

# ORIGINALISM AS FAITH

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INTRODUCTION.....	37
I. “OUR LAW” .....	38
II. INCLUSIVE ORIGINALISM .....	39
III. THE SUPREME COURT AND INCLUSIVE ORIGINALISM ...	42
IV. WHY ORIGINALISM? .....	48
CONCLUSION .....	51

## INTRODUCTION

In a recent issue of the *Columbia Law Review*, Professor William Baude asks a provocative question: “Is Originalism our Law?”<sup>1</sup> His answer, yes, likely surprised observers who know that Supreme Court decisions frequently protect free speech, criminal defendants, state sovereign immunity, a woman’s right to choose, and the rights of gays and lesbians to marry (among many other rights and people) in ways that would have perplexed those who drafted, proposed, and ratified each of the constitutional provisions allegedly supporting those rights. As Professor David Strauss explains persuasively in the most recent Foreword to the *Harvard Law Review*,<sup>2</sup> neither text nor history can adequately support or justify the Court’s cases. Rather, Supreme Court constitutional law is best seen as common law where prior decisions and the justices’ personal values writ large generate the decisions. Yet, Professor Baude boldly argues that “inclusive originalism” is the law of the land.<sup>3</sup>

This essay argues that, to the extent Professor Baude’s thesis (which is a branch or outgrowth of “New Originalist” scholarship) tries to connect Court decisions to the various relevant ratification eras, it fails to account for how constitutional law is actually generated by the Supreme Court.

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<sup>1</sup> William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (“Originalism.”).

<sup>2</sup> David A. Strauss, *The Supreme Court: 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 52–55 (2015).

<sup>3</sup> See Baude, *supra* note 1, at 2365.

To the extent his definition of originalism merges with or is indistinguishable from a “living constitution” approach (or Strauss’s common law constitutionalism), it may accurately describe the Court’s cases, but it is not truly (or even partly) originalist in any meaningful sense of that term.

Most of what follows supports these twin ideas about Baude’s inclusive originalism (that it is either descriptively inaccurate or that it is irrelevant to how the Court actually decides cases) and suggests that those observations apply equally to other forms of New Originalist scholarship. The final section provides a few tentative thoughts on why talented legal scholars like Professor Baude still hold on to puzzling and unpersuasive theories about the role originalism plays in constitutional law. My tentative answer is that, for many current originalists, it comes down to a matter of faith.<sup>4</sup>

## I

### “OUR LAW”

To understand and appreciate Professor Baude’s thesis that originalism is “our law,” it is necessary to understand what he means by “our law.”<sup>5</sup>

Professor Baude does not specifically indicate whether he is writing for philosophers or judges or both when referring to “our law.” He does say that “[i]f I’m right . . . originalist judging can potentially be justified on a . . . plausible normative ground—that judges have a duty to apply the law, and our current law . . . is this form of originalism.”<sup>6</sup> He also remarks that his article “relies on lawyers’ assumptions rather than technical jurisprudence.”<sup>7</sup>

Both the tone and overriding substance of Baude’s article seem directed primarily at judges and lawyers, not theorists. In any event, this Essay assumes that we (the academy, lawyers, judges, and law students) care mostly about how originalism (of any stripe) affects our legal practices on the ground<sup>8</sup> and that Professor Baude’s article should be evaluated within that framework.

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<sup>4</sup> One definition of “faith” is the “firm belief in something for which there is no proof.” *Full Definition of Faith*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/faith> [<https://perma.cc/5KD5-GFQ2>].

<sup>5</sup> Baude, *supra* note 1, at 2352.

<sup>6</sup> *Id.* at 2353.

<sup>7</sup> *Id.* at 2352 n.5.

<sup>8</sup> See Eric Segall, *Originalism on the Ground*, DORF ON LAW (Nov. 2, 2015, 7:00 AM), <http://www.dorfonlaw.org/2015/11/originalism-on-ground.html> [<https://perma.cc/FA5X-PLTN>].

