Popular Originalism? The Tea Party and Constitutional Theory

Rebecca E. Zietlow
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The United States Constitution is currently the subject of a heated political debate. Tea Party activists have invoked the constitution as the foundation of their conservative political philosophy. These activists are engaged in “popular originalism,” using popular constitutionalism, constitutional interpretation outside of the courts, to invoke originalism as constitutional method. The Tea Party movement thus provides an excellent heuristic to explore the relationship between originalism and popular constitutionalism, two prominent trends in constitutional theory. Both originalists and popular constitutionalists study legal history to illuminate constitutional meaning, but the two schools of thought draw diverging lessons from that history. Originalists look to history to determine fixed original meaning, which they hold to be binding on contemporary interpreters regardless of subsequent historical or political developments. Popular constitutionalists study how constitutional interpretation has been influenced by historical developments, and explore the use of constitutional theory to bolster constitutional arguments. This essay explores the convergence and divergence between originalism and popular constitutionalism, and questions whether popular originalism is feasible given originalists’ fidelity to the original text. The essay concludes by asking what popular originalism can teach about us constitutional interpretation and democracy. While modern originalism began as a critique of judicial over-reaching into the political process, it has evolved into a justification for courts to overturn democratic measures. Paradoxically, then, the popular originalism of the Tea Party may achieve its only success, not through the democratic process, but in the federal courts.

* Charles W. Fornoff Professor of Law and Values, University of Toledo College of Law. Copyright Rebecca E. Zietlow. I presented an early version of this essay at the 2010 Law and Society Association. Thanks to the other panel participants, Randy Barnett, Mark Graber, Lawrence Solum, and Lee Strang, for their helpful comments and encouragement. Thanks also to Jack Balkin, Alfred Brophy, Todd Pettys and Lee Strang for comments on earlier drafts.
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I. INTRODUCTION

The United States Constitution is currently the subject of heated political debates. Most notably, Tea Party activists have invoked the constitution as the foundation of their conservative philosophy of limited government. \(^1\) They advocate a return to the constitutional interpretation of the past, calling for limits on congressional power which they believe to be consistent with the original meaning of the Constitution. \(^2\) The Tea Party movement is engaged in “popular originalism,” \(^3\) using popular constitutionalism, constitutional interpretation outside of the courts, \(^4\) to invoke originalism as interpretive method. \(^5\)

The Tea Party movement thus highlights the relationship between popular constitutionalism and originalism, two constitutional methods

\(^1\) See Jeffrey Rosen, Radical Constitutionalism, THE NEW YORK TIMES MAGAZINE (November 28, 2010) at 34.
\(^4\) I use the term “popular constitutionalism” here broadly, to refer to all constitutional advocacy outside of the courts, by individual advocates, political movements, or elected officials. As I have explained elsewhere, there is a significant difference between the popular constitutionalism of “the people themselves,” see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004), and that of democratically elected lawmakers. See Rebecca E. Zietlow, Democratic Constitutionalism and the Affordable Care Act, ___ OH. ST. L. J. ____ (2011). When legislatures engage in popular constitutionalism, the legislative process provides procedural protections, transparency, and accountability that is lacking from political movements. See id. at ___. Nonetheless, lawmakers exercising popular constitutionalism are almost always acting in response to political movements.
\(^5\) See Rosen, supra note ___. (quoting Utah Senator Mike Lee, who promised during the campaign that “As your U.S. senator, I will not vote for a single bill that I can’t justify based on the text and the original understanding of the Constitution, no matter what the court says you can do.”)
that have captivated the attention of constitutional theorists in the past
decade, and provides a valuable heuristic for considering the
relationship between the two constitutional methods. While at first,
the notion of popular originalism may seem paradoxical, the
relationship between originalism and popular constitutionalism is in
fact both complex and nuanced.6 Exploring this relationship reveals
important lessons about constitutional theory and the importance of
context to constitutional development. Originalism has evolved over
the years, from a constitutional method that championed deference to
the political branches, to one that has embraced judicial supremacy.7
Thus, the popular originalism of the Tea Party movement raises the
question of whether a popular constitutionalist can be a faithful
originalist. It may not be possible for an originalist to engage in the
political realm and maintain fidelity to the original meaning of the
Constitution. Paradoxically, then, the principle contribution of
popular originalism to constitutional interpretation may be to provide
a justification for judicial activism.

Like the politics of the United States, constitutional scholarship in
recent years has arguably been polarizing along political lines. A
significant number of scholars have embraced originalism, a method
of constitutional interpretation which seeks to discern the meaning of
the constitution at the time that it was adopted.8 Perhaps because
originalism is resistant to change in constitutional meaning, scholars
who advocate originalism tend to be politically conservative or
libertarian.9 On the other end of the spectrum are scholars who
advocate popular constitutionalism.10 Perhaps because many of the

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6This relationship has been receiving growing attention from constitutional scholars. See Lee Strang,
Originalism as Popular Constitutionalism? Theoretical Possibilities and Practical Differences, __
NOTRE DAME L. REV. ____ (2011). Todd E. Pettys, Popular Constitutionalism and Relaxing the Dead
Hand: Can the people Be Trusted?, 86 WASH. U.L.REV. 313 (2008); Robert Post & Reva Siegel,
Originalism as a Political Practice: The Right’s Living Constitution, 75 FORDHAM. L. REV. 545, 545
8 Some influential works on originalism include RANDY E. BARNETT, RESTORING THE LOST
CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); Lawrence B. Solum, Semantic Originalism,
http://papers.ssrn.com/abstract=1120244; KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION,
9 See Strang, supra note ____ at 34. One notable exception is Jack Balkin, a prominent liberal
constitutional scholar who advocates originalism. See Jack M. Balkin, Framework Originalism and the
10 See, e.g., KRAMER, supra note ____ ; James Gray Pope, Labor’s Constitution of Freedom, 106 YALE L.J.
941 (1997); Reva Siegel, Text in Context: Gender and the Constitution From a Social Movement
Perspective, 150 U. PA. L. REV. 297 (2001); Reva Siegel & Robert Post, Legislative Constitutionalism
and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J.
1943, 2023 (2003); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999);
successful political movements that have engaged in popular constitutionalism have been progressive, scholars who study popular constitutionalism tend to be liberal or progressive. The popular originalism of the conservative Tea Party movement is thus particularly intriguing because of the counter-intuitive nature of its political agenda from the perspective of constitutional theory.\footnote{Indeed, the Northwestern Law Review Colloquy recently published the proceedings of an AALS annual meeting panel about the popular constitutionalism of the Tea Party movement. See Richard Albert, \textit{The Constitutional Politics of the Tea Party Movement}, 105 N.W.U.L. Rev. Colloquy 267, 267-68 (2011); Randy Barnett, \textit{The Tea Party, The Constitution, and the Repeal Amendment}, 105 N.W.U.L. Rev. Colloquy 281 (2011); Goldstein, supra note \underline{1\text{1}}; Sandy Levinson, \textit{If We Have an Imperfect Constitution, Should We Settle for Remarkably Timid Reform?}, 105 N.W. L. Rev. Colloquy 271 (2011); Ilya Somin, \textit{The Tea Party Movement and Popular Constitutionalism}, 105 N.W. U. L. Rev. Colloquy 300, 306 (2011); Saul Cornell, Heller, \textit{New Originalism and Law Office History: “Meet the New Boss, Same as the Old Boss,”} 56 UCLA L. Rev. 1095, 1103 (2009) (“[p]opular constitutionalism was, and remains, closer in spirit to the modern ideas of living constitution, and is therefore ultimately incompatible with all forms of originalism.”). But see Strang, supra note \underline{1\text{2}} at 2 (popular constitutionalism and originalism are theoretically compatible).}

