Originalism and the Academy in Exile

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A great deal of scholarly research has been conducted on originalism. Valuable (and oftentimes competing) scholarship has outlined different forms of this mode of constitutional interpretation, made suggestions about proper interpretive practices, offered historical demarcations that distinguish correct from incorrect periodizations, and much more. This article approaches originalism from a less familiar perspective. By treating this mode of constitutional interpretation as an object of academic history, scholars can illuminate the evolving statuses of originalists within the legal academy, the ways in which originalism gained intellectual credibility over time, and the means by which originalism developed a stable niche in the ecology of legal professionals during the twentieth century. One hopes that such an approach will clarify the historical context and intellectual roots of modern originalist theory and practice.

By the early 1980s, the legal academy was undergoing significant transformation. A new generation of interdisciplinary law professors had emerged within American law schools, promising to reshape the future of legal research, training, and professional development. These young scholars established consequential academic movements and drove important ideological and interdisciplinary interventions within many top

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schools. But what role did originalist theorists and originalist scholarship play in this period of generational transition, occupational change, and interdisciplinary innovation?

Previous work on originalism's academic legacy generally neglects the first half of the 1980s or assumes that originalism maintained a small but powerful presence within the law schools by this period.[1] This article aims to correct the record, by outlining the rapid, rags-to-riches advance of constitutional originalism over the course of only a few years. Major intellectual and institutional changes were occurring across many American law schools during the first half of the 1980s, but this generational transition did not include originalism or the type of "founding history" interdisciplinary research that we now associate with the originalist scholarly program.

However, constitutional originalism did find a deep and broad base of support within the United States Department of Justice (DOJ) beginning in 1985. Although the legal academy housed very few originalist scholars when Edwin Meese III became United States Attorney General in 1985, Meese's DOJ set out to research and remake the landscape of American constitutional law. This "academy in exile" contested the dominant modes of constitutional interpretation and the theoretical currents emanating from the courts and the academy.[2] The DOJ instead turned to constitutional originalism, with government lawyers leading the way in the early development, theorization, and exercise of originalism.

In addition to becoming the declared constitutional stance of Meese and the DOJ, originalism started to gain followers on the federal bench and within growing conservative social movements during the second half of

1. See, for example, Johnathan G. O'Neill, *Originalism in American Law and Politics: A Constitutional History* (Baltimore and London: Johns Hopkins University Press, 2005); Murray Dry, "Federalism and the Constitution: The Founders' Design and Contemporary Constitutional Law," *Constitutional Commentary* 4 (1987): 233–34; Robert W. Bennett and Lawrence B. Solum, *Constitutional Originalism: A Debate* (Ithaca, NY and London: Cornell University Press, 2011); Ken I. Kersch, "The Talking Cure: How Constitutional Argument Drives Constitutional Development," *Boston University Law Review* 94 (2014): 1083–108; Ken I. Kersch, "Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in *National Review*, 1955–1980," *Studies in American Political Development* 25 (2011): 86–116; Steven M. Teles, "Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment," *Studies in American Political Development* 23 (2009): 61–83; Ann Southworth, "Lawyers and the Conservative Counterrevolution," *Law & Social Inquiry* 43 (2018): 1698–728; Logan E. Sawyer III, "Principle and Politics in the New History of Originalism," *American Journal of Legal History* 57 (2017): 198–222; Mary Ziegler, "Originalism Talk: A Legal History," *Brigham Young University Law Review* 2014 (2015): 869–926; and Lee J. Strang, "Originalism and the Aristotelian Tradition: Virtue's Home in Originalism," *Fordham Law Review* 80 (2012): 1997–2040.

2. Conversation with Gary Lawson, November 1, 2018.

the 1980s. This diverse base of originalist advocates and practitioners not only kept originalism afloat, but also was able to inspire wide-ranging debate and defense. As constitutional originalism grew in influence and professional use by the late 1980s, academic interlocutors began engaging with and reimagining originalism more intently.

I

The 1980s proved to be a decade of profound change for American law schools.[3] In the years leading up to the 1980s, law school populations were remarkably homogeneous. Professors were overwhelmingly elite, middle-aged, white men, and the lion's share of students in the 1970s was male.[4] During the 1980s, the American legal academy mushroomed, with a greater and more diverse range of law professors, law students, and accredited law schools. The number of American Bar Association-approved law schools rose from 157 in the 1974–75 academic year to 175 by the 1989–90 academic year. Within the law schools, the number of professors and students increased during the 1980s.[5] First year enrollment at law schools went up 7.6% in the decade between the 1979–80 and the 1989–90 academic years. The American law school population also became more diverse. The total number of females enrolled in J.D. programs in the United States shot up by 41.5% during the 1980s.[6] And although law faculties of the mid-1970s were more than 90% white and

3. When asked about the transition from life as a law student in the 1970s to starting a career as a law professor in the early 1980s, Richard Michael Fischl exclaimed, "Quite a contrast! In between being a student and a professor, I was a lawyer for the National Labor Relations Board for five years. So I had a sort of hiatus from the legal academy. When I came back, it was like, 'What happened?'" Richard Michael Fischl, Interview, October 6, 2017.

4. Donna Fossum, "Law Professors: A Profile of the Teaching Branch of the Legal Profession," *American Bar Foundation Research Journal* 5 (1980): 501–54; Elizabeth Mertz, Frances Tung, Katherine Barnes, Wamucii Njogu, Molly Heiler, and Joanne Martin, "After Tenure: Post-Tenure Law Professors in the United States," *Law School Admission Council*, Grants Report 11-02 (October 2011): 3; and "Enrollment and Degrees Awarded, 1963–2012 Academic Years," *American Bar Association*, Section of Legal Education and Admissions to the Bar, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf (accessed March 1, 2018).

5. "Enrollment and Degrees Awarded"; Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System, A Critical Edition* (New York and London: New York University Press, 2004), 204–5; and Carl Auerbach, *Historical Statistics of Legal Education* (Chicago: American Bar Foundation, 1997).

6. "Enrollment and Degrees Awarded."

