginsburg wrote that a “[b]oldly dynamic interpretation, *departing radically from the original understanding*, is required to tie to the fourteenth amendment’s equal protection clause a command that Government treat men and women as individuals equals in rights, responsibilities, and opportunities.”<sup>125</sup> Specter took issue with this. In his eyes, her approach to “interpretation” seemed to suggest that judges could “alter[]” the Constitution.”<sup>126</sup> For Specter, that would “rais[e] the issue of the appropriate role of the Court.”<sup>127</sup> He thought that judges changing the Constitution in that manner—outside the formal amendment process—would undermine the document’s durability. As he put it: “We have had a Constitution which has worked marvelously for 200 years, and we have to maintain it.”<sup>128</sup>

He made clear to Ginsburg that he didn’t want her “to get involved in legislating.”<sup>129</sup> And then he asked her point-blank: “Is it the role of the courts to upset decisions of legislators based on the jurist’s own ideas about enlightened policy by bold, dynamic interpretation of the Constitution?”<sup>130</sup> In other words, he

122. *Id.* at 274 (statement of Sen. Hatch).

123. *Id.* (statement of Sen. Hatch).

124. *Id.* at 276 (statement of Sen. Biden).

125. *Id.* at 187 (emphasis added) (quoting Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L. Q. 161, 161 (1979)) (statement of Sen. Specter).

126. *Id.* at 190 (statement of Sen. Specter).

127. *Id.* (statement of Sen. Specter).

128. *Id.* (statement of Sen. Specter).

129. *Id.* (statement of Sen. Specter).

130. *Id.* at 188 (statement of Sen. Specter).

wanted to know if she would privilege her own policy preferences over the words in the Constitution.

Ginsburg gave an enigmatic response but seemed to accept that her views on equality would, in fact, be grounded in the structure of the Constitution. As she put it: “The Framers of the 14th Amendment meant no change, they intended no change at all in the status of women before the law. But in 1920, when women achieved the vote, they became full citizens, and you have to read the Constitution as a whole, . . . over the years by amendment and by judicial construction.”<sup>131</sup> Put another way, Ginsburg’s answer suggests that her stance on equality was grounded in the Constitution—it was rooted in the lawful amendments made to the document. She was, then, also making an originalist argument of sorts: She was being faithful to the text of the Constitution as lawfully amended in 1920.

This exchange—like the others mentioned above—reflects the ubiquity of originalism and its conceptual linkage to judicial restraint, neutrality, and popular sovereignty.

Taking a step back, these confirmation hearings evince a simple social fact: In the late 1980s and early 1990s, originalism’s grip was strong. Jurists and politicians—of different ideological persuasions—spoke in an originalist vernacular and defended their viewpoints on originalist terms. Originalism was widely embraced and accepted. It was, as a matter of social fact, our law. But that’s not the main takeaway of this section; Baude has already demonstrated that empirical truth.

The upshot of this section is *how*, *why*, and *when* that happened. And now we know the answer: The normative justifications for originalism—popularized by Bork, Meese, and Justice Scalia—made the methodology attractive, especially to those weary of the Warren Court’s excesses. We can see that in the way originalism was discussed in confirmation hearings in the years that followed. Time and time again, originalism was conceptually linked to judicial restraint and neutrality.

\* \* \*

The relationship between the normative and the empirical accounts should be clear. Normative justifications made originalism attractive, and that led to the general acceptance of the methodology. Once widespread, originalism, as an empirical matter, became our law—it was, and still is, the way we do things around here. Baude’s work has demonstrated what our law is—this Article tells the story of how our law came to be.

In a moment, I’ll talk about why this all matters today—and it certainly does.<sup>132</sup> But first, I have to address an important qualification: I have to make clear what this Article’s account of originalism’s rise does *not* suggest.

## 2. Being Clear About the “When”

One might read the account above and think the following: Originalism wasn’t our law until the 1980s and 1990s after Bork, Meese, and Justice Scalia

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131. *Id.* at 189 (statement of then-Judge Ruth Bader Ginsburg).

132. *See infra* Part II.B.3.

popularized normative arguments to justify its use. But that's not the argument I'm making—and, as a historical and empirical matter, such an argument would be inaccurate.

As Baude's work, other literature, and Supreme Court opinions make clear, originalism has been, at the very least, part of our law for all of the country's history. But if that's the case, why does understanding the story of originalism in the post-Warren Court era matter?

Two reasons. First, even if originalism has always been our law, it could be our law at different times in history for different reasons. So, originalism can be our law *today* because of the normative justifications developed in the 1980s—even if it was our law at other points in history for different reasons. Second, during the Warren Court era, originalism was likely only *part* of our law. Today, however, as Baude demonstrates, it's *entirely* our law. So, the normative justifications deployed during the 1980s may have helped shift originalism's status from *partially* our law to *fully* our law. Let's tease that out.

\* \* \*

To begin, let me briefly defend the first point made above—that originalism has been, at the very least, part of our law for all of the country's history.

I'm not the first to make this argument. Professor Jamal Greene has pointedly argued that “[s]ome form of originalism is not new to American judicial culture.”<sup>133</sup> Indeed, he notes that “[i]t is not unusual to find strong statements of the need to give constitutional text the meaning intended by its framers in nineteenth-century Supreme Court opinions.”<sup>134</sup> He cites cases from 1827 through 1895 to support that view.<sup>135</sup> But we could also look earlier than 1827. For instance, in the landmark case of *Chisholm v. Georgia*,<sup>136</sup> every Justice who wrote an opinion invoked some form of originalism.<sup>137</sup> And while the twentieth century put pressure on the vitality of originalism,

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133. Greene, *supra* note 24, at 14.

134. *Id.*

135. *Id.*

136. 2 U.S. (2 Dall.) 419 (1793).