Originalists and popular constitutionalists differ not only along political lines, but also (and more importantly) along jurisprudential lines. Popular constitutionalism is arguably antithetical to originalism as a method of constitutional interpretation.\footnote{See Randy Barnett, \textit{Tea Party}, supra note \underline{1\text{1}} at 283 (2011) (describing his work with Tea Party activists).} While originalists believe that the constitution has a fixed meaning, popular constitutionalism is the purest example of the “living constitutionalism” that originalists decry. However, these two lines of scholarship have something crucially important in common – their interest in legal history. Originalists study legal history to understand the original meaning of the constitution, and popular constitutionalists study history to understand the impact of historical and political events on constitutional development. Both groups of scholars have reason to be interested in the Tea Party movement. In the Tea Party movement, originalists have found an important political ally that has increased the salience of their method of constitutional interpretation.\footnote{See Saul Cornell, Heller, \textit{New Originalism and Law Office History: “Meet the New Boss, Same as the Old Boss,”} 56 UCLA L. Rev. 1095, 1103 (2009) (“[p]opular constitutionalism was, and remains, closer in spirit to the modern ideas of living constitution, and is therefore ultimately incompatible with all forms of originalism.”). But see Strang, supra note \underline{1\text{2}} at 2 (popular constitutionalism and originalism are theoretically compatible).} On the other hand, even if they disagree with the policy goals of the Tea Party movement, popular constitutionalists should see the movement as an important example of that phenomenon in action.

Although originalists and popular constitutionalists share an interest in legal history, they disagree about the import of that history.
Originalists study history to determine what they view as the fixed meaning of constitutional provisions that do not change over time. They maintain that present day interpreters of the constitution are bound by that original meaning. Popular constitutionalists are skeptical of both the notion that meaning is fixed and the view that original meaning is binding. Popular constitutionalists are interested in how constitutional development has been affected by historical and political contexts, and are resistant to the idea that the constitution has definitive meaning devoid of context. Finally, and perhaps most importantly, originalism and popular constitutionalism can lead in very different directions when determining the relationship between democratic participation in constitutional development. The popular originalism of the Tea Party raises the issue of whether it is possible to be faithful to the original meaning of the Constitution while engage in democratic politics. If not, popular originalism could paradoxically lead to reducing the role of democracy in constitutional interpretation.

In the beginning of the Twenty-First Century, then, both politicians and constitutional scholars are engaged in a debate over the role of the federal government in people’s lives – whether the government has a duty to provide protection and some form of economic equality, or whether the government should be more limited by principles of federalism and limits on congressional power. The current debate over the Patient Protection and Affordable Care Act of 2010 (“ACA”), the power of the federal government in general, and the Tea Party movement which opposes them pits fundamental visions of the role of the federal government and the limits of congressional power against each other. To the extent that this debate is resolved, the success or failure of the Tea Party’s popular originalism will likely affect our political and constitutional landscape for years to come.

Part II of this essay provides a brief definition of the Tea Party movement, originalism and popular constitutionalism. While originalism and popular constitutionalism have gained prominence in the academy simultaneously, the two groups of scholars rarely interact. This section suggests that there is considerable overlap between the two schools of thought, their interest in the impact of history on constitutional development. However, Part III acknowledges the extent to which originalism and popular constitutionalism diverge. Popular constitutionalists and originalists

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14 See See Lawrence B. Solum, Semantic Originalism, supra note ___ at 2.
differ fundamentally on their understanding of constitutional fidelity and meaning. This begs the question of whether popular originalism is indeed feasible. Part IV analyzes the relationship between constitutional interpretation and democracy in originalist method and popular constitutionalism. It tentatively predicts that the popular originalism of the Tea Party is most likely to succeed, not through the democratic process, but by the mechanism of judicial review.

II. THE TEA PARTY, ORIGINALISM AND POPULAR CONSTITUTIONALISM

The Tea Party movement is a group of people that protest the size and power of the federal government.\(^{17}\) Tea Party activists called for limits on congressional power that they believed to be consistent with the constitution’s original meaning.\(^{18}\) Tea Party activists thus drew on two current trends in constitutional theory – originalism and popular constitutionalism. This section briefly defines the terms “originalism” and “popular constitutionalism,” and discusses the relationship between them. Leaders of the Tea Party movement have championed originalism and adopted an originalist approach to the constitution as one of their central principles. The current political salience of originalism in the Tea Party movement is a significant example of popular constitutionalism.

What is notable about both originalism and the study of popular constitutionalism is that scholars who engage in both endeavors rely on history to understand constitutional development. This significant convergence of interpretive focus belies the political and methodological divide between the two camps of scholars in determining constitutional meaning. This essay attempts to bridge that divide by considering the overlap between originalism and popular constitutionalism. It begins by defining the terms in order to enhance understanding.

A. The Tea Party Movement

The Tea Party movement began in the spring of 2009, as groups of people met to protest government measures intended to address the economic crisis, including the stimulus and bank bailout

\(^{17}\) See Barnett, *Tea Party*, supra note ___ at 281.

\(^{18}\) It is debatable whether the Tea Partier’s interpretation is correct. Compare Goldstein, supra note ___ at 290 (referring to the Tea Party constitutional theory as “constitutional mythology”) with Ilya Somin, supra note ___ at 306 (defending the level of education, knowledge and sophistication of participants in the Tea Party movement).
measures that Congress had recently enacted. The first Tea Party demonstrations were held on April 15 of that year, protesting federal taxes and the size of the federal government. The movement gained momentum that summer, as Tea Party activists attended town hall meetings of congressional representatives to protest the health reform bill then pending before Congress. Tea Partiers continued to stage protests throughout congressional debates over the Act. After Congress adopted the health care reform measure, known as the ACA, activists adopted a two pronged protest approach. They challenged the constitutionality of the Act in the federal courts, but they also turned to electoral politics to support candidates that opposed the ACA, federal taxes and federal spending in general. Tea Party supported candidates scored significant victories in the 2010 congressional elections. Members of Congress elected with the support of the Tea Partiers adamantly oppose federal spending measures and taxes, and played a leading role in the debt ceiling crisis in the summer of 2011.

The degree to which the Tea Party movement is a grass roots movement is debatable. Tea Party organizers have received extensive financial support from prominent conservative think tanks and financiers. Moreover, signs at Tea Party rallies such as “Keep your government hands off my Medicare” reflect confusion among some Tea Party activists about the role that government actually plays in people’s lives. Nonetheless, it is indisputable that the Tea Party

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20 See Barnett, Tea Party, supra note ___ at 281.
21 Id. at 284.
22 Id.
25 The extent to which the success of the Tea Party movement reflects anxiety about racial change, ignited by the election of the first Black president in the history of the United States, is also debatable. See http://www.huffingtonpost.com/2011/03/08/race-health-care-reform_n_832783.html. But see Barnett, Tea Party, supra note ___ at 281 (dismissing charges that Tea Partiers are motivated by racial prejudice).
27 See http://www.guardian.co.uk/commentisfree/cifamerica/2010/oct/25/tea-party-koch-brothers calling teh tea Party movement “one of the biggest exercises in false consciousness the world has ever seen – and the biggest Astroturf operation in history.”); http://www.theatlantic.com/politics/archive/2009/04/the-tea-party-movement-who’s-in-charge/13041/ (detailing Tea Party ties with larger conservative organizations). But see Barnett, Tea Party, supra note ___ at 281 (arguing that reports questioning the grass roots nature of the Tea Party movement are “essentially false.”) According to a New York Times/CBS News poll in April 2010, 18% of those polled identified themselves as Tea Party supporters. However, only 4% had attended a Tea Party
movement reflects a certain amount of popular distrust of government, and anxiety about change, especially increases in the size and power of the federal government.

