ORIGINALISM AS AN EMPTY SIGNIFIER

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INTRODUCTION

In her articles *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*[1] and *The "Levels of Generality" Game, or "History and Tradition" as the Right's Living Constitution*,[2] Reva Siegel concludes that originalism has been used as doublespeak.[3] Originalism purports to be a genuine interpretative method that offers to decipher the meaning of the constitutional text based on the meaning ascribed to the constitutional text by the public at the time of the Constitution's promulgation.[4] In this manner, it aims to ensure that interpreting the Constitution would not reflect the judges' political views.[5] Rather, the judge is to be constrained by the fixed meaning of the Constitution.[6] Yet, Siegel argues that in practice, and especially in *Dobbs*, originalism is used to insert the conservative ideology into constitutional law.[7] According to Siegel, this function of originalism as a conduit pipe for inserting the vision of American identity conservatives hold is known to members of the Republican Party.[8] Hence, the doublespeak function of originalism.[9] On the surface, the concept of originalism seems to communicate a certain interpretative methodology that aims to constrain judicial discretion and create a separation between law and politics.[10] Beneath the surface, it is a mechanism for conservative lawyers to insert the will of the conservative movement into constitutional law without going through the process of legislation or constitutional amendment.[11] The brand "originalism" covers up the true meaning of the concept that is different from what the word "originalism"

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[1] Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2022).

[2] Reva B. Siegel, *The "Levels of Generality" Game, or "History and Tradition" as the Right's Living Constitution*, 47 HARV. J.L. & PUB. POL'Y 563 (2024).

[3] *See* Siegel, *supra* note 1, at 1133 ("Originalism supplied a coded language . . . .").

[4] *See* RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT 47 (2018).

[5] *See, e.g.*, Antonin Scalia, *Originalism the Lesser Evil*, 57 U. CINN. L. REV. 849, 863–64 (1989) ("[T]he main danger in judicial interpretation . . . is that the judges will mistake their own predilections for the law . . . . Nonoriginalism . . . plays precisely to this weakness . . . . Originalism does not . . . .").

[6] *See, e.g.*, Grégoire C.N. Webber, *Originalism's Constitution*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION, 147, 160 (Grant Huscroft & Bradley W. Miller eds., 2011) ("An original constitution is law specific enough to be determinate . . . . In short, an original constitution is a set of determinate *rules*.").

[7] *See* Siegel, *supra* note 1, at 1158–59.

[8] *See id.* at 1149 ("Originalism supplies a language of impersonal authority—of law—that aligns with the conservative legal movement's values and goals.").

[9] *See* William Lutz, *Notes Toward a Definition of Doublespeak*, *in* BEYOND NINETEEN EIGHTY-FOUR: DOUBLESPEAK IN A POST-ORWELLIAN AGE 1 (William Lutz ed., 1989).

[10] *See* Siegel, *supra* note 1, at 1138 ("[O]riginalism is a value-neutral interpretive method—that method of constitutional interpretation that aspires to insulate adjudication from politics.").

[11] *See id.* at 1133 ("A claim on *constitutional memory* transmuted politics into law.").

purports to convey.[12] While Siegel does not use the term doublespeak, she exposes originalism's dual function.[13]

Siegel admits that "*Dobbs* does not employ the methods of academic originalists"[14] as it speaks disingenuously of history and tradition. Yet, she argues that *Dobbs* is an originalist judgment because it achieves one of the chief goals of the conservative movement: overruling *Roe v. Wade*.[15] Siegel argues that over the years, originalist rhetoric allowed originalists to interpret the Constitution to achieve the objectives of the conservative movement of here and now rather than binding judges to the dead hand of the past as originalism proclaims to do.[16] However, in *Dobbs*, even the attempt to use history and tradition as part of originalist rhetoric failed. Alito's majority judgment could not hide that history and tradition did not serve to constrain the Justices. Instead, according to Siegel, the rhetoric about history and tradition enabled the majority in *Dobbs* to insert their vision of American identity. She writes that "the Justices in the *Dobbs* majority have turned to history and traditions *to express*—not to constrain—their moral views."[17] For this reason, while originalism was not explicitly invoked in *Dobbs*, in Siegel's view, it is an originalist judgment because the vision of American identity that originalists hold was again inserted into constitutional law.

In criticizing Siegel's thesis, I raise two arguments. Before elaborating on them in detail, allow me to summarize them. First, Siegel is correct that jurists use originalism to inject their preferred way of life into constitutional interpretation. In a previous article, I used the term "identity originalists" to discuss this type of originalists because they use originalism to promote a certain vision of American identity.[18] I argued that as long as the Supreme Court has a central role in determining the meaning of the Constitution in issues that affect American identity, every interpretative theory would offer a particular roadmap to American identity.[19] For this reason, even if Siegel is correct that in *Dobbs*, Alito attempted to insert the conservative identity-agenda, her conjecture that such injection means he used originalism is flawed. Injecting the identity-agenda of the conservative movement through an interpretative methodology does not mean that the methodology was necessarily originalism. Other interpretative theories also enable inserting the conservative movement's agenda. Yet, identity originalists are committed not merely to a certain vision of American original identity but also to an originalist methodology or roadmap leading to such identity. If the methodology was not originalist, the judgment is not an identity-originalist ruling.

