The Word that Cannot be Spoken: Notes from the Jurisprudential Underground

STEPHEN FELDMAN[†]

I. INTRODUCTION

American law journals have banished a word. This word is neither offensive nor profane. Depending on context, the word previously signified an era, a cultural concept, or a philosophical theory. Regardless, it can no longer be spoken—or, more precisely, written. This word, this era, this concept, this theory, has become taboo.

Its banishment presents a problem for me as the author of this essay. I wish to explain this thing, its importance and its fate, but I cannot say it. To write this essay, then, I need a placeholder. A number of options are possible. My first thought was to use *Voldemort*, the name of the archvillain in the Harry Potter fantasy series. Characters in these novels constantly refer to Voldemort as "You-Know-Who" or "He-Who-Must-Not-Be-Named."[1] Only the most powerful, like Professor Dumbledore, or the most courageous, like Harry, use Voldemort's proper name. If I had opted for Voldemort, I would need to refer to Voldemortism, Voldemortity, and the like. These are mouthfuls, but the major drawback of Voldemort is that he is an evil antagonist. While many might disagree with me, I believe it would be misleading to suggest that my subject matter is evil or antagonistic.

Eventually, I decided to use the term *Taboo* as my placeholder.[2] *Taboo* spotlights the widespread current attitude toward this subject matter. The academic legal community largely forbids discussions and invocations of Tabooism. It has been driven underground or, perhaps, more precisely, below the line. If you are still uncertain about what Taboo stands for, then look below the footnote line. The notes to this essay openly use the forbidden word because, after all, who cares what scurries around below the line (well, maybe some law journal editors care).[3] A simple Westlaw

---

[†] Visiting Scholar, Harvard Law School. Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming.

[1] J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE 141–42, 593, 595 (2000); J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 11 (1997).

[2] *See* MARY DOUGLAS, PURITY AND DANGER 1966 (2003) (ebook) (studying taboo rituals).

[3] The banished word is 'postmodern' (and its derivatives, such as postmodernism and postmodernity). For characterizations of postmodernism, see STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 37–45,

search through the 'Law Reviews & Journals' database revealed that flagship journals now rarely publish articles with Taboo or its derivatives in the title. As a comparison, flagship journals published seventy-four such articles from 1992 to 2001, the heyday for open discussions of Tabooism. But from 2007 to 2016, the number dropped dramatically to only thirteen articles. In fact, from 2012 forward, only two such articles have been published.[4] As an empirical matter, the prohibition on Tabooism has been extremely effective.

When a writer today mentions Taboo or its derivatives (for example, Tabooism), the word typically connotes opprobrium. Taboo is anathema. We see this denunciatory labeling of Taboo in a variety of sources, not only in legal scholarship but also in popular media and Supreme Court opinions. In law journals, Douglas Laycock dismissed a Taboo "world in which no text or symbol has any core meaning and any text can mean anything."[5] Robert F. Cochran condemned Tabooism for slouching "toward nihilism."[6] Legal historian James Hackney referenced "some fanciful [Taboo] notion [in which] there are no scientific truths."[7] In a book review, James Q. Whitman criticized the author merely for relying too heavily on a Tabooist, Michel Foucault.[8] In other media, conservative columnist Jonah Goldberg condemned President Obama as a Tabooist.[9] Goldberg explained: "[Tabooism] was and is an enormous intellectual

---

137–87 (2000) [hereinafter AMERICAN LEGAL THOUGHT]; FREDRIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM (1991); NANCEY MURPHY, ANGLO-AMERICAN POSTMODERNITY: PHILOSOPHICAL PERSPECTIVES ON SCIENCE, RELIGION, AND ETHICS (1997).

[4] The numbers change, of course, if one accounts for secondary journals and for articles that discuss postmodernism without using it in the title. Also, the numbers change if one includes articles published with the word, deconstruction, and its derivatives in the title. Nevertheless, the point is the same: As an empirical matter, law reviews now rarely publish articles that focus on and overtly discuss postmodernism.

[5] Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211, 1248 (2011).

[6] Michael Martinez & William Richardson, *The Federalist Papers and Legal Interpretation*, 45 S.D. L. REV. 307, 333 (2000).

[7] James Hackney, *The "End" Of: Science, Philosophy, and Legal Theory*, 57 U. MIAMI L. REV. 629, 636 (2003); *see* Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 310 (2000) (denouncing postmodernism as being nihilistic).