## II

## INCLUSIVE ORIGINALISM

Originalism comes in many shapes and sizes. Professor Baude labels his “inclusive originalism.”<sup>9</sup> He acknowledges up front that his “type of originalism may be frustrating to those who knew originalism in its unruly youth,”<sup>10</sup> but he dramatically understates that case. Judge Bork, Ed Meese, and the other originalists of the 1980s would likely not recognize as originalism many of the theories now claiming that mantle, including Baude’s “inclusive originalism.”

Professor Baude argues that his definition of “inclusive originalism” is “coherent, consistent with much modern originalist scholarship, and most important, consistent with our practice.”<sup>11</sup> Interestingly and revealingly, he cites Justices Kagan and Alito, who are not exactly paragons of originalist decision making, to support his claim that “inclusive originalism” is “our law.”<sup>12</sup>

Professor Baude defines “inclusive originalism” as follows: “Under inclusive originalism, the original meaning of the Constitution is the ultimate criterion for constitutional law . . . . This means that judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them.”<sup>13</sup>

Professor Baude mentions at the outset of his article the tension between judicial respect for precedent and his (or any) form of originalism. The question whether an originalist judge, regardless of how that term is defined, may justifiably overlook or bypass the best originalist answer to a case on the grounds of *stare decisis* is a difficult one that divides thoughtful justices and scholars on both sides of the debate. However, its resolution is not germane to his article or to this Essay. I agree wholeheartedly with Professor Baude that “inclusive originalism” could theoretically be “our law” even if Supreme Court justices ought to privilege prior cases over originalist methodology when the two conflict.

Where Professor Baude’s thesis runs into serious trouble is with his belief that judges can look to “policy” and “practice” to “the extent that the original meaning incorporates or permits

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<sup>9</sup> Baude, *supra* note 1, at 2355.

<sup>10</sup> *Id.* at 2352.

<sup>11</sup> *Id.*

<sup>12</sup> *See id.* at 2352–53.

<sup>13</sup> *Id.* at 2355 (emphasis omitted).

them.”<sup>14</sup> Professor Baude says that it is perfectly consistent with “inclusive originalism” for judges to interpret the open-ended phrases of the Constitution in ways that were “unforeseeable at the time of enactment.”<sup>15</sup> This is so “because a word can have a fixed abstract meaning even if the specific facts that meaning points to change over time.”<sup>16</sup> Other New Originalists such as Randy Barnett agree with this notion that the meaning of vague constitutional provisions may evolve over time as facts and circumstances also change.<sup>17</sup>

How can the meaning of words be simultaneously “fixed” and “abstract?” The answer shows why “inclusive originalism” is either inaccurate or irrelevant and also why Professor Baude is correct that his version of originalism would mystify, to say the least, those “who knew originalism in its unruly youth.”<sup>18</sup>

According to Professor Baude, one “policy” and “practice” that is consistent with “inclusive originalism” recognizes that many constitutional terms are “ambiguous” or “vague,” and judges must use devices like “construction” and “presumptions” to give those words meaning.<sup>19</sup> These and other forms of constitutional interpretation are consistent with “our law” as long as they are permitted by the “many versions of originalism.”<sup>20</sup> Not only are such creative methods of judicial interpretation consistent with inclusive originalism but “[a] method like the use of evolving language is likely an example of a submethod that is *required* by originalism. Giving evolving terms their intended evolving meaning is necessary to be faithful to their original sense.”<sup>21</sup>

Professor Baude believes that the vague constitutional phrases that trigger most constitutional litigation should be given “evolving” meaning over time by the Supreme Court as society changes.<sup>22</sup> So defined, originalism seems indistinguishable from “living constitutionalism.” This conflict, however, cannot necessarily be laid at the feet of Professor Baude because ever since the mid 1990s, “new originalists” such as Professors Randy Barnett and Jack Balkin have tried to hide “living constitutionalism” under the

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<sup>14</sup> *Id.* (emphasis omitted).

<sup>15</sup> *Id.* at 2356.

<sup>16</sup> *Id.*

<sup>17</sup> See *infra* text accompanying note 26.

<sup>18</sup> Baude, *supra* note 1, at 2352.

<sup>19</sup> *Id.* at 2357.