137. See, e.g., *id.* at 450 (opinion of Blair, J.) (“In considering this important case . . . [t]he Constitution of the *United States* is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the *Union* . . .”); *id.* at 464 (opinion of Wilson, J.) (In order, ultimately, to discover, whether the people of the *United States* intended to bind those States by the *Judicial* power vested by the national Constitution, a previous enquiry will naturally be: Did those *people* intend to bind those *states* by the *Legislative* power vested by that Constitution?”); *id.* at 466 (“But, in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the *direct* and *explicit declaration* of the Constitution itself.”); *id.* at 469 (opinion of Cushing, J.) (“That an object of this kind was had in view by the Framers of the Constitution, I have no doubt, when I consider the clashing interfering laws which were made in the neighbouring States, before the adoption of the Constitution, and some affecting the property of citizens of another State in a very different manner from that of their own citizens.”); *id.* at 470–72 (opinion of Jay, C.J.) (surveying pre-ratification history, like the “Revolution[ary]” era to understand the meaning of the Constitution itself); *id.* at 437 (opinion of Iredell, J. dissenting) (“Now I presume it will not be denied, that in every State in the *Union*, previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissible in respect to claims against the State, were those which in



Baude persuasively argues that even supposedly anti-originalist decisions don’t appear, after further examination, to be so at odds with the methodology after all.<sup>138</sup>

Indeed, even Meese, when providing his justifications for originalism, recognized that originalism was “*not a shockingly new theory; nor [was] it arcane or archaic.*”<sup>139</sup> To Meese, “[a]t the time of the American founding, the prevailing rules of legal interpretation were well known.”<sup>140</sup> “When [judges] rolled up their sleeves and went to work in constitutional cases, they began by seeking to discern the original meaning of the text.”<sup>141</sup> And that way of doing constitutional interpretation had “been assumed by judges, if not explicitly argued for, during most of our judicial history.”<sup>142</sup> “[T]his tradition of constitutional interpretation and this understanding that the Constitution was law limiting all governmental power[,] was dominant in legal circles until, only recently.”<sup>143</sup>

If that’s true—if originalism is our law today and has been throughout our nation’s history—then how can it be that normative justifications offered only in the latter part of the twentieth century helped make originalism our law? Wasn’t it our law already? In other words, what’s the point of this whole Article?

Well, as I mentioned above, there are two reasons why the story this Article tells is important—despite the observations of Meese, Greene, and Baude.

First, let’s say that originalism has *always* been our law. It can still be the case that it was our law for different reasons at different points in American history. Recall that rules can be accepted for a variety of reasons.<sup>144</sup> So, maybe originalism was accepted as our law immediately following ratification of the Constitution because “the origin [of our law] had been so recent.”<sup>145</sup> In other words, maybe those in the late 1700s and early 1800s were originalists because they were personally familiar with the people and ideas that animated the Constitution. Today, however, originalism’s acceptance is not tied to our generation’s personal familiarity with the Framers; instead, it’s likely related to the normative justifications I described above.

England apply to claims against the crown; there being certainly no other principles of the common law which, previous to the adoption of this Constitution could, in any manner, or upon any colour apply to the case of a claim against a State in its own Courts, where it was solely and completely sovereign in respect to such cases at least.”).

138. See Baude, *supra* note 1, at 2376–86.

139. Meese, *American Bar Association*, *supra* note 15, at 7 (emphasis added).

140. Meese, *Constitution Day*, *supra* note 68, at 9.

141. *Id.* (“Finding the sense of meaning of the Constitution as it was accepted and ratified by the Nation required serious consideration of the words in their general and popular usage, the context in which they were written, their subject-matter, their effects and consequences, and the spirit or reason of the law.”).

142. *Id.*

143. *Id.* at 10.

144. See Baude & Sachs, *supra* note 14, at 184–85; see Baude & Sachs, *supra* note 14, at 185 (quoting HART, *supra* note 11, at 203); Sachs, *supra* note 2, at 851 (quoting Leslie Green, *Introduction to HART*, *supra* note 11, at xxiii (3d ed. 2012)).

145. See Harrison, *supra* note 27, at 474.

Simply put, even if originalism has always been our law, the reasons why that's true have changed over time. This Article argues that originalism is embraced and accepted today because of the normative reasons put forward by Bork et al. That's one reason why the story of the 1980s and 1990s still matters, despite the fact that originalism has always had some dominance in American life and law.

But there's another reason, too. Because, as a matter of social fact, originalism was likely only *partially* our law in the Warren Court era.<sup>146</sup> That is, originalism wasn't as entrenched, as ubiquitous, or as pervasive as it is now. True, it wasn't jettisoned altogether.<sup>147</sup> But it was not "a social fact that when [those in that era] debate[d] or justif[ied] the "content of [their] law,"<sup>148</sup> that they did so in an originalist manner—they didn't *always* "expect [their] legal rules to have an ultimate pedigree in Founding-era law."<sup>149</sup>

That is not a novel or radical observation. Speaking in 1986, Meese explained that originalism was the "dominant" way of reading the Constitution "until only recently."<sup>150</sup> "During the past several decades," he observed, a "radical" approach took hold—one that "denie[d] the validity of the traditional view."<sup>151</sup> Such a view held that "judges [could] infuse the Constitution with new meanings derived from evolving notions of contemporary morality."<sup>152</sup> To Meese, this new view "represent[ed] a radical departure from the great tradition of [originalist] interpretation."<sup>153</sup> And this new way of doing things was popping up not only in "law schools" and "congressional debates" but also in "court opinions."<sup>154</sup>

