

Johnathan O'Neill. *Originalism in American Law and Politics: A Constitutional History.* Baltimore: Johns Hopkins University Press, 2005. x + 281 pp. \$57.00 hardcover, \$35.00 paperback.

Steven G. Calabresi, ed. *Originalism: A Quarter-Century of Debate.* Washington: Regnery Publishing, 2007. 360 pp. \$29.95 hardcover.

As of this writing, 110 men and women have served as justices of the United States Supreme Court. Eleven of them—exactly ten percent—have been Catholic, beginning with Chief Justice Roger B. Taney, who was appointed in 1836 by President Andrew Jackson. Five of those eleven Catholics are serving together right now—Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito—and comprise a “Catholic majority” on the Court. Thus it is somewhat interesting that four of them—all but Kennedy—are strongly associated with the approach to constitutional interpretation known as “originalism,” and that none of the other justices is so associated. For originalism has a certain Protestant air to it, as though its adherents were wedded to a notion of *sola scriptura*, holding that no legal conclusions are valid that cannot be justified by reference to the language of the Constitution’s text and the original public understanding of its meaning. It might be argued that a more “Catholic” approach to constitutional interpretation is one that recognizes the evolutionary character of tradition at the hands of the “episcopacy”—that is, the judiciary. Perhaps Justice Kennedy struck the more Catholic posture, invoking the founding generation but rejecting originalism, when he wrote in 2003 that the Constitution’s framers “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom” (*Lawrence v. Texas*, 539 U.S. 558, at 579).

Well, maybe not. A better comparison between the legal and religious worlds might be that the rise of originalism in the last few decades is akin to the Counter-Reformation of the sixteenth century—an effort to restore, revivify, and reform the faith as a response to challenges that threatened to fracture its foundations altogether. (This would make the Federalist Society the Jesuits of the originalist faith, but let’s not take the comparison too far.) Viewed in this light, originalism is a response to a certain kind of latitudinarianism in constitutional jurisprudence, and a defense of orthodoxy and fundamental truths against any claim that the times call for abandonment of them, or for the

fashioning of novel doctrines that float free from any roots in constitutional history.

This at least is one way to view the story ably told by legal historian Johnathan O'Neill in *Originalism in American Law and Politics*. O'Neill's book traces the history of originalism from its birth—coeval with the Constitution itself—to its fall and rise again in the last century, with the main focus on the re-emergence of originalism in response to the Warren and Burger Courts. While his sympathies are pretty clearly with the protagonists of the originalist story, O'Neill does not elevate those figures into faultless heroes and is scrupulously fair to other actors in the drama. In addition, he appears to have mastered enormous quantities of material—ranging widely across both the constitutional jurisprudence of the Supreme Court since the founding and the scholarly literature on constitutional interpretation in the twentieth century. On both subjects, he is a trustworthy guide and an astute critic. As a historical narrative and as a work of synthesis in major jurisprudential ideas, O'Neill's *Originalism* is unparalleled. Combine these virtues with a fluid prose style and a compact treatment that does not weary the reader with unnecessary minutiae, and the work amounts to one-stop shopping for understanding the most important issues in constitutional law in recent decades.

The essentials of originalism's history are as follows. While it was not known by the name "originalism," the view that the Constitution must be interpreted and applied according to the shared understanding of its meaning held by the generation that brought it into being was the default position of all legal, judicial, and scholarly interpreters of the Constitution from the founding itself through the nineteenth century. This traditional view, which might be called "textual originalism," was "a natural outgrowth of the Blackstonian inheritance and the principles of social contractarianism and popular sovereignty that informed the founding" (p. 15). So "natural" was it that it was unchallenged during our early history, and so taken for granted that it was therefore philosophically under-articulated.

In the late nineteenth century, "legal reasoning . . . began to get more rigid and scientific" (p. 25), with a kind of deductive formalism taking over the study of law in the growing number of professional law schools sprouting up at American universities. While "judges of this era did not understand themselves as engaged in a non-originalist or quasi-legislative project," the "new formalism" (p. 25) did lead American judges astray, giving them an overweening confidence that their specialized legal science made them the nation's infallible constitutional

guardians. The result was such excrescences on constitutional doctrine as the “economic substantive due process” made famous in *Lochner v. New York* (1905).

Its association in practice with the foibles of formalism and the dubious doctrines it spawned left originalism (however innocent it might be in itself) vulnerable to assault by the new school of legal realism in the early twentieth century, which collapsed the distinction between law and politics in judicial decision-making and treated the Constitution as “a judicially updated living document” (p. 32) of astonishing malleability. Yet since the old Court’s formalism had been no barrier to judicial activism, indeed had aided and abetted activism, there remained a felt need for constraints on the theory and practice of judicial review. While originalism was in eclipse, the search for such constraints led to the development of “process theory,” a new view of the “judicial process” as capable of generating its own principles of “self-restraint” that would exert some effective counter-pressure on the activist impulse.

