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## Popular Originalism? The Tea Party Movement and Constitutional Theory

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## ESSAY

POPULAR ORIGINALISM? THE TEA PARTY MOVEMENT AND  
CONSTITUTIONAL THEORY*Rebecca E. Zietlow*\*

The U.S. 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 interpretive 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 the fixed “original” meaning of the Constitution, which they hold to be binding on contemporary interpreters, regardless of subsequent historical or political developments. Popular constitutionalists study the way in which 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 of the Constitution. This Essay concludes by asking what popular originalism can teach us about constitutional interpretation and democracy. While modern originalism began as a critique of judicial overreaching 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.

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

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INTRODUCTION

The U.S. Constitution is currently the subject of a heated political debate. Most notably, Tea Party activists have invoked the Constitution as the foundation of their conservative philosophy of limited government.<sup>1</sup> They advocate a return to the constitutional interpretation of the past, calling for limits on congressional power that they believe to be consistent with the original meaning of the Constitution.<sup>2</sup> The Tea Party movement is therefore engaged in “popular originalism”<sup>3</sup>—constitutional interpretation outside of the courts<sup>4</sup>—to invoke originalism as interpretive method.<sup>5</sup>

The Tea Party movement highlights the relationship between popular constitutionalism and originalism, two interpretive methods that have captivated the attention of constitutional theorists in the past decade. The

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1. See, e.g., Jeffrey Rosen, *Radical Constitutionalism*, N.Y. TIMES MAG., Nov. 28, 2010, at 34.

2. See Randy Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 NW. U. L. REV. COLLOQUY 281, 282 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/10/LRColl2011n10Barnett.pdf>.

3. Professor Jared Goldstein first coined the term “popular originalism” in Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. COLLOQUY 288, 298 (2011), <http://www.law.northwestern.edu/lawreview/colloquy/2011/11/LRColl2011n11Goldstein.pdf> [hereinafter Goldstein, *Popular Constitutionalism*]; see also Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827 (2011) [hereinafter Goldstein, *Perils of Popular Originalism*].

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* 7 (2004), and that of democratically elected lawmakers. See Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 73 OHIO ST. L.J. 1367 (2011). When legislatures engage in popular constitutionalism, the legislative process provides procedural protections, transparency, and accountability that is lacking from political movements. *Id.* Nonetheless, lawmakers exercising popular constitutionalism are almost always acting in response to political movements.

5. Rosen, *supra* note 1, at 34 (quoting Utah Senator Mike Lee, who promised during the campaign that “[a]s 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”).

Tea Party movement thus 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.<sup>6</sup> Exploring this relationship reveals important lessons about constitutional theory and the importance of context to constitutional development. Originalism has evolved from a constitutional method that championed deference to the political branches to one that embraces judicial supremacy.<sup>7</sup> 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 principal contribution of popular originalism to constitutional interpretation may be to provide a justification for judicial activism.

Constitutional scholarship in recent years arguably has been polarized along political lines. Many 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.<sup>8</sup> Perhaps because originalism is resistant to change in constitutional meaning, scholars who advocate originalism tend to be politically conservative or libertarian.<sup>9</sup> On the other end of the spectrum are scholars who advocate popular constitutionalism.<sup>10</sup>

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6. This relationship has been receiving growing attention from constitutional scholars. See, e.g., Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 321–22 (2008); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 547–49 (2006); Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. (forthcoming 2011) (manuscript at 1–2), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1658549](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1658549).

7. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 602, 608 (2004). But see Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1542 (2005) (book review) (“Courts lack interpretive supremacy—the power to resolve, once and for all, the Constitution’s meaning.”).

8. Some influential works on originalism include RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); and Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. L. & Legal Theory Research Papers Series, No. 07-24, 2008), available at <http://papers.ssrn.com/abstract=1120244>.

9. See Strang, *supra* note 6, at 34–35. One notable exception is Jack Balkin, a prominent liberal constitutional scholar who advocates originalism. See, e.g., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009) (arguing that “the most intellectually sound version[]” of originalism is “original meaning originalism,” which aims to set out the basic structure of government and to make future constitutional construction possible and is therefore compatible with living constitutionalism).

10. See, e.g., KRAMER, *supra* note 4; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS* (2006); James G. Pope, *Labor's Constitution of*

Perhaps because many of the successful political movements that have engaged in popular constitutionalism have been progressive,<sup>11</sup> 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 counterintuitive nature of its political agenda from the perspective of constitutional theory.<sup>12</sup>

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.<sup>13</sup> While originalists believe that the constitution has a fixed meaning, popular constitutionalism is the purest example of the “living constitutionalism” 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, originalists have found an important political ally that has increased the

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*Freedom*, 106 YALE L.J. 941 (1997); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

11. *But see* Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 DENV. U. L. REV. 523, 550–52 (2011) (detailing examples of conservative movements invoking the Constitution).

12. Indeed, the *Northwestern University 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, *The Constitutional Politics of the Tea Party Movement*, 105 NW. U. L. REV. COLLOQUY 267, 267–68 (2011), available at <http://www.law.northwestern.edu/lawreview/colloquy/2011/8/LRColl2011n8Albert.pdf>; Barnett, *supra* note 2, at 282; Goldstein, *Popular Constitutionalism*, *supra* note 3, at 289–91; Sanford Levinson, *If We Have an Imperfect Constitution, Should We Settle for Remarkably Timid Reform? Reflections Generated by the General Phenomenon of “Tea Party Constitutionalism” and Randy Barnett’s Particular Proposal for a “Repeal Amendment” Designed to Rein in an Overreaching Congress*, 105 NW. U. L. REV. COLLOQUY 271, 279–80 (2011), available at <http://www.law.northwestern.edu/lawreview/colloquy/2011/9/LRColl2011n9Levinson.pdf>; Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300, 306–08 (2011), available at <http://www.law.northwestern.edu/lawreview/colloquy/2011/12/LRColl2011n12Somin.pdf>. Other scholarship on the Tea Party movement and constitutional theory includes Goldstein, *Perils of Popular Originalism*, *supra* note 3; Jared A. Goldstein, *The Tea Party’s Constitution*, 88 DENV. U. L. REV. (forthcoming); Schmidt, *supra* note 11.

13. *See* Saul Cornell, Heller, *New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,”* 56 UCLA L. REV. 1095, 1103 (2009) (“Popular constitutionalism was, and remains, closer in spirit to modern ideas of a living constitution, and is therefore ultimately incompatible with all forms of originalism.”). *But see* Strang, *supra* note 6, at 2 (explaining that popular constitutionalism and originalism are theoretically compatible).

salience of their method of constitutional interpretation.<sup>14</sup> 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, which does not change over time. They maintain that present day interpreters of the Constitution are bound by that original meaning.<sup>15</sup> On the other hand, popular constitutionalists are skeptical of both the notion that meaning is fixed and the view that original meaning is binding.<sup>16</sup> 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 and 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 engaging in democratic politics. If not, popular originalism could paradoxically lead to a reduction of the role of democracy in constitutional interpretation.

Currently, 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 restricted by principles of federalism and limits on congressional power. The current debate over the Patient Protection and Affordable Care Act (ACA),<sup>17</sup> with the federal government on one side and the Tea Party movement in opposition, 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 I of this Essay provides a brief definition of the Tea Party movement, originalism, and popular constitutionalism. While originalism and popular constitutionalism simultaneously have gained prominence in academia, the two groups of scholars rarely interact. This Part suggests that

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14. See Barnett, *supra* note 2, at 283 (describing his work with Tea Party activists).