Meese's observations, of course, were a response "to the Warren and Burger Courts' refusal to ground a series of prominent individual-rights decisions in originalist terms."<sup>155</sup> Indeed, as Greene points out, both Bork and Justice Scalia shared Meese's view that things had only *recently* gone awry.<sup>156</sup> Bork, for instance, had argued that "[w]hat was once the dominant view of constitutional law—that a judge is to apply the Constitution according to the principles intended by those who ratified the document—is now very much out of favor among the theorists of the field."<sup>157</sup>

What's clear, then, is that originalism was likely not *fully* our law during the Warren and early Burger Court eras. During that period, it was losing its foothold. Indeed, it was that reality that mobilized people like Bork and Meese to articulate

146. Thanks to Will Baude for helping me work through this.

147. See Baude, *supra* note 1, at 2376–86.

148. Sachs, *supra* note 4, at 790 (quoting Baude & Sachs, *supra* note 7, at 1458).

149. *Id.*

150. Meese, *Constitution Day*, *supra* note 68, at 10.

151. *Id.*

152. *Id.*

153. *Id.* at 11.

154. *Id.* at 12.

155. Greene, *supra* note 24, at 16.

156. *Id.*

157. *Id.* (quoting ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990)).

reasons for returning to a way of reading text that had been—up until then—the gold standard: originalism.

And this is where the normative justifications come in. As Bork, Meese, and Justice Scalia urged the country to return to the previously dominant interpretive method, they did so by enlisting normative justifications, like judicial restraint. And, as we’ve seen, those arguments were successful. Today, originalism is our law. But that shift from *partially* our law to *fully* our law—from the Warren Court era to the Roberts Court era—was facilitated by the normative justifications this Article has discussed. Those justifications contributed to originalism’s *re*-acceptance.

\* \* \*

This Article does *not* attempt to argue that originalism became our law only in the 1980s because of normative justifications. Instead, this section makes clear that originalism has *always* been our law, even if only *partially* so during the Warren Court era. But the normative justifications offered in the 1980s help explain why originalism has continued to be our law—because laws can be accepted at different points in time for different reasons—and they help explain how originalism shifted from *partially* our law to *fully* our law.

### 3. Why A More Complete Story of Our Law Matters Today

Let’s get back to this Article’s main contention: that normative justifications contributed to originalism’s acceptance, so now, as a social fact, we can say it’s our law. This section sketches why understanding the relationship between normative justifications and positivist accounts matters. And it’s simple: Originalism is our law *today*. But it doesn’t have to be that way. Empirical accounts take the temperature of society: They ask, “How are people doing law around here?” But social facts change. And if originalism is no longer the way we do law, then it will cease to be our law. So, if folks don’t want that to happen, they’ll want to reckon with the normative arguments that led to originalism’s social acceptance in the first place—and, perhaps, be mindful to maintain their validity.

\* \* \*

It’s true that normative justifications for originalism are contingent. We saw that above.<sup>158</sup> If you’re an originalist because you think it constrains judges, and if it can be shown that it doesn’t, in fact, constrain judges, then you’ll have to switch teams. You’d need to adopt a methodology that actually achieves the normative goals you value. But let’s be clear: Positivist accounts are contingent in their own way, too.

If the content of our law is based on social facts—that is, empirical observations about how things are—then when those social facts change, the law changes, too. Baude recognizes this when he identifies his positivist account of originalism as “contingent but truer to our actual commitments.”<sup>159</sup> Indeed, Baude is clear that “it is surely possible to argue that some other methodology

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158. See Lash, *supra* note 51, at 4:00–4:52; Baude, *supra* note 1, at 2399; Barrett *supra* note 56; Murray, *supra* note 57.

159. Baude, *supra* note 1, at 2352.

that is not the law should be adopted. And if these arguments *work*—if they result in widespread agreement about the new methodology—then that methodology will be the law instead.”<sup>160</sup>

In other words, originalism is our law. But that’s not a given. Other methodologies *might* be able to gain widespread acceptance. In that case, originalism would either be only partially our law—as it was in the Warren Court era—or not our law at all.

That’s why originalists might want to be mindful of the normative justifications that contributed to originalism’s widespread acceptance. As we’ve seen, a polity can accept rules for a variety of reasons.<sup>161</sup> This Article has set out to argue that originalism gained popularity and eventual acceptance in the 1980s and 1990s because of a particular set of normative justifications. That is, the positivist account of originalism is *contingent* on *today’s* social facts—and those social facts were shaped by the normative arguments of the post-Warren Court era. But if originalists lose sight of those normative justifications, originalism could cease being our law.

In other words, if originalism becomes unmoored or conceptually disconnected from the normative justifications that contributed to its rise, then people might eventually find the methodology less appealing. After all, normative ideas, like judicial restraint, made originalism popular—it could lose that popularity if those values are jettisoned. And if it loses widespread acceptance, it will no longer be our law. In this picture, normative justifications might contribute to originalism’s continued acceptance, such that if they fall away, originalism’s status as our law will fall with it.

Realizing that is important today. Today’s originalism—so-called “New Originalism”—has largely cast aside the normative justifications that animated Meese’s “Old Originalism.”<sup>162</sup> “Indeed, some New Originalists explicitly part company from the Old Originalists by disavowing any serious claim to judicial constraint.”<sup>163</sup> In fact, Professor Randy Barnett—a New Originalist—has remarked that “when [he] first got into the conservative legal movement, restraint certainly had the higher ground. It was the most compelling of those things. Originalism was sort of the lesser of the two things. But that gradually started to shift over the years . . . .”<sup>164</sup>

That’s likely the case because they viewed originalism—not just as a theory that promoted restraint and neutrality—but rather as a theory that was “logically entailed by the Constitution and the principles on which it rested.”<sup>165</sup> Why was it

160. *Id.* at 2398.