The constitutional vision of the Tea Party focuses on limiting the power of the federal government by reducing spending and opposing taxes that support federal programs. Their primary target has been the ACA, which, they argue, unduly expands the power of the federal government and infringes on individual liberty. Some Tea Partiers have called for changes to the existing constitution. They support a constitutional amendment that would authorize two thirds of states to vote to repeal congressional acts. Tea Party activists have also proposed repealing existing constitutional amendments, including the Sixteenth Amendment, which authorizes the federal income tax, the Seventeenth Amendment, which provides for the direct election of United States Senators, and to repeal or amend the citizenship clause of the Fourteenth Amendment, which guarantees birthright citizenship for people born in the United States.

Tea Party activists advocate an originalist interpretation of the Constitution that would narrow the power of the federal government, and some have even called for a constitutional amendment that would require judges interpreting the constitution to apply originalist methods. As Tea Party favorite Sarah Palin explained, instead of a “fundamental transformation of America,” they want to “go back to what our Founders and our founding documents meant.” They also

meeting or donated to the movement. See Kate Zernike, Polls Show Negative View of Tea Party on the Rise, http://www.nytimes.com/2011/08/05/us/politics/05teaparty.html. On election day in November, 2010, polls showed the approval rate had risen to 40%. By August, 2011, that number had dropped to 20% of the American public. Id. See Barnett, Tea Party, supra note ___ at 282 (“The Tea Party movement is about two big subjects: first, the undeniable recent surge in national government spending and debt, and second, what the Tea Partiers perceive as a federal government that has greatly exceeded its constitutional powers.”) See Id. at 284. See Foley, supra note ___ at 752. See Barnett, Tea Party, supra note ___ at 283-285 (describing the efforts of Tea Party activists to enact a repeal amendment). See id at 283. See id at 284.

http://www.nytimes.com/2011/08/05/us/politics/05teaparty.html. On election day in November, 2010, polls showed the approval rate had risen to 40%. By August, 2011, that number had dropped to 20% of the American public. Id. See Barnett, Tea Party, supra note ___ at 282 (“The Tea Party movement is about two big subjects: first, the undeniable recent surge in national government spending and debt, and second, what the Tea Partiers perceive as a federal government that has greatly exceeded its constitutional powers.”) See Id. at 284. See Foley, supra note ___ at 752. See Barnett, Tea Party, supra note ___ at 283-285 (describing the efforts of Tea Party activists to enact a repeal amendment).
share a general concern about the size and power of government infringing upon individual liberty.\textsuperscript{37} Members of the Tea Party movement claim that they are champions of individual liberty in the face of a tyrannical federal government.\textsuperscript{38} This dispute over the role of the federal government and its relationship to individual rights could influence the constitutional interpretation of lawmakers and judges in coming years.

B. Originalism

In the past thirty years, originalism has emerged as the of the principle theories of constitutional interpretation.\textsuperscript{39} The Supreme Court routinely surveys original sources when interpreting the Constitution.\textsuperscript{40} Virtually all constitutional scholars agree that the original meaning of the constitution, to the extent that it can be discerned, is relevant to its meaning when applied to contemporary circumstances. What differentiates originalists is their view that the meaning of the constitution is limited to its meaning at the time that it was adopted. Subsequent events, including political movements and other historical developments, are irrelevant to the Constitution’s meaning today.\textsuperscript{41}

Early modern originalists looked to the intent of the Framers of the Constitution to determine what the constitution means.\textsuperscript{42} This is the only context that matters, and it occurs only at the time that the constitution and its amendments are adopted. The main critique of original intent originalism is that it is difficult to determine the intent of even one individual, and even more so the intent of a group of individuals.\textsuperscript{43} It is not clear whose intent should matter, that of those who wrote the constitution or those who voted to ratify it.\textsuperscript{44} Moreover, the proposal of the constitutional convention arguably did not acquire meaning until the ratifying conventions or from the people

\textsuperscript{38} See Barnett, Tea Party, supra note ___ at 282. Their opponents argue that the Tea Party is a threat to individual rights because of their extremist rhetoric, and because they dismiss their opponents as illegitimate and un-American. See Goldstein, supra note ___ at 298.
\textsuperscript{39} See Solum, Semantic Originalism at ___; BARNETT, RESTORING at 91.
\textsuperscript{41} See Solum, supra note ___ at 22 (arguing that court precedents are “non-originalist” when they are the “product of popular social movements.”)
\textsuperscript{42} Solum, Semantic Originalism at 14.
\textsuperscript{43} See Paul Brest, The Misconceived Quest for Original Understanding, 1980 B.U.L.REV. 204.
\textsuperscript{44} Solum at 40.
themselves.\textsuperscript{45} The problem of “collective intent” is thus a major obstacle to original intent originalism.

Responding to these concerns and others,\textsuperscript{46} a new strand of originalism has developed that focuses, not on the intent of the Framers, but on the original meaning of the provisions of the Constitution at the time that they were adopted.\textsuperscript{47} This branch of originalism, known as “original public meaning” originalism, looks to extraneous evidence such as dictionaries and newspapers to determine the generally accepted meaning of the words used in constitutional text at the time that it was adopted.\textsuperscript{48}

Constitutional meaning is resistant to change in originalism.\textsuperscript{49} Some originalists argue that because the Constitution is a written text that articulates the foundational principles of our government, neither judges nor political actors can change the meaning of the constitution short of the Article V amendment process.\textsuperscript{50} Others claim that because the constitution owes its legitimacy to the consent of the governed during the ratification process, any changes to the constitution are illegitimate unless they undergo the same ratification process.\textsuperscript{51} Originalists agree that any law or judicial opinion that deviates from the original meaning of the constitution is illegitimate because it is inconsistent with the meaning of the document.\textsuperscript{52} Thus, originalism is said to have the value of providing certainty and stability to constitutional interpretation.\textsuperscript{53} Of course, stability depends on interpreters adhering to the original meaning instead of the interpreters’ policy or political considerations.\textsuperscript{54}

\textsuperscript{45} Id.
\textsuperscript{46} See Whittington, New Originalism, supra note \___ at 14-15.
\textsuperscript{47} Prominent “original public meaning” originalists include Keith Whittington, Randy Barnett, and Lawrence Solum. See, e.g., Keith Whittington, Constitutional Interpretation, Barnett, Restoring, supra note \___; Solum, supra n\oe \_.
\textsuperscript{48} See Barnett, Restoring, supra note \___ at 92; Solum, Semantic Originalism at 4.
\textsuperscript{49} See Barnett, Restoring, supra note \___ at 96 (“[T]he fact that the Constitution was put in writing is what mandates that its meaning must remain the same until it is properly changed – or candidly rejected.”)
\textsuperscript{50} See Barnett, Restoring, supra note \___ at 106 (“adopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text and thereby to undermine the value of writtenness itself.”)
\textsuperscript{52} Id. at 112.
\textsuperscript{53} Id. at 117. See also Richard S. Kay, Original Intention and Public Meaning in Constitutional Interpretation, 103 NW. L. Rev. 703 (2009).
\textsuperscript{54} A more fundamental concern about originalism is whether the original intent or original public meaning is actually discernible. This essay returns to that concern in the following section.
Originalists differ on the specifics of their interpretive method, and a full discussion of originalism is beyond the scope of this article. Nonetheless, two aspects of originalism which unite the various camps of originalist scholars are notable for the purposes of my discussion. The first is what Larry Solum calls the “fixation thesis.” Originalists believe that each provision of the constitution has a fixed meaning that dates back to the time of its adoption. The second theme that unites originalists is the belief that the original intent or meaning is binding on those interpreting the provisions. Thus, originalism is conservative, in the classic sense of conservatism—it is a method that requires looking back in time to determine meaning. In sum, originalists believe that the context that determines the meaning of the Constitution is the context of the adoption of the constitutional provisions, not the context in which they are applied.

