

Where Are We Going, Where Have We Come From?

Review of: ORIGINALISM IN AMERICAN LAW AND
POLITICS: A CONSTITUTIONAL HISTORY.

By Johnathan O'Neill. Baltimore, MD:
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The *Book of Judges* is a striking text within the Biblical canon. Wedged between the uplifting books of *Joshua* and *Ruth* in the English ordering of the Old Testament, this narrative documents the spiritual decline of the Israelite tribes in serious and disturbing fashion. Four times throughout the last five chapters, readers are reminded, “In those days, there was no king in Israel.”¹ In the first and the last instances, the text also supplies that “[e]veryone did what was right in his own eyes.”² The message is a simple apologetic for the Israelite monarchy, but reveals a historical truth: when there is no moral and political authority by which a society may measure itself, that society slowly replaces moral coherency and political identity with the fickle whims behind contemporary (and distorted) notions of justice.

Johnathan O’Neill’s *Originalism in American Law and Politics* is neither as spiritually focused nor as tragic as *Judges*, yet the intellectual history he develops maps neatly onto the Biblical theme. Effectively arguing that originalism is nothing new to the American legal project, O’Neill

1. *Judges* 17:6; 18:1; 19:1; 21:25.

2. *Id.* at 17:6; 21:25.

reveals that the decline of originalism paralleled the decline of coherent constitutional jurisprudence. O’Neill’s work, certainly a type of historical apologetic, does not condemn American jurisprudence. His historical project is far more modest: an examination of the constitutional jurisprudence of “originalism as a defense of traditional understandings of legal interpretation, limited and consent-based government, and the rule of law” (p. 1). Within the popular history of originalism, birth of originalism occurred with Bork’s *Neutral Principles and Some First Amendment Problems*³ and Berger’s *Government by Judiciary*,⁴ or perhaps with then-Judge Scalia’s speech before the Attorney General’s Conference on Economic Liberties.⁵ O’Neill rejects this

3. See generally Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

4. See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977). Raoul Berger and Robert Bork together pioneered the modern original-intent originalism. Yet critics were able to theoretically isolate this movement, noting the issues of competing intentions, and more foundationally, the fact that the Framers themselves rejected private intentionalism. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214 (1980); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 476 (1981); see also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985).

5. “As I was musing in my chambers over this perplexing problem, the room was filled with the sound of a voice - loud, though it was in a whisper - which seemed to be coming from the picture of Mount

puerile intellectual history, grounding originalism as the “natural outgrowth of the Blackstonian inheritance and the principles of social contractarianism and popular sovereignty that informed the founding” (p. 15).

Additionally, O’Neill avoids anachronistic discussion, distinguishing the modern, sophisticated, and methodologically-precise originalism(s) from antecedents. Recognizing that originalism has never existed in isolation, O’Neill puts forward three complementary and overlapping hermeneutics prevalent in the period: Textualism proper, subdivided into “clause-bound” (limiting analysis to narrow pieces of text), “structuralist” (looking at clauses in their textual context), and “purposive” (seeking to identify the ends of the clauses or text as a whole) textualisms;⁶ Doc-

Sinai that we have hanging in the D.C. Circuit’s Conference Room.... It said: CRITICIZE THE DOCTRINE OF ORIGINAL INTENT. The voice, I must admit, sounded a little like David Bazelon. Then again, it sounded a bit like Robert Bork. In any case, since I am rarely given these revelations, I thought that was what I should do.... I ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning.” Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 102, 106 (U.S. Dep’t of Just. ed., 1987).

