

# ESSAY

## PROFILING ORIGINALISM

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*Originalism is a subject of both legal and political discourse, invoked not just in law review scholarship but also in popular media and public discussion. This Essay presents the first empirical study of public attitudes about originalism. The study analyzes original and existing survey data in order to better understand the demographic characteristics, legal views, political orientation, and cultural profile of those who self-identify as originalists. We conclude that rule of law concerns, support for politically conservative issue positions, and a cultural orientation toward moral traditionalism and libertarianism are all significant predictors of an individual preference for originalism. Our analysis suggests that originalism has currency not only as a legal proposition about constitutional interpretation, but also as a political commodity and as a culturally expressive idiom.*

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### INTRODUCTION

Originalism has gone mainstream. Two of the largest Tea Party organizations have been at odds on occasion,<sup>1</sup> but they both agree on a commitment to the intentions of the Framers. Tea Party Nation describes itself as “a user-driven group of like-minded people who desire our God-

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1. See Amy Gardner, Tea Party Faces Challenge of No Leader, Single Goal, Wash. Post, Sept. 22, 2010, at A02 (discussing row over cancellation of convention planned by Tea Party Nation).

given individual freedoms written out by the Founding Fathers.”<sup>2</sup> That entails a belief in “Limited Government, Free Speech, the 2nd Amendment, our Military, Secure Borders and our Country.”<sup>3</sup> Another prominent group, Tea Party Patriots, lists among its core values that “[w]e believe that it is possible to know the original intent of the government our founders set forth, and stand in support of that intent.”<sup>4</sup> For them, this means support for “Fiscal Responsibility, Constitutionally Limited Government, and Free Markets.”<sup>5</sup>

Meanwhile, in the legal academy, hands have been wrung and much ink has been spilled over whether, to paraphrase Thomas Jefferson, we are all now originalists.<sup>6</sup> Michael Perry is among the first to have made that suggestion in print, and in a sense he is surely correct.<sup>7</sup> Most responsible constitutional interpretation begins with the original meaning of the text; the differences are over the content and generality of that meaning, and what judges should do when it does not provide clear answers to modern legal disputes.<sup>8</sup> Hence Perry’s conclusion, completing the Jeffersonian analogy, that just as we are all originalists, none of us is an originalist.<sup>9</sup> The question of the degree to which judges and legal academics should commit themselves to the Constitution’s original meaning acquired new life after the Supreme Court’s recent decision in *District of Columbia v. Heller*, in which both the majority<sup>10</sup> and the principal dissent<sup>11</sup> used originalist methods in analyzing whether the Second Amendment protects an individual right to handgun possession in the home.

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2. Tea Party Nation, at <http://www.teapartynation.com> (on file with the *Columbia Law Review*) (last visited Oct. 17, 2010).

3. *Id.*

4. Tea Party Patriots, Mission Statement and Core Values, at <http://www.teaparty-patriots.org/Mission.aspx> (on file with the *Columbia Law Review*) (last visited Oct. 17, 2010).

5. *Id.*

6. See Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in 9 *The Works of Thomas Jefferson* 193, 195 (Paul Leicester Ford ed., 1905) (“We are all republicans: we are all federalists.”).

7. See Michael J. Perry, *Morality, Politics and Law* 280 (1988) [hereinafter Perry, *Morality*] (“There is a sense in which we are all originalists: We all believe that constitutional adjudication should be grounded in the origin—the text that is *at* our origin and, indeed, *is* our origin.”).

8. See Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 *Va. L. Rev.* 669, 694 (1991) (“The more specific the original meaning, the greater the constraint; the more general the meaning, the lesser the constraint and the greater the latitude for what is sometimes called judicial ‘discretion’ in ‘applying’ the provision to the case at hand.”).

9. See Perry, *Morality*, *supra* note 7, at 280 (“But there is a sense, too, in which none of us is an originalist: . . . [W]e cannot travel back to the origin, no matter how hard we try, and we deceive ourselves if we think we can.”).

10. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790 & n.6 (2008) (examining text of Constitution and “other founding-era documents” to determine scope of Second Amendment right).

11. See *id.* at 2831–36 (Stevens, J., dissenting) (reviewing text and constitutional drafting history of Second Amendment).

We have described two related but distinct conversations, one popular and the other professional, but the precise relationship between them is mysterious. On one hand, it is clear that many who promote and affiliate with originalism in popular discourse believe that their views should have purchase in courts of law.<sup>12</sup> On the other hand, it is not clear that frequent invocations of the founding fathers or original intent on cable news, on talk radio, or even at Supreme Court confirmation hearings has much at all to do with the serious work of historians and legal scholars.<sup>13</sup> “[O]riginalism has long since reached beyond the courts,” Jill Lepore writes. “Set loose in the culture, it looks like history but it’s not. It is to history what astrology is to astronomy, what alchemy is to chemistry, what creationism is to evolution.”<sup>14</sup> Who is right?

We can imagine at least three different, though not mutually exclusive, understandings of originalism’s prominence within popular culture. First, we might expect relative enthusiasm for originalism to align with support for the kinds of rule of law values of democracy and transparency that many of its proponents in the legal profession celebrate.<sup>15</sup> Second, we might imagine originalism to be associated with a set of political outcomes or, alternatively, with a particular political ideology, and supported by those who wish to promote those outcomes or who affiliate with that ideology.<sup>16</sup> Finally, we might believe that originalism is as much a cultural phenomenon as a narrowly legal or political one. In other words, affiliation with originalism might be associated with certain cultural orientations, such as hierarchical, individualistic, or egalitarian ways of thinking—or with their opposites. This last suggestion resonates with the

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12. See Jamal Greene, *Selling Originalism*, 97 *Geo. L.J.* 657, 672–96 (2009) [hereinafter Greene, *Selling Originalism*] (describing integration of social and political movement behind originalism into professional discourse); Kate Zernike, *Beyond New Deal*, *N.Y. Times*, July 3, 2010, at A9 (“When Republicans pressed [Elena] Kagan on the Constitution’s commerce clause and whether she was a legal progressive, they were speaking not just about academic abstractions, but about the very ideas that animate the . . . [Tea Party] movement.”).

13. For a discussion of originalism in bestselling books, blogs, popular speeches, and newspaper editorials, see Zernike, *supra* note 12.

14. Jill Lepore, *Tea and Sympathy: Who Owns the American Revolution?*, *New Yorker*, May 3, 2010, at 26, 31.

15. See Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 *Harv. L. Rev.* 2387, 2415 (2006) (reviewing Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005)) (“The point is that *in principle* the textualist-originalist approach supplies an objective basis for judgment that does not merely reflect the judge’s own ideological stance.”); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 39 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*] (arguing nonoriginalist judges typically interpret the Constitution according to what they believe it “ought to mean”).

16. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *Harv. L. Rev.* 191, 241 (2008) (arguing “[t]he New Right embraced originalism as the jurisprudential vehicle” for its conservative political claims).

work of scholars such as Dan Kahan and Donald Braman, who posit that cultural predisposition variables go a long way toward predicting certain policy views.<sup>17</sup>

The questions of whether, to what degree, and how popular support for originalism aligns with the robust professional debate over the subject lend themselves to empirical answers, but to date no one has explored these questions empirically. This Essay begins to fill that gap. As discussed in Part I, we rely on data from three surveys: a series of polls between 2003 and 2010 in which the Quinnipiac University Polling Institute asked Americans about their views on the Supreme Court's reliance on original intentions;<sup>18</sup> the Cooperative Congressional Election Study (CCES), conducted in October and November 2008;<sup>19</sup> and an original panel survey, the Constitutional Attitudes Survey (CAS), that we commissioned in July 2009 and July 2010.<sup>20</sup> The CAS, which drives most of our analysis, asked for respondents' views on originalism, and asked other questions concerning principles of constitutional interpretation. It also included all the standard demographic and ideological variables in most public opinion surveys, questions concerning salient issues that have recently come before the Supreme Court, and a battery of questions popularized by the American National Election Studies (ANES) that measure cultural values such as libertarianism, egalitarianism, and moral traditionalism.

As we discuss in Part II, our various measures of originalism reveal both coherence and inconsistency in public attitudes concerning methods of constitutional interpretation. On one hand, most respondents be-

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17. See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. Pa. L. Rev. 1291, 1294–95 (2003) (arguing cultural disposition rather than objective evaluation of empirical evidence explains views on gun rights).

18. Press Release, Quinnipiac Univ., *Obama's Bounce Goes Flat, Quinnipiac University National Poll Finds; but Voters Confident He Will Pick Good Judge* (Apr. 21, 2010); Press Release, Quinnipiac Univ., *American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, but They Don't Want Government to Ban It* (July 17, 2008); Press Release, Quinnipiac Univ., *Voters Back Supreme Court Limit on School Desegregation* 3–1 Quinnipiac University National Poll Finds; *Approval of Congress Drops to Lowest Point Ever* (Aug. 16, 2007); Press Release, Quinnipiac Univ., *Supreme Court Nominee Should Speak Up on Abortion, U.S. Voters Tell Quinnipiac University National Poll; Bush Approval Drops to New Low* (July 27, 2005); Press Release, Quinnipiac Univ., *U.S. Voters Back Roe v. Wade 2–1, Support Filibusters, Quinnipiac University National Poll Finds; Bush Approval at Lowest Point Ever* (May 25, 2005); Press Release, Quinnipiac Univ., *Supreme Court Should Listen to the People, Americans Tell Quinnipiac University Poll; 2–1 Are Opposed to Race-Based College Admissions* (Mar. 5, 2003) [hereinafter *Quinnipiac Surveys*] (all on file with the *Columbia Law Review*).

19. Stephen Ansolabehere, *Guide to the 2008 Cooperative Congressional Election Survey* (2009) [hereinafter *CCES*] (on file with the *Columbia Law Review*) (discussing background, methodology, and results of survey).

20. Stephen Ansolabehere & Nathaniel Persily, *Knowledge Networks, Field Report: Constitutional Attitudes Survey 38–113* (2010) [hereinafter *Constitutional Attitudes Survey*] (on file with the *Columbia Law Review*).

lieve judges ought to factor original intent into their interpretations of the Constitution. On the other, very few believe it should be determinative. Even those who ally themselves with originalism as an abstract concept tend to sacrifice originalism as an interpretive value in a concrete context—such as when asked to read a right to privacy into the Constitution, or when given a forced choice between other values they consider important.

With all that said, those who express the originalist option in the Quinnipiac question, as well as those who can be fairly characterized as *most* originalist according to an index derived from all relevant questions in the CAS, exhibit the demographic and ideological characteristics one would expect. We present the demographic and ideological breakdown of originalists and nonoriginalists in Part III. It should come as little surprise that originalists share the characteristics traditionally associated with political conservatives. Originalism is part of a bundle of ostensibly methodological commitments that opinion leaders and the media associate with the Republican Party, and so it is hardly surprising that originalists seem to support conservative outcomes.<sup>21</sup>

The expected correlation between conservative and originalist attitudes represents only the beginning of our analysis, however. We also wish to understand what types of political and cultural issue positions seem best to predict whether one is an originalist. Do attitudes on issues such as abortion, same-sex marriage, and gun rights show additional predictive power not captured by generic labels, such as conservative, or by demographic predictors, such as religiosity? How much of a role do values of moral traditionalism, libertarianism, and egalitarianism play in predicting whether someone is an originalist? Part IV engages in this kind of multivariate analysis.

Our data are consistent with the proposition that originalism is salient within the public mind not simply as a political commodity or partisan slogan, but also as a legal argument and as a culturally embedded meme. The possible penetration of legal professional norms into the public consciousness is not only of intrinsic interest to those who wish to understand public attitudes toward the law, but also implicates several debates within the scholarly literature. Attempting to unravel competing accounts for the public's methodological choices seems particularly urgent for popular constitutionalists, who believe that constitutional interpretation should be broadly responsive to political and social move-

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21. See, e.g., Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. Rev. 1069, 1073 (2006) (remarking that Justice Scalia and Justice Thomas, the Court's two most originalist Justices, appear to "see a great parallel between the 'originalist' Constitution and the 2004 Republican Party platform"); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 Cardozo L. Rev. 543, 554 (2005) ("[O]ur parties now seem to be divided on originalism, with the Republican Party much more sympathetic to originalism and the Democratic Party opposed.").

ments.<sup>22</sup> Both the level of political and legal knowledge the American people have, and the direction of influence between popular movements and legal methodological practice, may implicate whether popular constitutionalists are able to articulate a normatively attractive vision of constitutional interpretation. Insofar as cultural factors are significant but nonexclusive predictors of attitudes toward originalism, our data also lend moderate support to the views of Kahan and Braman and other cultural theorists who believe that such factors predominate. Our data are also consistent with the possibility that, at a sufficiently broad level of abstraction, Americans have nontrivial levels of legal and political knowledge—an assertion that is the subject of some debate.<sup>23</sup> Finally, apart from legal and political theory, these data might be useful to political strategists who seek to reframe debates of constitutional importance and, more specifically, to understand the avenues of influence on the judicial confirmation process.

### I. THE SURVEYS

We rely on data from three sets of surveys: the Quinnipiac series,<sup>24</sup> the CCES,<sup>25</sup> and the CAS.<sup>26</sup> Each survey included one common question—the “Quinnipiac question”—on originalism, which states as follows:

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22. See generally Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009) [hereinafter Friedman, *Will of the People*] (arguing Supreme Court generally follows public opinion); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) (advocating revival of constitutional interpretation by the American people rather than by judges); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *Harv. C.R.-C.L. L. Rev.* 373 (2007) [hereinafter Post & Siegel, *Roe Rage*] (defending model of “democratic constitutionalism” that accords prominent role for citizens to engage with courts on constitutional interpretation through dialectic process).

23. Compare Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 *Iowa L. Rev.* 1287, 1304 (2004) (“Decades of research on political knowledge have uniformly showed it to be very low.”), with James L. Gibson & Gregory A. Caldeira, *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People* 17 (2009) (“Even though widely accepted, the image of the American people as ignorant about courts rests upon a remarkably thin layer of empirical evidence.”).

24. The Quinnipiac results are based on telephone interviews conducted in February and March 2003, May 2005, July 2005, August 2007, July 2008, and April 2010. The surveys conducted in 2005, 2007, 2008, and 2010 polled a national sample of registered voters or likely voters, with sample sizes ranging from 920 to 1,930; the 2003 survey polled a national sample of 1,448 adults. Quinnipiac Surveys, *supra* note 18.

25. The CCES is a national survey commissioned by thirty research teams from more than thirty universities and coordinated through the Massachusetts Institute of Technology political science department. The 2008 CCES was conducted over the Internet by the polling firm YouGov/Polimetrix, and the panel including the originalism question was part of a 2,000-person national panel. The CCES was in the field in two waves in October and November of 2008. CCES, *supra* note 19, at 1–2, 9.

26. The Constitutional Attitudes Survey was conducted in 2009 and 2010 by Knowledge Networks, which derives its sample from telephone- and address-based polls

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Which comes closer to your point of view:

(A) In making decisions, the Supreme Court should only consider the original intentions of the authors of the Constitution or

(B) In making decisions, the Supreme Court should consider changing times and current realities in applying the principles of the Constitution.<sup>27</sup>

As this is the most consistently asked question regarding originalism, it represents the starting point of our analysis. Nevertheless, because many valid objections can be raised to the wording of this particular question,<sup>28</sup> and because the responses do not appear entirely stable, we included a variety of other measures of originalism in the CAS.

and then conducts the survey through the Internet (providing internet access to those who otherwise do not have it). Constitutional Attitudes Survey, *supra* note 20, at 8–11. The 2009 CAS used a national sample of 1,677 adults. *Id.* at 4–5. It was in the field from July 6, 2009 to July 13, 2009, concluding just as the Senate Judiciary Committee hearings commenced on the nomination of Justice Sonia Sotomayor. Stephen Ansolabehere, Knowledge Networks, Field Report: Attitudes & Perceptions About the Constitution 4 (2009) (on file with the *Columbia Law Review*). The 2010 CAS reinterviewed 1,027 of the respondents from the 2009 CAS, beginning on June 16, 2010 and concluding on July 6, 2010. Constitutional Attitudes Survey, *supra* note 20, at 4–5. The survey period, therefore, included both the last few days of the Supreme Court’s term, when it issued several salient decisions, and a few days of the Senate Judiciary Committee’s confirmation hearings for Justice Elena Kagan.

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27. Quinnipiac Surveys, *supra* note 18, at Questions 31 (2010 survey), 23 (2008 survey), 36 (2007 survey), 8 (July 2005 survey), 10 (May 2005 survey), 22 (2003 survey).

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28. Close watchers of the academic debate around originalism will immediately notice at least three potential problems with the phrasing of this question. First, the “original intentions” option is phrased as a binary question, whereas the “changing times” option is not. That is, this question allows a respondent to be coded as “originalist” only if she believes that the Court should take “only” the original intentions of the Framers into account. A respondent who believes that “changing times and current realities” are relevant, but that the original intentions of the Framers should predominate, would conventionally be considered an originalist, but might not be identified as such by this question. Responses to the question may therefore overrepresent nonoriginalists.