While adhering to the fixation thesis, some original public meaning originalists acknowledge that parts of the constitution are sufficiently vague so that they “do not provide enough guidance to identify a single rule of law to apply to a particular case at hand.” These scholars “embrace the distinction between ‘constitutional interpretation’ understood as the enterprise of discerning the semantic content of the constitution and ‘constitutional construction,’ which we might tentatively define as the activity of further specifying constitutional rules when the original public meaning of the text is vague.” The context at the time of interpretation is relevant in the process of construction because construction takes place when the constitution is applied to particular contextual circumstances. Nonetheless, an originalist always tries to adhere as closely as possible to the original meaning of the constitution when interpreting it.

C. Popular Constitutionalism

55 See Solum, Semantic Originalism at 2.
56 Id. See Barnett, Restoring, supra note ___ at 89 (arguing that “originalism is warranted because it is the best method to preserve or ‘lock in’ a constitution that is initially legitimate because of what it says.”)
57 Id. at 6.
58 Barnett, Restoring, supra note ___ at 121. Other originalists reject the view that any provision is sufficiently vague to require constitution. See John O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction, 103 NW. L. Rev. 751, 788 (2009).
59 Solum at 18.
60 Barnett, Misconceived, supra note ___ at 631.
61 See Barnett, Restoring at 125 (arguing that the text provides a “frame” “that excludes many potential constructions.”)
Recent years have also been marked by a surge of interest in popular constitutionalism.\(^{62}\) Popular constitutionalism is, broadly viewed, any form of constitutional interpretation that occurs outside of the courts.\(^{63}\) The people themselves may engage in popular constitutionalism, as when political movements invoke the constitution as a basis for their political arguments.\(^{64}\) When these political movement influence lawmakers and judges they can have a lasting impact on constitutional interpretation. Scholars study popular constitutionalism to understand the historical dynamics surrounding constitutional development, and to understand the role that the people themselves have played in that development, both inside and outside of the Court.\(^{65}\)

Popular constitutionalism occurs in juxtaposition to constitutional interpretation by the courts. Popular constitutionalists question the role that judicial review plays in constitutional interpretation.\(^{66}\) Drawing on Robert Cover’s classic *Nomos and Narrative*,\(^ {67}\) some popular constitutionalists point out that judicial review has the effect of inhibiting debate over constitutional meaning.\(^ {68}\) However, popular constitutionalists differ over the extent to which they oppose judicial review.\(^ {69}\) Few seek to displace judicial review entirely.\(^ {70}\) Most popular constitutionalists simply challenge the hegemony of judicial review in constitutional interpretation and call on courts to adopt a deferential attitude towards legislative measures which enforce constitutional values.\(^ {71}\) Others point out that

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\(^{62}\) See Kramer, supra note \_\_; Siegel & Post, supra note \_\_; Pope, supra note \_\_; ZIETLOW, SUPRA NOTE \_\_.


\(^{66}\) See, e.g., Kramer, supra note \_\_\_ at 229; TUSHNET, SUPRA NOTE \_\_\_ at 154.


\(^{68}\) For example, Mark Tushnet argues that the Court’s rejections of claims to economic rights by poor people stifled political efforts to convince lawmakers to adopt legislation enforcing those rights. See TUSHNET, SUPRA NOTE \_\_\_ at 168. See also Kramer, Popular Constitutionalism circa 2004 at 975.

\(^{69}\) See David E. Pozen, Judicial Elections as Popular Constitutionalism, 110 Colum. L. Rev. 2047, 2062 (2010).

\(^{70}\) But see Tushnet, supra note \_\_\_ at 154.

\(^{71}\) See, e.g., Reva Siegel & Robert Post, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L. J. 1943, 2023 (2003); Reva
popular movements from the women’s rights to the gun rights movement have influenced the Court’s constitutional interpretation.  

The history of our country is replete with examples of popular constitutionalism influencing constitutional development in the courts and the political branches. One of the most important examples is the movement of antislavery constitutionalists in the early Nineteenth Century. Prior to the Civil War, antislavery constitutionalists invoked principles of freedom and equality in the original constitution to elaborate the meaning of freedom and challenge the constitutionality of slavery. Their vision of freedom and equality had a profound impact on the Reconstruction Congress. The Reconstruction ideology also influenced Twentieth Century activists who engaged in popular constitutionalism. Drawing on the Free Labor strand of abolitionism, labor activists in the late Nineteenth and early Twentieth Century argued that workers had a constitutional right to organize into unions based on the First and Thirteenth Amendments. Their understanding of these constitutional provisions formed the core of the ideology behind a social movement that was eventually successful in urging Congress to adopt legislation establishing this right. Similarly, civil rights advocates in the 1940s through 1960s argued that they had a constitutional right to equal protection and equal citizenship. This strong constitutional and moral vision, also drawing on the Reconstruction tradition, was crucial to the success of that movement.

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72 See Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA, 2005-06 Brennan Center Symposium Lecture, 94 CAL. L. REV. 1323 (2006) (describing the influence of the feminist movement on the Court’s interpretation of the Equal Protection Clause of the Fourteenth Amendment); Reva B. Siegel, Dead or Alive: Originalism as Popular Constitutionalism in Heller, 122 HARV. L. REV. 191, 192 (2008) (arguing that the Court’s interpretation of the Second Amendment has been influenced by the twentieth century gun rights movement); William Eskridge.

73 For a discussion of popular constitutionalism influencing the courts, see, e.g., Siegel, De Facto ERA, supra note 72; BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS. For a discussion of popular constitutional influencing the political branches, see, e.g., ZIETLOW, ENFORCING EQUALITY, supra note 77.


77 See ZIETLOW, ENFORCING EQUALITY at 99-104.

78 Id. at ____.
Of course, not all popular constitutionalists are liberal or progressive. During the antebellum Era, John Calhoun and his followers presented an alternative vision of the Constitution, in which states had the authority to trump federal antislavery laws. Following in Calhoun’s footsteps, in the years following the Court’s ruling in Brown v. Board of Education, southern segregationists engaged in “massive resistance” to the Court’s and advocated the nullification of federal law. The Tea Party movement, the most salient example of popular constitutionalism today, advocates a restrictive reading of congressional power and de-emphasizes the Reconstruction Era expansion of that power.