Second, I argue that much of Siegel's criticism of the *Dobbs* majority judgment suffers from a difficulty that she has had a significant role in creating. In her work on democratic constitutionalism, Siegel has promoted the idea that the Constitution has been amended

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[12] *See id.* at 1175 ("It functions to conceal rather than to constrain discretion.").

[13] *See id.* at 1183 ("The originalist judge may employ the historical record covertly to express values that the originalist judge does not wish to acknowledge as his own.").

[14] *Id.* at 1173.

[15] *See id.* at 1173 ("But *Dobbs* is the expression of originalism that has developed in the conservative legal movement and the Republican Party over the last forty years.").

[16] *See id.* at 1149 ("We have become so accustomed to the originalist's restorationist claims that we no longer notice that originalists formulaically claim to be impersonally bound by the authority of the past at exactly those points at which they are pursuing movement goals.").

[17] *Id.* at 1183; *see also* Siegel, *supra* note 2, at 567 (noting that "reasoning from the past in interpreting the Constitution does not insulate judges from making value-based judgments").

[18] *See* Or Bassok, *Interpretative Theories as Roadmaps to Constitutional Identity: The Case of the United States*, 4 GLOBAL CONSTITUTIONALISM 289, 297–302 (2015).

[19] *See id.* at 295–316 (exposing how various interpretative methodologies serve as roadmaps to American identity).

outside of the Article V procedure and that this way of changing constitutional law is proper.[20] Siegel's work is part of a larger school of thought in American constitutional law—known as the New Haven School[21]—that promotes the idea of informal constitutional amendments. The gist of this idea of constitutional amendments outside of Article V is that even if a social movement cannot bring a change in the law through the proper procedure of amending the Constitution, and even if it fails to convince the Court using tools of constitutional reason, a social movement may still achieve a constitutional change based on public support for their agenda. This re-conceptualization of constitutional law was aimed to answer the difficulty in amending the Constitution,[22] but it created a problem of giving priority to the public will over reason. Rather than limiting the paths for overruling the Court's constitutional interpretations to formal constitutional amendments or convincing constitutional reasoning, according to the New Haven School, social movements can change constitutional law by mere strength of public support.

Siegel's conceptualization of what happened in *Dobbs* follows the path offered by the New Haven School. Siegel explains that beyond all the rhetoric, in *Dobbs*, the will of a conservative political movement was adopted in a judicial decision that is supposed to be controlled by constitutional reason. According to Siegel, in *Dobbs*, constitutional arguments succeeded not based on their legal merit but based on their power in the political arena.[23] She is dismayed that the conservatives in *Dobbs* were allowed to break the border between law and politics and essentially amend the Constitution outside of the Article V procedure.[24] Yet, this entire line of argument contradicts her re-conceptualization of constitutional law in earlier work as allowing precisely this type of constitutional change.

By allowing public will to change the Constitution without the constraints of constitutional reason, the New Haven School has eroded the ability to criticize constitutional changes based on constitutional reason. After years of eroding the distinction between law and politics in order to allow social movements to amend the Constitution outside the formal amendment process, Siegel argues that originalists should adhere to the border between law and politics. A scholar who believes social movements may amend the constitution without complying either with the formal rules of constitutional amendment or with constitutional reason as developed by courts needs to explain why, in *Dobbs*, the law/politics distinction is suddenly resurrected to the point that the *Dobbs* reasoning is criticized as lacking doctrinal plausibility. Lacking such an explanation, Siegel's two articles on *Dobbs* reveal once more the dead-end that the New Haven School of Constitutional Law has reached.[25]

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[20] Reva B. Siegel, *The Jurisgenerative Role of Social Movements in United States Law* 16 (2004) (unpublished paper) https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel_Jurisgenerative_Role_of_Social_Movements.pdf [https://perma.cc/3MS9-8WNP] (explaining how legal changes occur due to social movements that "voice the changing constitutional understandings of the demos, though they do not always do so in ways that satisfy the conditions of procedural regularity or majoritarianism associated with lawmaking").

[21] *See* PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 167 & n.44 (2005) (explaining that the "'New Haven School' of constitutional thought" privileged the People's will over constitutional reason).

[22] *See* Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to our Undemocratic Constitution*, 55 DRAKE L. REV. 925, 926–27 (2007) (explaining the connection between "blocking most formal amendments" and the conceptualization of paths to amend the constitution outside of Article V).

[23] *See* Siegel, *supra* note 1, at 1138–40 (arguing that while originalism as a constitutional interpretative scheme is a failed idea, as a political idea, it is successful).

[24] *See id.* at 1183.

[25] *See* Or Bassok, *The Dead-end of the New Haven School of Constitutional Law*, 13 JURISPRUDENCE 301 (2022) (reviewing PAUL W. KAHN, ORIGINS OF ORDER: PROJECT AND SYSTEM IN THE AMERICAN LEGAL IMAGINATION (2019)).