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male, the professorial ranks evolved in the 1980s, as a greater number of women and African-Americans joined law school faculties.[7]

With the increase in size and diversity, the legal academy was introduced to fresh tastes, ambitious scholarly agendas, and competing institutional goals. A new ethos arose within elite law schools, and the nature of professorial work morphed, a joint phenomenon that David Trubek referred to as the "academization" or "intellectualization of the law school."[8] The 1980s saw the American legal academy laboring to move beyond its trade school label and fight to become an equal player (and department) in the modern American research university. This changing institutional identity had enormous implications for law professors, as the dominant forms of legal pedagogy and scholarship came under scrutiny.

Law schools erupted with interdisciplinary research and teaching, especially among younger professors who were eager to expand the methodological possibilities and disciplinary audiences within the academy. Scholarship from the period and conversations with law professors working in the early 1980s emphasize the extent to which law schools were being shaped and challenged by forms of writing, activism, and teaching that did not fit within the disciplinary parameters found in earlier periods of legal education.[9] "Law-school curricula will always follow the most persuasive explanations of the law. And the best writing about the legal system is interdisciplinary. As a consequence, the structure of the law school and its curriculum must change," one law professor wrote in 1983.[10] Another professor added, "It marked the shift in the legal academy from a largely doctrinally focused enterprise, to an arena in which high-level theoretical and interdisciplinary work thrives. The theoretical tracks we

7. Fossum, "Law Professors: A Profile"; Mertz, Tung, Barnes, Njogu, Heiler, and Martin, "After Tenure"; Richard H. Chused, "The Hiring and Retention of Minorities and Women on American Law School Faculties," *University of Pennsylvania Law Review* 137 (1988): 537–69.

8. David Trubek, Interview, January 29, 2016.

9. Gary Minda, "The Jurisprudential Movements of the 1980s," *Ohio State Law Journal* 50 (1989): 599–662; Robert C. Clark, "The Interdisciplinary Study of Legal Evolution," *Yale Law Journal* 90 (1981): 1238–74; Philip C. Kissam, "The Decline of Law School Professionalism," *University of Pennsylvania Law Review* 134 (1986): 251–324; Martha Minow, "Law Turning Outward," *Telos* 73 (1987): 79–100; Thomas Morgan, Interview, December 8, 2017; Edmund Kitch, Interview, January 19, 2018; William Carney, Interview, January 11, 2018; Conversation with Earl Maltz, October 11, 2017; and Douglas G. Baird, Interview, November 29, 2017.

10. George L. Priest, "Social Science Theory and Legal Education: The Law School as University," *Journal of Legal Education* 33 (1983): 440.

navigate today and will traverse into the future were laid down during this critical period in the 1980s."[11]

Law-and-economics and critical legal studies (CLS) represent just two of the intellectual movements that conducted new and exciting interdisciplinary work during the early 1980s. CLS and law-and-economics practitioners offered competing views of the professional values and goals that ought to motivate the American legal order, and their theoretical work attracted the attention of law school professors, students, and administrators across the United States. These movements ushered in new generations of scholars willing to challenge the prevailing norms surrounding legal scholarship, law school pedagogy, and student learning outcomes.[12]

II

Although both CLS and law-and-economics grew steadily within the legal academy during the early 1980s, neither movement commands significant popular appeal today. However, unlike CLS or law-and-economics, "originalism" has become a commonplace term within the twenty-first century, recognizable to lawyers and nonlawyers alike.[13] Ideas and thinkers associated with constitutional originalism regularly appear in television broadcasts, news reports, and partisan propaganda within the United States.

Originalism, a set of legal ideas and interpretive commitments strongly associated with the Reagan era and the rise of modern conservatism, has achieved a remarkable degree of public salience and staying power over the past several decades. One of the most peculiar aspects of originalism is that, unlike CLS and law-and-economics research from the 1980s,

11. James R. Hackney, *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (New York and London: New York University Press, 2012), 2.

12. See, for example, Paul Reidinger, "Civil War in the Ivy," *ABA Journal* 72 (1986): 64–68; Owen M. Fiss, "The Death of the Law?" *Cornell Law Review* 72 (1986): 1–16; Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA and London: Belknap Press, 1993), 265–67; Ron Harris, "The History and Historical Stance of Law and Economics," in *The Oxford Handbook of Historical Legal Research,* ed. Christopher Tomlins and Markus Dubber (Oxford: Oxford University Press, 2018), 23–42; Murray L. Schwartz, "Economics in Legal Education," *Journal of Legal Education* 33 (1983): 365–68; George L. Priest, "The Rise of Law and Economics: A Memoir of the Early Years," in *The Origins of Law and Economics: Essays by the Founding Fathers*, ed. Francesco Parisi and Charles K. Rowley (Cheltenham, UK and Northampton, MA: Edward Elgar, 2005), 350–82.

13. See Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere, "Profiling Originalism," *Columbia Law Review* 111 (2011): 356–418.

very little has been written about the intellectual development and academic politics behind originalism. Much ink has been spilled with regard to the business of defining originalism: establishing the place of originalism within the broad contours of constitutional interpretivism, contrasting originalism with non-interpretivist theories, and mapping the methodological fault lines between different forms of originalism (such as original intent originalism and original meaning originalism).[14] However, some of the best research conducted on American constitutional thought during the Reagan era fails to address the place of constitutional originalists or originalist theories in the legal academy during the 1980s.[15]

A good reason for this lacuna may be that originalist scholars and scholarship held marginal and dubious status in the American legal academy for much of the 1970s and 1980s.[16] Writing in the *National Review* in 1982, the originalist scholar Robert Bork noted that non-interpretivism was "on the brink" of the "entire intellectual hegemony in the law schools."[17] Bork, who had just begun serving on the United States Court of Appeals for the District of Columbia Circuit, explained that interpretivist theorists like him were outsiders within top schools: "My own philosophy is interpretivist. But I must say that this puts me in a distinct minority among law professors. Just how much of a minority may be seen by the fact that a visitor to Yale who expressed interest in debating my position was told by one of my colleagues that the position was so passé that it would be intellectually stultifying to debate it. By my count, there were

14. For more on the interpretivism/non-interpretivism divide, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980); Symposium, "Judicial Review and the Constitution—The Text and Beyond," *University of Dayton Law Review* 8 (1983): 443–831. According to Ely, the chief distinction between interpretivism and non-interpretivism centers on "the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." Ely, *Democracy and Distrust*, 1. For more on originalism as one particular form of interpretivism, see Richard H. Fallon, Jr., "A Constructivist Coherence Theory of Constitutional Interpretation," *Harvard Law Review* 100 (1987): 1211; and Philip Bobbitt, "Is Law Politics?" *Stanford Law Review* 41 (1989): 1245–46.