The “process-restraint” school of thought failed to generate effective principles to govern the practice of judicial review—not surprisingly, since “process judges and scholars were New Deal liberals who embraced the skepticism, value relativism, and pragmatism of modern thought” (p. 46). In their reaction to *Brown v. Board of Education* (1954), for instance, a ruling poorly reasoned but widely admired by legal liberals of every stripe, the process theorists strove to enunciate a notion of “neutral principles” to constrain judicial decision-making, but without a turn to history, those principles, however neutrally applied, would be chosen willy-nilly by the judges themselves. Down that road there was no solution to the crisis of legitimacy into which the Warren Court led the American constitutional order. But another path was possible: a revival of interest in the historical underpinnings of constitutional decisions and a resuscitation of the originalist argument, now more theoretically articulated.

The depredations of the modern Supreme Court provided originalism with much critical fodder. The “selective incorporation” of the Bill of Rights to apply against the states via the Fourteenth Amendment; the separationist reading of the religion clause of the First Amendment; the problem of “state action” under the equal protection clause; the extension of that clause to deal with the previously political question of the malapportionment of state legislatures; and the invention of the “right of privacy” in the contraception and abortion cases—all of these issues, and more, prompted the new originalists to undertake new historical researches. O’Neill makes it clear that originalism was (and

is) not synonymous or interchangeable with political conservatism or partisan Republicanism. Originalism was, rather, an intellectual movement in the law that grew out of a reaction to the shocking degree of disconnection between the decisions made by the Court's modern legal liberals, on the one hand, and the most elementary received understanding of the constitutional text's meaning on the other. Still, there is no overlooking the fact that there were (and are) strong mutual attractions between political conservatism and originalism. As the New Deal Democratic coalition "began to fragment in the 1960s" (p. 94), liberalism's redoubt in the judiciary appeared both more outrageous and more vulnerable than ever to Republican and conservative critics in Congress and elsewhere. These partisans found intellectual support for their criticisms in the work of scholars such as historian Alfred H. Kelly and political scientist Charles A. Miller who, "[t]hrough not originalists in today's sense, . . . had reencountered the force of history as a legitimating concept in constitutional decision-making" (p. 105).

Originalism "by the mid-1970s . . . was an identifiable and cogent position in American constitutional thought" (p. 110). Appropriately enough, at this point O'Neill slows down his story to dwell on major characters and events as originalism became strong enough to threaten the established order of legal liberalism and to provoke a counterattack. The decade from 1977 to 1987—from the publication of Raoul Berger's *Government by Judiciary* to the defeated nomination of Robert H. Bork to the Supreme Court—occupies three entire chapters in O'Neill's narrative. He is quite right about the "explosive effect on constitutional debate" (p. 123) of Berger's work, which "made originalism impossible to ignore" (p. 131), and O'Neill appropriately gives Berger's work and impact a whole chapter here. This is followed by a treatment of both political and scholarly developments during the Reagan years, including the founding of the Federalist Society in 1982 by law students and faculty interested in challenging the "liberal domination of the legal academy" (p. 148), and the creation of the regrettably short-lived Center for Judicial Studies and its journal, *Benchmark*, by the late James McClellan. The institutionalization of originalism in these ways helped provide the reserves of strength, in terms of both people and ideas, that emboldened the Reagan Justice Department under Attorney General Edwin Meese to challenge legal liberalism in litigation before the Supreme Court and in the public discourse. Meese's speeches to the American Bar Association and other audiences in 1985 and 1986, and the responses he elicited from Justices John Paul Stevens and William J. Brennan, "constituted the most direct constitutional debate between the executive branch and the Court since the New Deal" (p. 157).

Thus the stage was set for the cataclysm of the Bork nomination in 1987, to which O'Neill devotes an entire chapter (beginning with a review of Bork's career and thought in the years before his nomination). There is a tragic aspect to this episode—leavened by grimly comic moments such as Senate Joseph Biden's resort to an argument about the framers' view of the Senate's advice and consent function to justify opposing Bork on grounds that his jurisprudential approach was "out of the mainstream" inasmuch as it . . . relied on the views of the framers as a guide to judicial decision! The tragedy lay in the Reagan administration's loss of nerve in pressing Bork's nomination, as it downplayed how much his appointment to the Court would change constitutional law; in the fact that "Bork was sometimes his own worst enemy" during the hearings, owing to a decidedly tin ear for politics; and in the extent to which "the issue of *stare decisis* remained a jurisprudential challenge for originalism" (p. 181), as Bork struggled without success to articulate some way to say which of the liberal precedents unmoored from history deserve to survive the withering gaze of originalism and which do not. Still, O'Neill is surely right to conclude that "the difficulties of originalism as a developing body of jurisprudence contributed less to Bork's defeat than did the bitterly partisan attacks and distortions which dominated the hearings" (p. 183).