6. In some respects, this mirrors Justice Frankfurter’s own method of textual interpretation. *See* HENRY J. FRIENDLY, BENCHMARKS 202 (1967) (recalling Justice Frankfurter’s three rules of statutory interpretation: “(1) Read the statute; (2) read the statute; (3) read the statute!”).

trinalism, explained as applying standard interpretations to new sets of facts through analogy to precedents; and Structuralism proper, defined as “an appeal to the nature and relationship of the institutions created in the text” (p. 4). O’Neill also recognizes that “[t]he ‘purposive’ approach has a second and wider meaning, as an appeal to more abstract...theories which can supplement or override the text, its original meaning, or established doctrine” (p. 4-5). This is the Purposivism that Scalia identified and opposed during his judicial tenure.⁷ Synthesizing the interpretive regime of the Colonial and Founding periods, O’Neill labels the orthodox hermeneutic “textual originalist” (p. 5), denoting

While repetition breeds emphasis, each command to “read the statute” also illuminates a slightly different element of reading the statute. While none of the types of Textualism proper follow the strict-constructionist model, I understand the “clause-bound” textualism to be the most akin to the wooden literalism that Justice Scalia condemned. *See Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22* (Amy Gutmann ed., 1997).

7. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 18 (2012) (“Perhaps the non-textualists’ favorite substitute for text is purpose. So-called purposivism, which has been called ‘the basic judicial approach these days,’ facilitates departure from the text in several ways.”); *see also* *Harris v. Commissioner*, 178 F.2d 861, 864 (2d Cir. 1949) (per L. Hand, C.J.) (“It is always a dangerous business to fill in the text of a statute from its purposes.”).

its natural, rather than derived, form.

O’Neill begins his book by quickly detailing the shift from textual originalism to modern judicial power, invoking the writings of, i.a., Marshall, Story, and even Taney to demonstrate the consistent hermeneutic from the time of the Founding into the Antebellum. O’Neill cites other American jurist to support the contention that textual originalism was the orthodox hermeneutic, viz., Thomas Cooley and Arthur W. Machen, Jr.’s rejection of “the nascent notion of an ‘elastic’ living Constitution,” (p. 24), for Reconstruction and Gilded Age continuity. A limitation of this history is that O’Neill fails to explain from where that “nascent notion” arose, but does note that the Langdellian movement to systematize textual originalism into “formalism” or “classical legal thought” continued originalism into the Progressive Era. He also notes the unfortunate association of classical legal thought with economic substantive due process.⁸ Ultimately, he documents how the rise of Oliver

8. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a weekly-hour maximum for bakeshop employees as beyond the scope of State police powers); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (voiding a minimum wage provision for women as a violation of due process).

Wendall Holmes's legal realism led to a revolt against the formalist orthodoxy,⁹ eclipsing originalism as it had been practiced.

After the Realist Revolt¹⁰ succeeded in reshaping Supreme Court jurisprudence, O'Neill catalogues how Thayerian-Holmesian deference developed as a replacement jurisprudence, demonstrated by the rise of Hart and Sacks's Process-Restraint School,¹¹ practiced routinely by

9. *See generally, e.g.*, Oliver Wendall Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457 (1897). *See also* Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (per Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky."). The legal realists were never a formal school of legal thought, although Holmes is recognized as an initial leader of the movement. For other realist thought, *see generally* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Karl Llewellyn, *Some Realism about Realism*, 44 HARV. L. REV. 1222 (1931); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

10. This phrase refers to the period when the Four Horsemen were retiring from the Court (1936-1938), replaced by jurisprudential realists. Best evinced in the death of Federal common law through the *Erie* doctrine, *see generally* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Revolution rejected formalism for legal realism, itself replaced by legal liberalism after the fall of the Nazi regime. This interregnum, epitomized by the Warren and Burger Courts, ended with the appointment of Justice Antonin Scalia to the Court and the rise of the New Originalism. *See generally* Scalia, *supra* note 5.

11. *See generally* HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS* (1958) (putting forward the idea of institutional competence as a reason for judicial restraint and institutional settlement, i.e., agreed-upon process, as a reason for the acceptance of substantive law in a pluralist society).

Justice Frankfurter,¹² and developed in Weschler's criticism of the *Brown*¹³ opinion.¹⁴ Yet, just as the Israelite tribes thought themselves faithful to the LORD during their prolonged periods of infidelity and depravity, O'Neill's work demonstrates that even non-originalist jurists in American history have tried to claim the weight and authority of history and original meaning. Justice Hugo Black would regularly cite original intent (though not consistently and with none of the methodological staples of originalism);¹⁵ the Warren Court more broadly also engaged in the sloppy use of original intent as justification for non-originalist outcomes in several cases.¹⁶ O'Neill sufficiently shows that,

12. See, e.g., *Adamson v. California*, 332 U.S. 46, 59-69 (1947) (per Frankfurter, J., concurring) (arguing for slow and cautious selective incorporation of the Bill of Rights).