As the Tea Party rallies illustrate, public debates over constitutional values are often disruptive and challenging. However, because these debates are conducted openly and transparently, the results tend to be more widely accepted than constitutional change effected by courts alone. Of course, the Court often plays an important role in ratifying this change. Thus, the New Deal Era was characterized by a debate in both the political branches and the courts over whether the government had a duty to provide a safety net for the people, and whether freedom of contract or the freedom to organize into unions was a more important constitutional value. Congress established a federal commitment to the economic and social welfare of the people of the United States, and the Court upheld legislation fostering that commitment. The New Deal was followed by a forty year period of consensus that the federal government had a duty to provide a safety net and further the economic security of the people of this country.

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79 See William Freehling, Preclude to Civil War: The Nullification Crisis in South Carolina. Thanks to Al Brophy for pointing this out to me.
81 See Rosen, supra note ___ at 34.
82 See Siegel, de Facto ERA, supra note ___ at 1329 (“Typically, it is only through sustained conflict that alternative understandings are honed into a form that officials can enforce and that the public will recognize as the Constitution.”)
83 See Balkin, Framework Originalism at 562.
84 See Zietlow, Enforcing Equality at 76-77.
85 See Bruce Ackerman, We the People Transformations.
86 Zietlow, Enforcing Equality at 96. Notably, President Lyndon Johnson believed that convincing Congress to enact War on Poverty legislation would be easier than convincing Congress to enact civil rights legislation. Arguably, this consensus unraveled during the presidency of Ronald Reagan, illustrated most dramatically by Congress dismantling the New Deal program of Aid to Families with Dependent Children in the 1996 Personal Responsibility Act during the Democratic presidency of Bill Clinton.
Similarly, the 1960s saw a national debate inside and outside the courts over whether constitutional protections for equality included freedom from racial segregation and discrimination based on other immutable characteristics. The debate was resolved in favor of a broad view of equality rights, and a widespread consensus remains in this country that race discrimination, and discrimination based on other immutable characteristics, is immoral and should be illegal. In both eras, popular constitutionalism contributed to the public acceptance of constitutional values which have expanded the rights of individuals in our nation. Similarly, resolving the current debate over the size and role of the federal government, in which the Tea Party is playing a major role, could well impact our government structure for years to come.

Popular constitutionalists argue that it is normatively desirable for people other than judges to engage in constitutional interpretation. They claim that the involvement of popular movements and elected officials in constitutional development is not only important historically, but that it also has a healthy impact on civic society. When people engage in popular constitutionalism, they invoke the essential principles of our constitutional government and strengthen those principles. Political movements, including the Tea Party movement, cannot change constitutional meaning simply through advocacy. Popular constitutionalism influences constitutional meaning when government officials, including courts and the political branches, adopt the interpretation advocated by those engaging in popular constitutionalism.

By making this observation, I do not intend to state that race discrimination no longer exists in our country. There is ample evidence that discrimination based on race and other immutable characteristics still plagues our country. However, while there is disagreement over the extent to which race discrimination still exists, and if so, how best to eradicate it, it is highly unusual for a public figure to claim that race discrimination is a good thing. Kentucky senatorial candidate Rand Paul recently revealed his opposition to Title VII of the Civil Rights Act of 1964, which prohibits race discrimination in employment. Paul clarified that he was not in favor of race discrimination, he just thought the federal government should not be able to tell private businesses how to conduct their business. The critical outcry which responded to Paul’s comments only serves to illustrate my point that we have a societal consensus that race discrimination is wrong. See also Robert Post article on courts deferring to 1964 Civil Rights Act.


See Siegel, De Facto at 1329.
There are strong normative arguments in favor of popular constitutionalism. Faith in the Constitution is central to our nation’s political identity. Popular constitutionalism is healthy for civic society because the Constitution is the foundation of our government. “Although they may disagree sharply about what the Constitution demands, Americans today are convinced that a commitment to constitutionalism in general, and to the core values of the United States Constitution in particular, are central to what it means to be a full-fledged member of the American community.” Our civic values are based in the Constitution, and our views of the Constitution are often based on what we believe our civic society should be. In a very real sense, one’s views of the Constitution reflect what each individual believes to be his or her most fundamental values, such as freedom, equality, and the need for security. Because people are bound to differ in their beliefs about what the Constitution means, when people engage in popular constitutionalism, they engage in a debate over fundamental values. This debate is both healthy for civic society, and helpful to determining the content of those values.

III. POPULAR ORIGINALISM – AN OXYMORON?

What is the relationship between popular constitutionalism and originalism? At first glance, the two don’t seem to have much in common. Originalism is a method of constitutional interpretation that focuses on what the constitution and its amendments meant at the time that they were adopted. Originalists believe that meaning to be both fixed and binding. Popular constitutionalism is a process of constitutional interpretation, interpretation that occurs outside of the courts. Unlike originalism, popular constitutionalism allows for the possibility of constitutional meaning changing over time because it involves “elaborating constitutional meaning in the political realm.” The two concepts have a common theme. Both look to historical

91 Pettys, supra note ____ at 347.
92 See ZIETLOW, ENFORCING EQUALITY at ____; Balkin, supra at 566; Post & Siegel, Roe Rage at 374.
93 Other scholars have treated originalism and popular constitutionalism as diametrically opposed. See Todd E. Pettys, Popular Constitutionalism and Relaxing the Dead Hand: Can the people Be Trusted?, 86 WASH. U.L.REV. 313 (2008).
95 See Lawrence B. Solum, Semantic Originalism at 2.
96 KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 1.
context to determine constitutional meaning. However, popular constitutionalism and originalism diverge in their application of history to determine meaning, and more fundamentally, over the question whether a constitutional provision has a single discernible meaning.

One issue that does not differentiate originalism and popular constitutionalism is the extent to which either method is involved with politics. Like popular constitutionalism, originalism has influenced the political realm. At the same time that originalism developed as a juriprudential movement, it also gained prominence in conservative political circles. Indeed originalism has played an important political role as the foundation of a conservative jurisprudential movement.97 The strength of originalism as a rallying force for conservative political actors in the past thirty years, most recently championed by the Tea Party movement, suggests that the overlap between originalism and popular constitutionalism is quite significant in practice.98 From this perspective, the popular originalism of the Tea Party movement is not an oxymoron. However, the challenge for those who engage in popular originalism is whether it is possible to adhere to the original meaning despite political pressures to the contrary. This section concludes by considering whether, from this perspective, popular originalism is indeed feasible.

97 Siegel & Post, Originalism, supra note ___ at 549. See infra, notes ___ and accompanying text.
A. History, Fidelity and Meaning

Arguably, popular constitutionalism should be irrelevant to an originalist. Popular constitutionalists determine meaning in contemporary culture, while originalists determine meaning by looking back to the time of the framing or adoption of the constitutional provision that is being interpreted. Both originalism and popular constitutionalism rely on legal history to determine constitutional meaning, but the two diverge in the means that they use to determine that meaning. To an originalist, constitutional meaning is fixed and binding on subsequent generations.

To popular constitutionalists, constitutional meaning depends on the context at the time of the constitutional interpretation. Popular constitutionalists interpret the constitution in political contexts, and their interpretation is thus influenced by contemporary political events. The current political salience of originalism illustrates the fact that popular constitutionalism can co-exist. However, some basic divergences remain, rooted in fundamental principles of meaning.