15. See note 1.

16. Compare with Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago and London, University of Chicago Press, 2004). Keck contends that originalism held a stronger position in the law schools during this period. Ibid., 151–56.

17. Robert Bork, "The Struggle Over the Role of the Court," *National Review*, September 17, 1982, 1138.

in recent years perhaps five interpretivists on the faculties of the ten best-known law schools."[18]

The leading legal scholarship from the period appears to support Bork's stark portrayal of the theoretical imbalance between interpretivism and non-interpretivism within the academy. In the words of a current originalist scholar, "If you try to look for the literature on originalism in the 1970s, there isn't any. This was not something that was part of the conversation."[19] From 1975 to 1985, only one article appeared in the pages of the *Yale Law Journal* that directly addressed the topic of constitutional originalism and took up the mantle on behalf of this brand of interpretivism, and none appeared in the *Harvard Law Review*, the *Stanford Law Review*, the *University of Chicago Law Review*, or the *Columbia Law Review*.[20]

Outside of these leading journals, a limited originalist scholarship did exist. In "The Notion of a Living Constitution," United States Supreme Court Justice William H. Rehnquist railed against judicial activism and unwarranted attempts "to make the Constitution relevant and useful in solving the problems of modern society."[21] But even this small piece—penned by a judge, not a law professor—aimed more at critiquing living constitutionalism and Warren Court excesses than at expounding a coherent theory of originalism or redirecting the field of American constitutional scholarship. In *Government by Judiciary*, originalism pioneer Raoul Berger undertook a more ambitious project.[22] Berger, who was not a tenured law professor at the time of the book's publication, explicated his framework for an original intent mode of constitutional interpretation. Berger believed that his framework effectively discredited a host of Supreme Court decisions and numerous precedents covering the Bill of Rights and the Fourteenth Amendment.

Although *Government by Judiciary* gained recognition, Berger's scholarship became a common foil for mainstream constitutional theorists. Law professor Richard B. Saphire wrote in 1983 that "responding to Berger's thesis has become somewhat of a cottage industry" and "most of the

18. Ibid., 1137.

19. Conversation with Lawson.

20. See Stephen L. Carter, "Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle," *Yale Law Journal* 94 (1985): 821–72. However, even in this article, Carter is careful to outline the limited applicability of an originalist approach to constitutional interpretation: "Originalism has weaknesses, and with respect to adjudication under less determinate clauses concerned with individual rights, these weaknesses may be fatal." Ibid., 861.

21. William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (1976): 698–99.

22. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977).

commentary has been quite critical."[23] In fact, the academic work that coined the term "originalism" in 1980—Paul Brest's article, "The Misconceived Quest for Original Understanding"—opposed Berger and his mode of constitutional interpretation.[24] Constitutional scholar John C. Harrison maintains that Brest's article—not Berger's work—was "[t]he most important academic work on the subject that today is called originalism," adding, "I suspect that most constitutional law scholars agreed with Brest and thought that what he had to say was pretty much conclusive."[25]

Conversations with leading constitutional originalists from the present day—many of whom were law students during the early 1980s—reinforce the meager number of originalist scholars and the general disuse of originalist theory in the academy during much of the 1980s. Gary Lawson recalls, "There was no originalist presence in the academy—I mean none. I mean zero. Zero. Nothing."[26] Steven Calabresi remembers how "you could have gathered all of the originalists in the country around a kitchen table quite comfortably. It was a small group of people."[27] According to John O. McGinnis, who graduated from Harvard Law School in 1983, "In constitutional law, I'm not at all confident originalism was even mentioned."[28]

Such a void seems surprising, especially in light of the powerful status held by William H. Rehnquist at the time that "The Notion of a Living Constitution" was published. The appearance of Rehnquist's law review article might lead some observers to surmise that constitutional originalism possessed significant intellectual and professional clout during the 1970s. However, such an inference is not historically supportable. The remarkably small amount of work being done in originalist theory during the 1970s and early 1980s bears emphasizing, as does the exceptional degree of professional disdain directed toward originalism throughout this period. Dozens of law review articles dismissed this fringe mode of interpretation.[29] Originalism "was treated as a theory that no sophisticated thinker

23. Richard B. Saphire, "Judicial Review in the Name of the Constitution," *University of Dayton Law Review* 8 (1983): 753.

24. Paul Brest, "The Misconceived Quest for Original Understanding," *Boston University Law Review* 60 (1980): 204–38. For Berger's response, see Raoul Berger, "Paul Brest's Brief for an Imperial Judiciary," *Maryland Law Review* 40 (1981): 1–38.