13. *Brown v. Board of Education*, 347 U.S. 483 (1954).

14. See generally Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

15. See, e.g., *Adamson*, 332 U.S. at 69-92 (1947) (per Black, J., dissenting) (arguing for total incorporation).

16. See *Brown v. Board of Education*, 345 U.S. 972, 972-73 (June 8, 1953) (ordering reargument to determine whether the original meaning of the Fourteenth Amendment with respect to school segregation). Yet the *Brown* opinion said only that the original intent was "inconclusive." *Brown*, 347 U.S. at 489. See also *Reynold v. Sims*, 377 U.S. 533, 573 ("[The] Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted."). But see *Baker v. Carr*, 369 U.S. 186, 267-70, 297 (1962) (per Frankfurter, J., dissenting) (stating the originalist separation-of-pow-

even while originalism slumbered during this interregnum, Legal Liberalism still recognized the authority of text and history, even as it struggled to wield it.

The central contribution of O'Neill's work is his focus on Raoul Berger¹⁷ and Robert Bork (each receive a dedicated chapter), documenting their shifts from a jurisprudence of Legal Process to a modern original-intent originalism. Berger's story in particular is so principal to O'Neill's work because Berger gave originalism academic voice long before judges started seriously considering originalism. Indeed, "originalism" as a term derives from critiques of Berger's work.¹⁸ Berger and Bork were both motivated to develop a constitutional theory which would constrain judicial review in light of the Legal Liberal

excesses of their day, providing an understanding for the ers view); *Reynolds*, 377 U.S. at 624-25 (per Harlan, J., dissenting) (arguing the majority manipulated or ignored the original meaning of the Constitution); *Wesbury v. Sanders*, 376 U.S. 1, 20-50 (1964) (per Harlan, J., dissenting) (supplementing textual exegesis with a survey of the Philadelphia convention, the ratification debates, and the *Federalist* to demonstrate original meaning of the Constitution).

17. Before I read this text, I had always heard of Berger referred to in the same manner as the John Birch Society, as some sort of fringe, right-wing extremist; I had no idea the he was actually a New Deal Democrat who remained a political liberal all his life.

18. The term was coined in the most prominent critique of Berger. See Brest, *supra* note 4, at 204.

initial Legal-Process-esque defenses which characterize originalism to this day. A true intellectual history, this text does not play hagiography with Berger or his ideas, but recognizes their centrality to a movement that has long since abandoned his reformulation: “Although originalism would become a more refined and contested doctrine after Berger, his efforts ensured that it would not be quickly dismissed” (p. 132).¹⁹

Turning to the 1990s, O’Neill details the influence and rise of an academically-refined originalism. O’Neill also helpfully details liberal responses to originalism, including the “republic revival,” the incorporation of history by liberal and leftist scholars in favor of a revived legal liberalism, and even liberal attempts at originalism. Jurisprudential *examples*, rather than jurisprudential *analyses*, of Scalia and Thomas are littered throughout this discussion. Curiously, Chief Justice Rehnquist is included amongst the originalist Justices; while Justice Rehnquist professed

19. O’Neill also demonstrates the importance of the Reagan administration, in advancing originalism into the mainstream and associating it with conservative politics. *See generally, e.g.*, OFF. OF LEGAL POL’Y, REPORT TO ATT’Y GEN.: ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (Mar. 12, 1987).

adherence to original intent,²⁰ his jurisprudence in practice was more *conservative* than it was originalist.²¹ At least one former clerk to Justice O'Connor has described Rehnquist's jurisprudence as one of "sinuosity," and his record indicates a mix of pragmatism and institutionalism.²² Helpfully, O'Neill does not limit his account to judges or legal scholars; as the name of his book suggests, O'Neill also presents and analyzes originalism in American politics, often using Senate hearings or other statements by political actors.