Less obviously, a sophisticated view on constitutional interpretation need not regard the two options as mutually exclusive. One might reasonably believe that the original intentions of the authors of relevant constitutional provisions were that the text be applied in light of “changing times and current realities.” See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget that it is *a constitution* we are expounding.”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885, 902–13 (1985) (arguing that authors of Constitution did not believe their own subjective intentions would bind future generations); see also Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 61–65 (1955) (suggesting even if Fourteenth Amendment was not originally understood to prohibit racial segregation, its language was deliberately broad enough to allow for different future interpretations). But see Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 *Mich. L. Rev.* 239, 242 (1989) (“In general, . . . neither Federalists nor Anti-Federalists thought it appropriate for constitutional law to change in adaptation to social developments.”).

The third potential problem with the question is that it refers to the original intentions of the authors of the Constitution rather than the original meaning of the

The results of the Quinnipiac question from nine surveys over seven years are presented in Table 1.<sup>29</sup> Between 37% and 49% chose the originalist option and between 42% and 60% chose the “changing times” option. The surveys vary somewhat in how easy it was for someone to register a “don’t know” option, with the Quinnipiac surveys explicitly offering “don’t know” as an option and the CAS requiring voters to skip the question, for example. Thus, the “true” share of originalists, according to this question, probably hovers in the low forties, and the “true” share of nonoriginalists probably hovers in the fifties. We do not mean to make much of the relative shares of those expressing originalist or nonoriginalist responses, however. These surveys are not elections where 50% is a magic number; we cannot and should not say originalism has “lost” according to these results. Indeed, in the April 2010 Quinnipiac survey, a greater share of respondents did, in fact, choose the originalist response.<sup>30</sup> Had we asked the question any number of other ways, we are confident that a consistent majority would consider themselves originalist according to a different metric.

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constitutional text. As is well known among constitutional theorists, most academic originalists and many judges, including Justice Antonin Scalia, prefer the latter formulation. See Antonin Scalia, Response, *in* A Matter of Interpretation, *supra* note 15, at 129, 144–47 (stating focus should be “upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean”); see also Randy E. Barnett, An Originalism for Nonoriginalists, 45 *Loy. L. Rev.* 611, 620 (1999) (noting conceptual change in originalism “from original *intention* to original *meaning*”).

29. Throughout this Essay in Tables 1–3 and 5–7 and accompanying text, any totals not equal to 100% are due to rounding.

30. We do not know for sure why such a great discrepancy exists between the 2010 Quinnipiac and 2010 CAS surveys, despite being separated by only two months. Both surveys are outliers, but in opposite directions. Judging from responses to other questions on those surveys, it appears that the CAS sample had a somewhat more favorable view of Obama than did the Quinnipiac sample. However, that would not account for the size of the discrepancy. It is also possible that some salient Supreme Court decisions issued toward the end of the Court’s term and intervening between the surveys had some effect picked up by the CAS but not the Quinnipiac survey. Or perhaps the announcement of Justice Elena Kagan’s nomination to the Court had some effect. It also appears that the Quinnipiac survey asked a number of questions about President Obama’s approval just before asking about originalism, and these questions could have had a priming effect. Although we view this discrepancy as cause for concern in the precision of our estimates of the current share of the public that supports originalism, we do not think it casts doubt on our profile of originalists or the variables that we think predict originalist attitudes. Nevertheless, potential instability in responses to the Quinnipiac question further justifies the approach we take here—that is, to create an index of originalism derived from several questions rather than just one.



**Table 1. Quinnipiac Originalism Question**

Survey	Original Intentions	Changing Times	Don't Know/NA
CAS (June 2010) <sup>31</sup>	37	60	4
Quinnipiac (Apr. 2010) <sup>32</sup>	49	42	9
CAS (July 2009) <sup>33</sup>	40	58	3
CCES (Nov. 2008) <sup>34</sup>	44	56	NA
Quinnipiac (July 2008) <sup>35</sup>	40	52	8
Quinnipiac (Aug. 2007) <sup>36</sup>	43	48	9
Quinnipiac (July 2005) <sup>37</sup>	44	50	6
Quinnipiac (May 2005) <sup>38</sup>	42	51	8
Quinnipiac (Mar. 2003) <sup>39</sup>	39	54	7

In fact, when we posed the question differently, almost every respondent expressed *some* support for originalism as an interpretive value. Employing a battery based on questions developed by political scientists James Gibson and Gregory Caldeira,<sup>40</sup> the 2009 CAS asked: “How important would you say it is for a good Supreme Court judge to . . . [u]phold the values of those who wrote our constitution two hundred years ago?”<sup>41</sup> Ninety-two percent said it was very or somewhat important, more than for any other option presented to respondents, as described in Table 2.<sup>42</sup>

As the other questions in the same battery attest, however, a majority of respondents appear to think all kinds of values are important for interpretation. Strong majorities, for example, believe that Supreme Court Justices should “stay entirely independent of the President and Congress”

31. See Constitutional Attitudes Survey, *supra* note 20, Question 503a (2010), at 35, 106.

32. Quinnipiac Survey, *supra* note 18, Question 31 (2010 survey).

33. See Constitutional Attitudes Survey, *supra* note 20, Question 101 (2009), at 20, 51.

34. See CCES, *supra* note 19, Question V3081 (2008) (unpublished codebook).

35. Quinnipiac Survey, *supra* note 18, Question 23 (2008 survey).

36. Quinnipiac Survey, *supra* note 18, Question 36 (2007 survey).

37. Quinnipiac Survey, *supra* note 18, Question 8 (July 2005 survey).

38. Quinnipiac Survey, *supra* note 18, Question 10 (May 2005 survey).

39. Quinnipiac Survey, *supra* note 18, Question 22 (2003 survey).

40. See James L. Gibson & Gregory A. Caldeira, Confirmation Politics and the Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination, 53 Am. J. Pol. Sci. 139, 147 (2009) [hereinafter Gibson & Caldeira, Confirmation Politics] (studying which factors were most important to Americans when forming their opinions on judicial nomination of Justice Samuel Alito).

41. Throughout the remainder of this Essay, survey question text, percentages, and other data are based on the Constitutional Attitudes Survey, *supra* note 20. For specific citation references, see Tables 2–9 that accompany the text. R

42. As described later in this Essay, we characterize as “originalists” the top quartile of the survey scoring highest on our originalism index derived from six questions asked on the 2009 and 2010 CAS depicted in Tables 3 and 4. The bottom quartile of scorers are denoted as nonoriginalists. See *infra* text accompanying note 58 (describing methodology in creating originalism index). R

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and that they should “protect people without power from people and groups with power.” Even the politically contested notion of “empathy” receives majority support (although the lowest in our battery)—that is, 59% believe it is very or somewhat important for Supreme Court Justices to “feel empathy for the people involved in a case.”<sup>43</sup>

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43. These findings are consistent with those of James Gibson in recent survey work. He found that 74% of Americans believe that it is “very important” for Supreme Court Justices to “uphold the values of those who wrote the U.S. constitution long ago” and 68% consider it “very important” for such justices to “empathize with ordinary people.” James L. Gibson, *Expecting Justice and Hoping for Empathy*, Miller-McCune, June 20, 2010, at <http://www.miller-mccune.com/legal-affairs/expecting-justice-and-hoping-for-empathy-17677/> (on file with the *Columbia Law Review*).

**Table 2. Responses to Judicial Values Questions as Broken Down by Scores on Originalism Index<sup>44</sup>**

How important would you say it is for a good Supreme Court judge to . . .		Very Important	Somewhat Important	Not Very Important	Not Important at All
Strictly follow the law no matter what people in the country may want?	Originalists	69	25	4	3
	Nonoriginalists	17	47	31	5
	<i>Total</i>	<i>39</i>	<i>43</i>	<i>14</i>	<i>4</i>
Feel empathy for the people involved in a case?	Originalists	10	33	29	28
	Nonoriginalists	15	44	29	11
	<i>Total</i>	<i>17</i>	<i>42</i>	<i>27</i>	<i>14</i>
Protect people without power from people and groups with power?	Originalists	38	38	12	12
	Nonoriginalists	48	45	3	5
	<i>Total</i>	<i>53</i>	<i>35</i>	<i>8</i>	<i>5</i>
Respect the will of the majority of people in the United States?	Originalists	23	38	18	21
	Nonoriginalists	28	49	18	5
	<i>Total</i>	<i>34</i>	<i>40</i>	<i>17</i>	<i>9</i>
Stay entirely independent of the President and Congress?	Originalists	79	13	5	3
	Nonoriginalists	42	38	16	4
	<i>Total</i>	<i>58</i>	<i>32</i>	<i>8</i>	<i>3</i>
Follow his or her conscience or sense of morality?	Originalists	25	28	22	25
	Nonoriginalists	27	54	14	6
	<i>Total</i>	<i>32</i>	<i>43</i>	<i>16</i>	<i>9</i>
Respect existing Supreme Court decisions by changing the law as little as possible?	Originalists	45	40	9	5
	Nonoriginalists	15	59	21	5
	<i>Total</i>	<i>31</i>	<i>48</i>	<i>16</i>	<i>5</i>
Uphold the values of those who wrote our Constitution two hundred years ago?	Originalists	96	4	0	0
	Nonoriginalists	0	76	20	4
	<i>Total</i>	<i>54</i>	<i>38</i>	<i>7</i>	<i>2</i>

Although most Americans might be described as “constitutional pluralists” when it comes to interpretive values,<sup>45</sup> we can fairly array them on an originalism continuum depending on their responses to several questions. For example, 82% of respondents who answered “original intent” to the Quinnipiac question in the 2009 CAS believed that it is very important to uphold the values of the Framers, whereas only 35% of “changing

44. See Constitutional Attitudes Survey, *supra* note 20, Questions 102a–102h (2009), at 20, 51–54.

45. See Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 *Tex. L. Rev.* 1753, 1753 (1994) (“Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution.”).

times” respondents held that view.<sup>46</sup> Thus, although question wording will greatly affect the share of the population identifying with an originalist option, most people tend to sort themselves in predictable directions on the values they hold most important in interpreting the Constitution.

We are able to gauge coherence even better based on a second CAS survey we conducted in June 2010. We re-asked the same 2009 CAS respondents several different questions concerning originalism. The results largely confirmed the conclusions we reached from the earlier survey, but offered additional insights. The results from those questions appear in Table 3 and the correlations between all the originalism-related questions from both survey years appear in Table 4.

**Table 3. Attitudes Toward Originalism**

<b>In general, do you agree or disagree with the following statements about the United States Supreme Court:</b>	<b>Agree Strongly</b>	<b>Agree Somewhat</b>	<b>Disagree Somewhat</b>	<b>Disagree Strongly</b>
The Supreme Court should focus less on what the Constitution meant when it was written and more on the effect its decisions will have in today’s America. <sup>47</sup>	17	38	22	22
The Supreme Court should read the Constitution as a general set of principles whose meaning changes over time. <sup>48</sup>	21	41	19	19
The Supreme Court should recognize a right of privacy even though it is not explicitly stated in the Constitution. <sup>49</sup>	33	53	11	3

46. See Constitutional Attitudes Survey, *supra* note 20, Questions 101 (2009), 102h (2009), at 20, 51, 54.

47. See Constitutional Attitudes Survey, *supra* note 20, Question 502bb (2010), at 31, 96.

48. See *id.*, Question 502cc (2010), at 31, 97.

49. See *id.*, Question 502aa (2010), at 31, 96.

**Table 4. Correlations Between Originalism Items, 2009 and 2010 CAS**

	Quinnipiac wording (2009 CAS) <sup>50</sup>	Quinnipiac wording (2010 CAS) <sup>51</sup>	Judges should uphold the values of those who wrote our Constitution two hundred years ago. <sup>52</sup>	The Supreme Court should focus less on what the Constitution meant when it was written and more on the effect its decisions will have in today's America. <sup>53</sup>	The Supreme Court should read the Constitution as a general set of principles whose meaning changes over time. <sup>54</sup>	The Supreme Court should recognize a right of privacy even though it is not explicitly stated in the Constitution. <sup>55</sup>
Quinnipiac wording (2009)	1					
Quinnipiac wording (2010)	0.57	1				
Judges should uphold the values of those who wrote our Constitution two hundred years ago.	0.40	0.36	1			
The Supreme Court should focus less on what the Constitution meant when it was written and more on the effect its decisions will have in today's America.	0.50	0.57	0.35	1		
The Supreme Court should read the Constitution as a general set of principles whose meaning changes over time.	0.55	0.58	0.31	0.74	1	
The Supreme Court should recognize a right of privacy even though it is not explicitly stated in the Constitution.	0.18	0.16	0.02	0.28	0.31	1

Roughly similar population shares in 2009 and 2010 identify with the abstract notion of originalism as revealed in the Quinnipiac question. Slim majorities gravitate toward the nonoriginalist response in differently worded questions, while substantial minorities express a preference for the originalist position. For example, 55% agreed and 45% disagreed with the statement: “The Supreme Court should focus less on what the Constitution meant when it was written and more on the effect its decisions will have in today’s America.” Moreover, 62% agreed and 38% disagreed with the statement: “The Supreme Court should read the Constitution as a general set of principles whose meaning changes over time.”

50. See *id.*, Question 101 (2009), at 20, 51.  
 51. See *id.*, Question 503a (2010), at 35, 106.  
 52. See *id.*, Question 102h (2009), at 20, 54.  
 53. See *id.*, Question 502bb (2010), at 31, 96.  
 54. See *id.*, Question 502cc (2010), at 31, 97.  
 55. See *id.*, Question 502aa (2010), at 31, 96.

The exception to this rule lies in answers to a question concerning the right to privacy. When asked whether “[t]he Supreme Court should recognize a right of privacy even though it is not explicitly stated in the Constitution,” 86% of respondents agreed.

Except for the privacy question, roughly the same share of respondents chose the originalist option in these questions, but these are not necessarily the same people. Even among the identical survey respondents asked the same Quinnipiac version of the originalism question in both the 2009 and 2010 CAS, the correlation between their responses is 0.57, suggesting some instability in responses to that question. Moreover, the correlation between responses to the 2010 Quinnipiac question on the CAS and the two other originalism items just mentioned—the effect decisions have today and the Constitution as a set of principles that changes over time—are 0.57 and 0.58, and the correlation with the Gibson and Caldeira version of the originalism question is even lower.

The low correlations between the “pure” originalism questions and the right to privacy question are particularly noteworthy.<sup>56</sup> The correlation between responses on the privacy question is less than 0.2 with the Quinnipiac question and approximately 0.3 with the other 2010 originalism questions. In other words, a large share of the public and even self-identified originalists want the Court to respect the right to privacy, regardless of its connection to the constitutional text. This finding goes some way toward validating the view of skeptics that, while some “originalists” in the mass public may cling to the label because it sounds good or coincides with other traditionalist notions, they really do not “mean it” when confronted with its implications.<sup>57</sup> The same might be said concerning views of self-described originalists on First Amendment issues, on which originalist Justices have expressed more libertarian views. As Table 7 indicates, a majority of originalists, for example, think the following should not be allowed: flag burning, corporate tobacco advertisements, selling of animal cruelty videos or violent video games, and corporate spending on candidate elections.

We are neither surprised nor troubled by inconsistencies in originalist thinking by the mass public or their lack of fit with positions taken by originalists on the Court. Skeptics are undoubtedly correct that the mass public does not have a completely worked out and consistent philosophy concerning how to interpret the Constitution. Indeed, we might even question the completeness of such philosophies held by the elites of the

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56. See Jack M. Balkin, *Abortion and Original Meaning*, 24 *Const. Comment.* 291, 291 (2007) (arguing right to privacy is commonly assumed by both sides of abortion debate to be inconsistent with text, history, and structure of Constitution).

57. See Andrew B. Coan, *Talking Originalism*, 2009 *BYU L. Rev.* 847, 859 (arguing even self-labeled originalists reject its strictest consequences, such as “permit[ting] the segregation of public schools and other public facilities; bans on inter-racial marriage; all manner of racial covenants in the sale of private property; bans on the sale of contraceptives; and, quite possibly, established state churches”).

competing schools of constitutional interpretation. For us, the interesting questions are what characteristics distinguish and predict whether someone gravitates toward the originalist option in such surveys. We do not assume that originalism describes a fixed concept whose popularity is being tested; we are more concerned with the associated ideological commitments of those who affiliate with originalism. The great majority of Americans feel comfortable expressing one or another view on these questions—even when given a “don’t know” option. The data suggest these choices are not randomly made, even if different people might make such choices for reasons that possess greater or lesser ideological coherence. Our project is to identify the demographic and ideological variables that characterize originalists, and specify the relative importance of such factors in predicting who might call themselves originalists.

## II. PROFILING ORIGINALISTS

To avoid the problems with question wording and framing that affect each individual originalism question in our surveys, we constructed an originalism index based upon a principal components factor analysis of the six originalism questions in the 2009 and 2010 CAS.<sup>58</sup> Someone who gave the originalist answer to all such questions would receive the highest originalism “score” and someone who gave the originalist answer to none of those questions would receive the lowest score. The more questions to which one gave an originalist answer, the higher the score one received. For purposes of the tables that follow, we call the top quartile of scorers on the originalism index “originalists” and the lowest quartile “non-originalists.” However, as we stress throughout, originalism represents a continuum in opinion, in which people can be arrayed as more or less originalist.