15. See Solum, *supra* note 8, at 2.

16. See Pettys, *supra* note 6, at 320–21.

17. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

there is considerable overlap between the two schools of thought, particularly their interest in the impact of history on constitutional development. Conversely, Part II acknowledges the extent to which originalism and popular constitutionalism diverge. Popular constitutionalists and originalists differ fundamentally on their understanding of constitutional fidelity and meaning. This raises the question of whether popular originalism is indeed feasible. Part III analyzes the relationship between constitutional interpretation and democracy in originalism 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.

#### I. THE TEA PARTY, ORIGINALISM, AND POPULAR CONSTITUTIONALISM

The Tea Party is a group of people protesting the size and power of the federal government.<sup>18</sup> Tea Party activists call for limits on congressional power that they believe to be consistent with the Constitution's original meaning.<sup>19</sup> Tea Party activists thus draw on two current trends in constitutional theory—originalism and popular constitutionalism. This Part briefly defines the terms “originalism” and “popular constitutionalism,” and discusses the relationship between them. Leaders of the Tea Party movement have championed originalism by adopting an originalist approach to the Constitution as one of their central principles. Yet, the current political salience of originalism in the Tea Party movement is a significant example of popular constitutionalism.

What is notable about the study of originalism and popular constitutionalism is that scholars who engage in both endeavors rely on history to understand constitutional meaning and 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 spring 2009, as groups of people met to protest government measures intended to address the economic crisis, including the stimulus and bank bailout measures that Congress had recently enacted.<sup>20</sup> The first Tea Party demonstrations were held on April

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18. See Barnett, *supra* note 2, at 282.

19. It is debatable whether the Tea Party's interpretation of the Constitution is correct. Compare Goldstein, *Popular Constitutionalism*, *supra* note 3, at 290 (referring to the Tea Party's constitutional theory as “constitutional mythology”), with Somin, *supra* note 12, at 306 (defending the level of education, knowledge, and sophistication of participants in the Tea Party movement).

20. See Kathleen Lucadamo, *Stimulus Critics Stage “Tea Party,”* N.Y. DAILY NEWS, Mar. 1,

15 of that year, protesting, among other things, the size of the federal government.<sup>21</sup> The movement gained momentum that summer, as Tea Party activists attended town hall meetings of congressional representatives to protest the healthcare reform bill, then pending before Congress.<sup>22</sup> Tea Partiers continued to stage protests throughout congressional debates over the ACA. After Congress adopted the healthcare reform measure, Tea Party activists adopted a two-pronged protest approach. They challenged the constitutionality of the ACA in the federal courts, but also turned to electoral politics to support candidates who opposed the ACA, federal taxes, and federal spending in general.<sup>23</sup> Tea Party-supported candidates scored significant victories in the 2010 congressional elections.<sup>24</sup> Members of Congress elected with the support of the Tea Partiers adamantly opposed federal spending measures and taxes, and they played a leading role in the debt ceiling crisis in summer 2011.<sup>25</sup>

The degree to which the Tea Party movement is a grassroots movement is debatable. Tea Party organizers have received extensive financial support from prominent conservative think-tanks and financiers.<sup>26</sup> Moreover, declarations made by Tea Party supporters at rallies and town hall meetings, such as “Keep your government hands off my Medicare,”<sup>27</sup> reflect confusion among some Tea Party activists about the role that government actually plays in people’s lives.<sup>28</sup> Nonetheless, it is

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2009, at 13, available at [http://www.nydailynews.com/money/2009/02/28/2009-02-28\\_stimulus\\_critics\\_stage\\_tea\\_party.html](http://www.nydailynews.com/money/2009/02/28/2009-02-28_stimulus_critics_stage_tea_party.html); see also Somin, *supra* note 12, at 303 (citing Lucadamo, *supra*).

21. See Barnett, *supra* note 2, at 281–82.

22. *Id.* at 284.

23. See *id.* at 284–85 (discussing Tea Party support for a repeal amendment and the endorsements the amendment subsequently received from various legislative leaders).

24. Albert, *supra* note 12, at 267–68 (detailing victories of Tea Party candidates in congressional elections).

25. See Michael D. Shear, *Freshman Republicans Face Defining Debt Vote*, N.Y. TIMES BLOG: CAUCUS (July 28, 2011, 9:43 AM), <http://thecaucus.blogs.nytimes.com/2011/07/28/freshman-republicans-face-defining-debt-vote/?scp=13&sq=tea%20party%20debt&st=cse>.

26. E.g., George Monbiot, *The Tea Party Movement: Deluded and Inspired by Billionaires*, GUARDIAN (Oct. 25, 2010, 15:15 EDT), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/oct/25/tea-party-koch-brothers>. 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 Yepoka Yeebo, *Surprising Way Race Colors Attitudes to Health Care Reform*, HUFFINGTON POST (Mar. 8, 2011, 3:02 PM), [http://www.huffingtonpost.com/2011/03/08/race-health-care-reform\\_n\\_832783.html](http://www.huffingtonpost.com/2011/03/08/race-health-care-reform_n_832783.html). But see Barnett, *supra* note 2, at 281 (dismissing charges that Tea Partiers are motivated by racial prejudice).

27. Bob Cesca, *Keep Your Goddamn Government Hands off My Medicare!*, HUFFINGTON POST (Aug. 5, 2009, 6:45 PM), [http://www.huffingtonpost.com/bob-cesca/get-your-goddamn-governme\\_b\\_252326.html](http://www.huffingtonpost.com/bob-cesca/get-your-goddamn-governme_b_252326.html).

28. See Chris Good, *The Tea Party Movement: Who's in Charge?*, ATLANTIC (Apr. 13, 2009, 6:07 PM), <http://www.theatlantic.com/politics/archive/2009/04/the-tea-party-movement-whos-in-charge/13041> (detailing the Tea Party’s ties to larger conservative organizations); Monbiot, *supra*



indisputable that the Tea Party movement reflects a certain amount of popular distrust of government and anxiety about change, especially regarding 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.<sup>29</sup> The Tea Party's primary target has been the ACA, which, it argues, unduly expands the power of the federal government and infringes on individual liberty.<sup>30</sup> Some Tea Partiers have called for changes to the existing Constitution.<sup>31</sup> This group supports a constitutional amendment that would authorize the repeal of congressional acts if two-thirds of all state legislatures voted for the change.<sup>32</sup> Tea Party activists have also proposed repealing existing constitutional amendments, including the Sixteenth Amendment, which authorizes the federal income tax,<sup>33</sup> and the Seventeenth Amendment, which provides for the direct election of U.S. senators,<sup>34</sup> as well as either repealing or amending the Citizenship Clause of the Fourteenth Amendment, which guarantees birthright citizenship for people born in the United States.<sup>35</sup>

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note 26 (calling the Tea Party movement "one of the biggest exercises in false consciousness the world has seen—and the biggest Astroturf operation in history"). *But see* Barnett, *supra* note 2, at 281 (arguing that reports questioning the grassroots nature of the Tea Party movement are "essentially false"). According to an April 2010 poll, 18% of those polled identified themselves as Tea Party supporters. However, only 4% had attended a Tea Party meeting or donated to the movement. Kate Zernike, *Poll Shows Negative View of Tea Party Is on the Rise*, N.Y. TIMES, Aug. 6, 2011, at A10, available at <http://www.nytimes.com/2011/08/05/us/politics/05teaparty.html>. On Election Day in November 2010, polls showed that four in ten voters said they were Tea Party supporters, and of those polled, only 18% characterized their view as "not favorable." *See id.* By August 2011, the number of voters characterizing their view as "not favorable" increased to 40%. *Id.*

29. *See* Barnett, *supra* note 2, at 282 ("[T]he Tea Party movement is about two big subjects: first, the undeniable recent surge in national government spending and debt, and second, what Tea Partiers perceive as a federal government that has greatly exceeded its constitutional powers.").