<sup>20</sup> *Id.* at 2358.

<sup>21</sup> *Id.* at 2360.

<sup>22</sup> See *id.* at 2352.

guise of “originalism.”<sup>23</sup> For example, Professor Balkin named his book “Living Originalism.”<sup>24</sup>

Professor Barnett’s “construction zone” originalism provides an excellent example of originalism which really isn’t and appears to be the model for Professor Baude’s descriptive account of constitutional cases.<sup>25</sup> According to Barnett, the meaning of the words of the Constitution must be derived by judges through an “empirical” analysis of what the text actually meant to the people who ratified it.<sup>26</sup> That “core meaning” does not change over time unless the Constitution is formerly amended pursuant to Article V.<sup>27</sup> For Professor Barnett, the text is no mere symbol but the center piece of constitutional adjudication.

That “core” meaning of the constitutional text, however, according to Barnett, often fails to tell judges how to apply vague constitutional provisions to unanticipated facts. To complete that enterprise, judges must construct rules of interpretation that guide them. He admits that his “[o]riginalism is not a theory of what to do when original meaning runs out . . . [but] this is not a bug; it is a feature. Were a constitution too specific, its original meaning probably would become outdated very quickly.”<sup>28</sup>

Barnett’s preferred rule of construction is that the Constitution is republican in character, strongly protecting the rights of the individual against majority rule.<sup>29</sup> He believes the text and its history support such a rule, and he would disapprove of background rules such as deciding cases by applying socialist or egalitarian ideals because he believes those interpretations would be inconsistent with the actual written Constitution and its history.<sup>30</sup>

The problem with Barnett’s originalism is that constitutional litigation almost always involves “vague

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<sup>23</sup> See Eric Segall, *Originalist Defenses of Overturning Same-Sex Marriage Bans: Really?*, DORF ON LAW (Feb. 9, 2015, 7:00 AM) <http://www.dorfonlaw.org/2015/02/originalist-defenses-of-overturning.html> [perma.cc/J5X3-UWCE].

<sup>24</sup> *Id.*

<sup>25</sup> See Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176, 180 (2016).

<sup>26</sup> Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 69–70.

<sup>29</sup> See George F. Will, *Foreword* to RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION*, at ix, xii–xiii (2016).

<sup>30</sup> *Id.*

constitutional provisions” that have uncertain meanings in the context of our ever-changing society.<sup>31</sup> When is the last time someone litigated the requirements that there be two Senators from every state, that the President be at least thirty-five, or that jury trials are required if more than twenty dollars are at stake? Most cases that end up in front of judges implicate vague phrases like “equal protection,” “due process,” “establishment of religion,” and “cruel and unusual punishment.”

For Professor Baude to support his claim that “inclusive originalism” is “our law,” he has to figure out a way to fit a wide variety of landmark Supreme Court decisions, considered by most to have little originalist content, into his definition. His explanations for these cases indicate that he believes that Barnett’s “construction zone” originalism is, in fact, originalism. But if he is right, his and Barnett’s originalism don’t matter. If he is wrong, they need a new descriptive account.

### III

#### THE SUPREME COURT AND INCLUSIVE ORIGINALISM

Professor Baude claims that cases like *Brown v. Board of Education*,<sup>32</sup> *Obergefell v. Hodges*,<sup>33</sup> and *Home Building & Loan Ass’n v. Blaisdell*<sup>34</sup> are consistent with inclusive originalism. His efforts to fit these cases into his model reveal a lot about both his inclusive originalism and other New Originalist scholarship.

The Court in *Blaisdell* allowed Minnesota to put a temporary stop on the obligations of mortgagees to comply with the terms of their mortgages despite the Constitution’s express prohibition on states passing any “Law impairing the Obligation of Contracts.”<sup>35</sup> The Court allowed Minnesota to violate what appears to be the clear meaning of this provision on the basis that there was an emergency (the Great Depression), and while “emergency does not create power, emergency may furnish the occasion for the exercise of power,” and under the logic that while “an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already

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<sup>31</sup> Segall, *supra* note 25, at 180.