25. John C. Harrison to Paul Baumgardner, E-mail, November 2, 2018 and December 12, 2018.

26. Conversation with Lawson.

27. Conversation with Steven Calabresi, October 2, 2018.

28. Conversation with John O. McGinnis, November 13, 2018.

29. See, for example, Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985); Terrence Sandalow, "Constitutional Interpretation,"

could believe in," remarks Michael Rappaport, the Director of the Center for the Study of Constitutional Originalism at the University of San Diego School of Law.[30] Ridiculed by the law professoriate as inchoate, parochial, and politically conservative, originalist theory did not appear to be going anywhere within the academy.[31] Proponents of originalism conceded as much. Officials in the Reagan administration commented on the hostility toward originalism within law schools, and originalist scholars turned to conservative media outlets to lament the nastiness of scholarly responses to originalism.[32]

III

To some, originalism's lack of academic theorization or general support may seem to be little more than a pedantic triviality. Who cares what

Michigan Law Review 79 (1981): 1033–72; Sanford Levinson, "Law as Literature," *Texas Law Review* 60 (1982): 373–403; Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harvard Law Review* 96 (1983): 781–827; Mark Tushnet, "Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory," *Yale Law Journal* 89 (1980): 1037–62; Bruce A. Ackerman, "The Storrs Lectures: Discovering the Constitution," *Yale Law Journal* 93 (1984): 1013–72; Neil K. Komesar, "Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis," *University of Chicago Law Review* 51 (1984): 366–446; Brest, "The Misconceived Quest"; Paul Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship," *Yale Law Journal* 90 (1981): 1063–109; Michael J. Perry, "The Authority of Text, Traditions, and Reason," *Southern California Law Review* 58 (1985): 551–602; Larry Simon, "The Authority of the Constitution and its Meaning: A Preface to a Theory of Constitutional Interpretation," *Southern California Law Review* 58 (1985): 603–46; Larry Simon, "The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?" *California Law Review* 73 (1985): 1482–539; Robert W. Bennett, "Objectivity in Constitutional Law," *University of Pennsylvania Law Review* 132 (1984): 445–96; Robert W. Bennett, "The Mission of Moral Reasoning in Constitutional Law," *Southern California Law Review* 58 (1985): 647–59; Thomas W. Merrill, "The Common Law Powers of Federal Courts," *University of Chicago Law Review* 52 (1985): 1–72; and H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98 (1985): 885–948.

30. Michael Rappaport to Paul Baumgardner, E-mail, October 3, 2018.

31. Simon, "The Authority of the Constitution and its Meaning."

32. Edwin Meese, "Remarks of The Honorable Edwin Meese III, Attorney General of the United States, at The University of Richmond, Richmond, Virginia," in "Speeches of Attorney General Edwin Meese III," United States Department of Justice, updated October 24, 2014, https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/09-17-1986.pdf (accessed November 15, 2018); Edwin Meese III, "A Return to the Founders," *National Law Journal* June 28, 2004, 22; Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven, CT: Yale University Press, 1996), 133; and Raoul Berger, "Academe vs. the Founding Fathers," *National Review*, April 14, 1978, 468–71.

legal theories or theorists are in vogue within the ivory tower at a given time? Uncovering the number of law professors, law review articles, or symposia that engaged with a particular set of ideas tells us very little about the day-to-day legal reasoning and decision making of our lawyers and judges. However, this is not the perspective taken by leading conservative legal figures during the 1980s. Conservatives paid keen attention to the legal academy, and they sought intellectual community to develop new directions in constitutional theory and argumentation.

In his best-selling book, *The Tempting of America*, Robert Bork highlighted the political importance of law schools in the United States. Legal academics and their research have the potential to profoundly shape the minds of future lawyers, law professors, and judges. For example, legal realist scholarship strongly informed the work of the Warren Court, Bork argued. More recently, law faculty opinions and favored constitutional theories have been hampering the development of originalist theories.[33] The idea that thousands of new lawyers were leaving law schools each year with wrongheaded ideas about constitutional law and the proper role of judges worried Bork and his allies on the political right.

In 1984, William Bradford Reynolds—the assistant attorney general in charge of the United States DOJ's Civil Rights Division—asserted that he was "particularly well-positioned to feel the currents in the law schools today and to observe their effects upon lawyers and judges—and, indeed, upon the law itself."[34] Reynolds observed, "The past three years have fully confirmed my worst suspicions that much of the antidemocratic, result-oriented jurisprudence of our time can be traced directly to our system of legal education."[35] Although Reynolds believed that the original design of the federal judiciary rendered it a politically limited arm of the national government, the court "has over time aggregated unto itself the most power. In doing so, it has drastically changed the constitutional landscape that we originally inherited. Indeed, the Constitution, as it was written and ratified, is today barely recognizable in a number of significant respects. Regrettably, legal education bears much of the blame!"[36]

Therefore, if legal education and the development of legal ideas were central concerns for conservative lawyers, and the legal academy proved averse to originalist scholarship in the early 1980s, how did this mode of constitutional interpretation grow? How did originalism gain legitimacy

33. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990), 135–36.

34. William Bradford Reynolds, "Renewing the American Constitutional Heritage," *Harvard Journal of Law and Public Policy* 8 (1984): 225.

35. Ibid.

36. Ibid., 228.

in such an inhospitable climate? The main forces responsible for the changing fortunes of constitutional originalism relate to constitutional theorizing and support outside of the academy. This turnaround began with the appointment of Edwin Meese III to the office of the United States Attorney General in 1985.

When Meese became attorney general, originalism was not taken seriously within the realms of academic law and constitutional theory. But under Meese's leadership, the United States DOJ played an important role in developing originalism outside of the law schools. Within his first few months of service as attorney general, Meese publicly declared that "a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of limited but energetic government."[37] Attorney General Meese understood the political potential of a constitutional framework that could be used to curb the power of the federal judiciary and challenge undesirable, liberal developments in constitutional law. Meese told the House of Delegates of the American Bar Association that the DOJ would "press for a Jurisprudence of Original Intention. In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment."[38] Meese understood the value of this forceful address on constitutional priorities. The Director of Public Affairs in the Department of Justice, Terry Eastland, recollects that "a few days before the speech … Meese summoned department heads to discuss it. It was unusual to have so many top officials gathering in the AG's conference room to talk about an attorney general's *speech* as opposed, say, to some new law enforcement strategy."[39] But this early speech was to set the tone for the DOJ under Meese.[40]

Meese encouraged young, conservative government lawyers to research and develop originalist ideas and craft new, originalist constitutional arguments that could be used in court. Gary Lawson, who served in the DOJ

37. Edwin Meese, "American Bar Association," in "Speeches of Attorney General Edwin Meese III."

38. Ibid.

39. Terry Eastland, "The Power of Giving the Right Speech at the Right Time," *The Weekly Standard*, December 7, 2018, https://www.weeklystandard.com/terry-eastland/edwin-meeses-speech-that-saved-originalism (accessed December 8, 2018).