30. *See id.* at 282, 284.

31. Elizabeth P. Foley, *Sovereignty, Rebalanced: The Tea Party & Constitutional Amendments*, 78 TENN. L. REV. 751, 754 (2011).

32. Bill Bartel, *In Tea Party Speech, McDonnell Backs "Repeal Amendment,"* VIRGINIAN-PILOT (Oct. 9, 2010), <http://hamptonroads.com/2010/10/tea-party-speech-mcdonnell-backs-repeal-amendment>; John Rossomando, *Tea-Party Affiliated Group Seeks Constitutional Change*, DAILY CALLER (last updated Oct. 3, 2010, 9:27 AM), <http://dailycaller.com/2010/10/02/tea-party-affiliated-group-seeks-constitutional-change>; *see also* Barnett, *supra* note 2, at 283–85 (describing the efforts of Tea Party activists to enact a repeal amendment).

33. David H. Gans, *Strange Brew: The Tea Party's Predictable, but Misguided, Campaign to Repeal the Sixteenth Amendment*, CONST. ACCOUNTABILITY CTR. (July 23, 2010), [http://theconstitution.org/blog.history/?p=1857](http://theconstitution.org/blog/history/?p=1857).

34. Steven D. Schwinn, *The Tea Party and the Seventeenth Amendment*, CONST. L. PROF BLOG (June 2, 2010), <http://lawprofessors.typepad.com/conlaw/2010/06/the-tea-party-and-the-seventeenth-amendment.html>.

35. *See* Shannon44, *Lindsey Graham Pledges to End "Birthright Citizenship" with Constitutional Amendment*, CHARLESTONTEAPARTY.ORG (July 29, 2010), <http://charlestonteparty>

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.<sup>36</sup> 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.”<sup>37</sup> They also share a general concern about the size and power of government infringing upon individual liberty.<sup>38</sup> Members of the Tea Party movement claim that they are champions of individual liberty in the face of a tyrannical federal government.<sup>39</sup> Finally, Tea Partiers embrace the view that individual Americans have a personal responsibility to study and understand the Constitution.<sup>40</sup> They often criticize courts and reject the notion that only lawyers can properly interpret the Constitution.<sup>41</sup> This dispute over the role of the federal government and its relationship to individual rights could influence lawmakers and judges’ constitutional interpretation in coming years.

### B. Originalism

In the past thirty years, originalism has emerged as one of the principal theories of constitutional interpretation.<sup>42</sup> The Supreme Court routinely surveys original sources when interpreting the Constitution.<sup>43</sup> Virtually all constitutional scholars agree that the original meaning of the Constitution, to the extent that it can be discerned, is relevant when the Constitution is applied to contemporary circumstances. What differentiates originalists

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.org/?p=6650.

36. See Barnett, *supra* note 2, at 283.

37. Ellen, *Sarah Palin Lectures Fox News Viewers: Our Constitution Creates Law Based on the God of the Bible and the Ten Commandments*, NEWS HOUNDS (May 7, 2010), [http://www.newshounds.us/2010/05/07/sarah\\_palin\\_lectures\\_fox\\_news\\_viewers\\_our\\_constitutio\\_n\\_creates\\_law\\_based\\_on\\_the\\_god\\_of\\_the\\_bible\\_and\\_the\\_ten\\_commandments.php](http://www.newshounds.us/2010/05/07/sarah_palin_lectures_fox_news_viewers_our_constitutio_n_creates_law_based_on_the_god_of_the_bible_and_the_ten_commandments.php) (quoting Sarah Palin) (internal quotation marks omitted); see also Goldstein, *Popular Constitutionalism*, *supra* note 3, at 292.

38. See Barnett, *supra* note 2, at 282; Foley, *supra* note 31, at 754.

39. See, e.g., Foley, *supra* note 31, at 752. 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, *Popular Constitutionalism*, *supra* note 3, at 298.

40. See Schmidt, *supra* note 11, at 534.

41. *Id.* Professor Christopher W. Schmidt argues that the Tea Partiers’ antagonism to courts is based on their general view that courts are not on their side. See *id.* at n.53. However, as the litigation over the ACA illustrates, the conservative federal courts are actually quite receptive to the originalist arguments of the Tea Party movement. See *infra* notes 163–67 and accompanying text.

42. See BARNETT, *supra* note 8, at 91; Solum, *supra* note 8, at 1–2.

43. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008); *Printz v. United States*, 521 U.S. 898, 905–07 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

from popular constitutionalists is the originalist view that the meaning of the Constitution is limited to its meaning at the time it was adopted. Originalists argue that subsequent events, including political movements and other historical developments, are irrelevant to the Constitution's meaning today.<sup>44</sup>

Early modern originalists looked to the intent of the Framers of the Constitution to determine the meaning of the Constitution.<sup>45</sup> They believed that this was the only context that mattered, and this context occurred only at the time the Constitution and its amendments were adopted. The main critique of this early modern originalism or "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.<sup>46</sup> It is not clear whose intent should matter—that of those who wrote the Constitution or that of those who voted to ratify it.<sup>47</sup> Moreover, the "proposal" of the Constitutional Convention arguably did not acquire meaning until the ratifying conventions or until it gained approval from the people themselves.<sup>48</sup> The problem of "collective intent" is thus a major obstacle to original intent originalism.

Responding to these concerns and others,<sup>49</sup> 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.<sup>50</sup> 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 of adoption.<sup>51</sup>

In all forms of originalism, constitutional meaning is resistant to

44. Cf. Strang, *supra* note 6, at 22 (noting that court precedents are more likely to be "nonoriginalist" when they are the "product of popular social movements").

45. Solum, *supra* note 8, at 14 (describing and discussing possible rationales behind "original intentions originalism"). 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 U.S. Constitution. See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 788 (2009).

46. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214–15 (1980).

47. See Solum, *supra* note 8, at 40.

48. See *id.*

49. See Whittington, *supra* note 7, at 605–06.

50. Prominent "original public meaning" originalists include Randy Barnett, Keith Whittington, and Lawrence Solum. See, e.g., BARNETT, *supra* note 8, at 92; WHITTINGTON, *supra* note 8, at 35; Solum, *supra* note 8, at 2.