[8] James Q. Whitman, *The Free Market and the Prison*, 125 HARV. L. REV. 1212, 1219–21, 1224–25, 1229–30 (2012) (reviewing BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2011)); *see* Brian Leiter, *Books in Review*, *in* ABA Divsion for Public Education Focus on Law Studies 14, 14 (Fall 1998) (condemning postmodernists for their "sophomoric jargon"). For a list of additional articles labeling postmodernism in denunciatory terms, see Reza Dibadj, *Postmodernism, Representation, Law*, 29 U. HAW. L. REV. 377, 377, 408 (2007).

[9] Jonah Goldberg, *Obama, the postmodernist*, USA TODAY 11A (Mar. 23, 2011), *available at* http://usatoday30.usatoday.com/printedition/news/20080805/opledetuesdayx.art.htm.

hustle in which left-wing intellectuals take crowbars and pick axes to anything having to do with the civilizational Mount Rushmore of Dead White European Males."[10] According to Goldberg, "the deep dishonesty" of Tabooism threatens truth, rightness, and the American way of life.[11] And it is not only conservatives who issue such denunciations. In the liberal magazine, *American Prospect*, Chris Mooney equated Tabooism with "fact-free discourse."[12] Meanwhile, in a dissent to the Supreme Court's same-sex marriage decision, *Obergefell v. Hodges*, Justice Alito denigrated the majority's interpretation of Due-Process liberty as having "a distinctively [Taboo] meaning."[13]

Of course, the widespread denunciation and dismissal of Tabooism raises a crucial question: Why do so many writers condemn Tabooism? This essay answers this question. Part I explains how Tabooism is occasionally manifested in legal scholarship despite its banishment. Part II explores the reasons for the banishment. Part III, the conclusion, discusses why legal scholars should again openly discuss Tabooism.

II. THE CLANDESTINE MANIFESTATION OF TABOOISM

Most critics equate Tabooism to no more than a "four-letter word."[14] When explicitly mentioned, it is immediately denounced as nonsense, unconstrained relativism, nihilism, and the like. Even so, many current scholars rely on Taboo insights and themes, often apparently without realizing they are doing so. To be fair, one reason for that lack of awareness arises from the nature of Tabooism itself: many of its primary themes are drawn from earlier intellectual movements. For instance, Tabooists break down disciplinary boundaries and emphasize interdisciplinary work.[15] To be sure, academic disciplines can provide useful methods of research, but from the Taboo standpoint, that reason alone is insufficient to limit one's scholarship to only one such method. Tabooism, though, is neither the first nor the only form of legal scholarship to emphasize interdisciplinary methods. The Legal Realists of the 1920s

---

[10] *Id.*

[11] *Id.*

[12] Chris Mooney, *Reality Bites*, AMERICAN PROSPECT 2 (June 6, 2011); *see* Kevin Mattson, *The Book of Liberal Virtues*, AMERICAN PROSPECT (Jan. 16, 2006) (condemning conservatives as postmodern).

[13] Obergefell v. Hodges, 135 S. Ct. 2584, 2640 (2015).

[14] Dibadj, *supra* note 8, at 389.

[15] *See* Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. LEGAL EDUC. 471, 491 (2004) (discussing the development of law as an academic discipline).

and 1930s were renowned for their reliance on social-science methods.[16] Regardless, nowadays, interdisciplinary scholarship is standard fare in law journals. The use of history, for instance, has exploded across legal scholarship.[17] But history is not the only non-law discipline to grace pages of recent law journals. One can find articles relying on anything from Sartrean philosophy to the qualitative and quantitative methods of the social sciences, including economics, of course.[18] On the one hand, this abundance of interdisciplinary scholarship cannot be attributed solely to Tabooism. On the other hand, the proliferation of such scholarship is commensurate with the Taboo paradigm.[19] From a Taboo stance, disciplinary boundaries are contingent fences that constrain creative thinking and should be disregarded whenever fruitful.[20]

Interdisciplinarity is not the only Taboo insight or theme to appear in recent law journals.[21] One can find discussions of the social construction of

---

[16] AMERICAN LEGAL THOUGHT, *supra* note 3, at 108–15; *see, e.g.*, William O. Douglas, *Wage Earner Bankruptcies—State v. Federal Control*, 42 YALE L.J. 591, 593 (1933) (explaining how to improve bankruptcy system).