Siegel's response to *Dobbs* is to use originalism to insert silenced voices into constitutional interpretation, thus adhering to the use of originalism as doublespeak and further contaminating the meaning of this signifier until it becomes an empty signifier. As I will explain below, taking this path would be a mistake as it would deepen the corruption of constitutional law as a language of expertise and leave progressives with even fewer legal resources to criticize the Court.[26] At the same time, such an approach capitulates to the idea that following the Founding Era's identity vision is the correct path to current American identity.

I. IDENTITY ORIGINALISM

In criticizing *Dobbs* for failing to adhere to the originalist method of interpretation, Siegel diagnoses that there are different types of originalism.[27] For her, true or pure originalists are those who believe that the best interpretative scheme for deciphering the American Constitution as a legal-constitutional text is to detect the original understanding of the text.[28] However, Siegal identifies another group of people who use the brand of originalism to inject their conservative vision of American identity into constitutional interpretation.[29] In a previous article, I called these originalists "identity originalists."[30] Following Josh Hammer, Siegel titles this group "common good originalism."[31]

Identity originalism is based on three principles. First, the Constitution is central to American identity. Second, constitutional law, as discussed by lawyers and judges, should be central in defining, or at least articulating, American constitutional identity. Making the language of constitutional law, as discussed by lawyers, detrimental to American identity is not trivial. One can accept that the Constitution is central to American identity and yet maintain that public discourse on the Constitution—rather than the legal discourse in courts—should dominate the understanding of the Constitution in its function as the focal point of American identity.[32] Yet, for identity originalists, the Justices serve as the "keepers of the covenant" that constituted American identity.[33]

The third principle all identity originalists share is viewing the originalist interpretative scheme as a roadmap to a vision of American identity that is in some substantial way connected to American identity during the Founding Era. Identity originalists believe that while this original identity was amended over the years, there must be a thread connecting it to the current American identity. In other words, America's original identity must have a substantive bearing on its current constitutional identity.

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[26] On constitutional law as a language of expertise *see* Or Bassok, *Constitutional Law: A Language of Expertise?*, 103 GEO. L.J. ONLINE 66 (2015).

[27] *See* Siegel, *supra* note 1, at 1141 (discussing "*[t]he Many Meanings of Originalism*").

[28] *See id.* at 1170–71 (discussing the critique of academic originalists on *Dobbs*).

[29] *See id.* at 1132–33 ("Appealing to the Founders' Constitution invoked understandings about authority and identity that are rooted in the Nation's creation story. A claim on *constitutional memory* transmuted politics into law.").

[30] *See* Bassok, *supra* note 18, at 297–302.

[31] *See* Siegel, *supra* note 2, at 583–84.

[32] *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 37–46 (1988) (distinguishing between a Catholic and a Protestant approach to interpreting the Constitution and noting that the latter promotes the idea of "the community joined together in basically egalitarian discussion of the meaning (and demands) of the relevant materials").

[33] *Cf.* William H. Rehnquist, *Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1975) ("Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are no longer the keepers of the covenant . . . .").

According to identity originalists, Americans should be bound to their original covenant, to their original self, as it was expressed in the act of founding and later founding moments such as the constitutional amendments following the Civil War. For identity originalists, originalism is an interpretative scheme committed to preserving a thread of identity stretching from the days of the Founders to the present. What makes identity originalism a type of originalism is precisely this commitment to "fixation" of the founding act as a stable identity-constant constraining constitutional interpretation even amid changes.[34]

Identity originalists do not deny that, over the years, American original identity went through significant changes. Many features of the American original constitutional identity have vanished, and for a good reason—for example, slavery and other forms of inequality.[35] However, they insist that, as a legal matter, Americans must preserve a link to the identity of the founding generation. If the Constitution is "a covenant running from the first generation of Americans to us and then to future generations,"[36] identity originalists believe that a thread of identity from the framers to our times must be guarded.[37] In their vision, by using the originalist interpretative scheme, the Court ensures that the core features that connect contemporary America to the time of its founding are maintained.[38]

Purist originalists deny the identity function of originalism as it pertains to the legal discourse. In their view, constitutional *law* functions as "pure" law with no aspiration to function as a focal point of American identity.[39] Purists may accept that outside the legal discourse, the Constitution is central to American identity. But in their view, constitutional *law* functions as a language of expertise and not as an identity manifesto.[40] For pure originalists, originalism's merit lies precisely in its value as a technique of legal interpretation that resembles legal techniques used to interpret non-constitutional legal sources.[41] Requiring judges to construct American identity through their judgments is antithetical to this view. In this spirit, Larry Solum wrote in response to my claim that identity originalism exists in constitutional law that he doubts whether "'identity originalism' exists as an approach to

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[34] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 9 (2015) ("[O]riginalism has a unifying core. That core is specified by the Fixation Thesis and the Constraint Principle.").

[35] *See* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 673 (2013) ("[B]ecause of the work of successive waves of social movements for equality, most Americans believe that equality and opposition to racism are central to the American creed. But many people in 1787—or even 1868—might not have seen it the same way.").

[36] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992).

[37] *Cf.* William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L.J. 1115, 1117 (2011) ("Much of what lends originalism its public appeal is the narrative of a 'traditional' nation that it promises to restore: an America dedicated to personal responsibility, limited government, private property, and godliness.").