51. See BARNETT, *supra* note 8, at 92 (explaining the objective nature of "original meaning" originalism); Solum, *supra* note 8, at 4 ("[M]eaning is fixed by the general pattern of usage at the time of constitutional utterance.").

change.<sup>52</sup> Some originalists argue that because the Constitution is a written text articulating the foundational principles of our government, neither judges nor political actors can change the meaning of the Constitution short of using the Article V amendment process.<sup>53</sup> 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.<sup>54</sup> All originalists, however, 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.<sup>55</sup> Thus, originalism is said to have the value of providing certainty and stability to constitutional interpretation.<sup>56</sup> Of course, such stability depends on interpreters' adherence to original meaning instead of policy or political considerations.<sup>57</sup>

Originalists differ on the specifics of their interpretive method, and a full discussion of originalism is beyond the scope of this Essay. Nonetheless, two aspects of originalism which unite the various camps of originalist scholars are notable for the purposes of this discussion. The first is what Professor Lawrence B. Solum calls the “fixation thesis.”<sup>58</sup> This describes the originalist belief that each provision of the Constitution has a fixed meaning dating back to the time of its adoption.<sup>59</sup> The second theme that unites originalists is the belief that the original intent or meaning of the Constitution is binding on those interpreting the provisions.<sup>60</sup> Thus, originalism is conservative in the classic sense—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

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52. See BARNETT, *supra* note 8, at 96 (“[T]he fact the Constitution was put in writing is what mandates that its meaning must remain the same until it is properly changed—or candidly rejected . . .”).

53. See *id.* 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 . . . . A commitment to textualism, therefore, begets a commitment to original meaning unless this meaning is altered by a written amendment.”).

54. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 706 (2009); cf. Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1910 (2008).

55. See, e.g., BARNETT, *supra* note 8, at 112–13.

56. Kay, *supra* note 54, at 714–15; see also BARNETT, *supra* note 8, at 117.

57. 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 next Part. See *infra* Part II.

58. See Solum, *supra* note 8, at 2.

59. *Id.*; cf. BARNETT, *supra* note 8, at 89 (“[O]riginalism is warranted because it is the best method to preserve or ‘lock in’ a constitution that is initially legitimate because of what it says.”).

60. See Solum, *supra* note 8, at 5.

the context at the time of the adoption of the constitutional provisions, not the context in which they are applied today.

While adhering to the fixation thesis, some original public meaning originalists nevertheless acknowledge that parts of the Constitution are sufficiently vague so that they “may still not provide enough guidance to identify a single rule of law to apply to a particular case at hand.”<sup>61</sup> These scholars “embrace the distinction between ‘constitutional interpretation’ understood as the enterprise of discerning the semantic content of the [C]onstitution 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 . . . .”<sup>62</sup> The context at the time of interpretation is relevant to the process of construction because construction takes place when the Constitution is applied to particular contextual circumstances.<sup>63</sup> Nonetheless, an originalist always tries to adhere as closely as possible to the original meaning of the Constitution when interpreting it.<sup>64</sup>

### C. Popular Constitutionalism

Recent years have also been marked by a surge of interest in popular constitutionalism.<sup>65</sup> Broadly viewed, popular constitutionalism is any form of constitutional interpretation that occurs outside of the courts.<sup>66</sup> The people themselves may engage in popular constitutionalism, as when political movements invoke the Constitution as a basis for their political arguments.<sup>67</sup> When these political movements 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

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61. BARNETT, *supra* note 8, at 121. Other originalists reject the view that any provision is sufficiently vague to require constitutional construction. *See, e.g.*, McGinnis & Rappaport, *supra* note 45, at 788 (arguing that the only interpretive rules that should be used are those which the Framers intended).

62. Solum, *supra* note 8, at 18–19.

63. *See* Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 Nw. U. L. Rev. 615, 631 (2009).

64. *See* BARNETT, *supra* note 8, at 125 (arguing that the text provides “a ‘frame’ that excludes many potential constructions”).

65. Rebecca E. Zietlow & James G. Pope, *The Toledo Auto-Lite Strike of 1934 and the Fight Against “Wage Slavery,”* 38 U. TOL. L. REV. 839, 840 (2007). *See generally* KRAMER, *supra* note 4; ZIETLOW, *supra* note 10; Pope, *supra* note 10; Post & Siegel, *supra* note 10.

66. *See* Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959–60 (2004) (contrasting the concept of popular constitutionalism with legal constitutionalism).

67. *See, e.g.*, Siegel, *supra* note 10, at 298–300 (focusing on the history of the Equal Rights Amendment and the Nineteenth Amendment to demonstrate that social movements play a significant role in shaping constitutional interpretation); Zietlow & Pope, *supra* note 65, at 849 (focusing on the role of popular constitutionalism in the 1934 AutoLite Strike).

inside and outside of the courts.<sup>68</sup>

Popular constitutionalism often occurs in juxtaposition to constitutional interpretation by the courts. Popular constitutionalists question the role that judicial review plays in constitutional interpretation.<sup>69</sup> Drawing on Professor Robert M. Cover's classic *Nomos and Narrative*,<sup>70</sup> some popular constitutionalists point out that judicial review often has the effect of inhibiting debate over constitutional meaning.<sup>71</sup> Furthermore, popular constitutionalists differ over the extent to which they oppose judicial review.<sup>72</sup> Few seek to displace judicial review entirely.<sup>73</sup> 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 that enforce constitutional values.<sup>74</sup> Others point out that popular movements, such as the women's rights and gun rights movements, have influenced the Court's constitutional interpretation.<sup>75</sup> Popular constitutionalism is good for constitutional development because it involves open debate over fundamental values and constitutional principles. Thus, popular constitutionalism also strengthens civic society.

The history of our country is replete with examples of popular constitutionalism influencing constitutional development in the courts and

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68. See generally KRAMER, *supra* note 4 (detailing the involvement of "the people" in constitutional development throughout U.S. history); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999) (examining the influence of politics on constitutional development); ZIETLOW, *supra* note 10 (examining congressional protection of individual rights as a form of popular constitutionalism).

69. See, e.g., KRAMER, *supra* note 4, at 229; TUSHNET, *supra* note 10, at 154.

70. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

71. Kramer, *supra* note 66, at 975–76. See, e.g., TUSHNET, *supra* note 10, at 168 (arguing that the Court's rejection of claims to economic rights by poor people stifled political efforts to convince lawmakers to adopt legislation enforcing those rights).

72. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2061–64 (2010) (comparing three different populist approaches to judicial review).

73. But see TUSHNET, *supra* note 10, at 154 (advocating for elimination of judicial review).

74. See, e.g., Post & Siegel, *supra* note 10, at 2023; Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004).

75. See William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 193, 213–14 (2009) (arguing that increased public acceptance of homosexuals influenced the Court to extend the constitutional right to privacy to gay couples in sexuality cases); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323–24 (2006) [hereinafter Siegel, *Constitutional Culture*] (describing the influence of the feminist movement on the Court's interpretation of the Equal Protection Clause); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008) [hereinafter Siegel, *Dead or Alive*] (arguing that the Court's interpretation of the Second Amendment has been influenced by the twentieth century gun rights movement).

the political branches.<sup>76</sup> One of the most important examples of this is the antislavery constitutionalist movement in the early nineteenth century. Before the Civil War, antislavery constitutionalists invoked principles of freedom and equality already included in the Constitution to challenge the constitutionality of slavery, and their vision of freedom and equality had a profound impact on the Reconstruction Congress.<sup>77</sup> Consequently, 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 centuries argued that workers had a constitutional right to organize into unions based on the First and Thirteenth Amendments.<sup>78</sup> 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.<sup>79</sup> Similarly, civil rights advocates in the mid-twentieth century argued that they had a constitutional right to equal protection and equal citizenship.<sup>80</sup> This strong constitutional and moral vision, which also drew on the Reconstruction tradition, was crucial to the success of that movement.<sup>81</sup>

Notwithstanding the fact that scholars who advocate popular constitutionalism tend to be liberal or progressive, our country also has a significant history of conservative popular constitutionalism.<sup>82</sup> 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.<sup>83</sup> Following in Calhoun's footsteps, in the years following the Court's 1954 ruling in *Brown v. Board of Education*, southern segregationists engaged in "massive resistance" to the Court and advocated

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76. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (discussing popular constitutionalism and its influence on the courts); ZIETLOW, *supra* note 10 (discussing the influence of popular constitutionalism on the political branches); Siegel, *Constitutional Culture*, *supra* note 75.