<sup>32</sup> 347 U.S. 483 (1954).

<sup>33</sup> 135 S. Ct. 2584 (2015).

<sup>34</sup> 290 U.S. 398 (1934).

<sup>35</sup> U.S. CONST. art. I, § 10; *see* 290 U.S. at 447.

enjoyed.”<sup>36</sup>

The Court went on to say that there are two types of constitutional provisions, “specific” and “general,” and specific provisions are “so particularized as not to admit of construction,” but general ones “afford a broad outline” and the “process of construction is essential to fill in the details. That is true of the contract clause.”<sup>37</sup> Which constitutional provisions are “specific” so that they do not “admit of construction?” The Court said that no emergency would allow “a state to have more than two Senators . . . or permit the States to ‘coin money,’” among a few other examples.<sup>38</sup>

About all of this, Professor Baude says that “there is some reason to believe that Founding-era lawyers would have *expected* a mortgage moratorium to violate the Contract Clause. But originalism often requires one to read the constitutional text beyond its specific expectations.”<sup>39</sup> Although the Court may have mistakenly read the Contracts Clause as “general,” not “specific,” it asked “precisely the kinds of question [sic] about the original meaning of the Contract Clause that [he has] argued that originalism ought to embrace.”<sup>40</sup> Professor Baude goes so far as to approvingly quote Thomas Colby (a major critic of New Originalism), who said that this reasoning in *Blaisdell* “actually appears to be a paragon of the New Originalism rather than nonoriginalism.”<sup>41</sup>

Pursuant to this analysis, Professor Baude’s “inclusive originalism” allows Supreme Court justices to ignore clear constitutional commands and well-documented original expectations about those demands, if modern circumstances so require.<sup>42</sup> This type of constitutional interpretation is no different than the form embraced by living constitutionalists (and liberals) such as Professors Erwin Chemerinsky and Laurence Tribe, and Justices William Brennan and Thurgood Marshall. The fact that so-called “originalists” might pause and ask whether the provision at issue is “specific” or “general” before embarking on their “construction zone” constitutionalism cannot matter given that “specific” provisions are almost never litigated, and even when they are,

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<sup>36</sup> 290 U.S. at 425–26 (quoting *Wilson v. New*, 243 U.S. 332, 348 (1917)).

<sup>37</sup> *Id.* at 426.

<sup>38</sup> *Id.*

<sup>39</sup> Baude, *supra* note 1, at 2378 (footnote omitted).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (quoting Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 767 (2011)).

<sup>42</sup> *See id.* at 2377, 2395.

like the Eleventh Amendment, they are still not given their obviously intended meaning if policy concerns are important enough.<sup>43</sup>

Professor Baude's analysis also mistakenly assumes that the justices' answers to hard constitutional questions—such as whether emergencies can override clear constitutional commands—come *after* they ask their originalist questions as opposed to *after* an all-things-considered approach to the difficult issue.<sup>44</sup> One does not have to be a core legal realist to think that Professor Baude's sequencing here is quite unlikely. It is far more probable that the justices settled on a result and then justified it by labeling the Contract Clause a general provision that may be constructed as times and circumstances change. And, once they made that move, all of the originalist language in the opinion is mere window dressing. Legal realists and living constitutionalists do not deny that the justices often use the rhetoric of originalism to create a symbolic (and maybe important) link to the past.<sup>45</sup> We just deny that the rhetoric drives their decisions.

Professor Baude also argues that *Obergefell v. Hodges* is an example of “inclusive originalism.”<sup>46</sup> He says that the Court's decision that the “Fourteenth Amendment required states to license same-sex marriages. . . . seemed to pick the originalist route.”<sup>47</sup> This claim, that gays and lesbians have a constitutionally protected right to marry secured by an originalist interpretation of the Fourteenth Amendment, is quite extraordinary given that we know for certain that virtually no one alive in 1868 would have felt that way.<sup>48</sup>

Professor Baude supports this argument with two points. He maintains that Justice Kennedy's opinion explicitly identified the Fourteenth Amendment as a constitutional provision setting “forth broad principles rather than specific requirements,” consistent with the “new originalism.”<sup>49</sup> Second, Professor Baude cites the following paragraph from Justice Kennedy's opinion:

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<sup>43</sup> See Eric J. Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16 U. PA. J. CONST. L. 443, 446–47 (2013).