161. See Baude & Sachs, *supra* note 14, at 184–85; Baude & Sachs, *supra* note 14, at 185 (quoting HART, *supra* note 11, at 203); Sachs, *supra* note 2, at 851 (quoting Green, *Introduction* to HART, *supra* note 11, at xxiii).

162. See Colby, *supra* note 88, at 715; Solum, *supra* note 54, at 16–19.

163. Colby, *supra* note 88, at 715.

164. *The Evolution of Originalism*, NAT’L CONST CENTER (July 25, 2024), <https://constitutioncenter.org/media/files/The-Evolution-of-Originalism-WTP-transcript.pdf> (statement of Prof. Randy Barnett) [perma.cc/S9KG-54Z3].

165. Joel Alicea, *Dobbs and the Fate of the Conservative Legal Movement*, CITY J. (Winter 2022), <https://www.city-journal.org/article/dobbs-and-the-fate-of-the-conservative-legal-movement> [perma.cc/W75B-9HGL].

logically entailed? Well, different scholars have different answers. A prominent one, based on the philosophy of language, is that the Constitution’s text was “fixed” at the time of ratification and that its fixed meaning should “constrain constitutional practice.”<sup>166</sup> Originalism is called for, then, *not* because it does good things—like restrain judges—but rather because it reflects, for instance, how we communicate in everyday life.

This conceptual foundation of New Originalism has implications for judicial restraint. Indeed, New Originalist theories have explicitly distinguished between “constraint” and “restraint.”<sup>167</sup> New Originalists embrace the former and are less concerned with the latter. That is, if a New Originalist judge’s “decision conflicts with executive or legislative action,” that’s perfectly fine so long as the decision is “consistent with the constitutional text.”<sup>168</sup>

In this respect, “New Originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.”<sup>169</sup> But as we’ve seen, Old Originalists held a somewhat different view. As Professor J. Joel Alicea notes: “[T]o the extent that originalism did not restrain the judiciary, [Old Originalists] thought that [it] should be abandoned as having failed to serve its purpose.”<sup>170</sup> Old Originalism often cared about stopping judges from striking down the duly enacted policies of legislatures or from creating new rights out of whole cloth.

We should say more about this difference. To be sure, both Old and New Originalists believe that laws contrary to the Constitution should be invalidated. An Old Originalist, in the name of restraint, wouldn’t uphold a law that plainly violated the Constitution. Both schools of thought agree that judges are required to make that call when the evidence presents itself. The disagreement, then, is the following: How much discretion does originalism give judges in making that call?<sup>171</sup>

So, when we say that Old Originalism is more restrained than New Originalism, what we’re really saying is this: Old Originalists, concerned with judges imposing their own values when deciding a case, embraced approaches that curbed judges’ discretion. For instance, Scalia and Bork were hesitant to look to vague provisions of the Constitution as fountains of unenumerated rights to be explicated by judges.<sup>172</sup> New Originalists, however, have no issue appealing

166. See generally Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

167. Lawrence Solum, *Legal Theory Lexicon: Restraint and Constraint in Constitutional Theory*, LEGAL THEORY BLOG (Apr. 21, 2024), <https://lsolum.typepad.com/legaltheory/2024/04/legal-theory-lexicon-restraint-and-constraint-in-constitutional-theory.html> [<https://perma.cc/YE8M-DQEK>].

168. *Id.*

169. Colby, *supra* note 87, at 750–51 (alterations omitted) (quoting Whittington, *supra* note 22, at 609).

170. Alicea, *supra* note 165.

171. I am thankful to Michael Ramsey for recommending this addition.

172. See Steven G. Calabresi, *Originalism and Liberty*, 2015–2016 CATO SUP. CT. REV. 17, 30–31 (2015) (“Justice Scalia, Judge Robert Bork, and Attorney General Edwin Meese have all denied that the

to these open-textured provisions.<sup>173</sup> Those provisions, like any other in the Constitution, mean *something* after all. The New Originalist, then, is duty-bound to give them effect—even if giving them effect, *in practice*, grants judges wide discretion to “find” rights.<sup>174</sup>

The Old Originalist would be reticent to read vague text in such a manner. Giving judges too much power to disambiguate constitutional text—especially when the original contours of the Constitution remain contested—might end up being too tempting. Judging might start looking an awful lot like legislating, as judges make conclusive decisions about the Constitution’s vague text without a “solid textual anchor.”<sup>175</sup> As a judge embarks on that path—of turning vague text into constitutional law—it might just be unavoidable that his values slip into his exercise. And the costs are high. Once a constitutional rule is laid down, it can trump all contrary federal and state legislation. If a judge’s elucidation of the Constitution—which, in practice, looks a lot like legislating—can stifle the nation’s *real* legislatures, is it not safer and more restrained to avoid decisional approaches that grant judges broad discretion? The Old Originalists thought so; indeed, in edge cases, they often relied on the presumption of constitutionality.<sup>176</sup> They embraced decisional tools that *limited* their discretion.

So, when we say that New Originalists are less concerned with restraint or neutrality, we are *not* saying that New Originalists seek to impose their *own* values. That’s certainly not the case. Instead, they are just more comfortable with tools and decisional devices that give judges discretion when deciding constitutional cases. More discretion, however, leads to more chances that a judge’s values imbue his adjudicative exercise. That’s why Bork et al. feared those sorts of approaches.

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This Article does *not* take a side in this debate. All I’m arguing is that normative values, like restraint, made originalism attractive in the first instance and led to its widespread acceptance. They made originalism *fully* our law. As originalism gets more sophisticated, these sorts of normative considerations have largely been cast aside. Maybe that’s making originalism more theoretically sound.<sup>177</sup> But there might be a cost.