[38] *See* PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 63 (1992) ("[T]he American myth of originalism is linked to a particular idea of popular sovereignty . . . . The popular sovereign suggests identity across time and space, not just linking the entire nation at the moment of birth but linking subsequent generations back to the moment of birth.").

[39] *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory* in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION, 74 (Grant Huscroft & Bradley W. Miller eds. 2011) (contrasting between originalism and theories that view constitutional law as "the narrative constructed by the American people that constitute their identity as a polity").

[40] *See* John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 750 (2012) ("The Constitution is a legal document, and when it employs words that have an existing legal meaning, this is strong evidence that the legal meaning is the correct meaning.").

[41] *See, e.g.*, Scalia, *supra* note 5, at 854 (promoting originalism as means for the pursuit of "fixed meaning ascertainable through the usual devices familiar to those learned in the law"); J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY 39 (2012) (arguing that one of "the virtues of originalism" is "harnessing the judiciary's expertise in traditional legal analysis . . . .").

constitutional interpretation (as opposed to a motivation for originalist approaches)."[42] However, he agreed that "some appeals to original meaning (especially outside the academy) are entwined with the narrative and identity functions of the Constitution and the framing era."[43]

Siegel does a good job of rebutting Solum's argument. While she agrees that, at first, identity originalism was not common among legal academics,[44] she recognizes that currently, "there are large numbers of originalists in the academy, in politics, and on the bench who are identified with the conservative legal movement that . . . understands itself as having an identity and telos—a 'substantive moral constitutionalism' to borrow Professor Vermeule's term."[45] Siegel further writes on how originalism has been used to defend a "way of life—let's call it family values traditionalism . . . ."[46] She argues that the majority Justices in *Dobbs* essentially adopted identity originalism in turning to history and tradition to express and project "a family-values agenda into nineteenth-century legal materials."[47] She explains that "[t]his is surely not the original public meaning originalism that academic originalists practice, but it is a species of family-values traditionalism that movement originalists have practiced since the Reagan era."[48] According to Siegel, the goal of the majority opinion in *Dobbs* is constructing a history that current conservative Americans can identify with.[49]

However, Siegel views identity originalism as a sham legal technique. First, according to Siegel, originalism's "reason of being" is constraining judges by ensuring that their interpretative determinations are not decided according to their own values but according to the founding generation's understanding.[50] Yet Siegel argues that in the hands of the conservative Justices, originalism is used to advance their identity vision rather than to dictate the correct interpretation according to the originalist methodology.[51] In this manner, originalism does not constrain discretion as it promises to do. Rather, in allowing the injection of the conservative movement's identity values into constitutional interpretation, originalism leads to radical changes in constitutional law—such as the one in *Dobbs*—that are contrary to the incremental way Burkean conservatism dictates.[52]

Yet, here, Siegel disregards a different connection between identity originalism and conservatism. Identity originalism is a conservative agenda in the sense that it aims to conserve a thread of American identity that is preserved by the original meaning of the Constitution. Conservative in terms of identity does not imply conservative in terms of

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[42] *See* Lawrence Solum, *Bassok on Interpretive Theories & American Identity*, LEGAL THEORY BLOG (Sept. 11, 2015), https://lsolum.typepad.com/legaltheory/2015/09/bassok-on-interpretive-theories-american-identity.html [https://perma.cc/4QEF-DLJQ].

[43] *Id.*

[44] *See* Siegel, *supra* note 1, at 1143 ("Despite fierce disagreements, the law professors all understood originalism as an interpretive method.").

[45] *See id.* at 1144.

[46] *See id.* at 1169.

[47] *See id.* at 1183–84.

[48] *See id.* at 1192.

[49] *See id.* at 1185 ("[O]n closer reading of the *Dobbs* opinion, one can see that the Court's finding of a tradition depended on an additional critical factor—on a determination that prior practice was sufficiently respect-worthy and consistent with contemporary constitutional commitments that Americans could identify with it as their tradition.").

[50] *See id.* at 1131 ("Originalist methods are said to promote the values of (1) democracy and (2) judicial constraint.").

[51] *See* Siegel, *supra* note 2, at 577 ("[O]riginalism is *not* a value-neutral, content-independent method. Instead in these circumstances, originalism is a goal-oriented political practice, a way of achieving movement-valued ends.").

[52] *See* Siegel, *supra* note 1, at 1135 ("the Court does not exhibit respect for the history and traditions of the last half-century, demonstrate Burkean concern for preserving the status quo,"), 1175.

judicial restraint and incremental slow change. If identity originalists believe that America has strayed away from its original identity, their call for fidelity is an argument for change, not stasis.[53] Yet, they still proclaim to restore and conserve the original identity rather than reform it.