40. Ibid. Also see Edwin Meese III, "Remarks on the Originalism Revolution," in "The Originalism Revolution Turns 30: Evaluating Its Impact and Future Influence on the Law," Heritage Foundation, Special Report No. 191, ed. Elizabeth H. Slattery, January 26, 2017, 5–7.

from 1985 to 1986, fondly recalls this pivotal period in the history of constitutional originalism:

> We had zero, nothing, coming out of the academy. So that wasn't going to be a vehicle for exploring these ideas. God bless Edwin Meese III. He essentially made the Department of Justice the academy in exile. You [hear] people talk about the Constitution in exile. This was the academy in exile. This was the place where the people who were actually interested in working out and developing originalist theory concentrated. You had the Attorney General, you had Ken Cribb, Steve Calabresi, John Harrison, Lee Liberman Otis, me, shortly thereafter Mike Rappaport, Mike Paulsen, John McGinnis after that. I mean this is a Who's Who of the first generation of modern originalist scholars. We were all in the Department of Justice. That's where we were, so that's where all of these things had to be worked out.[41]

A variety of departmental actions aided in the advancement of originalist theory. Meese scheduled seminars, conferences, and lunchtime speakers around originalist topics, and government lawyers maintained ongoing conversations on constitutional theory.[42] These actions bore fruit, stimulating research and argumentation on diverse topics of seventeenth- and eighteenth-century legal history. As a result of this work, Meese's DOJ was able to flesh out a distinctive, originalist approach to constitutional interpretation.

These intellectual investments during the beginning of Attorney General Meese's tenure occurred without the benefit of originalist support within the legal academy. John C. Harrison—who worked in the DOJ during the period—acknowledges, "Engagement with academic thinking by lawyers in the executive on these issues was mainly a reaction to, often against, [Paul] Brest."[43] Instead of relying on past academic work, "[y]ou had people in the Department of Justice writing what would have been law review articles if they were in the academy, but they're white papers coming out of the Office of Legal Policy and other places in the Department of Justice. That's where originalism was being worked out."[44] From assessing the Founding Fathers' views of religious liberty to re-examining the original meaning of the Ninth Amendment, Office of Legal Policy reports during the Meese years included extensive historical research and laid out originalist pathways to legal reform.[45]

41. Conversation with Lawson.

42. Ibid; Harrison, E-mail; Edwin Meese III, "The Economic Liberties Conference," in "Speeches of Attorney General Edwin Meese III."

43. Harrison, E-mail.

44. Conversation with Lawson.

45. See, for example, *Religious Liberty under the Free Exercise Clause*, United States Department of Justice, Office of Legal Policy, August 13, 1986; *Wrong Turns on the*

This route of theoretical exploration had notable consequences. For one thing, DOJ contributions to constitutional originalism had "a more kind of practical bent. . .than may have been developed in the academy," says one former department lawyer.[46] With an eye toward present cases and growing controversies, officials mapped out guidelines and practical advice for using original understandings in constitutional disputes. In 1987, the Office of Legal Policy within the DOJ released *Original Meaning Jurisprudence: A Sourcebook*.[47] This extensive report described the mechanics of an original meaning approach to constitutional interpretation, while showcasing the multiple weaknesses attached to non-originalist modes of interpretation. The *Sourcebook* also provided answers to common questions related to originalist practices. For example, the sourcebook detailed how to best interpret ambiguous clauses of the Constitution and how to tackle modern problems that may not have been foreseen by earlier Americans.

A year later, the DOJ published *Guidelines on Constitutional Litigation*.[48] This manual of government litigation made clear that the DOJ's commitments to an originalist mode of constitutional interpretation were "much more than mere suggestions. They should presumptively be followed."[49] The *Guidelines* spelled out federal government lawyers' "obligation to educate lower courts (thereby laying the groundwork for making stronger appellate arguments) on the original meaning of the relevant constitutional or statutory provision."[50] In keeping with this pedagogical responsibility, the *Guidelines* stated that "[g]overnment briefs should clearly set out the text and original understanding of the relevant constitutional provisions, along with an analysis of how the case would be resolved consistent with that understanding."[51] Ideally, these historical sections of the federal government's briefs "will help to focus judges on the text of

Road to Judicial Activism: The Ninth Amendment and the Privileges or Immunities Clause, United States Department of Justice, Office of Legal Policy, September 25, 1987; *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*, United States Department of Justice, Office of Legal Policy, October 11, 1988; Dawn E. Johnsen, "Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change," *Indiana Law Journal* 78 (2003): 363–412.

46. Conversation with McGinnis.

47. *Original Meaning Jurisprudence: A Sourcebook*, United States Department of Justice, Office of Legal Policy, March 12, 1987.

48. *Guidelines on Constitutional Litigation*, United States Department of Justice, Office of Legal Policy, February 19, 1988.

49. Ibid., 1.

50. Ibid., 3.

51. Ibid., 3, 10.

the Constitution and away from their personal preferences or from incorrectly reasoned court precedent as the appropriate basis for decisionmaking."[52]

Even if some judges were not chastened by these history lessons, the "oppositional movement" built around constitutional originalism started to gain momentum outside of the DOJ.[53] Newspapers such as the *Wall Street Journal* reported on the interpretive war being waged by the attorney general and highlighted the resolve of "the irrepressible Mr. Meese" in "demanding that judges stick to the text of the Constitution and the intent of the Founders."[54] By establishing originalism as a mode of constitutional interpretation endorsed by President Ronald Reagan and his administration, the DOJ was able to bring popular and professional attention to formerly negligible legal ideas and historical considerations.