People accepted originalism because of those normative justifications. But if originalism turns its back on those arguments—today or in the future—then society could turn its back on originalism. It might fall out of favor. A new

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Ninth Amendment means what it plainly says on its face, which is that there are other, unenumerated, rights that are constitutionally protected above and beyond the rights mentioned in the first eight amendments. They fear that judges will run wild with the Ninth Amendment and will have no solid standards to guide them. In essence, they believe that the Ninth Amendment is ‘void for vagueness’ and that it is an undecipherable ink blot on the Constitution.”).

173. See *id.* at 38; see generally *id.* (discussing exactly these differences).

174. See *id.* at 31 (discussing the New Originalist view).

175. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989).

176. See Calabresi, *supra* note 172, at 38.

177. See Colby, *supra* note 87, at 718–19.



“methodology that is not the law”<sup>178</sup> could enter the picture, garnering support and approval. And if we later saw “widespread agreement about the new methodology[,] . . . then that methodology [would] be the law instead.”<sup>179</sup> Originalism would be our law no more.

This is why telling a fuller story of our law matters. Originalism is our law today. But things don’t have to be this way. Originalism was likely only *partially* our law in the Warren Court era, and that same sort of recession could happen again if the social facts on the ground were to change.

That’s why it’s not enough for originalists to say that originalism is our law. It’s important that they also understand *how* our law came to be. Doing so sheds light on the values and ideas that led to originalism’s acceptance. Debates about the future of originalism—its vitality and its longevity—need to keep this more *complete* story of our law front of mind.

### III. JUSTICE KAVANAUGH’S *RAHIMI* CONCURRENCE AND THE CONTINUED SALIENCE OF THE NORMATIVE JUSTIFICATIONS

I just argued that originalists might want to be mindful of the normative justifications that led to its acceptance. For if those arguments are ignored, originalism might fall out of favor. And then it would no longer be our law.

This lesson is especially important today. Originalism finds itself under attack. The current Court’s recent reliance on history is controversial. Some think that the Court is using history as a smokescreen—an only seemingly “objective” tool enlisted to deceptively aggrandize its own power and enact its own will. Put another way, modern originalist Justices are facing the exact same accusations leveled against the Warren Court.

Against this backdrop, Justice Kavanaugh’s concurring opinion in the 2024 case of *United States v. Rahimi* enlisted Old Originalism’s normative justifications to defend the current Court’s reliance on history. This might suggest that modern originalists, like Justice Kavanaugh, are mindful of originalism’s contingency—of the reality that social facts could change and originalism could cease to be our law. And, with that in mind, *today’s* originalists might be wise to justify their interpretive approaches and decisions by calling on the normative justifications of *yesterday*. Indeed, Justice Kavanaugh did just that.

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In *Rahimi*,<sup>180</sup> “the Court held that 18 U.S.C. § 922(g)(8), which prohibits persons subject to qualifying domestic violence restraining orders from possessing firearms, did not violate the Second Amendment.”<sup>181</sup> For our purposes, here, the

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178. Baude, *supra* note 1, at 2396.

179. *Id.*

180. *Rahimi v. United States*, 602 U.S. 680, 702 (2024).

181. *Second Amendment—18 U.S.C. § 922(g)(8)—History and Tradition—United States v. Rahimi*, 138 HARV. L. REV. 325, 325 (2024).

Court's ultimate decision is unimportant, but *how* they reached that decision requires our attention.

The Court argued that the federal law in question “fit[] neatly within the tradition” of firearm regulations in the country.<sup>182</sup> That mattered because in the 2022 case of *New York State Rifle & Pistol Ass’n v. Bruen*,<sup>183</sup> the Court articulated a test for whether firearm laws passed constitutional muster: Could the “government . . . justify its regulation by demonstrating that it [was] consistent with the Nation’s historical tradition of firearm regulation?”<sup>184</sup> In *Rahimi*, the Court said the government had met its burden.

Between *Rahimi*, *Bruen*, and *Dobbs v. Jackson Women’s Health Organization*,<sup>185</sup> the Court has increasingly looked at history to help discern the meaning of the Constitution. In this respect, for the originalist Justices on the Court, history and tradition “is not an end in itself.”<sup>186</sup> Instead, history is just one tool—among many—that helps to achieve the Court’s main goal: interpreting the original meaning of the fixed constitutional text.<sup>187</sup>

Using history to understand the constitutional text, however, is not new. The Court’s reputed innovation was, at least in the Second Amendment context, adopting a “historical analogy test.”<sup>188</sup> Before *Bruen*, courts assessed firearms regulations using a “means–end scrutiny approach.”<sup>189</sup> That basically meant courts would ask if the gun regulation at issue “was ‘substantially related to the achievement of an important governmental interest.’”<sup>190</sup> If so, it could survive.

But *Bruen* changed things up. The *Bruen* Court required the government to analogize the challenged regulation to one that was “part of the [country’s] historical tradition” of firearm regulation.<sup>191</sup> The Court opted for the analogical approach, in part, because the prior ways of doing things—using means–end scrutiny—required “judges to ‘make difficult empirical judgments’ about ‘the costs

182. *Rahimi*, 602 U.S. at 698.

183. 597 U.S. 1 (2022).

184. *Id.* at 24.

185. 597 U.S. 215, 241 (2022) (“[G]uided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty . . . the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.”).

186. See *Vidal v. Elster*, 602 U.S. 286, 323 (2024) (Barrett, J., concurring in part).

187. See, e.g., *id.*; *Bruen*, 597 U.S. at 35–36; see also Elias Neibart, *Trading Jabs over Tradition*, HARV. L. REV. BLOG (June 28, 2024), <https://harvardlawreview.org/blog/2024/06/trading-jabs-over-tradition> [<https://perma.cc/U39R-3XH3>] (discussing how originalist Justices are all attempting to discern original meaning through different means); Elias Neibart, *Methodological Convergence in Community Financial Services*, HARV. L. REV. BLOG (May 26, 2024), <https://harvardlawreview.org/blog/2024/05/methodological-convergence-in-community-financial-services> [<https://perma.cc/APX9-CUWD>] (doing the same).