77. Antislavery constitutionalists in the Reconstruction Congress sought to constitutionalize their vision of freedom and the fundamental rights of free people in the Reconstruction Amendments and civil rights statutes enforcing those amendments. See Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 *HOUS. L. REV.* (forthcoming 2012); see also ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 75–76* (1995). See generally WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848* (1977).

78. Pope, *supra* note 10, at 942; see also Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 *U. PA. L. REV.* 437, 499–502 (1989).

79. ZIETLOW, *supra* note 10, at 63–96; Zietlow & Pope, *supra* note 65, at 839–41.

80. ZIETLOW, *supra* note 10, at 99–104.

81. *Id.* at 97–99.

82. See Schmidt, *supra* note 11, at 522.

83. See WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816–1836*, at 166–67 (1965). I would like to thank Al Brophy for pointing this out to me.

the nullification of federal law.<sup>84</sup> The Tea Party movement, the most salient example of popular constitutionalism today, advocates a similarly restrictive reading of congressional power and deemphasizes the Reconstruction Era expansion of that power.<sup>85</sup> Thus, the Tea Partiers are following in the footsteps of conservative popular constitutionalists before them.

As the Tea Party rallies further 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.<sup>86</sup> Of course, the Supreme Court often plays an important role in ratifying this change.<sup>87</sup> For example, 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 the freedom of contract or the freedom to organize into unions was a more important constitutional value.<sup>88</sup> 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.<sup>89</sup> The New Deal was followed by a forty-year period of consensus acknowledging that the federal government had a duty to provide a safety net and further the economic security of the people.<sup>90</sup>

Similarly, the 1960s saw a national debate inside and outside the courts over whether constitutional protections for equality included freedom from not only racial segregation but also 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.<sup>91</sup> In both eras, popular

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84. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 330–34 (2004).

85. See Rosen, *supra* note 1, at 34.

86. See Siegel, *Constitutional Culture*, *supra* note 75, at 1329 (“Typically, it is only through sustained conflict that alternative understandings are honed into a form that officials can enforce and the public will recognize as the Constitution.”).

87. Balkin, *supra* note 9, at 562.

88. ZIETLOW, *supra* note 10, at 76–77.

89. See ACKERMAN, *supra* note 76, at 262.

90. Cf. ZIETLOW, *supra* note 10, at 96. Notably, President Lyndon B. 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 Republican presidency of Ronald Reagan; its downfall was illustrated most dramatically by Congress’ dismantling of the New Deal program Aid to Families with Dependent Children by the Personal Responsibility Act of 1996 during the Democratic presidency of Bill Clinton. See *id.* at 138.

91. By making this observation, I do not intend to state that race discrimination no longer exists here. 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



constitutionalism contributed to the public acceptance of constitutional values which have expanded the rights of individuals in our nation. Likewise, 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.<sup>92</sup> 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 positive impact on civic society.<sup>93</sup> 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.

There are strong normative arguments in favor of popular constitutionalism. Faith in the Constitution is central to our nation's political identity.<sup>94</sup> Popular constitutionalism is healthy for civic society

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which race discrimination continues to exist, 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, *see* Jesse, *Rand Paul Sets the Record Straight*, RAND PAUL: U.S. SENATE (May 20, 2010), <http://www.randpaul2010.com/2010/05/rand-paul-sets-the-record-straight>; he just thought the federal government should not be able to tell private businesses how to conduct their business. The critical outcry in response to Paul's comments only serves to illustrate my point that we have a societal consensus that race discrimination is wrong. *See* Wilson Huhn, *Rand Paul Opposes Civil Rights Laws Prohibiting Acts of Racial Discrimination by Private Businesses*, AKRON L. CAFÉ (May 20, 2010), [http://www.ohioverticals.com/blogs/akron\\_law\\_cafe/2010/05/rand-paul-opposes-civil-rights-laws-prohibiting-acts-of-racial-discrimination-by-private-businesses](http://www.ohioverticals.com/blogs/akron_law_cafe/2010/05/rand-paul-opposes-civil-rights-laws-prohibiting-acts-of-racial-discrimination-by-private-businesses). *Cf.* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 37–38 (2003) (discussing the manner in which the Court “deployed constitutional standards to interpret the statutory requirements” of civil rights legislation but avoided the question of whether Congress had the constitutional authority to enact certain sections of the statutes pursuant to Section 5 of the Fourteenth Amendment). One exception to this consensus is the question of whether gays and lesbians should enjoy the same anti-discrimination rights, which is still hotly debated. This exception is particularly noteworthy given that Tea Party supporters tend to have conservative values, and to oppose gay rights initiatives. *See* <http://www.nytimes.com/2010/03/13/us/politics/13tea.html> (noting that “the inaugural Tea Party convention, organized by the social networking site Tea Party Nation, featured remarks by fervent opponents of gay marriage and abortion rights”).

92. *See, e.g.*, TUSHNET, *supra* note 10, at ix–x; ZIETLOW, *supra* note 10, at 160–68; Siegel, *supra* note 10, at 312–13.

93. *See* Siegel, *Constitutional Culture*, *supra* note 75, at 1329.

94. Pettys, *supra* note 6, at 347.

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 U.S. Constitution in particular, are central to what it means to be a full-fledged member of the American community.”<sup>95</sup> 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 view of the Constitution reflects what one believes to be one’s 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 in determining the content of those values.<sup>96</sup>

## II. POPULAR ORIGINALISM—AN OXYMORON?

What is the relationship between popular constitutionalism and originalism? At first glance, the two do not seem to have much in common.<sup>97</sup> Originalism is a *method* of constitutional interpretation that focuses on what the Constitution and its amendments meant at the time they were adopted.<sup>98</sup> Originalists believe that meaning is both fixed and binding.<sup>99</sup> Popular constitutionalism is a *process* of constitutional interpretation that occurs outside of the courts. Unlike originalism, popular constitutionalism allows for the possibility that constitutional meaning may change over time because it involves “elaborating constitutional meaning in this political realm.”<sup>100</sup> The two concepts have a common theme—both look to historical 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 of whether a constitutional provision has a single discernible meaning.

One issue that unites originalism and popular constitutionalism is the extent to which both methods are involved in politics. Like popular constitutionalism, originalism has influenced the political realm. At the same time that originalism developed as a jurisprudential movement, it

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95. *Id.*

96. See ZIETLOW, *supra* note 10, at 160–68; Balkin, *supra* note 9, at 566; Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007).