The first issue that divides the two camps is the question of whether provisions of the constitution have a single fixed meaning. Originalists believe that a single fixed meaning exists and is discernible by examining the text and the intent of the framers or the original public meaning of the text.\(^9\) By contrast, popular constitutionalism accepts the possibility that the text has multiple meanings, and that the meaning of the text may change through the process of construction by the political branches. To that extent, popular constitutionalism is premised on the existence of a living constitution, a concept that is antithetical to most originalists. To be sure, originalists’ criticism of living constitutionalism is aimed primarily at judges, not at political actors.\(^1\) Nonetheless, the fixation thesis is a central tenet of originalism, and popular constitutionalism is arguably diametrically opposed to that thesis.

A more fundamental divergence between popular constitutionalism and originalism is the question of whether the constitution has a single meaning that is discernible regardless of who

\(^9\) See, e.g., Solum, Semantic Originalism at 4; BARNETT, RESTORING at 89.
\(^1\) One interesting exception to this general rule is their ongoing debate over whether and when courts should defer to non-originalist precedent. See Lee Strang, An Originalist Theory of Precedent, 2010 B.Y.U. L. REV. 1729.
is interpreting the provision. Originalists agree that there is a single discernible meaning to most, if not all, constitutional provisions. Popular constitutionalism calls into question the very idea of whether it is possible to discern a single meaning of any textual provision. The process of construction entails the creation of meaning during the application of a provision to the factual context. While some originalists agree that context is relevant to the application of some constitutional provisions, popular constitutionalists believe that meaning does not exist free of context. Thus, this divergence arguably causes an even more fundamental division between originalism and popular constitutionalism.

A. Politics and Law in Constitutional Interpretation

The key issue in determining whether popular originalism is an oxymoron is the question of whether political considerations may be allowed to affect originalist constitutional interpretation. When political actors engage in constitutional construction, political considerations are likely to affect their application of the constitution. Determining whether popular originalism is an oxymoron turns on whether it is possible to interpret the constitution in a political context and still adhere to the constitution’s original meaning.

Some originalists acknowledge that contemporary context is relevant to constitutional interpretation when interpreters engage in constitutional construction. Constitutional construction occurs when it is necessary to determine the meaning of constitutional provisions that are vague, that is, that it is difficult to discern their meaning. Though not all originalists agree that constitutional construction is necessary, many recognize the fact that construction is necessary when original meaning is not easily discernable from the constitutional text. Arguably, popular constitutionalism could provide a process for determining the meaning of vague constitutional

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101 Compare Barnett, Misconception (acknowledging that some parts of the constitution are either ambiguous or vague) with McGinnis & Rappaport (arguing that originalist methods can discern the meaning of all constitutional provisions).
102 See Whittington, Constitutional Construction at 1.
103 See Whittington, Constitutional Construction at 6.
104 See Barnett, Restoring, supra note ___ at 100 (“Constitutional construction fills the inevitable gaps created by the vagueness of these words when applied to particular circumstances.”)
106 See Barnett, Misconceived at 631, Solum, Semantic at 18.
provisions.\textsuperscript{107} Originalists disagree about whether actors other than courts can ever play a role in determining constitutional meaning.\textsuperscript{108} To the extent that an originalist is willing to acknowledge that actors other than courts can construct the constitution, he or she may be open to popular constitutionalism.\textsuperscript{109}

To maintain fidelity to the original text, it seems that originalists would be particularly likely to condemn the politicization of constitutional interpretation. Early modern originalists such as Edwin Meese and Robert Bork advocated deference to the political branches, arguably leaving space for popular constitutionalism.\textsuperscript{110} Paradoxically, given the early originalists’ critique of living constitutionalism of the Warren Court, their deference to political branches leaves more space for political branches to interpret the constitution and thus politicize constitutional interpretation outside of the courts.\textsuperscript{111} More recently, however, originalists have downplayed the extent to which they advocate judicial restraint.\textsuperscript{112} According to Keith Whittington, “The primary virtue claimed by the “new” originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.”\textsuperscript{113} Contemporary originalists therefore are likely to be more suspicious of popular constitutionalism, and more likely to reject legislative measures that are inconsistent with the original meaning of the constitution and its amendments.\textsuperscript{114} To put it another way, “new” originalists may believe that popular constitutionalism is invalid unless those who engage in popular constitutionalism are themselves originalists.

The Tea Party movement has called on lawmakers to engage in originalist interpretations on the Constitution.\textsuperscript{115} Despite any stated intentions, though, it is not at all clear that politicians could make decisions based solely on the original meaning of the constitution and still represent the interests of their political constituents. Political

\begin{footnotes}
\textsuperscript{107} See Jack Balkin, Framework at 550 (arguing that the Constitution is a “framework for government that sets politics in motion and must be filled out over time through constitutional construction.”)
\textsuperscript{108} See Strang, supra note ___ at 20.
\textsuperscript{109} See Strang, supra note ___ at 20.
\textsuperscript{110} See Meese, supra note ___; Bork, supra note ___.
\textsuperscript{111} See Strang, supra note ___ at 16.
\textsuperscript{112} Whittington, supra note ___ at 111.
\textsuperscript{113} Id. at 116.
\textsuperscript{114} See id. at 112 (pointing out that some “new” originalists such advocate judicial activism.;); see also Larry D. Kramer, Popular Constitutionalism, Circa 2004, 92 Cal. L. Rev. 959, 960 (2004) (pointing out that interest in popular constitutionalism has been fueled by the activism of the Rehnquist Court).
\textsuperscript{115} See Barnett, Tea Party, supra note ___ at 283.
\end{footnotes}
officials are accountable to their electorate and are therefore institutionally bound to take political considerations into account when interpreting the constitution in a way that federal courts simply are not. This is not to say that courts are completely isolated from political pressures. Recent empirical work shows that courts are responsive to political trends. Nonetheless, it is undeniable that legislatures are institutionally responsive to the popular will, while courts are institutionally designed to limit the impact of that will on their rulings.

Mariah Zeisberg has suggested that constitutional fidelity is reconcilable with popular constitutionalism if one distinguishes between political office holders and individual citizens interpreting the Constitution. Members of the political branches are arguably bound by fidelity to the constitution because of their institutional role as lawmakers and because they swear an oath to the constitution. Citizens, Zeisberg argues, have more flexibility to determine whether or not they agree with the authoritative interpretation of the Constitution. Thus, Zeisberg defends Frederick Douglass’ claim that the Constitution prohibited slavery even though he may have believed the opposite to be true. It would be possible to view Douglass as an opportunist who was not faithful to the Constitution. Zeisberg argues that Douglass’ status as a citizen (and not a public official) justified his position. Zeisberg points out that “The office of citizen is privileged in consent theory” because the Constitution “owes its authority to the consent of the people.” Even if judges and legislators owed deference to the public understanding of the text when ratified, citizens might still be justified in deferring to the “moral appeal of the interpretive position itself.” The work of the public would be to generate interpretations of the constitution that are more just.

If Zeisberg is correct, then, popular constitutionalism plays an important role in refining and improving our understanding of the

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118 Id. at 36.
119 Id. at 36.
120 Id. at 35.
121 Id. at 35-36.
122 Id. at 36.
123 Id. at 36.
constitution. The people themselves would not be bound by originalism; instead, they would have the latitude to interpret the Constitution consistently with their values and morality. Nonetheless, in Zeissberg’s paradigm, elected officials could still be bound by fidelity to the original constitution and arguably limited in their authority to take political considerations into account in constitutional interpretation. Their fidelity to the constitution might compel them to take positions that differ from the desires of their political constituents. Thus, elected officials must weigh their responsibilities as democratic representatives of the people.