IV

Although originalism had not achieved significant support within the academy during the first half of the 1980s, the second half of the decade proved more favorable to this mode of constitutional interpretation. Originalism came to be seen as a potent political tool, especially when wielded by government lawyers seeking to combat judicial activism and liberal constitutional developments. Soon after Attorney General Meese promulgated the originalist mission of the DOJ, United States Supreme Court justices elected to weigh in. In two speeches given during the fall of 1985, Justices William J. Brennan, Jr., and John Paul Stevens critiqued constitutional originalism. Justice Brennan took issue with this conservative assault on constitutional law, stating that "this facile historicism" known as originalism "expresses antipathy to claims of the minority to rights against the majority" and would "turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstances."[55] Moreover, such an interpretive approach would be "arrogant," impractical, and inapplicable to many contemporary constitutional disputes.[56]

These attacks did not stifle the judicial advance of originalism. In fact, some federal judges explicitly embraced this mode of constitutional

52. Ibid.

53. Conversation with McGinnis.

54. Editorial, "The Irrepressible Mr. Meese," *Wall Street Journal*, October 29, 1986, 28.

55. William J. Brennan, Jr., "Construing the Constitution," *UC Davis Law Review* 19 (1985): 5.

56. Ibid., 4–5; and John Paul Stevens, "Construing the Constitution," *UC Davis Law Review* 19 (1985): 19–21.

interpretation. It also helped that the Reagan administration endeavored to promote originalist judges within the federal judiciary.[57] William Rehnquist, author of "The Notion of a Living Constitution," was elevated to the position of Chief Justice of the United States Supreme Court in 1986. Antonin Scalia, a vocal proponent of originalism, was appointed to the Supreme Court the same year. Legal commentators registered the oddity of this new pride of place given to originalist thinking, especially as law professors had spent years lambasting this "silly idea."[58]

Ronald Reagan nominated another staunch advocate of originalism, Robert Bork, to the Supreme Court in 1987. Numerous legal scholars came out against the Bork nomination. At one point, "40 percent of the faculty members of all accredited law schools in the United States signed petitions calling on the Senate to reject him."[59] Depicted as an extremist, originalist judge determined to roll back decades' worth of civil rights gains, Bork did little in his Senate confirmation hearings to allay these concerns and his nomination was rejected.[60]

Ronald Dworkin—one of nation's leading legal scholars—heralded Bork's confirmation defeat as a public and governmental denunciation of originalism. Dworkin celebrated in the pages of the *New York Review of Books* that "the country rejected the crude jurisprudence of Reagan and Meese, the philosophy Bork was nominated to embody and defend."[61] Dworkin went on to guess that Bork's originalist views "were so thoroughly discredited in the hearings, and proved so generally unpopular, that I doubt that they will any longer be advanced even by lawyers and judges who found them congenial before." Such backwards views about constitutional interpretation, Dworkin opined, were "probably dead."[62]

57. Bernard Weinraub, "Reagan Says He'll Use Vacancies to Discourage Judicial Activism," *New York Times*, October 22, 1985, A1.

58. Stephen L. Carter, "The Independent Counsel Mess," *Harvard Law Review* 102 (1988): 118. Carter notes how "the Justices of the Supreme Court seem blissfully unaware of, or perhaps merely unimpressed by, the stinging and often cogent criticisms of originalism in its various guises. True, the critics dismiss what the Justices are doing as reactionary, pointless, or simply crazy, but there may be method to the Court's apparent madness. It is worth taking a moment to consider whether there might be a sensible theoretical reason for the Justices to cling to their much-maligned vision of the way constitutional interpretation ought to take place."

59. Ronald Dworkin, "From Bork to Kennedy," *New York Review of Books*, December 17, 1987, 36–42.

60. Stephen Macedo, *The New Right v. The Constitution* (Washington, DC: Cato Institute, 1987).

61. Dworkin, "From Bork to Kennedy."

62. Ibid.

Dworkin's projections about the fate of originalism proved incorrect. Robert Bork's nomination to the Supreme Court certainly increased the public and professional attention surrounding originalism, and Bork's defeat did not quash interest in this mode of constitutional interpretation. Writing in the aftermath of the Bork hearings, originalist scholar Earl Maltz argued that originalism had finally become politically viable and professionally influential, despite Bork's inability to join the Supreme Court.[63] Maltz was right. Within 4 years of the Bork hearings, another conservative, constitutional originalist—Clarence Thomas—would be nominated to the Supreme Court.[64] Unlike Bork's nomination, Thomas's would prove successful.

During the second half of the 1980s, constitutional originalism also transformed into a bedrock principle for movement conservatives, capable both of mobilizing and unifying disparate groups on the political right.[65] After tracking the intellectual and ideological developments within *National Review*, political scientist Ken I. Kersch found: "The weeping and gnashing of teeth unleashed by the martyrdom of failed Supreme Court nominee (and originalist saint) Robert Bork in 1987 only strengthened the movement's faith, uniting conservatives of diverse intellectual origins in a paroxysm of grief and indignation, followed by angry and embittered calls to battle."[66] "Originalism talk" supplied a new set of legal arguments and historical claims to conservative forces; the pro-life movement, for example, reframed its constitutional aims along originalist lines and fought for the nomination of originalist judges to the federal bench.[67]

The DOJ played a leading role in popularizing originalism within conservative circles. Attorney General Meese and DOJ lawyers traversed the country, actively campaigning for originalism among potential allies. By trumpeting originalism in speeches before law schools, think tanks, business interests, and Christian groups, members of the DOJ hoped to

63. Earl Maltz, "Foreword: The Appeal of Originalism," *Utah Law Review* 1987 (1987): 773–805. In fact, the Heritage Foundation's special report celebrating the thirtieth anniversary of the "originalism revolution" was released in 2017. Slattery, "The Originalism Revolution Turns 30."

64. See Clarence Thomas, "Toward a 'Plain Reading' of the Constitution—The Declaration of Independence in Constitutional Interpretation," *Howard Law Journal* 30 (1987): 983–95.

65. Robert Post and Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution," *Fordham Law Review* 75 (2006): 545–74; and Ann Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition* (Chicago and London: University of Chicago Press, 2008), 107–8.