97. Indeed, other scholars have treated originalism and popular constitutionalism as diametrically opposed. See generally Pettys, *supra* note 6 (arguing in favor of popular constitutionalism by pointing out inadequacies in originalism).

98. Whittington, *supra* note 7, at 599.

99. *E.g.*, Solum, *supra* note 8, at 2.

100. See WHITTINGTON, *supra* note 68, at 1.

also gained prominence in conservative political circles. Indeed, originalism has played an important political role as the foundation of a conservative jurisprudential movement.<sup>101</sup> 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.<sup>102</sup> 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 of the Constitution despite political pressures to the contrary. This Part concludes by considering whether, from this perspective, popular originalism is indeed feasible.

#### 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 originalists, constitutional meaning is fixed and binding on subsequent generations. To popular constitutionalists, constitutional meaning depends on the circumstances at the time of the constitutional interpretation, interpreting the Constitution in the context of contemporary political events. However, the current political salience of originalism illustrates that originalism and popular constitutionalism can coexist. Still, some basic divergences remain, rooted in fundamental principles of meaning.

Most fundamentally, there is disagreement between popular constitutionalists and originalists over whether the Constitution *has* a single discernible meaning, regardless of who is interpreting the provision. Originalists generally agree that there is a single discernible meaning to most, if not all, constitutional provisions.<sup>103</sup> Popular constitutionalists call into question the very idea of whether it is possible to discern a single meaning of any textual provision. They believe that the process of construction entails the creation of meaning during the application of a provision to the factual context.<sup>104</sup> While some originalists agree that context is relevant to the application of some constitutional provisions,

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101. Post & Siegel, *supra* note 6, at 548–51.

102. *See id.* at 549.

103. Compare Barnett, *supra* note 63, at 616–17 (acknowledging that some parts of the Constitution are either ambiguous or vague), with McGinnis & Rappaport, *supra* note 61, at 751–52 (arguing that originalist methods can discern the meaning of all constitutional provisions).

104. WHITTINGTON, *supra* note 68, at 1.

popular constitutionalists believe that meaning does not exist free of context. This divergence causes a crucial division between originalism and popular constitutionalism.

Assuming that some original meaning is discernible, the second 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.<sup>105</sup> By contrast, popular constitutionalists accept 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.<sup>106</sup> Nonetheless, the fixation thesis is a central tenet of originalism, and popular constitutionalism is arguably diametrically opposed to that thesis.

### B. *Politics and Law in Constitutional Interpretation*

The key issue in determining whether popular originalism is an oxymoron is 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.<sup>107</sup> Thus, 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, when it is difficult to discern their meaning.<sup>108</sup> Though not all originalists agree that constitutional construction is necessary,<sup>109</sup> many recognize its necessity when original meaning is not easily discernible from the

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105. Solum, *supra* note 8, at 4; see also BARNETT, *supra* note 8, at 89.

106. One interesting exception to the general tendency of originalists to focus only on courts' interpretation of the Constitution is the ongoing debate among originalists over whether and when courts should defer to nonoriginalist precedent. See Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1734–39.

107. See Solum, *supra* note 8, at 6 n.22.

108. See BARNETT, *supra* note 8, at 100 (“Constitutional construction fills the inevitable gaps created by the vagueness of these words when applied to particular circumstances.”).

109. See, e.g., McGinnis & Rappaport, *supra* note 45, at 752 (reasoning that “the constructionists have not supplied evidence that the constitutional enactors contemplated construction”).

constitutional text.<sup>110</sup> Arguably, popular constitutionalism could provide a process for determining the meaning of vague constitutional provisions through the mechanism of open public debate or the legislative process of decisionmaking.<sup>111</sup> Originalists agree that courts could play a role in determining constitutional meaning, although they disagree on whether other actors could play such a role.<sup>112</sup> To the extent that an originalist is willing to acknowledge that actors other than courts can construe the Constitution, he may be open to popular constitutionalism.<sup>113</sup>

To maintain fidelity to the original text, it seems that originalists would be particularly likely to condemn the politicization of constitutional interpretation. However, original intent originalists such as former judge Robert Bork and former Attorney General Edwin Meese have advocated deference to the political branches, arguably leaving space for popular constitutionalism.<sup>114</sup> Paradoxically then, given the original intent originalists' critique of the living constitutionalism of the Warren Court, their deference to political branches left more space for political branches to interpret the Constitution and thus politicize constitutional interpretation outside of the courts.<sup>115</sup> More recently, however, originalists have downplayed the extent to which they advocate judicial restraint.<sup>116</sup> According to Professor Keith Whittington, "The primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism."<sup>117</sup> Contemporary originalists are therefore more likely to be suspicious of popular constitutionalism and more likely to reject legislative measures that are inconsistent with the original meaning of the Constitution and its amendments.<sup>118</sup> Put 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 of the Constitution.<sup>119</sup> Despite any stated

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110. Solum, *supra* note 8, at 19; *see, e.g.*, Barnett, *supra* note 63, at 631–32.

111. *See* Balkin, *supra* note 9, at 550 (arguing that the Constitution is a "framework for governance that sets politics in motion and must be filled out over time through constitutional construction").

112. *See* Strang, *supra* note 6, at 20.

113. *Id.*

114. *See* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 352–53 (1990); Edwin Meese, III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 926–28 (1996).

115. *See* Strang, *supra* note 6, at 16–18.

116. Whittington, *supra* note 7, at 609.

117. *Id.*

118. *See id.* at 608–09 (pointing out that some "new" originalists advocate such judicial activism); *see also* Kramer, *supra* note 66, at 960 (pointing out that interest in popular constitutionalism has been fueled by the activism of the Rehnquist Court).

119. *See* Barnett, *supra* note 2, at 283.

intentions, though, it is not 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 officials are accountable to their electorates and are therefore institutionally bound to take political considerations into account when interpreting the Constitution, in a way that federal courts 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.<sup>120</sup> Nonetheless, it is undeniable that legislatures are institutionally responsive to the popular will, while courts, by contrast, are institutionally designed to limit the impact of the political will on their rulings.

Professor 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.<sup>121</sup> Members of the political branches are arguably bound by fidelity to the Constitution because of their institutional role as lawmakers and their oath to uphold the Constitution.<sup>122</sup> Citizens, Zeisberg argues, have more flexibility to determine whether they agree with the authoritative interpretation of the Constitution.<sup>123</sup> Thus, Zeisberg defends Frederick Douglass' claim that the Constitution prohibited slavery even though Douglass may have believed the opposite to be true.<sup>124</sup> While 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 "[t]he office of citizen is privileged in consent theory" because the Constitution "owes its authority to the consent of the people."<sup>125</sup> Even if judges and legislators "owe[d] deference to the public understandings of the text when ratified," citizens might still be justified in deferring to the "moral appeal of the interpretive position itself."<sup>126</sup> The work of the public would be to generate interpretations of the Constitution that are more just.<sup>127</sup>

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

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120. *See generally* BARRY E. FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (describing the relationship between popular opinion and the Supreme Court); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000) (discussing the effects of the political environment on the Warren Court).

121. *See* Mariah Zeisberg, Frederick Douglass, Citizen Interpreter 35–36 (Aug. 26, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1583683>.

122. *Id.* at 36.

123. *Id.*

124. *See id.* at 11–12.

125. *Id.* at 36.