As we are using it, factor analysis seeks to identify a latent variable—originalism—that underlies a series of correlated variables. By creating an index of originalism in this way, we can attempt to mitigate the question wording and priming effects of the types described earlier in this Essay.<sup>59</sup> There are some shortcomings to this approach as well, given that the 2010 survey, which contains the multiple originalism-related questions that help form the index, surveyed many fewer respondents (about 1,000, as compared to 1,600), and that many of our independent vari-

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58. These questions include (1) the Quinnipiac question in both surveys, (2) the question as to the importance of Supreme Court Justices to “[u]phold the values of those who wrote our [C]onstitution two hundred years ago,” as well as agreement or disagreement with the following statements: (3) “The Supreme Court should focus less on what the Constitution meant when it was written and more on the effect its decisions will have in today’s America,” (4) “The Supreme Court should read the Constitution as a general set of principles whose meaning changes over time,” and (5) “The Supreme Court should recognize a right of privacy even though it is not explicitly stated in the Constitution.” Constitutional Attitudes Survey, *supra* note 20, Questions 101 (2009), 503a (2010), 102h (2009), 502aa–502cc (2010), at 20, 31, 35, 51, 54, 96–97, 106.

59. See *supra* notes 28, 30.

ables come from questions asked a year earlier. Nevertheless, we suspect that this approach gets closer to measuring the latent originalism variable toward which each question gestures, and specifically addresses the legitimate criticisms one could have of the Quinnipiac question as an “authentic” measure of originalism.

We begin with the demographic profile of originalists. We expect that originalists are likely to be conservative and Republican, and we expect that those demographic characteristics known to be associated with conservatism and Republican Party identification will also be predominant among originalists. The demographic profile of originalists is presented in Table 5.

**Table 5. The Demographic Profile of Originalists**

<b>Race<sup>60</sup></b>					
	<b>White</b>	<b>Black</b>	<b>Other, Non-Hispanic</b>	<b>Hispanic</b>	<b>2+ Races, Non-Hispanic</b>
Originalist	86	2	7	4	1
Nonoriginalist	63	18	5	14	1
<i>Total</i>	<i>68</i>	<i>12</i>	<i>5</i>	<i>14</i>	<i>1</i>

<b>Gender<sup>61</sup></b>		
	<b>Male</b>	<b>Female</b>
Originalist	57	43
Nonoriginalist	48	52
<i>Total</i>	<i>48</i>	<i>52</i>

<b>Age<sup>62</sup></b>							
	<b>18–24</b>	<b>25–34</b>	<b>35–44</b>	<b>45–54</b>	<b>55–64</b>	<b>65–74</b>	<b>75+</b>
Originalist	5	10	22	16	24	15	9
Nonoriginalist	10	28	19	17	13	9	4
<i>Total</i>	<i>8</i>	<i>21</i>	<i>19</i>	<i>18</i>	<i>17</i>	<i>11</i>	<i>6</i>

60. See Constitutional Attitudes Survey, *supra* note 20, Background Demographic Variables (2010), at 87.

61. See *id.* at 88.

62. See *id.* at 86.



<b>Education<sup>63</sup></b>				
	<b>Less than High School</b>	<b>High School</b>	<b>Some College</b>	<b>Bachelor's Degree or Higher</b>
Originalist	6	28	32	34
Nonoriginalist	10	23	28	39
<i>Total</i>	<i>14</i>	<i>31</i>	<i>28</i>	<i>27</i>

<b>Metro<sup>64</sup></b>		
	<b>Metro</b>	<b>Not Metro</b>
Originalist	80	20
Nonoriginalist	89	11
<i>Total</i>	<i>84</i>	<i>16</i>

<b>Region<sup>65</sup></b>				
	<b>Northeast</b>	<b>Midwest</b>	<b>South</b>	<b>West</b>
Originalist	18	23	41	17
Nonoriginalist	27	17	36	20
<i>Total</i>	<i>18</i>	<i>22</i>	<i>37</i>	<i>23</i>

<b>Income (\$K)<sup>66</sup></b>								
	<b>0-25</b>	<b>25-49.9</b>	<b>50-74.9</b>	<b>75-99.9</b>	<b>100-124.9</b>	<b>125-149.9</b>	<b>150-174.9</b>	<b>175+</b>
Originalist	23	22	19	18	6	7	3	3
Nonoriginalist	24	23	17	21	7	4	2	3
<i>Total</i>	<i>27</i>	<i>24</i>	<i>19</i>	<i>16</i>	<i>6</i>	<i>4</i>	<i>2</i>	<i>2</i>

<b>Employment Status<sup>67</sup></b>		
	<b>Working</b>	<b>Not Working</b>
Originalist	64	36
Nonoriginalist	61	39
<i>Total</i>	<i>56</i>	<i>44</i>

<b>Literal Truth of Bible<sup>68</sup></b>		
	<b>Do Not Believe in Literal Truth</b>	<b>Believe in Literal Truth</b>
Originalist	24	76
Nonoriginalist	65	35
<i>Total</i>	<i>41</i>	<i>59</i>

63. See *id.* at 87.

64. See *id.* at 89.

65. See *id.* at 90.

66. See *id.* at 89.

67. See *id.* at 93.

68. See *id.*, Question 5 (2009), at 18, 49.

Religious Service Attendance <sup>69</sup>						
	More than Once per Week	Once per Week	Once or Twice a Month	A Few Times a Year	Once a Year	Never
Originalist	24	33	6	15	11	12
Nonoriginalist	4	14	11	21	16	34
<i>Total</i>	<i>12</i>	<i>20</i>	<i>9</i>	<i>17</i>	<i>14</i>	<i>28</i>

Evangelicalism <sup>70</sup>		
	Not Born- Again/ Evangelical Christian	Born- Again/ Evangelical Christian
Originalist	48	52
Nonoriginalist	83	17
<i>Total</i>	<i>68</i>	<i>32</i>

In particular, we look at gender, race, age, education, region, urbanization, and religiosity. Originalists are somewhat more likely than nonoriginalists to be male, white, and older. They are also more likely to live in rural areas and in the South. None of these differences are surprising or even that substantial, and with respect to education there is almost no difference. The starkest differences in the cross-tabulations, however, appear concerning religiosity, where 52% of originalists describe themselves as born-again or evangelical, as compared to only 17% of nonoriginalists. Similarly, 57% of originalists attend religious services at least once per week, as compared to 18% of nonoriginalists. Also, 76% of originalists believe in the literal truth of the Bible, whereas only 35% of nonoriginalists do.

As we discuss in our multivariate analysis, in which originalism is the dependent variable, most such demographic differences do not appear statistically significant once one controls for ideology and partisanship. As presented in Table 6a, originalists are more likely to be Republican and conservative than nonoriginalists. Eighty-five percent of originalists identify as or lean toward Republican, and 76% describe themselves as conservative, whereas 21% of nonoriginalists identify as or lean toward Republican, and 14% are conservative. As such, originalists are naturally less likely to approve of the job performance of President Obama and the 111th Congresses. As shown in Table 6b, a sizable share of originalists—over two-thirds—also describe themselves as supporting the Tea Party movement.

69. See *id.*, Question 27 (2009), at 16, 79.

70. See *id.*, Question 26a (2010), at 36, 108.

**Table 6a. The Partisan and Ideological Profile of Originalists**

<b>Party Identification<sup>71</sup></b>						
	<b>Strong Dem.</b>	<b>Not Strong Dem.</b>	<b>Leans Dem.</b>	<b>Leans Rep.</b>	<b>Not Strong Rep.</b>	<b>Strong Rep.</b>
Originalist	3	5	6	34	14	37
Nonoriginalist	22	30	28	7	9	5
<i>Total</i>	<i>19</i>	<i>19</i>	<i>19</i>	<i>17</i>	<i>12</i>	<i>14</i>

<b>Ideology<sup>72</sup></b>							
	<b>Extreme Liberal</b>	<b>Liberal</b>	<b>Slight Liberal</b>	<b>Moderate</b>	<b>Slight Cons.</b>	<b>Cons.</b>	<b>Extreme Cons.</b>
Originalist	0	3	3	17	15	46	15
Nonoriginalist	5	22	15	44	8	6	0
<i>Total</i>	<i>4</i>	<i>16</i>	<i>11</i>	<i>36</i>	<i>12</i>	<i>18</i>	<i>4</i>

<b>Approval of Obama<sup>73</sup></b>				
	<b>Strongly Approve</b>	<b>Approve Somewhat</b>	<b>Disapprove Somewhat</b>	<b>Strongly Disapprove</b>
Originalist	6	9	18	67
Nonoriginalist	25	55	13	7
<i>Total</i>	<i>17</i>	<i>37</i>	<i>20</i>	<i>26</i>

<b>Approval of Congress<sup>74</sup></b>				
	<b>Strongly Approve</b>	<b>Approve Somewhat</b>	<b>Disapprove Somewhat</b>	<b>Strongly Disapprove</b>
Originalist	2	11	25	62
Nonoriginalist	1	39	50	10
<i>Total</i>	<i>2</i>	<i>30</i>	<i>41</i>	<i>27</i>

**Table 6b. Tea Party Support as Predictor of Originalism<sup>75</sup>**

<b>Do you support the Tea Party movement?</b>		
	<b>Do Not Support Tea Party Movement</b>	<b>Support Tea Party Movement</b>
Originalist	21	79
Nonoriginalist	68	32
<i>Total</i>	<i>52</i>	<i>48</i>

71. See Constitutional Attitudes Survey, *supra* note 20, Questions 8–10 (2010), at 37, 109–10.

72. See *id.*, Question 11 (2010), at 37, 110.

73. See *id.*, Question 500 (2010), at 31, 94.

74. See *id.*, Question 600 (2010), at 35–36, 107.

75. See *id.*, Question 519a (2010), at 33, 103.

Our surveys, however, allow us to go further than these simple labels in assessing the ideological divergence of originalists and nonoriginalists. The survey included a battery of oft-used questions to measure a respondent's level of moral traditionalism, libertarianism, and egalitarianism. These questions form indexes, often used by the ANES,<sup>76</sup> by which researchers can assess the extent to which a respondent adheres to egalitarian versus hierarchical thinking, morally traditional as compared to less traditional attitudes, and libertarian versus "pro-government" beliefs. Tables 6c, 6d, and 6e present the data from these batteries of questions, broken down by originalists and nonoriginalists.

As one might suspect, originalists are relatively more hierarchical, morally traditionalist, and libertarian in their thinking. The more interesting questions for us concern the size of the gaps between originalists and nonoriginalists on these questions, the degree to which one or another cluster of values seems to reveal differences more than the other clusters, and which value clusters are statistically significant predictors as to whether one identifies with originalism, all else being equal. For example, on most of the measures of egalitarianism, originalists differ from nonoriginalists by an average of approximately 30 percentage points in their level of agreement. Whereas 83% of originalists agree with the statement "[w]e have gone too far in pushing equal rights in this country," only 41% of nonoriginalists agree. In contrast, 67% of nonoriginalists agree that "[i]f people were treated more equally in this country we would have many fewer problems," whereas only 34% of originalists agree.

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76. See generally Am. Nat'l Election Studies, at <http://www.electionstudies.org> (last visited Nov. 12, 2010).

**Table 6c. Profiling Originalists: Egalitarianism<sup>77</sup>**

	Strongly Agree	Agree Somewhat	Disagree Somewhat	Strongly Disagree
<b>Our society should do whatever is necessary to make sure that everyone has an equal opportunity to succeed.</b>				
Originalist	31	32	24	13
Nonoriginalist	43	45	9	3
<i>Total</i>	<i>44</i>	<i>38</i>	<i>13</i>	<i>5</i>
<b>We have gone too far in pushing equal rights in this country.</b>				
Originalist	38	45	10	7
Nonoriginalist	9	32	33	26
<i>Total</i>	<i>20</i>	<i>35</i>	<i>27</i>	<i>18</i>
<b>One of the big problems in this country is that we don't give everyone an equal chance.</b>				
Originalist	11	12	38	39
Nonoriginalist	18	39	36	8
<i>Total</i>	<i>19</i>	<i>32</i>	<i>32</i>	<i>17</i>
<b>This country would be better off if we worried less about how equal people are.</b>				
Originalist	34	44	16	6
Nonoriginalist	4	37	37	21
<i>Total</i>	<i>16</i>	<i>37</i>	<i>29</i>	<i>17</i>
<b>It is not really that big a problem if some people have more of a chance in life than others.</b>				
Originalist	18	36	38	9
Nonoriginalist	5	27	42	26
<i>Total</i>	<i>8</i>	<i>31</i>	<i>38</i>	<i>22</i>
<b>If people were treated more equally in this country we would have many fewer problems.</b>				
Originalist	12	22	40	25
Nonoriginalist	20	47	27	7
<i>Total</i>	<i>20</i>	<i>40</i>	<i>28</i>	<i>12</i>

The differences are even starker in the battery of questions concerning moral traditionalism. Indeed, given the emphasis on change versus stability in any question that attempts to measure originalist leanings, we would expect traditionalism (moral or otherwise) to constitute a fault line for the two groups. Divergent levels of agreement with the statement—“[t]he world is always changing and we should adjust our view of moral behavior to those changes”—represent a case in point; only 14% of originalists agree with that statement, but 76% of nonoriginalists do. Large (and expected) gaps also exist between the two groups on whether “[t]he newer lifestyles are contributing to the breakdown of our society,” whether “[w]e should be more tolerant of people who choose to live according to their own moral standards,” and whether “[t]his country

77. See Constitutional Attitudes Survey, *supra* note 20, Questions 3a–3f (2009), at 29, 72–74.

would have many fewer problems if there were more emphasis on traditional family ties.”

**Table 6d. Profiling Originalists: Moral Traditionalism<sup>78</sup>**

	Strongly Agree	Agree Somewhat	Disagree Somewhat	Strongly Disagree
<b>The world is always changing and we should adjust our view of moral behavior to those changes.</b>				
Originalist	4	10	19	67
Nonoriginalist	18	58	19	6
<i>Total</i>	<i>15</i>	<i>36</i>	<i>25</i>	<i>24</i>
<b>The newer lifestyles are contributing to the breakdown of our society.</b>				
Originalist	58	32	6	4
Nonoriginalist	13	38	31	18
<i>Total</i>	<i>29</i>	<i>40</i>	<i>21</i>	<i>10</i>
<b>We should be more tolerant of people who choose to live according to their own moral standards, even if they are very different from our own.</b>				
Originalist	7	26	35	31
Nonoriginalist	28	52	15	5
<i>Total</i>	<i>18</i>	<i>47</i>	<i>22</i>	<i>12</i>
<b>This country would have many fewer problems if there were more emphasis on traditional family ties.</b>				
Originalist	68	27	2	3
Nonoriginalist	18	37	29	16
<i>Total</i>	<i>39</i>	<i>37</i>	<i>16</i>	<i>8</i>

With respect to libertarianism, plausible hypotheses could point in different directions as to whether originalists or nonoriginalists are more likely to be libertarian. As in the “real world” of politics, it might depend on whether one asks questions focused on economic or social libertarianism. In other words, we would expect conservatives, and therefore originalists, to be more economically libertarian on issues such as taxes and spending, while liberals and nonoriginalists would be more libertarian on issues such as abortion and privacy rights. The forced choices in the ANES libertarianism battery, however, tend to frame the libertarian response in terms somewhat more consistent with the conservative brand of libertarianism, expressing self-reliance and fear of big government. Unlike the previous batteries, the three questions forming the libertarianism battery are posed as forced-choice responses between a pair of options that each ask “which comes closer to your view.” For example, originalists are more likely—89% as compared to 44% of nonoriginalists—to say “[t]he main reason government has become bigger over the years is because it has gotten involved in things that people should do for

78. See Constitutional Attitudes Survey, *supra* note 20, Questions 4a–4d (2009), at 29, 74–75.

themselves,” rather than “[g]overnment has become bigger because the problems we face have become bigger.” Eighty-seven percent of originalists—as compared to 35% of nonoriginalists—choose the statement “[t]he less government the better” as opposed to “[t]here are more things that government should be doing.” Finally, the largest gap concerns views on government and the economy. Only 21% of originalists, as opposed to 75% of nonoriginalists, believe “[w]e need a strong government to handle today’s complex economic problems,” rather than “[t]he free market can handle these problems without government being involved.”