188. See Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 470 (2023).

189. *Id.* at 464–66; *Bruen*, 597 U.S. at 17.

190. *Bruen*, 597 U.S. at 17 (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)); see also Barnett & Solum, *supra* note 188, at 464.

191. Barnett & Solum, *supra* note 188, at 465 (quoting *Bruen*, 597 U.S. at 19).

and benefits of firearms restrictions.”<sup>192</sup> The means-end approach was “judge-empowering” and amounted to an “interest-balancing inquiry” that “ask[ed] whether the statute burden[ed] a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.”<sup>193</sup>

Although the *Bruen* majority forcefully argued that the analogical approach was consistent with precedent,<sup>194</sup> critics viewed it as paradigm-shifting.<sup>195</sup> And it’s been controversial since. Many have criticized the Court’s “history and tradition” approach on the grounds that it actually allows opportunistic jurists to reach the policy outcomes they desire.

These critiques often go something like the following. As Professor Cary Franklin has noted, some opponents of the Court’s recent approach have argued “that history-and-tradition tests are so malleable, it is hard to get the analysis ‘right’ in any objective sort of way. Judges implementing these tests have observed that ‘there are frequently traditions that support each side of a constitutional controversy,’ leaving judges ‘free to cherry-pick from those traditions to justify their preferred results.’”<sup>196</sup>

And, “[e]ven in cases where the historical data is relatively clear, these tests [still] remain highly malleable, because so much depends on the level of generality at which courts choose to define the relevant history and tradition.”<sup>197</sup> For instance, “a court may find that [the Due Process Clause] protects a right to use contraception if it defines the relevant history and tradition at a relatively high level of generality (identifying a regulatory tradition protecting bodily autonomy and decisions regarding parenthood).”<sup>198</sup> But “another court may reach a different conclusion if it defines the relevant history more narrowly (asking if the Constitution was understood in 1868 to protect a fundamental right to use contraception).”<sup>199</sup>

Indeed, as Franklin notes, “[t]here is a growing body of scholarship demonstrating that selecting the appropriate level of generality in a history-and-tradition case is not an objective or value-neutral enterprise.”<sup>200</sup> “Ratcheting levels of

192. *Bruen*, 597 U.S. at 25 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 790–91 (2010) (plurality opinion)).

193. *Id.* at 22 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008)).

194. *See id.* (“As the foregoing shows, *Heller*’s methodology centered on constitutional text and history. Whether it came to defining the character of the right (individual or militia dependent), suggesting the outer limits of the right, or assessing the constitutionality of a particular regulation, *Heller* relied on text and history. It did not invoke any means-end test such as strict or intermediate scrutiny.”).

195. *See, e.g.*, Bazelon, *supra* note 29 (“Known as the ‘history and tradition’ test, the legal standard has been recently adopted by the court’s conservative majority to allow judges to set aside modern developments in the law to restore the precedents of the distant past.”).

196. Franklin, *supra* note 29, at 947–48 (quoting *Duncan v. Bonta*, 19 F.4th 1087, 1123 (9th Cir. 2021) (Berzon, J., concurring)).

197. *Id.* at 949.

198. *Id.*

199. *Id.*

200. *Id.* (footnote omitted) (collecting a variety of sources arguing this point).

generality up and down enables courts in history-and-tradition cases to achieve preferred outcomes while claiming they are simply deferring to the past.”<sup>201</sup>

To summarize, these critiques come in two forms. One alleges that historical inquiries leave jurists with troves of information on either side of a historical question, such that jurists can simply pick the history they “like” and ignore the data points that cut against their policy preferences. That strikes me, at least, as a criticism of using history *generally*. The other critique argues that jurists can opportunistically play with the level of generality in constitutional cases, setting it at whatever level will get them their desired result. This seems more like a more pointed attack against the Court’s new analogical approach.

Let me be clear: I disagree with these critiques. But they are out there. And they should sound *very* familiar. *Jurists playing fast and loose with constitutional interpretation to reach desired policy outcomes*. This is the same sort of attack leveled against the Warren Court by the founders of modern originalism. But, now, they’re being weaponized *against* originalism itself and against a Court that has largely adopted it.

Justice Kavanaugh’s concurrence in *Rahimi* should be read against this backdrop. He wanted to set the record straight by defending the Court’s use of history *writ large* and its analogical reasoning approach to assessing gun regulations.

He began by noting *why* he opted to write a concurrence, despite having joined the Court’s opinion in full. He wrote “to review the proper roles of text, history, and precedent in constitutional interpretation.”<sup>202</sup>

Then, he sought to defend the Court’s use of history more generally. He first noted a “recurring and difficult issue for judges”: “[H]ow to interpret vague constitutional text?”<sup>203</sup> Most of the time “judicial precedent informs or controls the answer” to a particular case.<sup>204</sup> “But absent precedent, there are really only two potential answers to the question of how to determine exceptions to broadly worded constitutional rights: *history* or *policy*.”<sup>205</sup>

For Justice Kavanaugh, “the historical approach” consists of a judge “examin[ing] the laws, practices, and understandings from before and after ratification [to] . . . help [him] . . . discern the meaning of the constitutional text and the principles embodied in that text.”<sup>206</sup> On the other hand, “[t]he policy approach rests on the philosophical or policy dispositions of the individual judge.”<sup>207</sup>

He then made his position clear: “History, not policy, is the proper guide.”<sup>208</sup> Why? Well, he gave several reasons—all of which would make Meese proud.

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201. *Id.*

202. *United States v. Rahimi*, 602 U.S. 680, 714 (2024) (Kavanaugh, J., concurring).

203. *Id.* at 1912.