<sup>44</sup> See Baude, *supra* note 1, at 2377–78.

<sup>45</sup> See *id.* at 2352–53.

<sup>46</sup> 135 S. Ct. 2584 (2015).

<sup>47</sup> Baude, *supra* note 1, at 2382.

<sup>48</sup> See *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting) (“[The majority] discovered in the Fourteenth Amendment a ‘fundamental right’ overlooked by every person alive at the time of ratification, and almost everyone else in the time since.”).

<sup>49</sup> Baude, *supra* note 1, at 2382 (quoting *Obergefell*, 135 S. Ct. at 2598).



The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.<sup>50</sup>

Professor Baude takes Justice Kennedy's rather obvious homage to living constitutionalism and suggests "this sort of living originalism" amounts to the Court asking the right questions and doing "what an inclusive originalist would do."<sup>51</sup> Thus, "even in one of its most potentially anti-originalist moments, the Court ultimately claimed fidelity to the Amendment's original authors."<sup>52</sup>

There are two ways to sort out this explanation. One way is to see the Court's explicit living constitutionalism for exactly what it is. In *Lawrence v. Texas*, for example, the first major gay rights case, Justice Kennedy did not try to hide the ball concerning his choice between originalism and the living Constitution. He ended that opinion as follows:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. *They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.*<sup>53</sup>

A clearer choice to reject originalism of any kind is hard to imagine. If I am right, Professor Baude's "inclusive originalism" is emphatically not "our law."

But, if by "inclusive originalism," Professor Baude means that the Supreme Court may identify vague constitutional provisions, ignore what we know the people who ratified those provisions would have expected them to mean, and then "construct" the best modern meaning of those provisions, with the only originalist move being to first label the provision "general" and not "specific," then there is no difference between

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<sup>50</sup> *Id.* (quoting *Obergefell*, 135 S. Ct. at 2598).

<sup>51</sup> *Id.* at 2382–83.

<sup>52</sup> *Id.*

<sup>53</sup> *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (emphasis added).

“inclusive originalism” and non-originalist methods and “inclusive originalism” is irrelevant to how judges decide cases. As I mentioned before, other than the Eleventh Amendment, “specific” provisions normally do not result in litigation. Either these gay rights cases are examples of living constitutionalism, or they are a form of originalism indistinguishable from living constitutionalism. The only other possible explanation is that they are outliers but Professor Baude does not make that argument (nor could he) in light of the Court’s long historical practice of using similar living constitutionalism analytical methods.<sup>54</sup>

Like most other academics discussing constitutional interpretation, Professor Baude tries to fit *Brown v. Board of Education* into his normative and descriptive account. He concedes that “[i]f *Brown* does repudiate the original meaning of the Fourteenth Amendment, that is a big problem for the positive-law theory of originalism.”<sup>55</sup>

Professor Baude begins his analysis by noting that the *Brown* Court held the case over one term and asked the parties to brief questions relating to the history of the Fourteenth Amendment as applied to segregated schools.<sup>56</sup> So far, so good. But, then, as Professor Baude relates, the Court specifically said that the history was “inconclusive” and that historical “sources” are not clear enough “to resolve the problem with which we are faced.”<sup>57</sup> The *Brown* Court went on to famously hold, based in part on social science reports, that separate schools could not be equal.<sup>58</sup>

Once again, Professor Baude uses the “Court asked the right question” move to conclude that nothing in *Brown*’s official canonicity contradicts originalism’s legal status.<sup>59</sup> It is difficult to figure out how a Court that specifically rejected relying on historical sources somehow evidences “inclusive originalism,” unless we define “inclusive” to mean “not at all related to history.” To the extent that, once again, the Justices *rejection of originalism is consistent with originalism because the framers expected them to reject originalism* is Professor

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<sup>54</sup> See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 15–20 (1998) (tracing the Supreme Court’s use of the “living Constitution” approach in the nineteenth and twentieth centuries).