Another issue with this section, however, is O'Neill's near-exclusive focus on the legal-positivist strain of originalism. While it is the dominant originalist approach as exemplified by Scalia and Bork, this intellectual history hardly addresses originalism from a Straussian or natural-rights approach, prominent among scholars like the late Harry Jaffa and Justice Thomas. Since the publication

20. *See generally* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

21. *Cf.* H. Jefferson Powell, *On Not Being "Not an Originalist,"* 7 U. ST. THOMAS L.J. 259, 273 (2009). Rehnquist is best understood as a judicial reactionary to Legal Liberalism. While his political and judicial conservatism often opposed liberal outcomes, Rehnquist's jurisprudence was theoretically undisciplined.

22. *See generally* Morrison v. Olson, 487 U.S. 654 (1988); Dickerson v. United States, 530 U.S. 428 (2000); Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

of O'Neill's book, the positivist/natural-law debates within originalism have only grown in importance.²³ O'Neill is not a legal philosopher, and he does not assume a role he is unqualified to hold; his humility notwithstanding, the ontological essence of originalism is a relevant topic for his text, and its absence is painfully obvious.

O'Neill's account of originalism is essentially historical in origin. Because of this, O'Neill also fails to adequately present originalism as equally philosophical, leaving a limited discussion to scholars he briefly cites. O'Neill operates under the common misapprehension of the Founding as a Lockean event (p. 2). While there was

23. See generally, e.g., Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016) (grounding originalism in natural-law theory); William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (defending originalism on Hartian positivist grounds); Steven E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253 (2014) (similar); LEE STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019) (arguing that positive originalism is compatible with the natural law without requiring natural-law reasoning); HADLEY ARKES, MERE NATURAL LAW: ORIGINALISM AND THE ANCHORING TRUTHS OF THE CONSTITUTION (2023) (arguing that originalism is referentially dependent on natural law); Jacob Sheldon Feiser, Note, *Originalism and Interpretive Sin*, 14 GROVE CITY COLL. J.L. PUB. POL'Y 1 (arguing that the use of natural-law reasoning is equivalent to substantive due process). See also ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022) (critiquing originalism as ineffective and outdated, articulating a jurisprudence of conservative living constitutionalism).

a Lockean element to the Founding, the continuity with the medieval common-law tradition, theological elements—primarily from the Reformed tradition—and Roman republicanism complicate that narrative. The philosophical amalgam of these interacting systems that birthed the Founding necessarily shapes one’s understanding of the history; by limiting himself to a purely Lockean outlook, O’Neill misunderstands the “Blackstonian inheritance” of the originalist project.

The most striking—though hardly severe—issue with O’Neill’s book is that, while he is cogent in thought, able to avoid jargon, and generally distinguishes terms with clarity, he operates from an assumption that his reader is largely familiar with the progress of American legal thought. As some students and laymen reading this review have probably already noted, O’Neill’s discussion of originalist intellectual history presumes familiarity with the jurisprudential big-wigs of American history; ignorance does not prohibit understanding and appreciation for his work, though it does stunt reader engagement. Yet, O’Neill’s treatment of the varied figures involved in Legal Liberal-

ism is more monolithic and amalgamated than an academic treatment should be—his text, while covering originalism in American law and politics, does not seem capable of covering the interaction between the intellectual and political history of originalism. Nonetheless, for readers interested in the topics he covers, the 59 pages of endnotes are a goldmine for continuing research and engagement with this worthwhile history.

In *Judges* 19, a Levite and his concubine encounter an old man in the town square of Gibeah. This man asks, “Where are you going? And where do you come from?”²⁴ O’Neill’s text seeks to answer one of those questions for the originalist project. This book was written 20 years ago, and the historical basis for the originalist project is as important as ever for the on-going jurisprudential debates. Certainly, O’Neill does not prognosticate about the future of originalism. Yet the Court is now judicially conservative—unseen since the Realist Revolt, and unforeseeable in 2005. Where are we in the originalist project going? I cannot say with any more clarity than O’Neill in 2005. But

24. *Judges* 19:17.

reading this text, I know where we have come from. This is a book worth reading, not only for the law student and the Americanist, but for anyone interested in the novelty (and ephemerality) of non-originalist jurisprudence.