126. *Id.* at 37.

127. *Id.*

people themselves would not be bound by originalism; instead, they would have the latitude to interpret the Constitution consistently with their values and morals. Nonetheless, in Zeisberg'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.

Professor Jack M. Balkin's theory of "framework originalism" also seeks to reconcile originalism with the type of evolving constitutional meaning inherent in popular constitutionalism. Balkin acknowledges that the Constitution contains some provisions that have a determinate meaning, but he points out that much of the Constitution describes standards and principles that are deliberately vague.<sup>128</sup> 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 capaciously over time.<sup>129</sup> Thus, the Constitution is "primarily a framework for governments, a skeleton on which much will later be built."<sup>130</sup> Balkin's originalism preserves the framework but leaves open the possibility of constitutional constructions that implement the Constitution consistent with its original meaning.<sup>131</sup>

What Balkin calls "living constitutionalism" is part of his theory of framework originalism. This is 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 purposes."<sup>132</sup> Thus, both originalism and popular constitutionalism play a role in Balkin's theory of constitutional development. Balkin may indeed be correct that the 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.

While the politicization of constitutional interpretation 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.<sup>133</sup> Original intent originalists criticized not just the

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128. Balkin, *supra* note 9, at 553.

129. *Id.*

130. *Id.* at 557.

131. *Id.*

132. *Id.* at 560.

133. See Post & Siegel, *supra* note 6, at 549.

methodology, but also the results, of the Warren Court's "activist" rulings. Indeed, 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."<sup>134</sup> Since the early 1980s, the connections between originalism and a conservative political agenda have been widely recognized: "Thus when President Reagan praised his appointees 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 narrow ideological [conservative] agenda.'"<sup>135</sup> 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 unclear whether Tea Partiers care about fidelity to the original Constitution or whether they simply use the originalist mantra to attain 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 do not care about motivation. What matters to them 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.<sup>136</sup> The challenge of popular originalism is determining how much space the Constitution allows for adherence to its original meaning while achieving political goals.

### III. CONSTITUTIONAL INTERPRETATION AND DEMOCRACY

The Tea Party movement builds on an originalist movement that has been growing, both within academia and in politics, since the late 1970s. Prominent politicians, such as Edwin Meese, have claimed to be originalists, as have judges appointed by presidents who also professed adherence to originalism.<sup>137</sup> In the political realm, conservative candidates have rallied the support of social conservatives by stridently opposing the Court's nonoriginalist abortion rights ruling in *Roe v. Wade*.<sup>138</sup> On the Supreme Court, Justices who profess themselves originalists have revitalized the doctrine of sovereign immunity and limits on congressional

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134. See Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986).

135. Post & Siegel, *supra* note 6, at 555–56.

136. See Siegel, *Constitutional Culture*, *supra* note 75, at 1348.

137. For example, President Ronald Reagan appointed a prominent originalist, William Rehnquist, as Chief Justice of the U.S. Supreme Court.

138. See Post & Siegel, *supra* note 96, at 374, 377.



power.<sup>139</sup> Notwithstanding Justice Stephen Breyer's recent attempt to revive "living constitutionalism,"<sup>140</sup> it is difficult to imagine a "living constitutionalist" nominee to the Court winning approval in the Senate today. Modern originalism has been highly successful.<sup>141</sup> Paradoxically, Dean Robert Post and Professor Reva Siegel argue that the *political* practice of originalism actually exemplifies living constitutionalism.<sup>142</sup> 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.<sup>143</sup>

Both modern originalism and popular constitutionalism were inspired, at least in part, by concerns about judicial overreaching in constitutional interpretation. Both originalists and proponents of popular constitutionalism have decried judicial activism and championed deference to the political process.<sup>144</sup> Of the two, however, only popular constitutionalism is wedded to the concept of deference to the democratic process.<sup>145</sup> Indeed, the relationship between constitutional interpretation and democratic decisionmaking may mark the most significant divergence between originalism and popular constitutionalism.

Protecting democratic rule was once one of the primary justifications for modern originalism.<sup>146</sup> Originalism as a modern movement began as a critique of the "political" rulings of the liberal Warren Court.<sup>147</sup> Early proponents of originalism such as Robert Bork and Professor Raoul Berger criticized the Warren Court's willingness to invalidate legislation based on what they viewed as the Court's substantive political values.<sup>148</sup> They

139. See, e.g., *United States v. Morrison*, 529 U.S. 598, 613 (2000); *Alden v. Maine*, 527 U.S. 706, 712 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

140. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 115–32 (2005) (arguing for constitutional interpretation that allows adaptation to unanticipated situations).

141. See Post & Siegel, *supra* note 6, at 554.

142. *Id.* at 569.

143. Ironically, the Court's originalist rulings have caused at least one scholar to label the Rehnquist Court as "The Most Activist Supreme Court in History." See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM passim* (2004); see also Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 287–92 (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 before doing so through the process of judicial review. See ZIETLOW, *supra* note 10, at 5–6; Siegel, *Dead or Alive*, *supra* note 75, at 193–94.

144. See, e.g., BORK, *supra* note 114, at 351–55; Zietlow, *supra* note 143, at 255–60; Post & Siegel, *supra* note 96, at 373–76.

145. See Strang, *supra* note 6, at 16.

146. See Post & Siegel, *supra* note 6, at 552–53.

147. See *id.* at 545; Whittington, *supra* note 7, at 599.

148. BORK, *supra* note 114, at 69–100; Post & Siegel, *supra* note 6, at 547 (citing RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT*

presented originalism as an antidote to “judicial activism” because originalism was a normatively neutral form of constitutional interpretation.<sup>149</sup> At that time, originalism was said to reduce judicial discretion and the concomitant opportunity for judges to impose their own political values under the guise of judicial review.<sup>150</sup> 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.”<sup>151</sup> Instead, proponents of originalism call on the Court to impose limitations on the democratic process based on an originalist interpretation of the Constitution.<sup>152</sup> Thus, instead of furthering democratic decisionmaking, originalism has become a justification for judicial activism.<sup>153</sup>

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 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.<sup>154</sup> Unlike judicial deliberations, the debates of lawmakers responding to popular constitutionalism are recorded and open to the public.<sup>155</sup> 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. Professor Jared Goldstein claims that the Tea Party is antidemocratic because participants in the movement are taking

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363–64, 386 (1977)); Whittington, *supra* note 7, at 601.

149. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976); Whittington, *supra* note 7, at 602.

150. See Meese, *supra* note 114, at 927–28; Meese, *supra* note 134, at 464–65; Rehnquist, *supra* note 149, at 703–04. A number of scholars have questioned whether originalism really has restrained judges from imposing their own views under the guise of constitutional interpretation. See, e.g., Jonathan R. Macey, *Originalism as an “Ism,”* 19 HARV. J.L. & PUB. POL’Y 301, 304 (1996); Post & Siegel, *supra* note 6, at 557–68; Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 432–33 (1998).

151. See Strang, *supra* note 6, at 14.

152. See, e.g., BARNETT, *supra* note 8, at 189.

153. As Lee Strang has pointed out, originalism can be the basis for limiting the power of the legislature by imposing either interior or external limits on legislative power. See Strang, *supra* note 6, at 17 (describing the difference between the attitudes of “conservative” and “libertarian” originalists towards judicial deference).