These are the three great fights that mark the arrival of originalism as a self-conscious school of thought in the law: the reception of Raoul Berger's scholarship, especially *Government by Judiciary*, his most searching critique of the work of the Supreme Court; the venture of Attorney General Meese into the lion's den of the legal establishment bearing the message that the executive branch was committed to originalist jurisprudence; and the bitter struggle over whether Robert Bork would sit on the Court. The first two took place on the field of ideas, in scholarship and in shaping public opinion; but in the third fight the stakes were the direction of Supreme Court decision-making itself, and in the event the forces of the left in law and politics proved equal to the task, by fair means and foul, of staving off the threat Bork represented. For the last twenty years, originalism and legal liberalism have been locked in a stalemate, with neither side gaining a decisive advantage on the Supreme Court as vacancies come and go. There are now at least two originalists on the Supreme Court, and almost certainly four, where there was once only Justice (later Chief Justice) Rehnquist. But given that twenty of the last twenty-eight years saw the White House occupied by Republicans who declared their devotion to originalist jurisprudence, and that during those twenty years the net vacancies on the Court numbered seven, while during the other

eight years (of the Clinton administration) only two vacancies occurred, devotees of originalism have a right to be frustrated.

O'Neill's final chapter takes the story forward through the 1990s, when "originalism became a more subtle, complex, and fragmented doctrine" (p. 190). But the story is necessarily an unfinished one, and O'Neill is quite right in his conclusion:

Only the passage of time will permit judgment of whether the arrival of originalism on the scene is the first step toward returning to a more traditional conception of the American constitutional order. It is quite possible that instead it is the last gasp of that order before its final replacement by some version of the pragmatic, pluralist instrumentalism now gaining adherents, in which originalism is likely to be just one more tool as susceptible to manipulation as the others. (Pp. 214-15)

This is a sobering thought indeed. And the fear that originalism may become subservient to a pragmatic instrumentalism is not allayed by the exchanges on display in *Originalism: A Quarter-Century of Debate*, a volume assembled by law professor Steven G. Calabresi, one of the law-student founders of the Federalist Society and currently the chairman of the society's board of directors, to commemorate the twenty-fifth anniversary of its founding.

After reading O'Neill's *Originalism in American Law and Politics*, with its thorough synthesis of the major issues and its keen historical insights, reading Calabresi's *Originalism* is something of a disappointment. The book is really two anthologies packaged together. The first part collects half a dozen speeches from 1985 and 1986: three by Attorney General Meese; one by Robert Bork, still at that time a federal appeals court judge; the remarks of President Reagan when swearing in Chief Justice Rehnquist and Justice Scalia; and (the lone liberal exemplar) the October 1985 speech of Justice Brennan at Georgetown University, universally understood as a response to Meese, though he went unnamed by Brennan. These documents, all relatively short because they were written for oral delivery, are necessarily somewhat lacking in the depth and sophistication of philosophical and historical argumentation that one would desire in treatments of so momentous a question as whether constitutional interpretation can and should bind itself to the discipline of discerning and following the understanding of the founding generation. Meese's speeches, which caused a storm of controversy at the time, hold up rather well after so many years. They are straightforward, accessible to lay readers as well

as lawyers and scholars, and provocative, especially his 1986 Tulane University speech that called judicial supremacy itself into question. Brennan's Georgetown speech is as self-indulgent and obscurantist as anyone who read it at the time will remember it being. Judge Bork is typically blunt and pithy in his devotion to the constraints of originalism and his impatience with those who want judges to wriggle free of them. And President Reagan is characteristically wise when he reminds us that "we the people"—not unelected, life-tenured judges—"are the ultimate defenders of freedom" and of the constitutional order that sustains it (p. 97). But each of these speeches is a snack when one wants a meal, and together they make up only an hors d'oeuvres tray for grazing from—not much nutrition there.