Jack Balkin’s theory of “framework originalism” also seeks to reconcile originalism with the type of evolving constitutional meaning that is inherent in popular constitutionalism. Balkin acknowledges that the Constitution contains some provisions that have a determinate meaning but points out that much of the Constitution describes standards and principles that are deliberately vague. According to Balkin, the framers of the Constitution and its amendments intended those provisions to be vague so that the political branches could interpret them capacious over time. Thus, the constitution is “primarily a framework for governments, a skeleton on which much will later be built.” Balkin’s originalism preserves the framework but leaves open the possibility of constitutional constructions that implement the constitution consistent with its original meaning.

What Balkin calls “living constitutionalism” is part of his theory of originalism because construction is necessary when the terms of the Constitution are vague or silent on a question and “when we need to create laws or build institutions to fulfill constitutional purpose.” Both originalism and popular constitutionalism thus play a role in Balkin’s theory of constitutional development. Balkin may indeed be correct that the original constitution allows ample room for constitutional construction. However, he does not explain how politicians engaging in that construction can adhere to original meaning given their obligations as representatives of their constituents.

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124 Balkin, Framework Originalism at 553.
125 Id. at 554.
126 Id. at 557.
127 Id.
128 Id. at 560.
While the politicization of constitutional interpretation that is inherent in popular constitutionalism may at first seem antithetical to originalism, it would be inaccurate to distinguish originalism from popular constitutionalism on the grounds that one method is less political than another. Originalism has always been more than merely a jurisprudential movement. Early originalists criticized not just the methodology, but also the results, of the Warren Court’s “activist” rulings. Indeed, former Attorney General Edwin Meese acknowledged that he intended his originalist agenda to “check the ‘drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court.’” Since the early 1980s, the connections between originalism and a conservative political agenda have been widely recognized. “Thus when President Reagan praised his judicial nominees because they embraced a ‘judicial philosophy of restraint’ . . . everyone immediately understood that he was appealing to the high ground of neutrality in order to justify the appointment of judges who were ‘committed to a narrowly ideological (conservative) agenda.’” The current salience of the Tea Party movement is arguably the culmination of the political side of the originalist movement.

An elected official with ties to the Tea Party movement may well be torn between his fidelity to the original constitution and meeting the needs of his constituents. Of course, it is not clear how much Tea Partiers care about fidelity to the original constitution, or whether they simply use the originalist mantra to obtain substantive political goals. The answer to this question may be essential to an originalist, but it might not matter at all to a popular constitutionalist. Popular constitutionalists simply don’t care about motivation. What matters is the efficacy of the argument, and the extent to which it succeeds in changing constitutional law. Popular constitutionalism allows ample space for the articulation of both politics and law. The challenge of popular originalism is determining how much space adherence to the original meaning of the constitution allows for achieving political goals.

131 Post & Siegel, Originalism, supra note ___ at 555.
132 See Siegel, de Facto at 1348.
IV. CONSTITUTIONAL INTERPRETATION AND DEMOCRACY

The Tea Party movement builds on an originalist movement that has been growing, both within the academy and in politics, since the late 1970s. Prominent politicians such as Attorney General Edward Meese claimed to be originalists, as did judges appointed by presidents who also profess adherence to originalism. In the political realm, conservative candidates have rallied the support of social conservatives by stridently opposing the Court’s non-originalist abortion rights ruling in Roe v. Wade. On the Supreme Court, Justices who profess to be originalists have revitalized the doctrine of sovereign immunity and limits on congressional power.

Notwithstanding United States Supreme Court Justice Stephen Breyer’s recent attempt to revive “living constitutionalism,” it is difficult to imagine a nominee to that Court who identified herself as a living constitutionalist winning approval in the Senate today. Modern originalism has been highly successful. Paradoxically, then, Robert Post and Reva Siegel argue that the political practice of originalism actually exemplifies living constitutionalism. However, with the notable exception of the judicial nomination process, popular originalism has achieved its constitutional victories, not through the political process, but through the process of judicial review.

Both modern originalism and popular constitutionalism were inspired, at least in part, by concerns about judicial over-reaching in constitutional interpretation. Both originalists and proponents of popular constitutionalism have decried judicial activism and championed deference to the political process. However, of the

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133 For example, President Ronald Reagan appointed a prominent originalist, William Rehnquist, as chief justice of the United States Supreme Court.
137 Id. at 567.
138 Id. at 569.
139 Ironically, the Court’s recent originalist rulings have caused at least one scholar to label the Rehnquist Court as the most activist Supreme Court in history.” Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism (U. Chicago Press 2004). See also Rebecca E. Zietlow, The Judicial Restraint of the Warren Court (and Why it Matters), 69 OHIO ST. L. J. 255, 295-301 (2008) (comparing the relative “activism” of the Rehnquist and Warren Courts). The political movement in favor of gun rights also achieved significant success through the political process. See Zietlow, Enforcing Equality, supra note ___ at 5-6; Reva B. Siegel, Dead or Alive: Originalism as Popular Constitutionalism in Heller, 122 HARV. L. REV. 191, 216 (2008).
134 See, e.g., Bork, Zietlow, Siegel & Post.
two, only popular constitutionalism is wedded to the concept of
deferece to the democratic process. \(^{141}\) Indeed, the relationship
between constitutional interpretation and democratic decision-making
may mark the most significant divergence between originalism and
popular constitutionalism.

Protecting democratic rule was once one of the primary
justifications for modern originalism. \(^{142}\) Originalism as a modern
movement began as a critique of “political” rulings of the liberal
Warren Court. \(^{143}\) Early proponents of originalism such as Robert
Bork and Raoul Berger criticized the Warren Court’s willingness to
invalidate legislation based on what they viewed as the Court’s
substantive political values. \(^{144}\) They presented originalism as an
antidote to “judicial activism” because it is a normatively neutral form
of constitutional interpretation. \(^{145}\) Originalism was said to reduce
judicial discretion and the concomitant opportunity for judges to
impose their own political values in the guise of judicial review. \(^{146}\)
More recently, however, originalists have strayed from this line of
reasoning and no longer champion the political process. Indeed, few
originalists today “subscribe to a broad constitutional requirement of
judicial deference.” \(^{147}\) Instead, proponents of originalism call on the
Court to impose limitations on the democratic process based on an
originalist interpretation of the Constitution. \(^{148}\) Thus, instead of

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\(^{141}\) See Strang, supra note ___ at 16.

\(^{142}\) See supra, notes ___ and accompanying text.

\(^{143}\) See Keith E. Whittington, The New Originalism at 109; Robert Post & Reva Siegel, Originalism as a
Political Practice: The Right’s Living Constitution, 75 FORDHAM. L. REV. 545, 545 (2006). I refer to the
originalist movement that began in the 1970s as the “modern” movement because originalism has been
recognized as an interpretive method as early as the framing of the United States Constitution. See John
O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation
and the Case Against Construction, 103 NW. L. REV. 751, 788 (2009).

\(^{144}\) Whittington, New Originalism, supra note ___ at 111; Siegel & Post, Originalism, supra note ___ at
547 (citing Raoul Berger, Government By Judiciary 363-364 (1977); Robert H. Bork, The Tempting of

\(^{145}\) See Whittington, New Originalism at 111; William H. Rehnquist, The Notion of a Living Constitution,
54 TEXAS L. R. 695 (1976).