154. ZIETLOW, *supra* note 10, at 11.

155. See *id.* at 160–61.

absolutist positions that discourage democratic debate.<sup>156</sup> Goldstein points out that Tea Partiers often dismiss opponents as being illegitimate and even un-American.<sup>157</sup> Tea Partiers argue that there is only one correct meaning of the Constitution: “what our Founders and our founding documents meant.”<sup>158</sup> Paradoxically, then, even as they are engaging in popular constitutionalism, the Tea Partiers reject the notion of living constitutionalism 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.”<sup>159</sup>

Professor Ilya 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.”<sup>160</sup> Somin argues that the Tea Partiers’ focus on limiting the federal government serves the interest of democracy because “[t]he enormous size . . . of modern government undercuts meaningful democratic control over government policy.”<sup>161</sup> Somin dismisses Goldstein’s concerns about the Tea Party rhetoric, maintaining that “[g]iven 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.”<sup>162</sup>

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 ACA.<sup>163</sup> Tea Party activists participated in numerous demonstrations against the ACA during congressional debates, claiming that it would unduly expand the federal government and

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156. See Goldstein, *Popular Constitutionalism*, *supra* note 3, at 291.

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

158. *Id.* at 292 (quoting Ellen, *supra* note 37) (internal quotation marks omitted).

159. Goldstein, *Popular Constitutionalism*, *supra* note 3, at 291.

160. Somin, *supra* note 12, at 301.

161. *Id.*

162. *Id.* at 304 (footnote omitted). Somin’s response here is ironic because he seems to advocate the same constitutional fundamentalism that characterizes the Tea Party movement.

163. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code (2010)).

infringe on individual liberty.<sup>164</sup> Congressional opponents of the ACA echoed the Tea Partiers during those debates.<sup>165</sup> They lost the debate when Congress approved the ACA.<sup>166</sup> Despite the fact that opposition to federal courts as constitutional arbiters is a fundamental principle of the constitutional theories of the Tea Party, Tea Partiers immediately filed lawsuits opposing the Act. Invoking constitutional reasoning that mirrors that of Tea Party activists and their supporters in Congress, three judges have relied on originalist reasoning to rule against the Act.<sup>167</sup> These judicial victories are ironic since the Tea Partiers had lost their popular constitutionalist battle over the ACA. The ACA itself was a major victory of progressive popular constitutionalism.<sup>168</sup> Rather than ceding to the constitutional interpretation of the country's elected representatives, Tea Partiers resorted to the courts to impose their originalist values. Other courts have upheld the ACA,<sup>169</sup> and the U.S. Supreme Court will ultimately resolve this constitutional dispute.<sup>170</sup> 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 fall 2010, which significantly affected the public debate over spending

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164. See Barnett, *supra* note 2, at 282.

165. See Zietlow, *supra* note 4.

166. *Id.*

167. See *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, No. 1:10-CV-763, 2011 WL 4072875, at \*21 (M.D. Pa. Sept. 13, 2011); *Florida v. U.S. Dep't of Health & Human Servs.*, No. 3:10-CV-91-RV/EMT, 2011 WL 285683, at \*29 (N.D. Fla. Jan. 31, 2011), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011), *aff'd in part, rev'd in part*, 648 F.3d 1235 (11th Cir. 2011); *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010), *vacated*, Nos., 11-1057, 11-1058, 2011 WL 3925617 (4th Cir. Sept. 8, 2011).

168. See Zietlow, *supra* note 4.

169. See *Thomas More Law Ctr. v. Obama*, No. 10-2388, 2011 WL 2556039, at \*533 (6th Cir. June 29, 2011); *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), *hearing en banc denied*, No. 11-5047, 2011 WL 1113489 (D.C. Cir. Mar. 17, 2011). Several other courts dismissed challenges for lack of justiciability. See *Kinder v. Geithner*, No. 1:10-CV-101(RWS), 2011 WL 1576721, at \*4-10 (E.D. Mo. Apr. 26, 2011) (standing and ripeness); *Purpura v. Sebelius*, No. 10-04814, 2011 U.S. Dist. LEXIS 43153, at \*34 (D.N.J. Apr. 21, 2011), *aff'd*, No. 11-2303, 2011 WL 4494187 (3d Cir. Sept. 29, 2011) (standing); *Peterson v. United States*, 774 F. Supp. 2d 418, 425 (D.N.H. 2011) (standing); *N.J. Physicians, Inc. v. Obama*, 757 F. Supp. 2d 502, 510-11 (D.N.J. 2010), *aff'd sub nom.* *N.J. Physicians, Inc. v. President of U.S.*, No. 10-4600, 2011 WL 3366340 (3d Cir. Aug. 3, 2011) (standing); *Shreeve v. Obama*, No. 1:10-CV-71, 2010 WL 4628177, at \*4 (E.D. Tenn. Nov. 4, 2010) (standing); *Baldwin v. Sebelius*, No. 10CV1033 DMS(WMC), 2010 U.S. Dist. LEXIS 89192, at \*13-14 (S.D. Cal. Aug. 27, 2010), *aff'd*, No. 10-56374, 2011 WL 3524287 (9th Cir. Aug. 12, 2011) (standing).

170. See *Dep't of Health & Human Servs. v. Florida*, No. 11-393, 2011 WL 5515164 (U.S. Nov. 14, 2011); *Florida v. Dep't of Health & Human Servs.*, No. 11-400, 2011 WL 5515165 (U.S. Nov. 14, 2011); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, No. 11-393, 2011 WL 5515162 (U.S. Nov. 14, 2011).

and taxes in 2011. Tea Partiers' 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.<sup>171</sup>

The Tea Party has achieved significant political success since its founding, but it has not yet achieved constitutional change in the political realm. So far, the Tea Party's constitutional victories have been confined to court rulings.<sup>172</sup> This 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. It is possible that the insulation of judges from the political process facilitates their implementation of originalism as a method of constitutional interpretation. Insulation from politics may be necessary to interpret the Constitution in a manner that is consistent with its 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 the Constitution, but like all popular constitutionalists, they are using constitutional advocacy to achieve their political goals. Members of the Tea Party movement may well care more about achieving those political goals than whether the lawmakers representing 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 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.

#### CONCLUSION

Recent years have seen a rise of interest in legal history among constitutional theorists. Originalists and popular constitutionalists share an interest in legal history because studying history is helpful to understanding constitutional development and meaning. Originalists and popular constitutionalists may inhabit the same historical archives, but until now,

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171. See Barnett, *supra* note 2, at 282 (arguing that the Tea Party movement is most concerned about federal spending and the size of the federal government).

172. This is particularly ironic, given the fact that opposing the courts is one of the fundamental tenets of the Tea Party ideology. See Schmidt, *supra* note 11, at 534.

there has been little scholarly interchange between the two groups. This is unfortunate because while the two groups may differ in the extent to which they feel bound by the past, they agree that the past is important and useful in 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.<sup>173</sup> Nonetheless, it is undeniable that the Tea Party movement has increased the salience of debate over constitutional issues such as federalism and individual liberty.<sup>174</sup> 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 its 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.

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173. Compare Somin, *supra* note 12, at 301 (arguing that limiting federal power would enhance democracy), with Goldstein, *Popular Constitutionalism*, *supra* note 3, 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.”).

174. See Barnett, *supra* note 2, at 287.