<sup>55</sup> Baude, *supra* note 1, at 2380.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 2381 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954)).

<sup>58</sup> See *Brown*, 347 U.S. at 494 n.11 (citing multiple social science sources to establish that segregation psychologically harms children).

<sup>59</sup> Baude, *supra* note 1, at 2380–81.

Baude's descriptive account, it is clear that "originalism" and "not originalism" are the same thing. There is no other choice.

Professor Stephen Griffin once wrote the following about *Brown*:

[O]ne of the most celebrated Supreme Court decisions in U.S. history, a decision that helped underwrite the legitimacy of the contemporary constitutional order, especially for racial and ethnic minorities, was *deliberately and unanimously* not based on any version of original intent or meaning, despite the clear understanding of the justices that originalism was an option.<sup>60</sup>

*Brown* is not the only example of obviously non-originalist judicial decisions. Griffin pointed this out clearly and persuasively:

The problem for originalism posed by equal protection law goes far beyond *Brown*. The development of vast tributaries of equal protection law owes little to historical or originalist argument. We can examine basic . . . precedents concerning school desegregation, interracial marriage and adoption, voting rights, racially disproportionate impact, affirmative action, and gender discrimination without finding any significant use of originalist argument. Equal protection law is a good demonstration of how doctrines can evolve legitimately without recourse to historical argument. This celebrated branch of law thus demonstrates that originalism is not the status quo.<sup>61</sup>

Why would Professor Baude label obviously non-originalist decisions as originalist? The answer is his uncritical acceptance of "New Originalism" as a form of originalism. This acceptance is a bit surprising given prior persuasive critiques of New Originalism similar to the one offered here.<sup>62</sup>

As Professor Baude does suggest, Judge Bork's originalism would not have deemed any of the gay rights cases or most of the cases cited by Baude acceptable nor would he ever have believed that his form of originalism was in fact "our law."<sup>63</sup> Bork, along with Ed Meese, Michael McConnell and a few others espoused their originalist methodology because they strongly believed "our law" needed to be changed, not because

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<sup>60</sup> Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1186, 1200 (2008) (footnotes omitted).

<sup>61</sup> *Id.* at 1202–03 (footnotes omitted).

<sup>62</sup> See *infra* notes 69–74 and accompanying text.

<sup>63</sup> See Baude, *supra* note 1, at 2355 (describing strict originalists as those who think "judges should look only to the original meaning of the Constitution" while disallowing any "other sources of law, such as precedent or practice or policy").

the Supreme Court was already using originalism correctly.<sup>64</sup>

Although Professor Baude does cite a few cases, like *District of Columbia v. Heller*, which evidence a more authentic originalist analysis, he does not, and could not, suggest those kinds of cases make up a substantial portion of “our law.”<sup>65</sup> Rather his argument depends on the assumption that the legion of Court cases interpreting vague constitutional text in a living constitutional manner are consistent with his “inclusive originalism.”<sup>66</sup> If he is right, there is no difference between originalism and living constitutionalism (at least to judges). If he is wrong, then his descriptive account is inaccurate.

#### IV

#### WHY ORIGINALISM?

Professor Baude seems to have no quarrel with the methods (not necessarily the results) of most of the decisions he uses to explain why “inclusive originalism” is indeed “our law.”<sup>67</sup> But these cases all used numerous methods of constitutional interpretation that go much further than, and sometimes ignore, historical evaluations of the original meaning of constitutional text. These methods include the justices taking into account prior Court decisions, contemporary considerations of public policy, and the text and structure of the United States Constitution.<sup>68</sup> Most importantly, original meaning is not privileged (in fact often ignored) by the justices in these decisions other than with a wink and a nod to the relevant text at issue being “general” and not “specific.”

What Professor Baude is describing (accurately except for the label) is a pluralistic method of constitutional decision

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<sup>64</sup> See Griffin, *supra* note 60, at 1188–89 (claiming that the “old originalism” of Bork and others in the 1980s was designed to cure what they perceived to be the judicial activism of the Warren and Burger Courts).