\(^{146}\) See Edwin Meese III, A Return to Constitutional Interpretation From Judicial Law-Making, 30 N.Y.L.Sch. L. Rev. 925, 928 (1996); Meese, The Supreme Court of the United States: Bulwark of a
Limited Constitution, 27 S. Tex. L. Rev. 455, 464 (1986); William H. Rehnquist, The Notion of a Living
Constitution, 54 Texas Law Review 695 (1976). A number of scholars have questioned whether
originalism really has restrained judges from imposing their own views in the guise of constitutional
(1996); Post & Siegel, Originalism as a Political Practice at 557-65; Eric J. Segall, A Century Lost: The

\(^{147}\) See Strang, supra note ___ at 14.

\(^{148}\) See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY
89 (2004).
furthering democratic decision-making, originalism has become a justification for judicial activism.  

In contrast, by definition, the democratic process will always play a major role in popular constitutionalism. Popular constitutionalism is a process of interpretation. Popular constitutionalists maintain that the people’s involvement in constitutional interpretation lends legitimacy to that interpretation. One of the primary goals of popular constitutionalism is to involve the people themselves in the constitutional dialogue. Popular constitutionalists point out that while courts are influenced by political developments, the influence of politics on popular constitutionalism is considerably more transparent than judicial review. Unlike judicial deliberations, the debates of lawmakers responding to popular constitutionalism are recorded and open to the public. Popular constitutionalism strengthens civic society, and correspondingly, strengthens democracy.

Scholars have debated the impact of the Tea Party and its ideology on the democratic process. Jared Goldstein claims that the Tea Party is anti-democratic because participants in the movement are taking absolutist positions that discourage democratic debate. Goldstein points out that Tea Partiers often dismiss opponents as being illegitimate, and even un-American. They argue that there is only one correct meaning of the Constitution, “what our Founders and our founding documents meant.” Paradoxically, then, this movement of popular constitutionalists reject the notion of living constitutionalism that is implicit in democratic constitutional debate. Goldstein concludes that the Tea Party “undermines the claim by some popular constitutionalists that popular engagement with the Constitution and control over constitutional interpretation promote democratic values and may be necessary for democratic legitimacy.”

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149 As Lee Strang has pointed out, originalism can be the basis for limiting the power of legislature by imposing either interior or external limits on legislative power. See Strang, supra note ___ at 17 (describing the difference between the attitudes of “conservative” and “libertarian” originalists towards judicial deference.).

150 ZIETLOW, ENFORCING EQUALITY at ___.

151 Id. at ____.

152 See Goldstein, supra note ___ at 291.

153 Id. at 290 (“In the Tea Party rhetoric, the Constitution is a label for fundamentalist principles that the movement embraces, while all other values and politics are regarded as dangerously un-American.”)


155 Goldstein, supra note ___ at 290.
Illya Somin disagrees with Goldstein, asserting that the Tea Party movement enhances democracy and “serve(s) a useful role as a check on the power of political elites.” Somin argues that the Tea Partier’s focus on limiting federal government serves the interest of democracy because “the enormous size of modern government undercuts meaningful democratic control over government policy.” Somin dismisses Goldstein’s concerns about the Tea Party rhetoric, maintaining that “Given the quasi sacred status of the Constitution in American political culture, any suggestion that opponents’ major policies violate it to some extent brands them as enemies of the nation’s fundamental values.”

In evaluating the feasibility of popular originalism, the experience of the Tea Party movement is instructive. So far, their most significant constitutional victories have occurred, not through the democratic process, but in the federal courts. The primary constitutional debate in which Tea Partiers engaged was that over the Patient Protection and Affordable Care Act of 2010 (“ACA”). Tea Party activists participated in numerous demonstrations against the Act during congressional debates, claiming that it would unduly expand the federal government and infringe on individual liberty. Congressional opponents of the Act echoed the Tea Partiers during those debates. They lost the debate when Congress approved the ACA. Immediately thereafter, Tea Partiers filed lawsuits opposing the act. Invoking constitutional reasoning that mirrors that of Tea Party activists and their supporters in Congress, two judges have relied on originalist reasoning to rule against the Act. These judicial victories are ironic since the ACA itself was a major victory of progressive popular constitutionalism. Other courts have

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157 Id. at 301.
158 Id. at 304.
159 Id. at ___.
upheld the Act, and it is likely that the United States Supreme Court will ultimately resolve this constitutional dispute. It is still possible that the Tea Party position, which failed in the democratic process, will prevail through the process of judicial review.

A number of Tea Party-supported candidates were elected to Congress in the fall of 2010, and that significantly affects the public debate over spending and taxes in 2011. Tea Parties’ opposition to federal spending and taxes may reflect their conservative values more than their originalist constitutional views. To a popular constitutionalist, however, what matters is not their motivation but the fact that the debate over the size and function of government implicates structural constitutional issues such as federalism and the power of the federal government.

The Tea Party has achieved significant political success since its founding, but so far they have no achieved constitutional change in the political realm. So far, the Tea Party’s constitutional victories have been confined to court rulings. This arguably lends support to the view that authentic originalism may simply not work in the political process. Perhaps judges are better than political actors at interpreting the constitution consistently with original meaning. Perhaps the insulation of judges from the political process facilitates their implementation of originalism as constitutional method. It could be that insulation from politics is necessary to interpret the constitution in a manner that is consistent with original meaning.

However, it would be premature to evaluate the long term impact of the Tea Party movement on our constitutional structure at this time. The long term goal of the Tea Party movement is to shrink the size and power of the federal government, and thus alter our system of federalism. Tea Party activists argue that reducing the size of the federal government would be consistent with the original meaning of


See Barnett, Tea Party, supra note ___ at 282 (arguing that the Tea Party movement is most concerned about federal spending and the size of the federal government).
the Constitution, but, like all popular constitutionalists, they are using constitutional advocacy to achieve their policy goals. Members of the Tea Party movement may well care more about achieving those political goals than whether the lawmakers that represent them engage in originalist constitutional construction.

In the end, the success of the Tea Party movement will depend more on the ability of the Tea Party to engage in politics and sway the popular will than it will on the movement’s adherence to originalism. Popular originalists may well have to decide which is more important to them – popular success, or adherence to originalism.

V. Conclusion

Recent years have seen a rise of interest in legal history among constitutional theorists. Originalists and those who study popular constitutionalism share an interest in legal history because studying history is so helpful to understanding constitutional development. Originalists and popular constitutionalists may inhabit the same historical archives, but until now there has been little scholarly interchange between the two groups. This is unfortunate because while we may differ to the extent that we feel bound by the past, we agree that the past is important, and useful to determining contemporary meaning.

To a significant extent, one’s view of whether the Tea Party is a salutary development in constitutional debate may depend on one’s view of the positions that the Tea Party espouses. Nonetheless, it is undeniable that the Tea Party movement has increased the salience of debate over constitutional issues such as federalism and individual liberty. Those who disagree with the Tea Party’s view of the Constitution would do well to remember that the long term impact of the movement depends on its success in convincing lawmakers to adopt their vision. Rather than dismiss the Tea Party, it would be better for its critics to engage in the debate that they have initiated, the debate over popular originalism.

167 Compare Somin, supra note ___ at 301 (arguing that limiting federal power would enhance democracy) with Goldstein, supra, note ___ at 297 (“The Tea Party movement’s understanding of the Constitution would eliminate large swaths of federal power, taking away the people’s hard won authority to determine economic policies at a national level, which has been understood to be available for several generations.”)

168 See Randy Barnett, Tea Party, supra note ___ at 292.