**Table 6e. Profiling Originalists: Libertarianism**<sup>79</sup>

<b>Pair A</b>		
	<b>Government has become bigger because the problems we face have become bigger.</b>	<b>The main reason government has become bigger over the years is because it has gotten involved in things that people should do for themselves.</b>
Originalist	11	89
Nonoriginalist	56	44
<i>Total</i>	42	58

  

<b>Pair B</b>		
	<b>We need a strong government to handle today’s complex economic problems.</b>	<b>The free market can handle these problems without government being involved.</b>
Originalist	21	79
Nonoriginalist	75	25
<i>Total</i>	61	39

  

<b>Pair C</b>		
	<b>There are more things that government should be doing.</b>	<b>The less government the better.</b>
Originalist	14	87
Nonoriginalist	65	35
<i>Total</i>	50	50

Finally, in completing our profiles of originalists and nonoriginalists, we can move from abstract variables to concrete issue positions on salient constitutional controversies. Table 7 presents the differences between originalists and nonoriginalists on an array of issues, including abortion, gay rights, gun rights, school prayer, and the death penalty, among other issues we surveyed. Of course, originalists tend to favor the more “con-

<sup>79</sup> See Constitutional Attitudes Survey, *supra* note 20, Question 6 Pairs A–C (2009), at 29–30, 75–76.

servative” position and nonoriginalists the more “liberal” position. We find more interesting the size of the gap (where one exists) between originalists and nonoriginalists. For example, it might seem obvious that originalists would differ from nonoriginalists in their opinions on abortion and *Roe v. Wade*.<sup>80</sup> Indeed, when asked whether, “[i]n general, do you agree or disagree with the 1973 *Roe v. Wade* Supreme Court decision that established a woman’s right to an abortion?”, 31% of originalists agreed, as compared to 82% of nonoriginalists—a 51 percentage point gap. Still, the fact that about a third of originalists agree with *Roe* is quite striking. Conversely, sizable majorities of both originalists and nonoriginalists support an individualist interpretation of the Second Amendment and oppose bans on handgun ownership, even though the gap in support for gun regulations between the two groups is about 20 to 30 percentage points. On gay rights questions, the differences appear more pronounced. Although majorities in both camps oppose bans on sex between gays, they diverge on same-sex marriage and allowing gays to serve openly in the military. Only 9% of originalists as compared to 62% of nonoriginalists support same-sex marriage at the state level, and only 39% of originalists as compared to 87% of nonoriginalists think gays should be able to serve openly in the military. Differences are much smaller, in contrast, on issues such as the death penalty, literacy tests, free speech, immigration, and eminent domain.

**Table 7. The Issue Positions of Originalists**

<b>In general, do you agree or disagree with the 1973 <i>Roe v. Wade</i> Supreme Court decision that established a woman’s right to an abortion?</b> <sup>81</sup>				
	<b>Strongly Agree</b>	<b>Agree Somewhat</b>	<b>Disagree Somewhat</b>	<b>Strongly Disagree</b>
Originalist	11	20	21	48
Nonoriginalist	58	24	13	5
<i>Total</i>	<i>37</i>	<i>29</i>	<i>14</i>	<i>21</i>

<b>Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriages?</b> <sup>82</sup>		
	<b>Yes, Should Be Recognized</b>	<b>No, Should Not Be Recognized</b>
Originalist	9	91
Nonoriginalist	62	38
<i>Total</i>	<i>41</i>	<i>59</i>

80. 410 U.S. 113 (1973).

81. See Constitutional Attitudes Survey, *supra* note 20, Question 510 (2010), at 32, 99.

82. See *id.*, Question 204 (2009), at 21, 55.



<b>Quite apart from whether you think same-sex marriage should be legal in your state, do you think that the federal government should recognize same-sex marriages in states where it is legal?</b> <sup>83</sup>		
	<b>Yes, Should Be Recognized</b>	<b>No, Should Not Be Recognized</b>
Originalist	16	84
Nonoriginalist	67	33
<i>Total</i>	<i>48</i>	<i>52</i>

<b>A recent case challenged a Texas law that banned sexual relations between consenting adults of the same gender. Would you support a state law banning sex between people of the same gender?</b> <sup>84</sup>		
	<b>No, Do Not Support Ban</b>	<b>Yes, Support Ban</b>
Originalist	54	46
Nonoriginalist	87	13
<i>Total</i>	<i>70</i>	<i>30</i>

<b>In general, do you agree or disagree with the following statement: Gays and lesbians should be able to serve openly in the military.</b> <sup>85</sup>				
	<b>Strongly Agree</b>	<b>Agree Somewhat</b>	<b>Disagree Somewhat</b>	<b>Strongly Disagree</b>
Originalist	13	26	20	41
Nonoriginalist	53	34	9	4
<i>Total</i>	<i>37</i>	<i>31</i>	<i>15</i>	<i>18</i>

<b>Should the government be allowed to apply the death penalty to an adult convicted of murder?</b> <sup>86</sup>		
	<b>No</b>	<b>Yes</b>
Originalist	15	85
Nonoriginalist	31	69
<i>Total</i>	<i>22</i>	<i>78</i>

<b>In general, do you believe that public schools should be permitted to start each school day with a prayer?</b> <sup>87</sup>		
	<b>No</b>	<b>Yes</b>
Originalist	13	87
Nonoriginalist	50	50
<i>Total</i>	<i>33</i>	<i>67</i>

83. See *id.*, Question 205 (2009), at 21, 55.

84. See *id.*, Question 206 (2009), at 21, 56.

85. See *id.*, Question 511b (2010), at 32, 98.

86. See *id.*, Question 207a (2009), at 22, 56.

87. See *id.*, Question 208 (2009), at 22, 58.

<b>In general, do you agree or disagree that an individual should have a right to have a registered handgun at home?<sup>88</sup></b>				
	<b>Strongly Disagree</b>	<b>Disagree Somewhat</b>	<b>Agree Somewhat</b>	<b>Strongly Agree</b>
Originalist	2	3	18	76
Nonoriginalist	5	20	37	38
<i>Total</i>	7	10	30	52

<b>In general, do you favor or oppose the following policy concerning gun control: ban ownership of a handgun?<sup>89</sup></b>				
	<b>Strongly Favor</b>	<b>Somewhat Favor</b>	<b>Somewhat Oppose</b>	<b>Strongly Oppose</b>
Originalist	5	4	15	76
Nonoriginalist	11	18	32	38
<i>Total</i>	10	12	29	50

<b>In general, do you favor or oppose the following policy concerning gun control: ban ownership of assault weapons and semiautomatic weapons?<sup>90</sup></b>				
	<b>Strongly Favor</b>	<b>Somewhat Favor</b>	<b>Somewhat Oppose</b>	<b>Strongly Oppose</b>
Originalist	23	21	22	34
Nonoriginalist	45	31	15	9
<i>Total</i>	39	24	18	19

<b>In general, do you favor or oppose the following policy concerning gun control: ban carrying handguns in public places?<sup>91</sup></b>				
	<b>Strongly Favor</b>	<b>Somewhat Favor</b>	<b>Somewhat Oppose</b>	<b>Strongly Oppose</b>
Originalist	16	18	20	46
Nonoriginalist	39	33	14	13
<i>Total</i>	31	26	20	22

<b>In general, do you favor or oppose the following policy concerning gun control: require registration and background checks of persons seeking to purchase guns?<sup>92</sup></b>				
	<b>Strongly Favor</b>	<b>Somewhat Favor</b>	<b>Somewhat Oppose</b>	<b>Strongly Oppose</b>
Originalist	61	21	4	13
Nonoriginalist	87	11	1	1
<i>Total</i>	76	17	3	4

88. See *id.*, Question 209 (2009), at 22, 58.

89. See *id.*, Question 517\_1 (2010), at 33, 102.

90. See *id.*, Question 517\_2 (2010), at 33, 102.

91. See *id.*, Question 517\_3 (2010), at 33, 102.

92. See *id.*, Question 517\_4 (2010), at 33, 103.

Do you think the words of the Second Amendment were intended to give individual Americans the right to own a gun or the right of citizens to form a militia? <sup>93</sup>		
	Right of Citizens to Form a Militia	Right of Individual Person to Own a Gun
Originalist	7	93
Nonoriginalist	34	66
<i>Total</i>	26	74

Would you approve of the following in your state: require that all people show that they can read in order to vote? <sup>94</sup>		
	No	Yes
Originalist	45	55
Nonoriginalist	41	59
<i>Total</i>	44	56

In general, do you agree or disagree that people should be allowed to say things in public that might be offensive to racial groups? <sup>95</sup>				
	Strongly Disagree	Mildly Disagree	Mildly Agree	Strongly Agree
Originalist	21	19	27	32
Nonoriginalist	24	27	33	16
<i>Total</i>	29	23	28	20

In general, do you agree or disagree that people should be allowed to say things in public that might be offensive to religious groups? <sup>96</sup>				
	Strongly Disagree	Mildly Disagree	Mildly Agree	Strongly Agree
Originalist	15	15	32	37
Nonoriginalist	19	25	36	20
<i>Total</i>	24	21	30	25

Please tell me whether you agree or disagree with the following statement: Companies should be allowed to advertise tobacco. <sup>97</sup>				
	Strongly Disagree	Disagree Somewhat	Agree Somewhat	Strongly Agree
Originalist	19	26	38	18
Nonoriginalist	22	31	39	9
<i>Total</i>	29	27	33	11

93. See *id.*, Question 519 (2010), at 33, 103.  
 94. See *id.*, Question VR7a (2009), at 25, 64.  
 95. See *id.*, Question 210 (2009), at 22, 59.  
 96. See *id.*, Question 211 (2009), at 22, 59.  
 97. See *id.*, Question 512a (2010), at 32, 99.

<b>Please tell me whether you agree or disagree with the following statement: People should be allowed to buy and sell video games depicting extreme violence.<sup>98</sup></b>				
	<b>Strongly Disagree</b>	<b>Disagree Somewhat</b>	<b>Agree Somewhat</b>	<b>Strongly Agree</b>
Originalist	32	22	29	17
Nonoriginalist	20	30	30	20
<i>Total</i>	<i>29</i>	<i>28</i>	<i>28</i>	<i>15</i>

<b>Please tell me whether you agree or disagree with the following statement: People should be able to buy and sell videos showing dog fighting, animal torture and killing, and other types of animal cruelty.<sup>99</sup></b>				
	<b>Strongly Disagree</b>	<b>Disagree Somewhat</b>	<b>Agree Somewhat</b>	<b>Strongly Agree</b>
Originalist	73	15	7	5
Nonoriginalist	64	17	12	7
<i>Total</i>	<i>68</i>	<i>18</i>	<i>9</i>	<i>5</i>

<b>Please tell me whether you agree or disagree with the following statement: Musicians should be allowed to sing songs with words that others might find offensive.<sup>100</sup></b>				
	<b>Strongly Disagree</b>	<b>Disagree Somewhat</b>	<b>Agree Somewhat</b>	<b>Strongly Agree</b>
Originalist	20	24	30	27
Nonoriginalist	14	17	34	35
<i>Total</i>	<i>20</i>	<i>19</i>	<i>33</i>	<i>28</i>

<b>Please tell me whether you agree or disagree with the following statement: People should be allowed to burn or deface the American flag as a political statement.<sup>101</sup></b>				
	<b>Strongly Disagree</b>	<b>Disagree Somewhat</b>	<b>Agree Somewhat</b>	<b>Strongly Agree</b>
Originalist	63	11	13	12
Nonoriginalist	45	19	24	12
<i>Total</i>	<i>57</i>	<i>15</i>	<i>17</i>	<i>10</i>

<b>Please tell me whether you agree or disagree with the following statement: Corporations ought to be able to spend their profits on TV advertisements urging voters to vote for or against candidates in an upcoming election.<sup>102</sup></b>				
	<b>Strongly Disagree</b>	<b>Disagree Somewhat</b>	<b>Agree Somewhat</b>	<b>Strongly Agree</b>
Originalist	27	24	30	19
Nonoriginalist	30	35	29	6
<i>Total</i>	<i>30</i>	<i>29</i>	<i>31</i>	<i>10</i>

98. See *id.*, Question 512b (2010), at 32, 100.

99. See *id.*, Question 512c (2010), at 32, 100.

100. See *id.*, Question 512d (2010), at 32, 100.

101. See *id.*, Question 512e (2010), at 33, 101.

102. See *id.*, Question 512f (2010), at 33, 101.

<b>In general, do you agree or disagree with the following statement: Police should request identification from anyone that they suspect may be in the country illegally.<sup>103</sup></b>				
	<b>Strongly Disagree</b>	<b>Disagree Somewhat</b>	<b>Agree Somewhat</b>	<b>Strongly Agree</b>
Originalist	7	6	20	66
Nonoriginalist	14	23	30	34
<i>Total</i>	<i>10</i>	<i>17</i>	<i>28</i>	<i>45</i>

<b>In your view should immigration be kept at its present level, increased, or decreased?<sup>104</sup></b>			
	<b>Increased</b>	<b>Kept at Present</b>	<b>Decreased</b>
Originalist	7	30	62
Nonoriginalist	14	36	51
<i>Total</i>	<i>12</i>	<i>34</i>	<i>54</i>

<b>Governments sometimes use the power of eminent domain to acquire a person's property at a fair market price for other uses. Recently, a local government transferred someone's property to private developers whose commercial projects could benefit the local economy. Do you think the local government should be able to use eminent domain?<sup>105</sup></b>		
	<b>Yes</b>	<b>No</b>
Originalist	6	94
Nonoriginalist	17	83
<i>Total</i>	<i>17</i>	<i>83</i>

Several of these “originalist” positions are not only consistent with mainstream conservative political views, but also accord with much of the legal discourse that attends each issue. Opposition to *Roe* has long been a galvanizing motif for originalists,<sup>106</sup> the Court’s “evolving standards of decency” approach to capital punishment is a favorite target for Justice Scalia in his discussions of judicial method,<sup>107</sup> and the Second Amendment case for gun rights has long been cast primarily in originalist terms.<sup>108</sup> Up to this point we have merely inquired as to how we know an

103. See id., Question 511c (2010), at 32, 98.

104. See id., Question 217 (2009), at 23, 62.

105. See id., Question 215 (2009), at 23, 61.

106. See Balkin, supra note 56, at 352 (“*Roe v. Wade* and the right to abortion have often been viewed as a controversial symbol of a ‘living constitution’ . . . in the views of its critics . . .”).

107. See Scalia, Common-Law Courts, supra note 15, at 40–41 (arguing evolving standards of decency approach “is preeminently a common-law way of making law, and not the way of construing a democratically adopted text” (internal quotation marks omitted)); Melissa Harris, Scalia Defends Judicial Views, Balt. Sun, Apr. 25, 2008, at 3B (noting Justice Scalia’s view that because, for example, abortion or the death penalty are not covered in the Constitution, courts should leave such decisions to legislatures).

108. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008) (striking down District of Columbia’s ban on handguns based on originalist position that Second Amendment protects individual’s right to possess handgun unconnected with use in militia); Robert E. Shalhope, The Ideological Origins of the Second Amendment, 69 J. Am. Hist. 599, 600 (1982) (“Advocates of both sides [in the Second Amendment debate]

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originalist when we see one, or perhaps more specifically, if we know someone is an originalist, what else might we suspect about that person? Our suspicions track conventional wisdom, for the most part. Originalists appear more religious, conservative, Republican, morally traditionalist, and economically libertarian. They therefore tend to hold the predictably conservative views on the “hot” constitutional controversies of the day.

### III. PREDICTING ORIGINALISM

For the remainder of this Essay, we engage three separate hypotheses as to the variables that would predict originalist sympathies. The hypotheses are not inconsistent with each other and in some respect may be complementary. Each emphasizes a different approach to the question: “What factors predict whether someone identifies as an originalist?” In other words, unlike in Part II of this Essay, we treat originalism as a dependent variable, instead of looking at it as an independent variable. We attempt to explain which factors predict whether someone is an originalist, rather than what we might otherwise know about a respondent who identifies as an originalist.

We proceed in two steps. First, we flip the axes on the cross-tabulations of the variables we have discussed to this point in Tables 8a, 8b, and 8c. In each of these tables, we break down groups, once again, into top and bottom quartiles according to their scores on the originalism index. Because we have defined originalists and nonoriginalists in this way (thereby excluding the second and third quartiles of respondents), the rows in the following tables naturally will not add up to 100%. We also present the simple correlations between the variables and the originalism index (indicated by “r =”). Finally, we present multivariate regressions using scores on the originalism index as our dependent variable.

We have been careful to use the language of prediction rather than causation. We are hesitant to ask what “causes” someone to be an originalist or identify the roots of originalist sympathies. Our data may point in directions that offer glimpses of answers to those questions. However, we recognize that we face a problem as to whether an originalist ideology is a cause or an effect of the other variables described, or whether omitted variables may be responsible for variations in both our independent and dependent variables. Further research and analysis might allow us to get closer to answers to those questions. For present purposes, we aim simply to verify whether the available evidence is consistent with what we consider the three principal hypotheses about the predictors of originalist ideology.

Under the first hypothesis, which we call the Legal Hypothesis, originalism accords with a certain conception of the rule of law. On this

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draw upon the same historical data but interpret them differently in light of their present-day beliefs.”).

model, the rule of law is either intrinsically valuable to respondents or is valuable for reasons we are unable to identify or measure. We label this the Legal Hypothesis because it assumes that support for originalism tracks the justifications most commonly propounded by legal practitioners and academics. That is, a commitment to originalism binds judges to an agreement actually reached through a legitimate democratic process and prevents them from deciding cases according to their own conceptions of justice, morality, or policy.