66. Kersch, "Ecumenicalism Through Constitutionalism," 116.

67. Ziegler, "Originalism Talk."

establish a public base of support for constitutional originalism.[68] The DOJ also helped to expand the network of constitutional originalists in government service. For example, the Meese DOJ worked hard to legitimize the small, little-known Federalist Society by employing its members and speaking at local chapter meetings. Political scientist Steven Teles has described the DOJ's aid to the fledgling Federalist Society as a paradigmatic case of "transformative bureaucracy."[69] By helping in the recruitment, employment, and credentialing of early Federalist Society members, Meese's DOJ was able to build an active, conservative professional association while also disseminating its own constitutional commitments in the process.[70]

Ferment in the DOJ, the federal judiciary, and various social movements eventually reshaped the law schools. As a growing number of lawyers and judges became exposed to—and committed to—constitutional originalism, the legal academy could not ignore this trending mode of constitutional interpretation. "The law schools are professional institutions," John O. McGinnis explains. "So the originalists—Scalia and then Thomas—go on the Supreme Court, and they [the law schools] really can't ignore originalism anymore."[71] But originalism's progress within the law schools

68. Edwin Meese III, "American Enterprise Institute," in "Speeches of Attorney General Edwin Meese III"; Edwin Meese III, "Address of the Honorable Edwin Meese III, Attorney General of the United States, before The Christian Legal Society Breakfast," in "Speeches of Attorney General Edwin Meese III"; Edwin Meese III, "The Economic Liberties Conference," in "Speeches of Attorney General Edwin Meese III"; Edwin Meese III, "The Heritage Foundation," in "Speeches of Attorney General Edwin Meese III"; Edwin Meese III, "St. Louis School of Law," in "Speeches of Attorney General Edwin Meese III"; Edwin Meese III, "The Conservative Political Action Committee Conference," in "Speeches of Attorney General Edwin Meese III"; Stephen H. Galebach, "The Declaration of Independence and Original Intent," *Journal of Christian Jurisprudence* 6 (1987): 107–19; and Slattery, "The Originalism Revolution Turns 30," 6.

69. Teles, "Transformative Bureaucracy."

70. Also see Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, NJ: Princeton University Press, 2008): 141–45; and Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (Oxford and New York: Oxford University Press, 2015). William H. Pryor, Jr., "Remembering Edwin Meese's Tulane Speech," in Slattery, "The Originalism Revolution Turns 30," 3–4; Edwin Meese III, "Speech Before the D.C. Chapter of the Federalist Society Lawyers Division, November 15, 1985," in Slattery, "The Originalism Revolution Turns 30," 14–18.

71. Conversation with McGinnis. Gary Lawson catalogs this academically reactive phenomenon similarly: "Once you get not merely one—Scalia was enough—but two Supreme Court justices who start talking this way, you have to start teaching your constitutional law classes and explaining why whoever's at the Supreme Court is talking about this stuff. You can only laugh them off for so long. Eventually, you have to start taking notice that maybe the actual description of legal practice includes this as one of its

was not only generated by law professors' attentiveness to the changing professional needs of new lawyers. The revolving door quality of the legal academy also accelerated originalism's breakthrough. Former DOJ lawyers, law clerks to originalist judges, and Federalist Society members began returning to law schools, this time as faculty. This revolving door precipitated curricular transformations, as courses on constitutional law, federal courts, and legal theory started incorporating originalist scholarship and forms of argumentation, a development that must have seemed unthinkable just a few years earlier.

One of the central achievements of Attorney General Meese's academy in exile was that it took advantage of this revolving door. Meese designed a professional environment that mirrored the legal academy in meaningful ways. The Meese DOJ gathered select professionals from top law schools and established many of the same organizational hierarchies and intellectual practices that were found in those schools. Originalist lawyers in the DOJ engaged in extended research projects, distributed their findings in authoritative reports, participated in seminars and conferences, and gave speeches about their work. DOJ attorneys who then wanted to transition to the law schools were well prepared. Originalists such as Gary Lawson, John C. Harrison, Steven Calabresi, John O. McGinnis, and Michael Stokes Paulsen presented impressive resumés to law school hiring committees: elite legal training, federal clerkships, experience and contacts within the United States DOJ, a record of legal practice, and extensive research and numerous fellowships.

The introduction of multiple originalists into the law schools during and immediately after Meese's tenure as attorney general had powerful consequences. Before long, "virtually all constitutional scholars on the right came to embrace originalism," Michael Rappaport recalls.[72] Most importantly, originalist scholars and scholarship did not fall into a quiet and insulated niche, becoming a political sideshow tolerated but ignored within the broader academy. Instead, constitutional originalism enjoyed a groundswell of academic attention and was the focus of extended debate and disagreement during the second half of the 1980s. Conferences, symposia, and special issues of law reviews were dedicated to originalist theories

components. . .Once it's at least part of the vocabulary, part of the set of arguments that are used to craft opinions, well, then you have to start crafting arguments in briefs. And if you want to take on actual decisions, you have to start writing articles that start talking in those terms." Conversation with Lawson.

72. Rappaport, E-mail.

and practices, and student chapters of the Federalist Society proliferated within the nation's law schools.[73]

As a result, originalist positions and historical considerations begun in the DOJ were studied, scrutinized, and reformulated within the academy.[74] Important fights over stare decisis, unrestrained originalist judging, the Founding Fathers, and interpretive ambiguity developed among professors. This new dialectic led legal scholars to conduct exciting interdisciplinary research into fields such as linguistics, Anglo-American history, and hermeneutics. As the 1980s concluded, constitutional theory and the legal academy itself were in positions extraordinarily different than a decade