The second reason that Siegel argues that identity originalism is not true originalism is the different methodology used compared to the one used by pure originalists. According to Siegel, identity originalists are not committed to the originalist methodology of deciphering the meaning of the Constitution using its original understanding.[54] Rather, they are committed to their vision of America's original identity. Siegel detects a tension in identity originalism between commitment to originalism as an interpretative methodology that serves to connect current America to its original identity and the commitment to American original identity. Identity originalists' goal is not only a correct interpretation in terms of linguistic original meaning but also an interpretation adhering to an original understanding of American identity as captured by the Constitution. As a result, a question arises: which of these commitments supersedes? If originalism is a roadmap to a certain vision of American identity, may the destination dictate the road, or does the road dictate the destination? Siegel is correct that there is a danger that the commitment to the fixation of American original identity would provide the answers to questions of how to interpret constitutional law and thus make originalism a mere sham tool for achieving a certain vision of American identity.

In Siegel's view, *Dobbs* is an example of a judgment that was corrupted by the commitment to a certain vision of America's original identity which overpowered originalism as an interpretative methodology. This is Siegel's "originalism as living constitutionalism" argument, according to which, under the guise of originalism, Alito inserted the developing ("living") values of conservative identity.[55] According to Siegel, the original American identity may have been the destination but the interpretative roadmap was living constitutionalism. In her view, the originalist identity function of the Constitution led Alito to reject the correct originalist interpretation of the Constitution. Originalism did not serve as the roadmap to America's original identity. Instead, according to Siegel, only by using living constitutionalism as the interpretative roadmap, could Alito incorporate the evolving identity-vision of the Republican Party into constitutional interpretation. For this reason, she writes "[t]he conservative Justices are living constitutionalists, too."[56]

In my view, Siegel's branding of Alito's majority opinion in *Dobbs* as driven by an identity vision is baffling. Alito's opinion does not directly address the Constitution's effect on American identity. His attempt to downplay the Court's role in determining American identity becomes especially clear in comparison to the dissenting opinion that speaks of constitutional law as a language expressing "what it means to be an American."[57] The dissenting Justices further stress that "reproductive control is integral to many women's identity and their place in the Nation."[58] The dissenting Justices in *Dobbs* accept the first and

[53] *Cf.* Balkin, *supra* note 35, at 679 ("Although appeals to tradition may seem conservative on the surface, they are often calls for transformation or revolution.").

[54] *See* Siegel, *supra* note 1, at 1173 ("*Dobbs* does not employ the methods of academic originalists; it shows no interest in the original public meaning of the Fourteenth Amendment.").

[55] *See id.* at 1183 ("In these circumstances, originalism is a practice of living constitutionalism that is not forthright about its values, aims, and commitments.").

[56] *See* Siegel, *supra* note 2, at 605.

[57] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 365 (2022) (dissenting opinion).

[58] *Id.* at 408.

the second premises of identity originalists. They agree that the Court must discuss the Constitution as a document central to American identity. In insisting that abortion is an identity question to be determined by the Court, the dissenting Justices preserve and strengthen the Court's role in expressing American identity, while Alito's judgment narrows this role. Alito downplays the Court's role in identity issues by returning the issue of abortion to the decision of the citizens and their elected representatives in each state. Hence, while acknowledging the fundamental nature of the issue, he denies that the American identity dictates the legal answer to the issue of abortion.[59] His judgment presents the Court's decision on abortion as derived from constitutional law as a language of expertise rather than a language for determining American identity.[60]

According to Siegel's branding, every judgment adhering to the conservative identity-agenda would be titled "political originalism" no matter what interpretative scheme is used.[61] As will be elaborated below, creating such conceptual confusion is the first step in Siegel's effort to pollute the concept of originalism so as to make it an empty signifier: a brand with no content behind it so that everyone can use the same signifier in diverse ways.[62] Then, everyone would be an originalist. Yet, if everything is originalism, then nothing is, making the concept useless.

II. ORIGINALISM AS DEMOCRATIC CONSTITUTIONALISM

Together with Robert Post, Siegel has devised and promoted the idea of democratic constitutionalism.[63] According to this idea, the meaning of constitutional provisions is not determined exclusively by the Court but stems from a complex pattern of exchanges between courts, representative government, and mobilized citizens.[64] Constitutional meaning continually changes through multiple communicative exchanges between the public and the courts, including public backlash.[65] Siegel and Post view the sharp distinction between "law" and "politics" as artificial and promote one common language of reason to which all players are committed. Yet, they acknowledge that public will—whether directed by reason or not—has a central role in determining the content of constitutional law, which is detrimental to American identity.[66]

Democratic Constitutionalism was developed as part of a larger school of constitutional thought that emerged at Yale Law School. The godfather of this school of thought is Bruce

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[59] *Id.* at 256 ("Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.").

[60] *See also* Or Bassok, *Legitimacy without Legality*, 68 ST. LOUIS U. L.J. 47, 96–97 (2023) (analyzing Alito's position).

[61] *See* Siegel, *supra* note 1, at 1148.

[62] Thomás Zicman de Barros, *The Polysemy of an Empty Signifier: The Various Uses of Ernesto Laclau's Puzzling Concept*, J. POL. IDEOLOGIES 1, 9–11 (2023) (discussing the fourth use of the term "empty signifier" as "[a] symbol whose content is problematically poor").

[63] *See, e.g.*, Robert C. Post & Reva Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020, 25 (Jack M. Balkin & Reva B. Siegel eds. 2009).