We call the second hypothesis the Political Hypothesis, as it posits that explicitly political considerations predict whether an individual prefers that judges follow the original intentions of the Constitution's authors. We can imagine two variations on this hypothesis. On one account, one's views on a set of politically attractive constitutional outcomes, such as protecting gun rights or upholding abortion bans, predicts one's attitudes toward constitutional interpretation. On a second account, originalism is not necessarily associated with specific legal outcomes but is identified as part of a bundle of substantive commitments tied to the Republican Party or to conservative politics more generally. More dramatically, constitutional interpretation could exist as just one more issue position amenable to heavily contingent electoral and political forces. Just as presidents might cause public opinion to shift on certain issues, such as support for a war or opposition to a government program, so too might approval of the president be related to the popularity of a mode of constitutional interpretation.

The third hypothesis we call the Cultural Hypothesis. According to this model, originalism is itself an expression of deeper cultural commitments, such as attitudes toward family structure, morality, or the role of government in public life. An originalist legal methodology, then, ought to be rooted in cultural issues and the cultural profile of the individual. As described in our discussion of the profile of originalists, we look specifically at metrics of moral traditionalism, libertarianism, and egalitarianism.

To reiterate, these hypotheses are not exclusive of each other, and indeed, we find partial support for each. Individual predictors for originalism will vary, but we are interested in assessing the extent to which our predictive models appear to have traction in the real world. In considering each of our models, we first examine cross-tabulations in which scores on the originalism index are the dependent variable. We then present ordinary least squares regressions to assess the relative consistency of the data with the originalism index.

#### A. *The Legal Hypothesis*

Among legal academics, justifications for originalism are diverse and sundry. Gary Lawson and Guy Seidman describe the Constitution as "an instruction manual for a form of government," the commands of which may be understood only by reference to its immanent intentions: those

of a hypothetical reasonable person at the time of the founding.<sup>109</sup> Randy Barnett supports originalism because he believes that protection of natural rights is essential to the Constitution's legitimacy, and that attention to original meaning is the surest means of ensuring that such rights are protected.<sup>110</sup> John McGinnis and Michael Rappaport argue that political understandings produced by supermajoritarian rules likely reflect better policy than those that (evidently) lack similar support.<sup>111</sup>

The Legal Hypothesis adopts the conservative assumption that these justifications have not, in most of their relevant particulars, penetrated into public discourse, and will not meaningfully be reflected in poll results. Rather, a different argument is more prominent among popular commentators: that originalism is uniquely consistent with the rule of law. Judges lack electoral accountability but stand in a principal-agent relationship with the citizenry at large. Originalism commits them to a democratic bargain that prevents them from generating legal rules out of their own subjective—or worse, partisan—conceptions of fairness or policy. As McConnell writes, originalism's "great appeal" is the fact that the principles it relies upon to constrain or facilitate modern government "will be the foundational principles of the American Republic—principles we can all perceive for ourselves and that have shaped our nation's political character—and not the political-moral principles of whomever happens to occupy the judicial office."<sup>112</sup>

It is not difficult to find this rule of law justification in action. It is a frequent topic of Justice Scalia's comments in his public appearances. As he told students at Oxford Union: "You think there ought to be a right to abortion? No problem. . . . Create it the way most rights are created in a democratic society. Pass a law."<sup>113</sup> Or as he told students at Stetson University College of Law in 2007: "If you want to be governed by an aristocracy, there are better aristocracies than nine lawyers."<sup>114</sup> Or as Justice

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109. Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *Const. Comment.* 47, 53–55 (2006).

110. Randy E. Barnett, *Restoring the Lost Constitution* 4, 67–68 (2004) ("With this analysis of constitutional legitimacy and natural rights, we will then be in a position to understand why the words of the Constitution should be interpreted according to their original meaning . . .").

111. See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 *Nw. U. L. Rev.* 383, 386–87 (2007) ("Supermajority rules . . . permit[ ] only norms with substantial consensus to be entrenched. A broad consensus for the Constitution creates legitimacy, allegiance and even affection as citizens come to regard the entrenched norms as part of their common bond.").

112. Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 *Yale L.J.* 1501, 1525 (1989) (reviewing Michael J. Perry, *Morality, Politics, and Law* (1988)).

113. CBS 60 Minutes, *Justice Scalia on the Record*, at <http://www.cbsnews.com/stories/2008/04/24/60minutes/main4040290.shtml> (on file with the *Columbia Law Review*) (last updated Sept. 12, 2008).

114. Chris Tisch, *Scalia at Stetson Praises Original Intent View of Constitution*, *St. Petersburg Times (Fla.)*, Apr. 5, 2007, at 3B.



Thomas told the University of Kansas School of Law in 1996, an “original understanding” approach to interpretation “deprives modern judges of the opportunity to write their own preferences into the Constitution by tethering their analysis to the understanding of those who drafted and ratified the text” and “places the authority for creating legal rules in the hands of the people and their representatives rather than in the hands of the nonelected, unaccountable federal judiciary.”<sup>115</sup>

Conservative commentators have picked up on just these themes. Mark Levin writes: “If the Constitution’s meaning can be erased or rewritten, and the Framers’ intentions ignored, it ceases to be a constitution but is instead a concoction of political expedients that serve the contemporary policy agendas of the few who are entrusted with public authority to preserve it.”<sup>116</sup> Charles Krauthammer has called originalism “an important counterweight to the irresistible modern impulse to legislate from the bench.”<sup>117</sup> Rush Limbaugh defines originalism as “not molding the Constitution to fit your political and social beliefs” and “not imposing your personal policy whims on society via judicial fiat.”<sup>118</sup>

The survey data at hand allow us to measure whether specific ideas about the rule of law are consistent with an affinity for originalism. Several of our questions from the Gibson and Caldeira battery deal directly with the rule of law issues that appear to animate many originalist arguments, and all at least indirectly engage the same themes. Most obviously, the Legal Hypothesis would predict a strong positive correlation between originalist responses and the views that a judge should “[s]trictly follow the law no matter what people in the country may want” and should “[u]phold the values of those who wrote our [C]onstitution two hundred years ago.” This Hypothesis would predict a negative correlation between originalist responses and the view that it is very important for a judge to “[f]eel empathy for the people involved in a case,” to “[p]rotect people without power from people and groups with power,” to “[f]ollow his or her conscience or sense of morality,” or to “[r]espect existing Supreme Court decisions by changing the law as little as possible.” If originalism is most attractive for its disciplinary value, we should expect its proponents to favor the original intentions of the Framers over the subsequent views or glosses of judges or transient political majorities.<sup>119</sup>

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115. Clarence Thomas, *Judging*, 45 U. Kan. L. Rev. 1, 6–7 (1996).

116. Mark R. Levin, *Liberty and Tyranny: A Conservative Manifesto* 37 (2009).

117. Charles Krauthammer, *From Thomas, Original Views*, Wash. Post, June 10, 2005, at A23.

118. Rush Limbaugh, *What Is Originalism?*, The Limbaugh Letter, Dec. 2005, at 12.

119. For this reason, one might also, on this model, expect a negative correlation between originalist responses and the view that it is important for judges to “[r]espect the will of the majority of the people in the U.S.” The difference between this question and the “strictly follow the law” question is that the latter situates fidelity to the law as the alternative to following majority will, whereas the former question leaves the alternative ambiguous. If a respondent views the alternative as obedience to the law, the two questions are very similar. If, however, a respondent views the alternative as judges

**Table 8a. Cross-Tabulations: Judicial Values<sup>120</sup>**

	Originalist	Nonoriginalist
<b>Strictly follow the law no matter what people in the country may want (r = -0.37)</b>		
Very Important	40	11
Somewhat Important	14	29
Not Very Important	6	53
Not Important at All	16	31
<b>Feel empathy for the people involved in a case (r = 0.15)</b>		
Very Important	13	22
Somewhat Important	18	27
Not Very Important	25	28
Not Important at All	46	19
<b>Protect people without power from people and groups with power (r = 0.17)</b>		
Very Important	17	23
Somewhat Important	25	32
Not Very Important	36	10
Not Important at All	57	23
<b>Respect the will of the majority of people in the United States (r = 0.13)</b>		
Very Important	16	21
Somewhat Important	21	30
Not Very Important	26	28
Not Important at All	54	14
<b>Stay entirely independent of the President and Congress (r = -0.22)</b>		
Very Important	32	19
Somewhat Important	10	31
Not Very Important	14	45
Not Important at All	23	35

exercising their independent judgment, then we would instead expect “rule of law” originalists to affirmatively choose the “respect the will of the majority” response. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 163 (1990) (“[T]he attempt to adhere to the principles actually laid down in the historic Constitution will mean that entire ranges of problems and issues are placed off-limits for judges.”); Thomas, *supra* note 115, at 6–7 (“[W]hen interpreting the Constitution, judges should seek the original understanding of the provision’s text . . . . [T]he Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean.”). Given this ambiguity, we cannot confidently predict the “originalist” response to our “respect majority will” question on the Legal Model.

120. See Constitutional Attitudes Survey, *supra* note 20, Questions 102a–102h (2009), at 20, 51–54.

<b>Follow his or her conscience or sense of morality (r = 0.18)</b>		
Very Important	18	20
Somewhat Important	16	32
Not Very Important	33	23
Not Important at All	59	15
<b>Respect existing Supreme Court decisions by changing the law as little as possible (r = -0.21)</b>		
Very Important	34	12
Somewhat Important	19	30
Not Very Important	16	37
Not Important at All	24	27
<b>Uphold the values of those who wrote our Constitution two hundred years ago (r = -0.67)</b>		
Very Important	41	0
Somewhat Important	2	50
Not Very Important	0	86
Not Important at All	0	82

In order to take a first cut at the extent to which rule of law values predict the originalist response, we look at a different set of cross-tabulations from those in Table 4. Table 8a indicates the share of respondents to each of the eight judicial values questions in the Constitutional Attitudes Survey who score in the top and bottom quartiles of the originalism index. We observe that among those who believe it is “very important” for judges to “strictly follow the law no matter what people in the country may want,” 40% are originalist, and for those who believe it is “somewhat important,” only 14% are originalist.<sup>121</sup> We see a similar gap with respect to attitudes toward precedent and judicial independence. Thirty-four percent of those who believe it is “very important” to respect existing Supreme Court decisions by changing the law as little as possible are originalists, whereas just 19% of those who believe it is “somewhat important” are originalists. Thirty-two percent of those who consider it “very important” for judges to stay entirely independent of the President and Congress are originalists, as compared to 10% of those who just view independence as somewhat important. In contrast, on values such as empathy or protecting people without power from people and groups with power, we see, if anything, nonoriginalists comprising a slim majority of those who think it important for judges to follow those approaches.

121. Sixteen percent of those who think it is not important at all for judges to “strictly follow the law” are also originalists. However, the number of people who chose that option was small—4%, or only 70 people of the 1,677 people surveyed—so the results are not statistically significant. As described in Table 2, *supra*, on most of these judicial values questions only a small number of people view any of these values as “not important at all.” Thus, the apparent curvilinear relationship between these variables and the originalism index is spurious and only due to the tiny share of respondents who think these values are not important at all.

These results suggest, albeit with considerable ambiguity, that there may be something to the Legal Hypothesis. As the Hypothesis predicts, those who believe in strict adherence to law notwithstanding the views of the people seem substantially more likely to be originalists, as do those who would discount the significance to judicial decisionmaking of empathy or of protecting the weak from the strong. It is not surprising that those who value respect for Supreme Court precedent show an affinity toward originalism, but this affinity is somewhat in tension with the Legal Hypothesis. Supporting strict adherence to the original intentions of the Constitution's authors is a notoriously poor strategy for ensuring that the Supreme Court remains faithful to existing precedent.<sup>122</sup> However, as discussed in our multivariate analysis, we might hypothesize that the predictive power of "respect for precedent" indicates originalists' preference for stability and nostalgia for the past.<sup>123</sup> In other words, if the roots of originalist sympathies for some people grow from an aversion to change and a preference for the way things used to be (a result perhaps more in keeping with the Cultural Hypothesis than the Legal Hypothesis), then respecting precedent is in keeping with a general worldview that constitutional meaning should remain bound to an age-old mast.

#### B. *The Political Hypothesis*

The Legal Hypothesis comports with the justification that many legal professionals and commentators have used to describe originalism to both public and professional audiences. But it is far from obvious that the appeal of originalism for many people is conventionally legal. We can imagine at least two plausible accounts under which its appeal is primarily political. First, it may be that respondents believe that, whether or not consistent with the rule of law, a judicial commitment to originalism will lead to desirable political outcomes. For example, the controversy over abortion arises so frequently in discussions of originalism because both sides of the issue generally assume that originalism compels a contrary outcome in *Roe*.<sup>124</sup> The association of originalism with hostility to *Roe* and other liberal decisions of the Warren and Burger Courts was both a cause for and an effect of the Democratic strategy against the Supreme Court nomination of Robert Bork in 1987.<sup>125</sup> The Reagan Justice Department under Attorney General Edwin Meese III simultaneously promoted

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122. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 723 (1988) ("The Supreme Court's repeated invocations of the Framers' understanding notwithstanding, a significant portion of our constitutional order cannot reasonably be reconciled with original understanding.").

123. See *infra* Part IV (multivariate analysis).

124. But see Balkin, *supra* note 56, at 292 (arguing abortion rights are consistent with text and underlying principles of Fourteenth Amendment).

125. See Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 *Harv. J.L. & Pub. Pol'y* 467, 493-94 & n.83 (1998) ("Judge Bork's 1987 confirmation hearings were a watershed event insofar as the Senate's interest in preserving *Roe v. Wade* is concerned. Prior to the hearings, *Roe's* fate was primarily the

both “a jurisprudence of original intention” and a specific set of constitutional outcomes that they implied such a jurisprudence would produce: a rollback of the exclusionary rule; limitations on affirmative action, gay rights, and immigrant rights; expanded protection for property rights and executive authority; diminution in congressional power to regulate state and local governments; and, most prominently, restrictions on abortion rights.<sup>126</sup> A political model of this sort would suggest that, quite contrary to the basic premise of the Legal Hypothesis, the case for originalism is best stated in consequentialist terms.

There is a distinct and less sophisticated way in which the appeal of originalism could be characterized as political. It could be that originalism is simply one of many notional commitments that form part of either a Republican or a conservative “package.” We return to Rush Limbaugh:

There is no greater difference between liberals and conservatives than their views on the Constitution. Liberals generally believe in a so-called “living Constitution,” which means whatever they say it means, whenever they mean it, depending on their political agenda at the moment. Conservatives, who hold that “words mean things,” counter that the Constitution means what it says, in the plain sense of the original text.<sup>127</sup>

Limbaugh invokes the themes of the Legal Hypothesis, but just as importantly he seeks to establish originalism as part of the conservative brand. In this sense, originalism is—like low taxes, self-reliance, and support for the military—a basic commitment that, in part, defines conservatism. On this view, one who is already conservative or wishes to affiliate with conservative matters need not conform to the Legal Hypothesis or any other analytic justification in order to embrace originalism. Rather, the set of political commitments she experiences derive in large part from successful branding by partisan or ideological signalers.<sup>128</sup>

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concern of those responsible for judicial selection in the Reagan administration.” (internal citation omitted)).

126. See Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. Tex. L. Rev. 455, 464 (1986) (“A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection.”); see also Office of Legal Policy, U.S. Dep’t of Justice, Report to the Attorney General, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*, at iii (1988) (analyzing fifteen major constitutional controversies, “the resolution of which [was] likely to be sharply influenced by the judicial philosophies of the individual justices who sit on the Court,” and predicting how Constitution would look in year 2000 should issues be decided by a so-called activist Court).

127. Limbaugh, *supra* note 118, at 12.

128. See Arthur Lupia & Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* 207 (1998) (“[P]arties work to make their ‘brand names’ effective by linking policy positions and outcomes to the party.”); Michael Tomz & Paul M. Sniderman, *Brand Names and the Organization of Mass Belief Systems* 17 (Oct. 10, 2005) (unpublished manuscript) (on file with the *Columbia Law Review*) (“Political parties and elites arrange policies into coherent bundles and attach brand

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Under the first variant of the Political Hypothesis, we would expect to see particular issue areas that seem to predict originalism. There are few issues for which there is consensus even among legal scholars as to the “correct” originalist position. We can, however, postulate a political consensus that an originalist approach to interpretation disfavors abortion rights and gay rights and favors an individual right to carry a handgun for self-defense. Casual inspection of cross-tabulations that situate originalism as the dependent variable, as found in Table 8b, indeed suggests that disagreement with *Roe*, opposition to same-sex marriage, and support for individual gun rights may predict originalism. Fifty-five percent of those who strongly disagree with *Roe* are originalist, as are 35% of those who oppose same-sex marriage, and 34% of those who strongly agree that an individual should have a right to have a registered handgun at home. Substantial majorities of those who favor allowing school prayer and who agree that “people should be able to say things in public that might be offensive to racial groups” are originalist.

The cross-tabulations also suggest that certain other issue positions, regardless of their connection to originalism as a legal theory, might also predict originalism. For example, 35% of those who strongly agree that “[p]olice should request identification from anyone that they suspect may be in the country illegally,” and 30% of those who believe the “U.S. military should be allowed to torture those who may have been involved with acts of terror” are originalists. In contrast, substantial majorities of those who oppose school prayer, the death penalty, and gun rights are nonoriginalists.

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names, giving citizens the information they need to put together a consistent set of positions across an array of issues.”).