73. See, for example, *Tulane Law Review* 61:5 (1987); *Constitutional Commentary* 6:1 (1989); Maltz, "The Appeal of Originalism"; Earl Maltz, "The Failure of Attacks on Constitutional Originalism," *Constitutional Commentary* 4 (1987): 43–56; Ronald D. Rotunda, "Original Intent, the View of the Framers, and the Roles of Ratifiers," *Vanderbilt Law Review* 41 (1988): 507–16; Henry Paul Monaghan, "Stare Decisis and Constitutional Adjudication," *Columbia Law Review* 88 (1988): 723–73; Daniel Farber, "The Originalism Debate: A Guide for the Perplexed," *Ohio State Law Journal* 49 (1989): 1085–106; Jack N. Rakove, ed., *Interpreting the Constitution: The Debate Over Original Intent* (Boston: Northeastern University Press, 1990); Fallon, "A Constructivist Coherence Theory"; Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); Mark Tushnet, "The U.S. Constitution and the Intent of the Framers," *Buffalo Law Review* 36 (1987): 217–26; Mark V. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge, MA: Harvard University Press, 1988); Raoul Berger, "Originalist Theories of Constitutional Interpretation," *Cornell Law Review* 73 (1988): 350–54; Robert Bennett, "Originalist Theories of Constitutional Interpretation," *Cornell Law Review* 73 (1988): 355–58; Michael W. McConnell, "On Reading the Constitution," *Cornell Law Review* 73 (1988): 359–63; Michael Moore, "Originalist Theories of Constitutional Interpretation," *Cornell Law Review* 73 (1988): 364–70; William E. Nelson, "History and Neutrality in Constitutional Adjudication," *Virginia Law Review* 72 (1986): 1237–96; Macedo, *The New Right v. The Constitution*; Suzanna Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review* 54 (1987): 1127–77; H. Jefferson Powell, "Rules for Originalists," *Virginia Law Review* 73 (1987): 659–99; H. Jefferson Powell, "The Modern Misunderstanding of Original Intent," *University of Chicago Law Review* 54 (1987): 1513–44; Jack N. Rakove, "The Madisonian Moment," *University of Chicago Law Review* 55 (1988): 473–505; Richard S. Kay, "Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses," *Northwestern University Law Review* 82 (1988): 226–92; Leonard W. Levy, *Original Intent And the Framers' Constitution* (New York: Macmillan, 1988); Erwin Chemerinsky, "The Vanishing Constitution," *Harvard Law Review* 103 (1989): 44–104; and Paul W. Kahn, "Reason and Will in the Origins of American Constitutionalism," *Yale Law Journal* 98 (1989): 449–517.

74. Bennett and Solum, *Constitutional Originalism: A Debate*, 8, 78; and O'Neill, *Originalism in American Law and Politics*, 192–93.

before: busily attaching patchwork onto constitutional originalism, as professors "filled in some of its theoretical gaps."[75]

V

In an insightful article exploring the social side of legal scholarship, Cass R. Sunstein explains the importance of "academic cascades" to the development and staying power of legal ideas.[76] Sunstein demonstrates the ways in which legal academics are drawn to—or away from—ideas because of having limited information about those ideas and the people who believe in them. Legal scholars also are concerned with their professional reputations and the types of theories and scholarly pursuits that are considered fashionable. Relatedly, law professors are driven by ideological signals and regularly align their work and occupational identities with the assumptions, attitudes, and behaviors of their fellow partisans.

From this vantage point, constitutional originalism must have seemed a lifeless and career-killing set of legal ideas and interpretive commitments for a young law professor in the early 1980s. The number of accredited law schools in the United States grew during the first half of 1980s, and many of these schools underwent significant transformations as a greater and more diverse number of professors and students entered the academy. Various fields of legal teaching and scholarship witnessed challenges, especially from younger professors with more interdisciplinary academic agendas. But originalist scholars and scholarship were not major forces in this period of educational reimagination.

By the end of the decade, however, the academic fashions had changed and originalist theory was in fashion. Although it is true that originalism has not monopolized the academic field of constitutional law over the past 30 years, originalist ideas have been able to secure an important place in popular and academic discourses about American constitutional law. This astounding turnaround began in earnest with Attorney General Edwin Meese III and the academy in exile that he built within the United States DOJ. Under Meese's leadership, lawyers working within

75. Jamal Greene, "Selling Originalism," *Georgetown Law Journal* 97 (2009): 671. Also see David Luban, "Legal Traditionalism," *Stanford Law Review* 43 (1991): 1035–60; and Gary Lawson, "Reflections of an Empirical Reader (Or: Could Fleming Be Right This Time?)," *Boston University Law Review* 96 (2016): 1457–79. Lawson describes this crucial shift as one made from the "political enterprise" of older originalists to the "intellectual" enterprise of second-generation originalists.

76. Cass R. Sunstein, "On Academic Fads and Fashions," *Michigan Law Review* 99 (2001): 1251–64.

the DOJ professionalized and popularized originalism, transforming it into a viable mode of constitutional interpretation. Young, conservative lawyers were recruited into the DOJ and helped to develop new originalist arguments and historical defenses that could be used during constitutional litigation. In addition to DOJ patronage, federal judges and movement conservatives began embracing the language and reasoning of constitutional originalism. Eventually, the academic cascades concerning originalism became more auspicious and powerful.

Uncovering originalism's relationship with American law schools during the 1980s might leave one uncertain about the actual forces at work behind ideational production and valuation. The cynic might interpret the aforementioned series of events as clear evidence that originalism did not take root in the 1980s as a result of any intellectual merit. Originalism was cobbled together and forced forward by Reaganite loyalists who exploited the political potential of a Founderist framework of constitutional interpretation. Subsequent elaborations and defenses by movement conservatives and rightist academics were predictable attempts to justify and rationalize partisan goals.

This interpretation misses the mark. For one thing, it renders intellectual development too dependent on the fluctuations of contemporaneous political forces. Also, it neglects the degree to which non-conservatives in the legal academy engaged with originalist theories and helped to reshape them during the second half of the 1980s and into the 1990s. Nevertheless, the cynic's interpretation does remind us to pause and reconsider the window of discourse in law schools.

We need to better understand how this window operates in law schools and how it corresponds with the window of discourse outside of the law schools. Legal academics and their research have the potential to profoundly shape the minds of future lawyers, law professors, and judges, but Meese's academy in exile demonstrated that intellectual influence also runs in the other direction. But *how far* in the other direction? Could an equally seismic originalist revolution have occurred outside of the academy during the 1980s without an academy in exile? What are the avenues through which sidelined legal ideas can gain credibility without the support of either the academy or an academy in exile? And how do such ideas overcome their controversial baggage and unconventional pedigree to gain influence and adherents within the ivory tower? Or is this form of elite support unnecessary? Taking stock of such questions will help scholars to grapple with the complex nexus among ideas, the academy, and legal development in the United States.