<sup>65</sup> See Friedman & Smith, *supra* note 54, at 3–8. Even if we concede that cases like *Heller* represent authentic originalism, these cases make up only a small portion of all cases and thus a small portion of “our law.”

<sup>66</sup> See *id.* at 11–33 (describing a number of nineteenth and twentieth century “living constitution” cases, which exemplify the type of cases Baude would have to reconcile with his “inclusive originalism” theory).

<sup>67</sup> See, e.g., Baude, *supra* note 1, at 2377–78. Baude approves of the reasoning used by the Court in *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934), despite disagreeing with the outcome.

<sup>68</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589–90 (2015) (relying heavily on prior Court decisions when legalizing same-sex marriage); *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954) (refusing to give weight to the original meaning of the Fourteenth Amendment).

making indistinguishable from the interpretative theories of such decidedly non-originalist scholars as Phillip Bobbitt, Richard Fallon, Michael Dorf, and Stephen Griffin.<sup>69</sup>

Why doesn't Professor Baude expressly align his "inclusive originalism" with these pluralistic theories? After all, to the extent his descriptive account embraces the New Originalism of the 1990s, this critique is well-grounded. As Saul Cornell has written about Randy Barnett and other New Originalists of the 1990s:

For right-wing scholars and judges, new originalism serves as a type of constitutional camouflage. It allows "conservatives" to create their own living constitution and advance a form of judicial activism, while claiming to be simply engaged in an act of constitutional redemption.<sup>70</sup>

Similarly, and perhaps less pejoratively, but no less accurately, Professor Fleming summed up in one sentence why the New Originalism is really not originalism at all: "the inclusiveness of the new originalism shows that it will require the very judgments that proponents of the moral reading have argued are necessary in constitutional interpretation and construction."<sup>71</sup> By the "moral reading," Fleming is of course referring to the greatest living constitutionalist of them all, Ronald Dworkin.<sup>72</sup>

We have come full circle. A leading constitutional law theorist at one of the nation's elite law schools who teaches a seminar on originalism (Professor Baude) is advocating a theory of originalism that is indistinguishable from the theories of the liberal, non-originalist Ronald Dworkin. And he is not the only one. Stephen Sachs of Duke, who Baude cites admiringly, believes that originalism is a theory of legal change that reveals that the law (including the Constitution) must stay the same until it is legally amended.<sup>73</sup> In other words, according to Sachs, "[o]ur law is still the Founders' law, as it's been lawfully changed."<sup>74</sup>

<sup>69</sup> See STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 144–49 (1996) (summarizing the works of these scholars).

<sup>70</sup> Saul Cornell, *New Originalism: A Constitutional Scam*, *DISSENT MAG.* (May 3, 2011), [https://www.dissentmagazine.org/online\\_articles/new-originalism-a-constitutional-scam](https://www.dissentmagazine.org/online_articles/new-originalism-a-constitutional-scam) [<https://perma.cc/SD5A-H3KH>].

<sup>71</sup> James E. Fleming, *The Inclusiveness of the New Originalism*, 82 *FORDHAM L. REV.*, 433, 436 (2013).

<sup>72</sup> See RONALD DWORGIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1996) (introducing his theory of moral reading).

<sup>73</sup> Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *HARV. J.L. & PUB. POL.* 817, 820–22 (2015).

<sup>74</sup> *Id.* at 838.

He is right. But he also suggests that such valid changes may be brought about by judges taking vague constitutional text and constructing modern meanings to address changed circumstances.<sup>75</sup> Again, this is originalism as living constitutionalism. Do we really need “originalist” theories to tell us that legal changes, to be valid, must be legal?

Both Professor Baude and Professor Sachs offer interesting descriptive and normative accounts of constitutional decision making. Neither, however, takes original meaning or history seriously as a constraint or even a factor in generating results in litigated cases.<sup>76</sup> If *Brown*, *Blaisdell*, and *Obergefell* are originalist cases, then the term has lost all meaning.