**Table 8b. Cross-Tabulations: Issue-Specific Variables**

	Originalist	Nonoriginalist
<b>Do you think the U.S. military should be allowed to torture those who may have been involved with acts of terror?<sup>129</sup> (r = 0.16)</b>		
No	19	28
Yes	30	20
<b>Do you favor or oppose affirmative action programs that give preferences to blacks and other minorities in college admissions?<sup>130</sup> (r = 0.29)</b>		
Strongly Favor	0	27
Favor	10	35
Oppose	24	27
Strongly Oppose	41	14
<b>Do you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriages?<sup>131</sup> (r = 0.44)</b>		
Yes	5	39
No	35	16
<b>Quite apart from whether you think same-sex marriage should be legal in your state, do you think that the federal government should recognize same-sex marriages in states where it is legal?<sup>132</sup> (r = 0.42)</b>		
Yes	8	36
No	37	16
<b>A recent case challenged a Texas law that banned sexual relations between consenting adults of the same gender. Would you support a state law banning sex between people of the same gender?<sup>133</sup> (r = 0.28)</b>		
No	18	32
Yes	35	10
<b>In general, do you agree or disagree with the following statement: Gays and lesbians should be able to serve openly in the military?<sup>134</sup> (r = 0.45)</b>		
Strongly Agree	8	36
Agree Somewhat	20	27
Disagree Somewhat	32	16
Strongly Disagree	54	6
<b>Should the government be allowed to apply the death penalty to an adult convicted of murder?<sup>135</sup> (r = 0.15)</b>		
No	16	36
Yes	25	22

129. See Constitutional Attitudes Survey, *supra* note 20, Question 202 (2009), at 21, 54.

130. See *id.*, Question 203 (2009), at 21, 55.

131. See *id.*, Question 204 (2009), at 21, 55.

132. See *id.*, Question 205 (2009), at 21, 55.

133. See *id.*, Question 206 (2009), at 21–22, 56.

134. See *id.*, Question 511b (2010), at 32, 98.

135. See *id.*, Question 207a (2009), at 22, 56.

<b>In general, do you believe that public schools should be permitted to start each school day with a prayer?</b> <sup>136</sup> (r = 0.33)		
No	9	39
Yes	30	19
<b>In general, do you agree or disagree that an individual should have a right to have a registered handgun at home?</b> <sup>137</sup> (r = 0.26)		
Strongly Disagree	7	19
Disagree Somewhat	6	42
Agree Somewhat	14	31
Strongly Agree	34	18
<b>In general, do you favor or oppose the following policy concerning gun control: ban ownership of a handgun?</b> <sup>138</sup> (r = 0.27)		
Strongly Favor	13	31
Somewhat Favor	8	41
Somewhat Oppose	12	28
Strongly Oppose	35	19
<b>In general, do you favor or oppose the following policy concerning gun control: ban ownership of assault weapons and semiautomatic weapons?</b> <sup>139</sup> (r = 0.28)		
Strongly Favor	14	29
Somewhat Favor	21	34
Somewhat Oppose	29	21
Strongly Oppose	39	12
<b>In general, do you favor or oppose the following policy concerning gun control: ban carrying handguns in public places?</b> <sup>140</sup> (r = 0.33)		
Strongly Favor	12	32
Somewhat Favor	16	32
Somewhat Oppose	22	18
Strongly Oppose	47	15
<b>In general, do you favor or oppose the following policy concerning gun control: require registration and background checks of persons seeking to purchase guns?</b> <sup>141</sup> (r = 0.28)		
Strongly Favor	19	29
Somewhat Favor	30	17
Somewhat Oppose	31	9
Strongly Oppose	69	3

136. See *id.*, Question 208 (2009), at 22, 58.

137. See *id.*, Question 209 (2009), at 22, 58.

138. See *id.*, Question 517\_1 (2010), at 33, 102.

139. See *id.*, Question 517\_2 (2010), at 33, 102.

140. See *id.*, Question 517\_3 (2010), at 33, 102.

141. See *id.*, Question 517\_4 (2010), at 33, 103.



<b>Do you think the words of the Second Amendment were intended to give individual Americans the right to keep and bear arms for their own defense or were these words intended to protect the right of citizens to form a militia?<sup>142</sup> (r = 0.26)</b>		
Right of Citizens to Form a Militia	6	34
Right of Individual Person to Own a Gun	29	22
<b>In general, do you agree or disagree with the 1973 <i>Roe v. Wade</i> Supreme Court decision that established a woman's right to an abortion?<sup>143</sup> (r = 0.46)</b>		
Strongly Agree	7	39
Agree Somewhat	16	21
Disagree Somewhat	35	24
Strongly Disagree	55	6
<b>Do you approve of the following in your state: require that all people show that they can read in order to vote?<sup>144</sup> (r = 0.01)</b>		
No	24	24
Yes	23	26
<b>In general, do you agree or disagree that people should be allowed to say things in public that might be offensive to racial groups?<sup>145</sup> (r = 0.09)</b>		
Strongly Disagree	19	23
Mildly Disagree	20	29
Mildly Agree	21	28
Strongly Agree	37	20
<b>In general, do you agree or disagree that people should be allowed to say things in public that might be offensive to religious groups?<sup>146</sup> (r = 0.11)</b>		
Strongly Disagree	16	22
Mildly Disagree	17	30
Mildly Agree	23	28
Strongly Agree	35	21
<b>Please tell me whether you agree or disagree with the following statement: Companies should be allowed to advertise tobacco.<sup>147</sup> (r = 0.10)</b>		
Strongly Disagree	15	19
Disagree Somewhat	22	29
Agree Somewhat	27	30
Strongly Agree	37	20

142. See *id.*, Question 519 (2010), at 33, 103.

143. See *id.*, Question 212 (2009), at 22–23, 59.

144. See *id.*, Question VR7a (2009), at 25, 64.

145. See *id.*, Question 210 (2009), at 22, 58.

146. See *id.*, Question 211 (2009), at 22, 59.

147. See *id.*, Question 512a (2010), at 32, 99.

<b>Please tell me whether you agree or disagree with the following statement: People should be allowed to buy and sell video games depicting extreme violence.<sup>148</sup> (r = -0.06)</b>		
Strongly Disagree	26	17
Disagree Somewhat	18	27
Agree Somewhat	24	28
Strongly Agree	26	33
<b>Please tell me whether you agree or disagree with the following statement: People should be able to buy and sell videos showing dog fighting, animal torture and killing, and other types of animal cruelty.<sup>149</sup> (r = -0.05)</b>		
Strongly Disagree	25	23
Disagree Somewhat	21	24
Agree Somewhat	18	33
Strongly Agree	21	34
<b>Please tell me whether you agree or disagree with the following statement: Musicians should be allowed to sing songs with words that others might find offensive.<sup>150</sup> (r = -0.11)</b>		
Strongly Disagree	23	18
Disagree Somewhat	28	22
Agree Somewhat	22	27
Strongly Agree	22	31
<b>Please tell me whether you agree or disagree with the following statement: People should be allowed to burn or deface the American flag as a political statement.<sup>151</sup> (r = -0.11)</b>		
Strongly Disagree	26	20
Disagree Somewhat	18	33
Agree Somewhat	19	36
Strongly Agree	27	28
<b>Please tell me whether you agree or disagree with the following statement: Corporations ought to be able to spend their profits on TV advertisements urging voters to vote for or against candidates in an upcoming election.<sup>152</sup> (r = 0.14)</b>		
Strongly Disagree	21	25
Disagree Somewhat	19	30
Agree Somewhat	23	24
Strongly Agree	44	14

148. See *id.*, Question 512b (2010), at 32, 100.

149. See *id.*, Question 512c (2010), at 32, 100.

150. See *id.*, Question 512d (2010), at 32, 100.

151. See *id.*, Question 512e (2010), at 33, 101.

152. See *id.*, Question 512f (2010), at 33, 101.

<b>Do you agree or disagree with the following: Police should request identification from anyone that they suspect might be in the country illegally?<sup>153</sup> (r = 0.23)</b>		
Strongly Disagree	16	33
Mildly Disagree	9	33
Mildly Agree	17	27
Strongly Agree	35	19
<b>Should noncitizens suspected of terrorism and detained in U.S. military prisons be allowed to challenge their detentions in the U.S. civilian court system?<sup>154</sup> (r = 0.27)</b>		
Yes	12	34
No	31	19
<b>Governments sometimes use the power of eminent domain to acquire a person's property at a fair market price for other uses. Recently, a local government transferred someone's property to private developers whose commercial projects could benefit the local economy. Do you think the local government should be able to use eminent domain for this purpose or not?<sup>155</sup> (r = 0.13)</b>		
Yes	10	29
No	26	25
<b>In your view, do you think immigration should be kept at its present level, increased, or decreased?<sup>156</sup> (r = 0.13)</b>		
Increased	15	29
Kept at Present Level	21	26
Decreased	27	23

The most direct evidence in support of this second variant on the Political Hypothesis is, quite naturally, whether either conservative ideology or Republicanism predicts originalism. Indeed, as shown in Table 8c, among those who identify as “strong Republicans,” 59% are originalists, and among those who identify as “extremely conservative,” 78% are originalists.<sup>157</sup> Given the strong relationship between party and presidential and congressional approval, we find a similar dynamic with those questions, as depicted in Table 8d. Those who disapprove of the job President Obama and the 111th Congress are doing are more likely also to identify as originalists. Standing alone, these numbers suggest that, consistent with the second version of the Political Hypothesis, originalism may be part of a Republican or conservative brand, and originalist attitudes correlate well with other planks on the Republican Party’s platform.

153. See *id.*, Question 511c (2010), at 32, 98.

154. See *id.*, Question 214 (2009), at 23, 61.

155. See *id.*, Question 215 (2009), at 23, 61.

156. See *id.*, Question 217 (2009), at 23, 62.

157. Originalists comprise 78% of those who identify as “extremely conservative,” but the sample includes only 40 people in 2010 so identifying.

**Table 8c. Partisanship and Ideology as Predictors of Originalism<sup>158</sup>**

	Originalist	Nonoriginalist
<b>Party Identification (r = 0.48)</b>		
Strong Democrat	4	29
Not Strong Democrat	6	42
Leans Democrat	7	37
Leans Republican	46	10
Not Strong Republican	28	19
Strong Republican	59	9
<b>Ideology (r = 0.50)</b>		
Extremely Liberal	2	34
Liberal	5	35
Slightly Liberal	7	36
Moderate	11	31
Slightly Conservative	29	17
Conservative	58	8
Extremely Conservative	78	2

**Table 8d. Presidential and Congressional Approval as Predictors of Originalism**

	Originalist	Nonoriginalist
<b>Obama Approval (2010)<sup>159</sup> (r = 0.54)</b>		
Strongly Approve	8	38
Approve Somewhat	6	38
Disapprove Somewhat	21	16
Strongly Disapprove	59	7
<b>Congress Approval (2010)<sup>160</sup> (r = 0.37)</b>		
Strongly Approve	24	20
Approve Somewhat	9	32
Disapprove Somewhat	14	30
Strongly Disapprove	53	9

Given the importance of originalist rhetoric for the Tea Party movement, we also wanted to gauge whether support for the Tea Party helped predict originalist leanings according to the CAS. Thirty-nine percent of Tea Party supporters score in the top quartile of originalists, and 33% of Tea Party opponents score in the bottom quartile. The correlation ( $r =$

158. See Constitutional Attitudes Survey, *supra* note 20, Questions 7–11 (2010), at 36–37, 109–10.

159. See *id.*, Question 500 (2010), at 31, 94.

160. See *id.*, Question 600 (2010), at 35–36, 107.

0.38) is stronger than it is for most issue variables but not as strong as the other partisan variables.

**Table 8e. Tea Party Support as Predictor of Originalism<sup>161</sup>**

	Originalist	Nonoriginalist
<b>Support Tea Party Movement (2010) (r = 0.38)</b>		
Oppose Tea Party Movement	9	33
Support Tea Party Movement	39	17

C. *The Cultural Hypothesis*

Digress for a moment and recall the famous singing of *La Marseillaise* at Rick’s Café in the film *Casablanca*.<sup>162</sup> The patrons join in not because (or not just because) it is more melodic than *Die Wacht am Rhein*, not because it will in fact drive the Germans out of Casablanca, and not because (or not just because) the anthem is French or even *in* French. Rather, they sing because *La Marseillaise* is the battle hymn of the French Revolution during a period of fascist occupation. They sing because they wish to evoke the revolutionary ideals of *liberté, égalité, and fraternité*. The anthem is valuable less for what it *promises* than for what it *expresses*.

This is how we might understand originalism through the Cultural Hypothesis. The second variation on the Political Hypothesis expresses identity in a thin sense. The respondent sensitive to this Hypothesis in effect delegates her methodological choice to political signalers. It is not necessary that she engage with or critically assess the methodology itself. The Cultural Hypothesis also expresses identity, but in a thicker way. Under this hypothesis, irrespective of its particulars as a modality of legal analysis or the political results it might produce in actual cases, originalism is selected because it resonates with a set of cultural values that the respondent finds compelling. Affiliation with originalism may also signal solidarity with others who share the same set of values. In a pioneering book, Mary Douglas and Aaron Wildavsky described what they called “a cultural theory of risk perception.”<sup>163</sup> The idea was that our perception of environmental risks varies based on our cultural orientation, be it individualistic, solidaristic, egalitarian, or hierarchical.<sup>164</sup> Dan Kahan and Donald Braman have applied cultural theory to perceptions of the risks of gun violence, arguing that cultural variables are so powerfully predictive of attitudes toward guns and gun control that culture overwhelms empirical arguments in shaping individual attitudes.<sup>165</sup> Consumers of

161. See Constitutional Attitudes Survey, *supra* note 20, Question 519a (2010), at 33, 103.

162. *Casablanca* (Warner Bros. 1942).

163. Mary Douglas & Aaron Wildavsky, *Risk and Culture* 7 (1982).

164. *Id.* at 2–15.

165. Kahan & Braman, *supra* note 17, at 1315–18.

constitutional methodology encounter a different, more abstract set of dangers: the competing risks that judges will underprotect rights, will yield too much power to national as against local officials (or vice versa), or will overzealously remove authority from more democratically responsive actors and institutions. We expect individuals to appreciate these risks differently depending on their cultural world views, and to affiliate with constitutional methodologies that resonate with those culturally influenced risk perceptions.

On the Cultural Hypothesis, we expect moral traditionalists to be originalists. Originalism expresses an affinity for traditional values and a suspicion of changes in political or cultural mores.<sup>166</sup> The extent to which originalism is affiliated with cultural values favoring big or small government is less obvious, but we can confidently predict that those who favor small government are more likely to be originalists. The federal government contemplated by the Constitution's authors was far smaller than the one that exists today, and adopting an originalist position is an appropriate strategy for those who wish the Supreme Court to police the expansion of the federal administrative and regulatory state.<sup>167</sup> Moreover, the Court is itself part of that federal regulatory state, and the central appeal of originalism is its presumed capacity to reduce the discretion of modern Justices by tethering their decisionmaking to an older, smaller world. More generally, the Founders' Constitution might evoke, for many, any number of distinct themes—the western frontier, states' rights and local control, Madisonian civic republicanism—that comfortably inhabit a small-government aesthetic. Finally, we have a weak expectation that originalists will be more satisfied than nonoriginalists with the nation's level of equality. The founding generation tolerated, and indeed accommodated within the Constitution, a radically unequal social order.<sup>168</sup> Constitutional claims that rely on that generation's political authority seem less likely to resonate with those who are uncomfortable with

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166. See Jamal Greene, *On the Origins of Originalism*, 88 *Tex. L. Rev.* 1, 69–71 (2009) [hereinafter Greene, *Origins*] (explaining how originalism's focus on traditional values and emphasis on original meaning often excludes alternative constitutional interpretations that would extend constitutional protections to traditionally unprotected groups).

167. See *United States v. Lopez*, 514 U.S. 549, 596–99 (1995) (Thomas, J., concurring) (arguing “substantial effects” test of federal power under Commerce Clause is inconsistent with original understanding and was invention of New Deal Court); see also Paul Pierson, *Dismantling the Welfare State? Reagan, Thatcher, and the Politics of Retrenchment* 35 (1994) (arguing centralization of regulatory authority permits uniform fiscal policy and therefore makes it more difficult for businesses and individuals to respond to local taxes by relocating).

168. See U.S. Const. art. I, § 2, cl. 3 (counting individual slaves as three-fifths of a person for purposes of apportioning representatives and direct taxes among states); *id.* art. IV, § 2, cl. 3 (requiring escaped slaves to be returned to owners after flight into another state).

the present level of equality in society. Again, however, we regard this as a fairly weak expectation.<sup>169</sup>

Our cross-tabulations in Tables 9a, 9b, and 9c are consistent with the expected difference in values relating to moral traditionalism, libertarianism, and egalitarianism between originalists and nonoriginalists. Thus, 64% of respondents who strongly disagree that “[t]he world is always changing and we should adjust our view of moral behavior to those changes” and 58% of respondents who strongly disagree that “[w]e should be more tolerant of people who choose to live according to their own moral standards, even if they are very different from our own” are originalists. Of course, perhaps these relationships could be explained by the large share of originalists among evangelicals, frequent churchgoers, and those who believe in the literal truth of the Bible, or they might be explained by the fact that older respondents tend to be more originalist than younger ones—as noted in Table 9d. Additionally, in our paired statements designed to assess relative levels of libertarianism, about one-third of those who selected the anti-big government option in each pair are originalists. The relationships appear even stronger for the egalitarianism battery. We find, for example, that 64% of those who strongly disagree—and 46% of those who disagree somewhat—that “[o]ur society should do whatever is necessary to make sure that everyone has an equal opportunity to succeed” are originalists. Forty-four percent of those who strongly agree “[w]e have gone too far in pushing equal rights in this country” are originalists, as are 46% of those who strongly agree that “[i]t is not really that big a problem if some people have more of a chance in life than others.” Similar relationships appear to hold for the other items on the egalitarianism battery.