[64] Robert Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L L. REV. 373, 374, 378–79, 389, 395 (2007) ("Democratic constitutionalism rests on the commonsense idea that judge-made constitutional law and democratic politics affect each other.").

[65] *Id.* at 380–83, 399, 430.

[66] *Id.* at 380 ("Americans have used a myriad of different methods to shape constitutional understandings—sit-ins, protests, political mobilization, congressional use of section five powers, ordinary federal and state legislation, state court litigation, and so on. These struggles are premised on the belief that the Constitution should express a nomos that Americans can recognize as their own.").

Ackerman, who identified that the Constitution has changed not only based on constitutional amendments in accordance with the textually prescribed procedure laid out in Article V or by convincing courts with constitutional reason. Rather, the Constitution was also amended by the will of the people not according to the formal constitutional amendment process.[67] Ackerman has shown that throughout American history, the mechanisms for amending the Constitution that are anchored in Article V were not always followed, and yet the Constitution was amended. We the People adopted constitutional changes outside the procedure stipulated in Article V. These informal constitutional amendments that occur through social mobilization and "outside" the procedures of Article V give another venue for the will of the People to manifest itself.[68]

Siegel and Post's "democratic constitutionalism,"[69] Jack Balkin and Sanford Levinson's "partisan entrenchment,"[70] and William Eskridge and John Ferejohn's "super-statutes"[71] are all part of this family of attempts to describe the mechanisms through which popular will amends the Constitution even when it is expressed outside the mechanism of formal constitutional amendments.[72] In that sense, these theories are all offspring of Ackerman's approach. Privileging the People's will over reason in describing constitutional changes is the common thread connecting all these attempts to re-conceptualize constitutional law.[73] These theories, that can be addressed — due to the number of Yale-based scholars among those who devised them — under the title of "the New Haven School of constitutional law," view a change in constitutional law as achieved not only by offering convincing legal reasons to the Court nor by only amending the Constitution according to the procedure in Article V. Rather, enduring public will compels a change in constitutional law; public legitimacy overwhelms legality.

Over the years, Siegel did a masterful job in depicting how conservative social movements have changed constitutional law through mechanisms akin to those suggested by the New Haven School.[74] Her articles criticizing the *Dobbs* judgment continue this line of thought. Siegel writes that:

> The Republican Party engaged in norm-busting appointments politics to produce the Supreme Court that decided the *Dobbs* case. These norm-busting appointments politics were a necessary condition for the decision. When I call *Dobbs* an originalist decision, I include within my account of originalism the appointment practices that produced the Court that decided the case.[75]

This description aligns with the theory of two proud members of the New Haven School: Balkin and Levinson's "Partisan Entrenchment." According to Balkin and Levinson, "[b]y installing enough judges and Justices with roughly similar ideological views over time,

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[67] 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 261 (1998).

[68] *See id.* at 10–17, 19, 27–31, 115, 261, 383.

[69] *See* Post & Siegel, *supra* note 63.

[70] Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006).

[71] WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010).

[72] *See* Gerken, *supra* note 22, at 930-31 (offering a list of 13 scholars—five of whom are from Yale Law School—who are proponents of the informal constitutional amendment idea).

[73] *See* KAHN, *supra* note 21, at 167 & n.44.

[74] *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008) (depicting how a social movement led to a shift in interpreting the Second Amendment).

[75] Siegel, *supra* note 1, at 1176.

Presidents can push constitutional doctrine in directions they prefer . . . ."[76] Partisan entrenchment helps ensure that the courts defend the controlling party's ideological commitments.[77] In this manner, responsiveness to the opinion of the electing public is indirectly created.[78] According to Balkin and Levinson, partisan entrenchment is "roughly but imperfectly democratic"[79] and "is one of the most important ways for parties to change the Constitution outside of Article V amendment."[80]

To summarize the argument made so far in this subsection: Siegel presents the "norm-busting appointments politics" as the best way to explain *Dobbs*.[81] According to Balkin and Levinson such "partisan entrenchment" is one route to amend the Constitution outside of the Article V procedure as part of several routes the New Haven School has to offer. Siegel is one of the founders of this school of thought and has consistently supported the idea of amending the Constitution outside of Article V.

Based on this brief summary, it is easy to understand why Siegel is unable to criticize the legal reasoning of the anti-abortion social movement by adopting the simple argument that if this movement lacks a convincing constitutional argument, its only route to change *Roe*'s constitutional interpretation was through Article V. After all, she developed a route for public will to overcome the constraints of legality. True, Siegel is against court-centric models, in which constitutional changes that occur outside of the Article V amendment procedure are initiated or consolidated by the Court. She objects to the role of the judiciary as having the last word.[82] However, she accepts changes to the Constitution that fail to go through the formal procedure of Article V or convince the Court based on reason as long as they are driven by proper and robust popular energy.[83] She accepts that such changes occur in "the field of constitutional culture" through "the formal and informal interactions between citizens and officials that guide constitutional change," including "lawmaking and adjudication, confirmation hearings, ordinary legislation, failed amendments, campaigns for elective office, and protest marches."[84] For this reason, the title of Siegel's *Memory Games* Article does not merely say that *Dobbs* adhered to the "living constitutionalism" method under the guise of originalism but that it was an anti-democratic adherence.[85] Unable to criticize the path of amending the constitution outside of Article V as illegal, it is vital for Siegel to add that *Dobbs* is anti-democratic. In Siegel's world, in which popular energy translates itself into informal

[76] Balkin & Levinson, *supra* note 70, at 490; *see also* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) ("Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.").