204. *Id.*

205. *Id.* (emphasis added).

206. *Id.*

207. *Id.*

208. *Id.*

First, using history is, well, historically rooted: “For more than 200 years, this Court has relied on history when construing vague constitutional text in all manner of constitutional disputes.”<sup>209</sup> This argument is reminiscent of Meese’s contention that originalism was the standard way of doing things up until the detour taken by the Warren Court.<sup>210</sup>

Second, “[h]istory is far less *subjective* than policy.”<sup>211</sup>

Third, “reliance on history is more consistent with the properly neutral judicial role than an approach where judges subtly (or not so subtly) impose their own policy views on the American people.”<sup>212</sup>

After listing history’s virtues, Justice Kavanaugh explicitly invoked both Bork and Justice Scalia.

Quoting Bork, Justice Kavanaugh argued that “[t]o be an umpire, the judge ‘must stick close to the text and the history, and their fair implications,’ because there ‘is no principled way’ for a neutral judge ‘to prefer any claimed human value to any other.’”<sup>213</sup>

And quoting Justice Scalia, he observed that “history establishes a ‘criterion that is conceptually quite separate from the preferences of the judge himself.’”<sup>214</sup> Building off another of Justice Scalia’s speeches, Justice Kavanaugh contended that “[w]hen properly applied, history helps ensure that judges do not simply create constitutional meaning ‘out of whole cloth.’”<sup>215</sup>

So, in Justice Kavanaugh’s opening defense of history *writ large*, he invoked familiar values and themes: Neutrality. Restraint. Objectivity. These are the same sorts of normative arguments made famous by Meese, Bork, and Justice Scalia.

Next, Justice Kavanaugh defended the Court’s historical analogical approach to assessing firearm regulations. Recall that the *Bruen* Court swapped out means-end scrutiny for a historical test requiring the government to point to an analogous firearm regulation on point.<sup>216</sup> And recall, as well, that this new form of constitutional adjudication has been controversial.<sup>217</sup>

Justice Kavanaugh described the pre-*Bruen* test as a “balancing approach”; these are common in constitutional law and are “variously known as means-end scrutiny, heightened scrutiny, tiers of scrutiny, rational basis with bite, or strict or intermediate or intermediate-plus or rigorous or skeptical scrutiny.”<sup>218</sup> Echoing points made by the *Bruen* Court,<sup>219</sup> he thought that such balancing approaches

209. *Id.*

210. See *supra* notes 139–143 and accompanying text.

211. *Rahimi*, 602 U.S. at 718 (Kavanaugh, J., concurring) (emphasis added).

212. *Id.*

213. *Id.* (quoting Bork, *supra* note 15, at 8).

214. *Id.* (quoting Scalia, *supra* note 15, at 864.).

215. *Id.* (quoting Scalia, *supra* note 175, at 1183).

216. See Barnett & Solum, *supra* note 188, at 464–66.

217. See *supra* notes 188–201 and accompanying text.

218. *United States v. Rahimi*, 602 U.S. 680, 731 (2024) (Kavanaugh, J., concurring).

219. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 22–25 (2022).

were “policy by another name.”<sup>220</sup> In his eyes, these tests “require[] judges to weigh the benefits against the burdens of a law and to uphold the law as constitutional if, in the judge’s view, the law is sufficiently reasonable or important.”<sup>221</sup> A “major problem . . . is that it requires highly subjective judicial evaluations of how important a law is.”<sup>222</sup>

At bottom, these tests are “subjective”—they “force[] judges to act more like legislators who decide what the law should be, rather than judges. . . .”<sup>223</sup> “That is because the balancing approach requires judges to weigh the benefits of a law against its burdens—a value-laden and political task that is usually reserved for the political branches.”<sup>224</sup> In other words, those sorts of tests license jurists to decide cases in a manner that mirrors the policy-laden jurisprudence of the Warren Court.

Justice Kavanaugh conceded that the “historical [analogical] approach is not perfect.”<sup>225</sup> “[U]sing history to interpret vague text can require ‘nuanced judgments.’”<sup>226</sup> “And [it is] ‘sometimes inconclusive.’”<sup>227</sup> However, “history tends to narrow the range of possible meanings that may be ascribed to vague constitutional language. A history-based methodology supplies direction and imposes a *neutral* and *democratically* infused *constraint* on judicial decisionmaking.”<sup>228</sup> Indeed, with respect to democracy, “the historical approach ‘intrudes less upon the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people.’”<sup>229</sup> For all these reasons, when it comes to promoting neutrality, restraint, objectivity and democracy, the “historical approach is superior to judicial policymaking.”<sup>230</sup>

Justice Gorsuch’s *Rahimi* concurrence echoed similar themes. He also conceded that “[f]aithful adherence to the Constitution’s original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow.”<sup>231</sup> In other words, using history to discern meaning might not be easy. But if we “[a]llow judges to reign unbounded by [historical] materials, or permit them to

220. *Rahimi*, 602 U.S. at 731 (Kavanaugh, J., concurring).

221. *Id.* (citing Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080 (2011)).

222. *Id.* at 732.

223. *Id.*

224. *Id.* at 732–33.

225. *Id.* at 734.

226. *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring)).

227. *Id.* (quoting Scalia, *supra* note 15, at 864).

228. *Id.* (emphases added).

229. *Id.* (quoting *McDonald*, 561 U.S. at 805 (Scalia, J., concurring)).

230. *See id.*

231. *Id.* at 712 (Gorsuch, J., concurring).



extrapolate their own broad new principles from those sources, [then] no one can have any idea how they might rule. (Except the judges themselves.)”<sup>232</sup>

\* \* \*

What do these opinions in *Rahimi* show us? Well, the current Court has been taking history seriously. As we discussed, it is looking to history more and more for evidence of the Constitution’s original meaning. In the same vein, in the Second Amendment context, the Court has rejected balancing tests for a historical analogical approach. The Court’s recent embrace of history, however, has been controversial. It’s been attacked as malleable and subjective. In other words, originalism’s developments have come under fire.