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169. One reason this is a weak expectation is that our egalitarianism battery does not specify any particular domain of equality. We might hypothesize that those who believe racial minorities receive less opportunity in society are less likely to be originalist, but we might also assume that those who believe social life is unduly dominated by corporations or by the federal government are more likely to be originalist. Either of these groups might plausibly be coded as being uncomfortable with the present level of inequality in society.

**Table 9a. Cross Tabulations: Moral Traditionalism<sup>170</sup>**

	Originalist	Nonoriginalist
<b>The world is always changing and we should adjust our view of moral behavior to those changes. (r = 0.53)</b>		
Strongly Agree	7	34
Agree Somewhat	6	39
Disagree Somewhat	18	19
Strongly Disagree	64	6
<b>The newer lifestyles are contributing to the breakdown of our society. (r = -0.39)</b>		
Strongly Agree	46	11
Agree Somewhat	19	24
Disagree Somewhat	8	41
Strongly Disagree	8	41
<b>We should be more tolerant of people who choose to live according to their own moral standards, even if they are very different from our own. (r = 0.39)</b>		
Strongly Agree	9	39
Agree Somewhat	14	29
Disagree Somewhat	36	17
Strongly Disagree	58	10
<b>This country would have many fewer problems if there were more emphasis on traditional family ties. (r = -0.41)</b>		
Strongly Agree	39	11
Agree Somewhat	19	28
Disagree Somewhat	3	43
Strongly Disagree	7	46

170. See Constitutional Attitudes Survey, *supra* note 20, Questions 4a–4d (2009), at 29, 74–75.



**Table 9b. Cross Tabulations: Libertarianism<sup>171</sup>**

	Originalist	Nonoriginalist
<b>Pair A: (r = 0.37)</b>		
Government has become bigger because the problems we face have become bigger.	7	35
The main reason government has become bigger over the years is because it has gotten involved in things that people should do for themselves.	35	19
<b>Pair B: (r = 0.42)</b>		
We need a strong government to handle today's complex economic problems.	8	32
The free market can handle these problems without government being involved.	44	15
<b>Pair C: (r = 0.40)</b>		
There are more things that government should be doing.	7	34
The less government the better.	39	17

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171. See *id.*, Question 6, Pair A–C (2009), at 29–30, 75–76.

**Table 9c. Cross Tabulations: Egalitarianism<sup>172</sup>**

	Originalist	Nonoriginalist
<b>Our society should do whatever is necessary to make sure that everyone has an equal opportunity to succeed. (r = 0.23)</b>		
Strongly Agree	17	24
Agree Somewhat	19	30
Disagree Somewhat	46	18
Strongly Disagree	64	16
<b>We have gone too far in pushing equal rights in this country. (r = -0.34)</b>		
Strongly Agree	44	11
Agree Somewhat	29	22
Disagree Somewhat	9	33
Strongly Disagree	9	40
<b>One of the big problems in this country is that we don't give everyone an equal chance. (r = 0.30)</b>		
Strongly Agree	14	24
Agree Somewhat	9	32
Disagree Somewhat	26	26
Strongly Disagree	55	12
<b>This country would be better off if we worried less about how equal people are. (r = -0.33)</b>		
Strongly Agree	47	6
Agree Somewhat	27	25
Disagree Somewhat	13	33
Strongly Disagree	8	32
<b>It is not really that big a problem if some people have more of a chance in life than others. (r = -0.25)</b>		
Strongly Agree	46	14
Agree Somewhat	28	23
Disagree Somewhat	22	27
Strongly Disagree	10	30
<b>If people were treated more equally in this country we would have many fewer problems. (r = 0.27)</b>		
Strongly Agree	14	24
Agree Somewhat	13	30
Disagree Somewhat	35	25
Strongly Disagree	45	13

172. See *id.*, Questions 3a–3f (2009), at 29, 72–74.

**Table 9d. Cross Tabulations: Demographic Variables**

	Originalist	Nonoriginalist
<b>Race<sup>173</sup> (r = -0.13)</b>		
White	29	23
Black	4	37
Hispanic	32	25
Other, Non-Hispanic	7	26
2+ Races, Non-Hispanic	14	17
<b>Gender<sup>174</sup> (r = -0.06)</b>		
Male	27	25
Female	20	26
<b>Age<sup>175</sup> (r = 0.16)</b>		
18-24	14	34
25-34	11	35
34-44	27	25
45-54	21	23
55-64	31	18
65-74	30	19
75+	35	17
<b>Education<sup>176</sup> (r = 0.02)</b>		
Less than High School	10	18
High School	21	19
Some College	27	25
Bachelor's or Higher	29	35
<b>Metro<sup>177</sup> (r = 0.09)</b>		
Metro	22	27
Non-Metro	28	17
<b>Region<sup>178</sup> (r = 0.02)</b>		
Northeast	23	35
Midwest	24	20
South	26	25
West	18	23

173. See id., Background Demographic Variables (2010), at 87.

174. See id. at 88.

175. See id. at 86.

176. See id. at 87.

177. See id. at 89.

178. See id. at 90.

<b>Income<sup>179</sup> (r = 0.04)</b>		
\$0–\$24,999	21	23
\$25,000–\$49,999	21	24
\$50,000–\$74,999	24	22
\$75,000–\$99,999	25	33
\$100,000–\$124,999	24	26
\$125,000–\$149,999	38	25
\$150,000–\$174,999	26	25
\$175,000+	30	29
<b>Literal Truth of the Bible<sup>180</sup> (r = 0.30)</b>		
Do Not Believe in Literal Truth	14	39
Believe in Literal Truth	30	15
<b>Religious Service Attendance<sup>181</sup> (r = -0.32)</b>		
More Than 1x/Week	46	8
1x/Week	36	17
1x–2x/Month	15	30
Few Times/Year	19	29
1x/Year or Less	19	30
Never	10	33
<b>Evangelicalism<sup>182</sup> (r = 0.31)</b>		
Not Born-Again/Evangelical Christian	16	30
Born-Again/Evangelical Christian	38	14

#### IV. ANALYSIS

We use multiple regression analysis to evaluate the extent to which our data are consistent with each of our hypotheses. We present ordinary least squares regressions with the originalism index as our dependent variable, derived from all the originalism questions in the 2009 and 2010 CAS. This analysis enables us to assess the magnitude of the effect of a change in our explanatory variables on our dependent variable, originalism, while holding other explanatory variables constant. We present the regression in Table 10.

179. See *id.*

180. See *id.*, Question 5 (2009), at 18, 49.

181. See *id.*, Question 27 (2009), at 16, 79.

182. See *id.*, Question 26a (2010), at 36, 108.

**Table 10. Predicting Originalism**<sup>183</sup>

	I	II	III	IV	V
Age	0.07*** (0.02)	0.04* (0.04)	0.07*** (0.02)	0.06*** (0.02)	0.05** (0.02)
Education	0.04* (0.02)	0.02 (0.02)	0.02 (0.01)	0.02 (0.01)	0.02 (0.01)
Literal Truth of Bible	0.41*** (0.07)	0.19* (0.08)	0.21** (0.07)	0.24*** (0.07)	0.18** (0.07)
Political Party	0.17*** (0.02)	0.06* (0.03)	0.03 (0.03)	0.00 (0.03)	0.00 (0.03)
Conservatism	0.17*** (0.03)	0.06* (0.03)	0.03 (0.03)	0.02 (0.03)	0.01 (0.03)
Tea Party Support		0.19* (0.08)	0.16* (0.07)	0.08 (0.08)	0.07 (0.08)
Moral Traditionalism		0.28*** (0.04)	0.18*** (0.04)	0.16*** (0.04)	0.13** (0.04)
Libertarianism		0.19*** (0.04)	0.16*** (0.04)	0.11** (0.04)	0.10* (0.04)
Gay Rights Index			0.09* (0.04)	0.09* (0.05)	0.08 (0.04)
Gun Rights Index			0.19*** (0.04)	0.17*** (0.04)	0.17*** (0.03)
Oppose <i>Roe v. Wade</i>			0.09* (0.04)	0.08* (0.04)	0.09** (0.04)
Allow Religious/Racially Offensive Speech			0.10** (0.03)	0.07* (0.03)	0.08* (0.03)
Obama Disapproval				0.14** (0.05)	0.13** (0.05)
Congress Disapproval				0.15*** (0.05)	0.14** (0.04)
Strictly Follow Law					0.17*** (0.05)
Respect Precedent					0.10** (0.03)
<b>Constant</b>	<b>-0.82***</b> <b>(0.21)</b>	<b>-0.58*</b> <b>(0.23)</b>	<b>-0.75***</b> <b>(0.22)</b>	<b>-1.23***</b> <b>(0.24)</b>	<b>-0.62*</b> <b>(0.28)</b>
<b>N</b>	<b>918</b>	<b>845</b>	<b>826</b>	<b>800</b>	<b>799</b>
<b>R Squared</b>	<b>0.34</b>	<b>0.44</b>	<b>0.54</b>	<b>0.54</b>	<b>0.56</b>

As Table 10 indicates, the model has a little something for each hypothesis. Belief in the rule of law, certain cultural values, and political attitudes help predict whether someone is an originalist. Once other ideological and issue-specific variables are added (that is, the types of variables that most bear on these hypotheses we are testing), the only demographic variable that remains statistically significant is age. Gender, race, frequency of church attendance, and born-again status (not depicted

183. Cell entries denote unstandardized coefficients with robust standard errors in parentheses. \* p<0.05; \*\*p<0.01, \*\*\*p<0.001.

here) are not statistically significant, but belief in the literal truth of the Bible is.

Advocates of the Legal Hypothesis can find support in the significance of two variables from the Gibson and Caldeira battery. Those who agree that good judges should “[s]trictly follow the law no matter what people in the country may want” and “[r]espect existing Supreme Court decisions by changing the law as little as possible” are likely to score high on the originalism index. None of the other judicial variables—even the question relating to empathy—are significant when included in the regression.<sup>184</sup> As discussed earlier, there is some sense in the notion that those who wish the Court to respect its existing precedent by changing the law very little would also support originalism. But the likely reason for a positive correlation between these values is that both disfavor changing the law to accommodate current political majorities.

The data provide a great deal of support for the Cultural Hypothesis. Both the moral traditionalism and libertarianism indexes represent powerful statistically significant predictors of originalism. Even if we employ individual items from these indexes instead of the indexes themselves, we achieve very similar results. The same cannot be said with respect to the egalitarianism index. Fears of big government, plus nostalgia for traditional values, go a long way toward predicting originalist sympathies. In fact, the correlation between the originalism index and the moral traditionalism and libertarianism indexes are 0.57 and 0.47 respectively. Correlation between the originalism and the egalitarianism indexes hovers around 0.30.

The Political Hypothesis accounts for the remaining variables in the regression. Republican Party identification and self-placement on a liberal to conservative scale remains statistically significant until we add in attitudes on specific issues. Tea Party support remains significant even when party, ideology and values indexes are included in the regression, but not once Obama and recent congressional disapproval is added (suggesting, perhaps, that support for the Tea Party is really about unfavorable views toward Obama). Obama disapproval is strongly correlated ( $r = 0.54$ ) and recent congressional disapproval somewhat less so ( $r = 0.37$ ) with the originalism index. Given that the addition of these variables also reduces the size of the coefficient on the libertarianism index, such measures may also account, in part, for respondents’ general fear of big government. At the same time, the significance of those disapproval variables attests to what might be the political contingency of originalism for some respondents. In other words, for some respondents, affection for originalism may grow during times when they fear a “change agenda” like the one promoted by President Obama and the Democrats in the 111th

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184. Neither of the significant variables is so highly correlated with our dependent variable so as to raise concerns, as one might reasonably suspect. Furthermore, the addition of these variables, as the stepwise regression indicates, only changes the  $r$  squared by 0.03 and all the other variables in the model remain significant.

Congress. Originalism becomes more attractive for some as they view politics as departing from some pure vision of how the Constitution should constrain government.

The issues that serve as statistically significant predictors of originalism add further support to both the Cultural and Political Hypotheses. Specific issues that prove significant include a standard menu of salient constitutional positions associated with the modern Republican Party: opposition to gay rights and to *Roe*, and support for gun rights. Those variables' simple correlations with our dependent variable are 0.49, 0.47, and 0.40, respectively. Attitudes toward gun rights appear especially significant ( $t$  value of 4.9 in the full regression: higher than any other variable). However, the gun rights index's relatively greater significance may be due in part to the fact that some of the "power" of the abortion and gay rights variables, acting alone, is accounted for by the moral traditionalism index. Still, the fact that attitudes toward gun rights remain a significant predictor of originalism, even when controlling for moral traditionalism, libertarianism, and a host of other political variables, may attest to the salience of gun rights in framing current debates over modes of constitutional interpretation. In addition, a belief that racially and religiously offensive speech should be allowed is a consistently significant variable in the regressions. This issue stands at the intersection of moral traditionalism and libertarianism, given that proponents may view such a right as especially important to counter liberal notions of political correctness. Other speech related items, such as flag burning, campaign finance, or indecent speech (not presented here), do not show up as significant. Opinion on some other issues, such as torture, detention, eminent domain, literacy tests for voting, and immigration are significant in some regressions (not presented here), but none of those variables display the consistency of abortion, gay rights, gun rights, and racially or religiously offensive speech.

#### V. IMPLICATIONS

There is a concern in a study of this sort, already discussed, that any effort to make sense of the preferences of the public about a legal method such as originalism cannot produce reliable results. There are countless reasons to expect incoherence among the public. This is true not only because one's degree of support for originalism or nonoriginalism might vary. The more significant problem is that originalism is not itself a single theory. As Mitchell Berman has ably demonstrated, there is no way to define originalism consistently across human experience or across time and place.<sup>185</sup> Unlike survey questions about, say, voting pref-

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185. See Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. Rev. 1, 8 (2009) ("Originalism comes in many flavors; varied distinct theses are fairly described as 'originalist' in tighter or looser senses."); see also Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 244 (2009) (arguing originalism is "not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct

ferences or intentions, it is not possible to pose a question about originalism that all respondents identically appreciate. And, it may indeed be the case that originalism is not a meaningful idea to the typical American. Under the circumstances, it is remarkable that we are able to account for half the variation in response to our originalism index with an identifiable set of explanatory variables.<sup>186</sup>

We do not wish to overburden our data with our own conclusions as to its potential prescriptive or normative implications. Our aim has not been to explain or to justify originalism but rather to profile and dissect it and to provide a resource for those who are interested in its salience and proliferation.<sup>187</sup> That said, a few observations about our results are in order. First, as noted above, the significant explanatory variables by and large conform to what we would expect of respondents who are engaging the questions in a serious and relatively informed manner. The data are consistent to varying but nontrivial degrees with each of the proposed hypotheses. These preferences surely reflect the promise of originalism, whether or not originalism is able to deliver. Our data suggest a rough divide between those who believe in the capacity and the desirability of a prominent interpretivist method to enforce strict adherence to law, to concretize the values of past generations, to limit the growth of government, and to avoid a decision like *Roe*. This dichotomy is not haphazard, nor is it simply a partisan divide between Democrats and Republicans. Rather, it parallels the divide within *professional* constitutional discourse among lawyers, judges, and academic commentators.<sup>188</sup>

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constitutional theories that share little in common except a misleading reliance on a single label”).

186. See *supra* Part IV (describing multivariate analysis).

187. For efforts at the former, see generally Greene, *Origins*, *supra* note 166 (arguing that originalist arguments in the United States emerge from, among other things, a particular reverence for the founding era, a backlash against the Warren Court, and a relative preference for political assimilation); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *Fordham L. Rev.* 545, 549, 569 (2006) (arguing jurisprudence of originalism is distinct from its political practice, which “seeks . . . to forge a vibrant connection between the Constitution and contemporary conservative values,” and therefore should be the focus of scholars who seek to understand how originalism has “rewrit[ten] the face of the Constitution”).