[77] Balkin & Levinson, *supra* note 70, at 490; *see also id.* at 495, 501.

[78] *Id.* at 495, 501.

[79] Balkin & Levinson, *supra* note 76, at 1076.

[80] JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 79 (2020).

[81] Siegel, *supra* note 1, at 1176.

[82] *See* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 302-03 (2001).

[83] *See* Gerken, *supra* note 22, at 932–33 (discussing different divisions within the scholarship that accepts constitutional amendments outside of Article V).

[84] *See, e.g.*, Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and the Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323, 1324-25 (2006); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. Pa. L. REV. 927, 946–50 (2006).

[85] *See* Siegel, *supra* note 2, at 568 (concluding that conservative justices are engaged "in *anti-democratic* forms of living constitutionalism").

amendments to the Constitution, defying legality can be accepted but not if it lacks public legitimacy.[86]

Siegel's argument is extremely important as it demonstrates the dead-end reached by the New Haven School of Constitutional Law. According to Siegel, in *Dobbs*, the conservative social movement led to a change in constitutional law not through a constitutional amendment utilizing Article V, and not based on constitutional reason, as their legal arguments were bogus.[87] *Dobbs* is an example of a constitutional change that followed a path—not different than the ones detected and promoted by the New Haven School—of amending the Constitution outside of Article V. According to Siegel, *Dobbs* represents the victory of public will through the appointment procedure, even when such public will is not in line with legal doctrine. There was no proper constitutional amendment, nor was there any convincing arguments in terms of constitutional law that convinced the Justices, but nonetheless, constitutional law changed. Siegel's inability to reject this path of amending the Constitution outside of Article V as illegal inevitably leads her to suggest using originalism as a vessel to insert the progressive political agenda. As she supports amending the Constitution outside Article V, as long as there is the correct political energy, why not use the originalism brand? Siegel suggests inserting voices that were repressed at the time of the founding of the Constitution or at the time the Reconstruction Amendments were adopted. In this manner, the right to abortion would become part of the Constitution.[88] While this idea uses the shell of originalism to insert voices from the era in which the Constitution was created/amended, it goes against the logic of identity originalism and pure originalism. It uses originalism as an empty signifier.

Think of the following example: currently, some groups consider the term "murder" to include not only intentional killings of human beings but also of animals.[89] These voices are under-represented in the way most Americans currently use the term "murder." Some of these voices arguing for a different use of the term "murder" would undoubtedly argue that they are repressed. If we would today create a constitution prohibiting "murder by state officials," the original understanding of the term "murder," by either the general public or lawyers, would not include intentionally killing dogs during military operations. Moreover, the constitutional identity which is based on such a constitution would not put animal life as a central property. However, if 300 years from now we include the voices of the repressed animal rights movements as part of our interpretative methodology, "murder" may need to include the intentional killing of dogs. By then, such interpretation may well be considered the progressive moral result and may also be part of the 2325 American constitutional identity. However, it would not be the correct result either according to pure originalism or identity originalism. According to Siegel, if originalism is not a true interpretive methodology but merely a guise for ideological goals, there is no reason not to use this popular brand for progressive ideological goals. Yet, in this manner, originalism would be emptied of its meaning and become an empty signifier.

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[86] *See* Siegel, *supra* note 2, at 610–12 (discussing *Dobbs* as anti-democratic due to its lack of transparency in its reasoning that hides value judgments behind originalism which leads to lack of "democratic oversight" and as a result an inability to mobilize the public against it).

[87] *See* Siegel, *supra* note 1, at 1173 ("I show how *Dobbs* grows out of the movement-party practice of originalism. *Dobbs* employs hardball appointments politics and constitutional memory frames in the service of constitutional change . . . .").

[88] *See id.* at 1200-04 (suggesting inserting excluded voices through the originalist methodology).

[89] Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1509–10 (2001) (book review) (examining the analogy between killing Jews in the Holocaust and the intentional killing of cattle).

CONCLUSION: *DOBBS* BEYOND THE ABORTION QUESTION

Siegel's Articles on *Dobbs* reveal a problem that is common to all scholars following the New Haven School of constitutional law. If, as the New Haven School argues, social movements can change constitutional law based on the support they receive from the public, without going through the formal procedure for a constitutional change, and without convincing the community of experts based on constitutional reason, how can a legal expert criticize such changes in terms of constitutional *law*? If members of the New Haven School conceptualize radical changes in the Court's adjudication—such as the 1930s "switch in time"— as a legitimate result of sustained public pressure that were contrary to constitutional doctrine,[90] how can they, based on constitutional doctrine, criticize a similar development with *Roe* and the right to abortion? Siegel is thus faced with a difficulty. After accepting and promoting the idea of constitutional change based on public will outside of Article V, she has no resources in terms of constitutional reason to criticize *Dobbs*.[91]