The nutritive value of the book does not climb markedly in its second and longer part, consisting of the transcripts of scholarly roundtables held at the 2005 national convention of the Federalist Society. (This gives the lie to the book's subtitle, by the way: there is no "quarter century of debate" here, but rather a couple of years of debate in the mid-1980s, a few days of debate in 2005, and nothing in between.) Some notable legal scholars, both devotees and critics of originalism, attended this meeting and participated in the discussions transcribed here. But their contributions, almost without exception, suffer from certain defects that make this book of dubious value. In the typical fashion of an academic conference roundtable, each speaker takes a turn with brief opening remarks, after which a panel chairman moderates a colloquy among the speakers and with members of the audience. The opening statements are, in nearly every case, based on no prepared text or paper, but are merely transcripts of remarks delivered orally—perhaps based on notes, perhaps not, but in any event so brief and conclusory as to leave the speakers' arguments severely underdeveloped. Each contributor has just the time (or in print, the space) to assert a position and nod in the direction of the evidence and logic that support that position. Succeeding speakers take to the microphone, express their consternation and dissent from what they have just heard, and then present a view equally ill-supported. In their colloquies with each other and the audience that follow these statements of manifestoes, there are often displays of wit and finger-wagging about the consequences of positions expressed, but rarely is an argument developed that would persuade anyone of anything. And from first to last, the views expressed assume such a level of sophistication in the reader's acquaintance with the issues in the field that, in contrast to, say, the Meese speeches of 1985-86 in the first part of the book, the Federalist Society roundtables are of very little use for the beginning student of the subject.

None of these observations is meant as a criticism of the contributors to the roundtables. Anyone who has attended or participated in such meetings knows that underdeveloped and conclusory arguments, the presumption of the listeners' understanding of a good deal of background, flashes of impromptu wit, and expressions of (mock or genuine) outrage at what others have said are all just in the nature of things at these hoedowns. The speakers and attendees get something of value out of the experience—perhaps a sharp sally by one speaker will puncture another's argument, for instance, and help the latter patch it up the next time around. But put down on paper, such oral exchanges are almost a total loss for readers who weren't there. It is hard not to conclude that a book collecting such exchanges is a publishing mistake.

So what *can* be gleaned from these exchanges? The good news is that originalism has made such gains in the legal academy, both in number of adherents and in confident intellectual strength, that the "turn to history" in constitutional jurisprudence appears to be a permanent fixture. The non-originalists on the roundtables are themselves constrained to "do history" in order to fashion arguments, and that is something, at least. (Remember Justice Kennedy resorted to the framers in order to advance a "living Constitution" view in *Lawrence*.)

The bad news—no, let's call it the uncertain news—is that the diversity and fragmentation O'Neill observes within mature originalism are fully on display here as well. There are originalists who embrace and others who reject the judicial protection of "unenumerated rights." There are originalists who denounce pragmatism in constitutional law and others who find the pragmatic case for originalism to be the strongest argument in its favor. There are partisans of broad and narrow readings of federal power vis-à-vis the states. What is uncertain is whether this intellectual diversity reflects weakness or strength in originalism. Such disagreements are harmless in themselves, and *pace* the critics of originalism, do not prove its incoherence or demonstrate that originalists have no common methods or principles.

But they do suggest something else, if one probes for the deepest layer of agreement among the originalists. Almost without exception, they are devoted to judicial supremacy, firmly convinced that their own reading of the Constitution's meaning must be vigorously enforced by a Supreme Court that cannot be gainsaid by the other branches of government. Almost none of them has internalized the homely wisdom expressed by Edwin Meese in his Tulane speech of 1986, that "constitutional decisions need not be seen as the last words in constitutional construction" (p. 105). Each has his pet theory or

constitutional principle he seeks to dogmatize—some “thou shalt not” inferred from the text of the Constitution, with or without straining for historical support—and tenaciously pursues the refinement of his dogma and the case for its judicial enforcement.

This leads to the very strong suspicion that devotion to the original understanding of the Constitution is no guarantee against the temptation to pick and choose among its provisions, to see one’s favorites in a light shed by present-day felt needs rather than by the lamps of historical comprehension, and to seek an authoritative judicial pronouncement in favor of one’s preferred outcomes. After all, several of the originalist doctrines staked out are mutually exclusive. They cannot all be valid conclusions from the original public meaning of the Constitution. Those that are invalid, however much the products of good-faith researches, must in some degree be produced by the temptation held out by authority itself. Were the temptation more commonly resisted, we might well see fewer originalists attached to the ahistorical notion of judicial supremacy.

Is there, then, a crisis in originalist scholarship? That might be overstating the case. But clearly there is far more work to be done, beginning with the least studied problem in constitutional jurisprudence, namely the original understanding of the judicial power itself. Until more rigorous work is done on that subject, originalism will suffer from something analogous to a familiar Protestant misunderstanding of Catholicism—the mistaken notion that “papal infallibility” means every last utterance of the Supreme Pontiff is to be taken as possessing the authority of divinely-inspired wisdom.

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