188. In regressions not presented here, we have divided up our sample between more and less knowledgeable respondents, as gauged by their correct answers to twelve questions concerning the Supreme Court and its recent decisions. Our model does a better job of explaining the variance for the more knowledgeable respondents ( $r^2 = 0.65$ ) than for less knowledgeable respondents ( $r^2 = 0.50$ ). For the more knowledgeable respondents, moral traditionalism, libertarianism, gun rights, religious/racially offensive speech, strict adherence to law, respect for precedent, and Obama approval are statistically significant variables. For less knowledgeable respondents, age, literal truth of the Bible, *Roe*, gay rights, gun rights, strict adherence to law, respect for precedent, and recent congressional approval are statistically significant variables. We might be able to spin a story from such results along the lines that culture and values are more important for the knowledgeable respondents, whereas issues are more important for the less knowledgeable respondents. Most would have expected the reverse to be true. We believe further



Second, and related, we are impressed by the strength of the Cultural Hypothesis. Our data give us substantial confidence that moral traditionalists and economic libertarians are disproportionately more likely to select originalism than others.<sup>189</sup> These groups are not obvious philosophical allies, but, as has been well documented, their courtship—or “fusion”—was pushed aggressively by conservative intellectuals like Frank Meyer and William F. Buckley in the 1950s and 1960s, and was consummated by the election of Ronald Reagan to the presidency in 1980.<sup>190</sup> The basic intellectual move is the suggestion that a liberal commitment to economic freedom must be disciplined by abiding by moral commitments.<sup>191</sup> We do not assume that this justification itself unites neoliberals and social conservatives behind originalism, but it is noteworthy that this pairing mimics not only the periodically successful Republican political coalitions of the last generation—as well as the Tea Party movement of the current age—but also plays out in professional discourse. The dual targets of the originalism movement of the last three decades have been the expanding regulatory state and the proliferation of rights grounded in sexual privacy.<sup>192</sup> Historians of the conservative legal movement who

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research is needed to better evaluate the interaction of knowledge with these variables on attitudes toward originalism.

189. See *supra* Tables 6d & 6e (profiling data on originalists with respect to moral traditionalism and libertarianism).

190. See, e.g., John Micklethwait & Adrian Wooldridge, *The Right Nation: Conservative Power in America* 51 (2004) (“Buckley tried to fashion a synthesis out of three fractious components of 1950s conservatism: traditionalism, libertarianism and anticommunism.”); Kevin J. Smant, *Principles and Heresies: Frank S. Meyer and the Shaping of the American Conservative Movement* 49–52 (2002) (describing Meyer’s efforts to “fuse” morally traditionalist and libertarian worldviews into a coherent philosophy).

191. Some of the fruits of the fusion of moral traditionalism and anti-government libertarianism are on display in the “Mount Vernon Statement” signed by many prominent conservatives in February 2010. *The Mount Vernon Statement, Constitutional Conservatism: A Statement for the 21st Century* (2010), available at <http://www.themountvernonstatement.com> (on file with the *Columbia Law Review*). The statement begins, “We recommit ourselves to the ideas of the American Founding.” *Id.* It then seeks to reconcile any apparent tension between economic libertarians, social conservatives, and national security hawks:

A Constitutional conservatism unites all conservatives through the natural fusion provided by American principles. It reminds economic conservatives that morality is essential to limited government, social conservatives that unlimited government is a threat to moral self-government, and national security conservatives that energetic but responsible government is the key to America’s safety and leadership role in the world.

*Id.*

192. Arguably the most prominent academic originalists are the libertarian Randy Barnett and the moral traditionalist Justice Scalia. They are the bookends of originalism in the legal academy and their differences were prominently on display in *Gonzales v. Raich*, in which Barnett argued for the respondent that Congress lacked the power to ban medical marijuana use by local growers whose conduct was legal under California law. 545 U.S. 1, 15 (2005) (“[R]espondents[ ] . . . argue that the [statute’s] categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’

wish to understand why originalism has been so integral to it will see value in the fact that it appeals independently to the two groups whose union has been so vital to conservative politics more generally.

Third, the relative strength of the Cultural Hypothesis might carry implications for the robust normative legal debate over originalist methods and over the “correct” originalist answer to specific legal controversies. Cultural cognition scholars such as Kahan and Braman have suggested that policy beliefs shaped by varying assessments of risk are more typically products of cultural values rather than empirical proof.<sup>193</sup> They argue that beliefs shaped by such values strongly resist, and indeed co-opt, empirically based counterarguments.<sup>194</sup> If Americans support originalism not just because it has an inherent disciplinary value for judges but also because they have a prior cultural predisposition that leads them to prefer a methodology that appeals to self-reliance and moral traditionalism, we might reasonably wonder whether originalism is capable of being proven right or wrong. Moreover, if the same cultural predisposition that predicts originalism also predicts the substantive results associated with originalism—such as opposition to *Roe*—then a kind of cognitive dissonance may hinder efforts to sever the link between methodology and result. Scholars like Jack Balkin who have tried to advance an originalist argument for abortion rights may be fruitlessly inserting a legal argument into the culture wars.<sup>195</sup>

Finally, we add a word or two about the relatively recent turn of many constitutional theorists to forms of popular constitutionalism. These scholars have sought ways to characterize constitutional evolution in terms of democratic culture rather than judicial decree. This move responds broadly to the countermajoritarian difficulty famously articulated by Alexander Bickel,<sup>196</sup> but more specifically seeks to kneecap originalist arguments that claim a democratic imprimatur.<sup>197</sup> It is not just

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authority under the Commerce Clause.”). Justice Scalia voted against Barnett’s client, effectively in favor of moral paternalism over libertarianism. See *id.* at 39 (Scalia, J., concurring) (“In the [statute], Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this.”); Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 *U. Cin. L. Rev.* 7, 14–15 (2006) (arguing Justice Scalia’s vote to uphold ban on medical marijuana based on Necessary and Proper Clause revealed his “lack of fidelity to originalism”).

193. Kahan & Braman, *supra* note 17, at 1315–18.

194. *Id.* at 1316.

195. See Balkin, *supra* note 56, at 292 (arguing originalism, properly understood, supports constitutional protection for abortion rights).

196. See generally Alexander M. Bickel, *The Least Dangerous Branch* (1986) (introducing concept of countermajoritarian difficulty created by judicial review).

197. See Nathaniel Persily, Introduction, *in* *Public Opinion and Constitutional Controversy* 3, 4 (Nathaniel Persily et al. eds., 2008) (“Under this view, what the Constitution means could change with each generation, not due to evolution in authoritative pronouncements from the Supreme Court, but from successful organization and persuasion by political leaders and the mass public.”). See generally Post & Siegel, *Roe*

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that constitutional interpretation is often democratically responsive as a descriptive matter, the claim goes, but that it is also normatively desirable and legitimacy-enhancing for judges to account for the authority of contemporary popular culture.<sup>198</sup> As one of us has written, however, if originalism is itself a product of democratic culture, it complicates the normative implications of popular constitutionalism for judicial method.<sup>199</sup> Our data are quite consistent with this possibility, and suggest the need for a well-developed account of the collapsing wall between methodological and popular discourse. For those who view judicial interpretation as appropriately in dialogue with popular interpretation, much is at stake in diagnosing stated popular preferences for particular approaches to judicial decisionmaking. Perry’s conclusion—that we are all now originalists but that none of us is now an originalist—might apply increasingly beyond the legal profession itself.

Another one of us has written of the need to ground the valuable insights of popular constitutionalism in the empirical data on which it relies for its sustenance.<sup>200</sup> Not all studies rely on quantitative data, of course,<sup>201</sup> but some of them do, and such research is rarely present in the popular constitutionalism discourse.<sup>202</sup> This study provides several data points in the ongoing effort to fill that gap. We have referred above to the longstanding criticism of public opinion data, both within law and

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Rage, *supra* note 22, at 374 (articulating theory of “democratic constitutionalism” that describes the process through which constitutional meaning emerges from interpretive contest among citizens).

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198. See Kramer, *supra* note 22, at 252–53 (“[T]he authority of judicial decisions [should] formally and explicitly depend[ ] on reactions from the other branches and, through them, from the public.”); Robert C. Post, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 *Harv. L. Rev.* 4, 8 (2003) (“[T]he Court in fact commonly constructs constitutional law in the context of an ongoing dialogue with culture, so that culture is inevitably (and properly) incorporated into the warp and woof of constitutional law.”).

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199. See Greene, *Selling Originalism*, *supra* note 12, at 701 (“[M]any non-originalist theoretical models need not only to acknowledge but also to accommodate the success of originalism as a political practice.”).

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200. See Persily, *supra* note 197, at 5 (“Curiously absent from the literature on popular constitutionalism or the counter-majoritarian difficulty is any evaluation of what ‘the people themselves’ actually think about the issues the Supreme Court has considered.”).

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201. Recent books by Barry Friedman and Larry Kramer in the popular constitutionalist tradition, for example, have used historical “data” to valuable effect. See generally Friedman, *Will of the People*, *supra* note 22 (chronicling history of Supreme Court’s apparent responsiveness to popular opinion); Kramer, *supra* note 22 (describing eighteenth- and nineteenth-century history of influence of citizen opinion on constitutional interpretation).

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202. See Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 *U. Cin. L. Rev.* 1257, 1272–73 (2004) (explaining that empirically studying judicial behavior has limitations and difficulties because it “requires data that one can code and count” and therefore “tend[s] to focus on judicial votes rather than the language of the opinions themselves, a shortcoming whose seriousness is obvious”).

political science, that Americans do not have sophisticated views on constitutional issues. Our data do not prove otherwise, but they do gesture in a different direction. Along with Gibson and Caldeira, we worry that assessments of political knowledge too readily mistake jargon and policy detail for substantive position-taking.<sup>203</sup> The degree of political and legal knowledge necessary to answer a survey question competently depends on the uses to which the questioner intends to put the data.<sup>204</sup> Public views on originalism might not be especially relevant to determining how the Supreme Court should answer a particular constitutional question, but might be highly relevant to assessing the value of originalism as a “brand” within, for example, the politics of judicial confirmation fights. We might ask similar questions about the value of, say, minimalism or adherence to *stare decisis*. Inquiring senators want to know.

Political science has an older analog to the popular constitutionalism turn within law. Much of the American political development literature has long rejected the countermajoritarian difficulty, and many political scientists remain mystified at the legal academic obsession with the putative tension between majoritarian democracy and judicial review. Judicial decisionmaking, these scholars have argued, is rarely far out of line from the policy preferences of the dominant political regime; the interesting questions within this literature are not whether judges roll with political tides, but through what sorts of mechanisms—institutional or ideational—and how.<sup>205</sup> Legal scholars have long underused political science

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203. Gibson and Caldeira note that:

When we allow the respondents to tell us which issues are important to them, we touch on highly salient concerns and consequently find remarkably high levels of information about the perceived policy location of the nominee. Moreover, a new revisionist literature is developing that shows that the American people are vastly more knowledgeable about courts than heretofore thought . . . .

Gibson & Caldeira, *Confirmation Politics*, *supra* note 40, at 147 n.17.

204. See Arthur Lupia, *How Elitism Undermines the Study of Voter Competence*, 18 *Critical Rev.* 217, 219 (2006) (“Political-knowledge questions test information that academics, journalists, and politicians value. The answers to these questions help such people accomplish important tasks. The elitist move is when such people assume that these questions have a similar value to citizens whose societal responsibilities can be very different from their own.”).

205. See generally Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (1997) (identifying four phases in presidential politics over time, from leadership strategies based on relationships among elites, to more populist political approach based on public support); Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (2007) (arguing presidents and political leaders have found it in their best interest to insulate Supreme Court and encourage justices to be ultimate interpreters of Constitution); see also Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. Pub. L.* 279, 294 (1957) (arguing Court is least effective in making policy “against a current lawmaking majority—and evidently least inclined to act,” while Court is most effective when setting “the bounds of policy for officials, agencies, state governments or even regions, a task that has come to occupy a very large part of the Court’s business”); Brian J. Glenn, *The Two Schools of American Political Development*, 2 *Pol. Stud. Rev.* 153, 159–61 (2004) (analyzing distinction between two

literature, but the reasons for that are also both institutional and ideational. There are insufficient efforts at and opportunities for cross-pollination of legal and political science scholarship, but there is also a frustration among many legal academics at the ready dismissal by many political scientists of the possibility of judicial independence. Many academic lawyers have worked intimately with judges, on both sides of the bench, and accordingly doubt that judges feel as unconstrained as much of the political science literature seems both to presuppose and ultimately to conclude.<sup>206</sup>

We would not be so immodest as to suggest that the data examined here offer a way out of the impasse, such as it exists. But we do believe it important to take note of the emphasis so many Americans seem to place on rule of law values, and the preference many rule of law Americans have for originalism. Forty percent of those who believe it is “very important” to strictly follow the law no matter what people in the country may want are originalists.<sup>207</sup> Even if we all agree that judicial decisionmaking is responsive to the policy views of the public, perhaps channeled imperfectly through political actors, we might also agree that interpretivism is part of the bundle of preferences that gets communicated to judges. Just as Keith Whittington has persuasively argued that there is a political market for judicial supremacy,<sup>208</sup> our results gesture at a political market for judicial constraint, or at least the appearance of it.<sup>209</sup>

#### CONCLUSION

Had we put our survey to 1,677 lawyers, judges, and legal academics rather than 1,677 lay Americans, we would expect originalists to comprise, in large measure, formalists who believe that judges must strictly follow the law, social conservatives, libertarians, and people opposed to *Roe* and gay rights and supportive of gun rights. Divisions among the public over the constitutional authority of “original intentions” appear to reflect many of the same divisions that arise among legal sophisticates.

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main schools of American political development scholarship); Mark A. Graber, *From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 *Md. L. Rev.* 1, 6–14 (2006) (examining causes and consequences of judiciary’s recent expansion in power).

206. See Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 *Cornell L. Rev.* 61, 104 (2009) (“[F]or attitudinalists, judging is explained primarily (or, depending on the scholar, at least in significant part) by political inclination.”).

207. See *Constitutional Attitudes Survey*, supra note 20, Question 102a (2009), at 20, 51–54; see also supra Table 8a. R

208. See generally Whittington, supra note 205, at 4–5 (describing development of judicial supremacy and how it responds to interests of political branches and government actors). R

209. See Greene, *Selling Originalism*, supra note 12, at 708–13 (arguing originalism responds to popular demand for simplicity, populism, and nativism in constitutional method). R

The fact that our assumptions about legally knowledgeable respondents have some overlap with the actual survey responses of the general public suggests that originalism has been translated into common parlance with some success. If originalism has indeed been translated from a complex tool of professional interpretation into a topic of popular discourse, then the interesting questions become when, by whom, and through what mechanisms. These questions exceed the scope of our study, which has focused on gathering relevant data and suggesting why it is useful to gather more of it. Those data are consistent with the notion that a preference for originalism in a survey does not just reflect an incoherent reflex, but expresses a substantive legal, political, and cultural preference. The interesting part of Perry's question of whether we are all originalists might not be who are the "originalists," but rather who are the "we."<sup>210</sup>

At the same time, popular attitudes toward originalism show a certain incommensurability with other attitudes people hold. They coexist with support for adherence to precedent, for respect for majority will, and for constitutional rights—the right to privacy, for example—with a strained connection to the Constitution's original meaning. These results may well reflect that people simply do not understand questions about constitutional interpretation, or at least that they do not understand what follows from their answers. Alternatively, it may reflect that constitutional interpretation is not solely the province of elite professional opinion. Ordinary citizens have views on constitutional argument, and those views may not be severable from political or cultural views. The challenge to legal professionals, particularly academics, is to map these relationships, and to develop a fuller understanding of both the limits and the possibilities of constitutional interpretation "out of doors."<sup>211</sup>

Future research should aim both to better understand preferences for originalism and to understand its rather inchoate alternative. Is the relative religious fundamentalism of originalists bound up with a particular cultural worldview,<sup>212</sup> or might it also be grounded in views about the interpretation of sacred texts?<sup>213</sup> Can we slice the Cultural Hypothesis

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210. See *supra* note 7 (noting Perry's belief that "[t]here is a sense in which we are all originalists").

211. See Kramer, *supra* note 22, at 46–47 (using phrase "people out-of-doors" to describe force of popular politics as interpretive impetus); cf. Siegel, *supra* note 16, at 192 ("Heller's originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.").

212. See Jill Lepore, *The Whites of Their Eyes: The Tea Party's Revolution and the Battle over American History* 15–16 (2010) (noting that having a worldview that says "that we are there, or the Founding Fathers are here, or that we have forsaken them and they're rolling over in their graves because of the latest, breaking political development" is to believe in "a set of assumptions about the relationship between the past and the present stricter, even, than the strictest form of constitutional originalism, a set of assumptions that, conflating originalism, evangelicalism, and heritage tourism, amounts to a variety of fundamentalism").

213. See Jaroslav Pelikan, *Interpreting the Bible and the Constitution* 38–39 (2004) (comparing Biblical and constitutional interpretation); Greene, *Origins*, *supra* note 166, at

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more finely and generate other independent variables of significance in predicting originalist attitudes? Is “changing times” a coherent view, or just an incoherent default? At the same time that most Americans choose “changing times,” they also believe it is important for judges to strictly follow the law no matter what people in the country may want, and to uphold the values of the Constitution’s authors. Are nonoriginalists, then, even more or equally susceptible to the charge of incoherence we hear lodged against originalists?

Our analysis is a start, and we invite both imitation and criticism. Above all, we hope to have provided a resource for a wide range of interested parties, tea or otherwise.

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78–81 (noting parallels between attitudes toward constitutional interpretation and attitudes toward Biblical interpretation).