And it’s at precisely this moment that originalist Justices Gorsuch and Kavanaugh have defended originalism, in part, on the very same normative grounds that this Article has discussed. These Justices made clear that looking at history for evidence of meaning or analogizing to historical regulations limits the judge, especially considering the alternative: policy-laden balancing approaches. They argued that originalism’s recent developments further and promote the normative values of restraint, democracy, and neutrality that were so essential to originalism forty years ago.

That’s significant. Normative justifications were given to encourage originalism’s *re*-acceptance in the 1980s, after it had lost its foothold. So, too, today, as the contours of originalism are changing—as the methodology becomes more sophisticated, as doctrine is moved more in-line with the original Constitution, and as originalism comes under attack—normative justifications are being enlisted to defend its desirability. This could mean that originalist Justices are mindful of originalism’s evolution—and that they want to assure society that originalism has

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232. *Id.* Here, I should note that this *type* of argument—that originalism/history promotes these values better than other forms of interpretation—is discussed by Baude. *See* Baude, *supra* note 1, at 2407–08. Baude argues that his positivist account “provides boundaries to the kinds of nonlegal arguments one must make to defend or attack originalism.” *Id.* at 2407. In his view, “once legal arguments run out, one might pick between legal interpretive methods based on whether they will promote national well-being, suppress judicial manipulation (i.e., “constrain judges”), or cohere with principles of popular sovereignty. . . . But originalism’s status as law affects the way such arguments should be made.” *Id.* Originalism’s status as our law means that “normative arguments”—like that it restrains judges—“need not render it superior to all conceivable competitors. It need only be superior to other competitors that are also part of our law.” *Id.*

For Baude, “this reframes and narrows the normative arguments relevant to originalism.” *Id.* That’s because, today, given that originalism is our law, proponents “need not argue that the method is the *only* way, or even the *best* way, to adhere to” particular normative values. *See id.* Originalists “need merely argue that the better ways . . . are outside the bounds of current legal practice.” *Id.* at 2407–08.

Recasting Justice Kavanaugh’s argument in Baude’s terms would look something like this: Judicial policymaking and history are *both* within the bounds of our current legal practice. *Legal* arguments have run out for why we should pick one or the other. But, upon closer examination, history promotes the normative values we care about more than judicial policy making. Justice Kavanaugh doesn’t make this argument explicitly. And I’m not sure if he would agree with it. But that’s how it might look within Baude’s paradigm.

not lost sight of the normative justifications that made it attractive in the first instance.

I argued above that if originalism turns its back on its normative justifications, then society could turn its back on originalism. That's because those normative arguments made originalism attractive and led to its widespread acceptance. Casting them aside might mean that originalism could fall out of favor. And if it falls out of favor—if social facts change—it would no longer be our law.

This deep dive into *Rahimi* suggests that, in some respects, the Justices are themselves cognizant of this reality. As originalism is changing, they're assuring the public and the legal community that the normative justifications that made originalism accepted aren't going anywhere. Originalism will continue to further the values that folks cared about forty years ago. In turn, that might lead to its continued acceptance. And, as we know, if originalism is continually accepted, then it will continually be our law.

This is why understanding the *full* story of our law is important. Positivist accounts only tell you what the law is today. They don't tell you how that law came to be. But if particular values led to the law's acceptance in the first place, then recommitting to and reaffirming those values will likely contribute to the law's continued acceptance. That's a lesson some of the Court's Justices seem to understand. And it's the lesson this Article has endeavored to demonstrate.

#### IV. CONCLUSION

Legal positivism can tell us that originalism is our law. It's just a social fact that when we debate or justify constitutional decisions we do so in an originalist manner. That's *what* our law is.

But the positivist picture is limited. It can't tell us *how*, *why*, and *when* our law came to be. Yet, those sorts of questions are important. The discipline of jurisprudence has long recognized that societies accept rules for various reasons, including normative ones. And once those rules gain widespread acceptance, they, as a matter of social fact, become law.

That's what happened with originalism. In response to the Warren Court's unrestrained and policy-driven approach to deciding constitutional cases, prominent public figures, like Bork, Meese, and Justice Scalia, argued that originalism *should* be accepted. To them, the methodology did good things: It restrained judges, provided neutral rules for adjudication, and promoted democracy.

These normative justifications for originalism made it popular. They led to its widespread acceptance. And once it had been widely accepted, a positivist could say that it was then "our law."

This Article has told this story: A fuller picture of how our law came to be. This story evinces just how essential normative justifications were to originalism's rise and acceptance—just how vital they were to the story of our law.

But current originalists have either ignored or cast aside these normative justifications. This Article shows why that might be a mistake. Originalism is our law today. But things don't have to be this way. Social facts can change. A new

methodology could enter the picture, gain widespread acceptance, and, ultimately, become our law.

So, if that’s the case, originalists need to care about ensuring that originalism is continually embraced and accepted. And if they care about that, they should be mindful of the reasons originalism gained widespread acceptance in the first place. Those normative justifications contributed to originalism’s rise; if they fall away, originalism might fall with them.

In *Rahimi*, Justice Kavanaugh seemed to appreciate originalism’s precariousness. As the methodology finds itself under attack, Justice Kavanaugh took to the pages of the U.S. Reports to make clear that the Court’s current strand of originalism is still furthering and promoting the values that made originalism popular in the first place. He explained that even as the contours of originalism change and even as it gets more sophisticated, it remains faithful to the normative values that led to its acceptance.

If originalists care about their methodology remaining our law, they may want to follow suit.