Why are these scholars so invested with characterizing “our law” as originalist? The answer lies, I think, with a great need or hope among many academics to believe that the justices are doing something other than imposing their personal values, writ large, on the rest of us. Judge Bork did not have that need. He constantly ranted against Supreme Court justices imposing their personal values on reluctant majorities unrelated to any relevant law.<sup>77</sup> Michael McConnell, another original originalist, also thought that the sin of non-originalist methods of constitutional interpretation lay in the unlawfulness of judges mistaking their personal values for legal values.<sup>78</sup> These scholars and judges saw most of constitutional law for what it is; all-things-considered decisions all the way down. They offered a solution: strict adherence to original meaning *combined* with a strong presumption in favor of legislation.

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<sup>75</sup> See *id.* at 852 (“Often we explain important developments in our law by describing them as applications of unchanging rules to changing facts.”).

<sup>76</sup> See, e.g., *id.* at 856 (downplaying the victory of a post-founding practice that conflicted with original constitutional text by explaining that the court “was willing to treat post-Founding tradition as a source of law because doing so had already been authorized at the Founding”); see also Baude, *supra* note 1, at 2382 (acknowledging that the Court in *Lawrence* rejected history as a dispositive factor but arguing the decision still had “an originalist pedigree” because the Court realized that the Founders intentionally left room for evolution in future application of the Fourteenth Amendment).

<sup>77</sup> Kelley Beaucar Vlahos, *Judge Bork: Judicial Activism Is Going Global*, FOX NEWS (Sept. 11, 2003), <http://www.foxnews.com/story/2003/09/11/judge-bork-judicial-activism-is-going-global.html> [<https://perma.cc/8WY6-ZHN4>].

<sup>78</sup> Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1525 (1989) (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988)) (“The appeal of originalism is that the moral principles so applied will be the foundational principles of the American Republic—principles we can all perceive for ourselves and that have shaped our nation’s political character—and not the political-moral principles of whomever happens to occupy the judicial office.”).

Professor Baude does not advocate for either strict adherence to original meaning nor strong deference to the elected branches. Yet, he must account for society-changing decisions such as *Brown*, *Obergefell*, and *Heller*, without simply conceding the legal realist (and Bork) critique that, if accepted, would make the job of a constitutional theorist mostly obsolete. It appears Professors Baude, Barnett, and Sachs need to maintain the faith that judging, especially the form of judging embodied by front page, landmark decisions, is separate from ordinary politics. For them, constitutional decision making must remain special otherwise their faith in constitutional law will be shaken. They are resisting the antitheory of Judge Posner,<sup>79</sup> and this author,<sup>80</sup> among others, despite widespread evidence that the justices use a values writ large approach to constitutional decisions.

In essence, Professors Baude and Sachs have combined theory with antitheory. A theory of “inclusive originalism” that allows for significant “judicial construction,” or a theory of constitutional change that allows meaning to evolve with changed facts, can justify virtually every aggressive act of judicial review of the last two hundred years. But, don’t worry, the justices aren’t simply making it up as they go along based on values, but they are originalists doing what the founding fathers would have wanted all along. “Our law” is their law and what Bork would have called judicial activism is in reality fidelity to the Constitution.

Of course, none of this is true. The Justices don’t let law, much less original meaning in any real sense, get in the way of their desired results, and they never have.

#### CONCLUSION

If Professor Baude’s “inclusive originalism” is broad enough to justify such historical and obviously non-originalist decisions as *Blaisdell*, *Brown*, and *Obergefell*, then it is irrelevant as a doctrine for judges. If “inclusive originalism” does not fairly describe those cases, then it is inaccurate. This new turn to originalism as “our law” is ~~really nothing more than taking the Court’s decisions as~~ ~~“law” as a matter of faith.~~ HOW JUDGES THINK 9 (2008) (noting it is “rather frequent” that judges are influenced by “their own political opinions or policy judgments, even their idiosyncrasies”).

<sup>80</sup> See ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 187 (2012) (concluding that Supreme Court justices make decisions based on “their subjective value preferences and personal life experiences”).

because logic, precedent, legal reasoning, and certainly original meaning, simply can't get the job done.