As constitutional reason has lost its privileged place to public will, at least among members of the New Haven School, it is no wonder that Siegel's articles present *Dobbs* as a sham originalist decision and as anti-democratic living constitutionalism. With deflated resources of legal reason to criticize *Dobbs*, Siegel's critique is limited to the inner logic of originalism and democracy. Siegel agrees that *Dobbs* does not speak in the language of originalism nor applies the originalist methodology.[92] Yet, because *Dobbs* incorporated a central piece of the conservative vision of American identity into constitutional law, Siegel views it as an originalist judgment. As such, she attacks it as inconsistent with the stated goals of originalism as a legal methodology.[93]

During periods when constitutional law functioned as a language of expertise in which reason reigns supreme,[94] constitutional law was disciplined by requirements of consistency and coherency.[95] Preferring will over reason as the central driving-force in conceptualizing constitutional development means that consistency is denied of this key disciplining role. Consistency is a tool of reason, while public will need not be consistent. According to the New Haven School, a social movement supported by enough public will can bring a constitutional change even if its agenda is inconsistent with current constitutional law and without going through the formal procedures for constitutional amendment that aim to distinguish politics from law. In Siegel's hands, consistency is a mere rhetorical tool for exposing the hypocrisy of the conservatives who purport to speak the language of law but do politics. She exposes that originalists are disingenuous as they are inconsistent with originalism's stated goals. An argument of doublespeak is the tool of critique.

The conceptualization of constitutional change—according to the New Haven School—as driven by will rather than reason has contributed its part in exposing constitutional law to the

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[90] *See* Ackerman, *supra* note 67, at 383 ("America's modern Constitution was created during Roosevelt Administration through processes unknown to Article Five.").

[91] *See* Siegel, *supra* note 1, at 1178–79 (referring to "institutional-legitimacy" reasons for not overruling *Roe*).

[92] *See id.* at 1169 ("*Dobbs* does not employ methods of original public meaning originalism . . . .").

[93] *See id.* at 1173 ("But *Dobbs* is the expression of originalism that has developed in the conservative legal movement and the Republican Party over the last forty years.").

[94] *See* Bassok, *supra* note 60, at 57–66 (discussing constitutional law as a language of expertise—not to be confused with formalism).

[95] *See* Bassok, *supra* note 60, at 51–52.

dangers of populism.[96] Without reason to discipline change in constitutional law, legal scholarship is led by the question of whether the social movement leading the change in political will is worthy of support. This crisis is well reflected in the annual campfire meeting of American constitutional scholars—the annual *Harvard Law Review* foreword—which has always been a good way for detecting the problems of American constitutional law.[97] On the eve of the 2020 elections between then (and now) President Donald Trump and Joe Biden, Michael Klarman published a 264-page long(!) foreword discussing "the recent degradation of American democracy."[98] The reader of the foreword—written in the spirit of "resistance" to autocracy[99]—could not but feel that the days are equivalent to the last days of the Weimar Republic.

A year has passed, and Cristina Rodriguez's foreword speaks in a completely different tone.[100] Rodriguez's foreword not only does not speak on how American democracy succeeded in surviving for another year but promotes the new administration's ability to make a "regime change—the advent of a new presidential administration that brings with it constitutional, interpretive, philosophical, and policy commitments distinct from those held by its predecessor . . . ."[101] Yet if Klarman was even remotely correct, why give such power to the institution that he described just a year earlier as presenting an immense danger to American democracy?

What has changed between the two forewords? What "constitutional moment" has occurred that ensured the immunity of constitutional law to dangers of a populist President? No such change has occurred, but Joe Biden was elected to become the 46th US President. The way out of this dead-end in which politics is the guiding star of constitutional scholarship is not to further corrupt the language of constitutional law nor to adopt the dissenting opinion in *Dobbs*, which aims to continue the judicial control over American identity. Part of the solution is to look at *Dobbs* beyond the abortion issue and to return to viewing constitutional law as a language of expertise with little effect on identity issues, just as Alito suggested in his majority opinion in *Dobbs*. Only by resurrecting the language of constitutional law as a language of expertise can a constitutional debate between conflicting political sides ensue with the border between law and politics ensuring that the mere popularity of a social movement does not make its agenda part of constitutional law.[102]

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[96] *See id.* at 98–101.

[97] *See* Or Bassok, *Beyond the Horizons of the Harvard Forewords,* 70 CLEV. ST. L. REV. 1 (2021) (demonstrating through a survey of the Harvard Law Review forewords the current dominance of the problematic idea that judicial legitimacy is to be identified with public support as measured in opinion polls).

[98] *See* Michael J. Klarman, *The Supreme Court, 2019 Term, Foreword: The Degradation of American Democracy-and the Court*, 134 HARV. L. REV. 1, 8-11 (2020).

[99] *See id.*

[100] *See* Cristina M. Rodriguez, *The Supreme Court, 2020 Term, Foreword: Regime Change*, 135 HARV. L. REV. 1, 156–57 (2021).

[101] *See id.*

[102] *See* Bassok, *supra* note 60, at 92–96 (discussing how *Dobbs* may be a reverse in course in attempting to resurrect constitutional law as a language of expertise).