[17] Christopher Tomlins, *Review Essay—The Consumption of History in the Legal Academy: Science and Synthesis, Perils and Prospects*, 61 J. LEGAL EDUC. 139, 139—46 (2011); *see* Robert W. Gordon, *The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023 (1997) (discussing the use of history for critical purposes); Paul Horwitz, *The Religious Geography of* Town of Greece v. Galloway, 2014 SUP. CT. REV. 243, 243 (2014) (arguing that constitutional lawyers "are obsessed with history"). *See generally*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 419 (2012) (using history to illuminate constitutional jurisprudence); Michele Goodwin & Erwin Chemerinsky, *No Immunity: Race, Class, and Civil Liberties in Times of Health Crisis*, 129 HARV. L. REV. 956, 965 (2016) (using history to show how health policies can be used to discriminate against racial minorities and the poor); Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 400 (2015) (using history to explain federalism and spending power); Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel*, 67 STAN. L. REV. 479 (2015) (reexamining Supreme Court decisions from 1962).

[18] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (Penguin Books 2009) (2008) (drawing on behavioral science and economics); Craig Green, *What Does Richard Posner Know About How Judges Think*, 98 CAL. L. REV. 625 (2010) (using history); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1321–22 (2002) (discussing economic theory); David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 895–896 (2016) (drawing on Sartrean philosophy); Kathryne M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318, 1359 (2016) (emphasizing the use of both qualitative and quantitative research).

[19] AMERICAN LEGAL THOUGHT, *supra* note 3, at 166–68 (explaining interdisciplinarity as aspect of postmodern themes); Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 442–48 (2005) (tying current interdisciplinary scholarship to postmodernism); *see* FRANÇOIS CUSSET, FRENCH THEORY 162–65 (Jeff Fort trans., 2008) (emphasizing the use of history to unmask illegitimate assumptions).

[20] *See* STEVE FULLER, PHILOSOPHY, RHETORIC, AND THE END OF KNOWLEDGE: THE COMING OF SCIENCE AND TECHNOLOGY 33–37 (1993) (arguing against disciplinary boundaries).

[21] Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151 (1999) (discussing absorption of postmodern themes into legal scholarship); Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673

the self and identity.[22] Likewise, one can find self-reflexive ruminations on the state of legal scholarship.[23] Given that legal scholars so frequently rely on such themes and insights without acknowledging possible ties to Tabooism, one might wonder whether these scholars are truly unaware of the resonance with Tabooism. After all, the constant denigration of Tabooism spotlights a risk for any scholar who explicitly invokes Taboo themes or insights. Why risk being labeled a nihilist or condemned as babbling on about nonsense?[24]

Indeed, a scholar will sometimes go to great lengths to avoid using the word Taboo. In an article on constitutional interpretation, André LeDuc articulated a Wittgensteinian approach to interpretation and cited prominent Tabooists, such as Richard Rorty and Dennis Patterson.[25] LeDuc avoided mentioning Tabooism in the text but dropped a footnote on the subject. He admitted that Tabooism is a label to be shunned for "presentational reasons" because it is, "in certain circles, fighting words."[26] Sometimes, authors' efforts to avoid mentioning Tabooism border on the comical. Louis Michael Seidman's book, *Our Unsettled Constitution*, is a stunning example.[27] Seidman presented a "new theory of Constitutional Law,"[28] though in truth, he provided a persuasive Taboo description of constitutional jurisprudence and adjudication.[29] Seidman intriguingly

---

(2000) (discussing absorption of postmodern themes into Supreme Court opinions).

[22] Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261 (2006) (emphasizing identity); Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747 (2015) (discussing identity); Laura E. Gomez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9 (2005) (emphasizing the social construction of race); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (emphasizing that perceptions are socially and culturally constructed); *see* AMERICAN LEGAL THOUGHT, *supra* note 3, at 174–78 (discussing social construction of self or subject).

[23] Lynn M. LoPucki, *Disciplining Legal Scholarship*, 90 TUL. L. REV. 1 (2015); Steven Keslowitz, *The Transformative Nature of Blogs and Their Effects on Legal Scholarship*, 2009 CARDOZO L. REV. de novo 252 (2009); *Symposium: Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1278 (2001–2002) (a symposium of scholarship about legal scholarship); *see* AMERICAN LEGAL THOUGHT, *supra* note 3, at 176–81 (discussing self-reflexivity in legal scholarship).

[24] *E.g.*, Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997); *see* Stephen M. Feldman, *An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship*, 54 VAND. L. REV. 2351 (2001) (responding to Arrow).

[25] André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN ST. L. REV. 131 (2014).

[26] *Id.* at 152 n.91. In an article published in 2002, well-before postmodernism had de facto disappeared from the law reviews, the author discussed the state of legal scholarship yet mysteriously failed to even mention postmodern scholarship. Todd D. Rakoff, *Introduction: Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1278 (2002).

[27] LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION (2001).

[28] *Id.* at 1.

[29] If a theory is supposed to provide some guidance toward constitutional interpretation or

called his approach an "unsettlement theory."[30] The crux of his argument was that constitutional adjudication never settles disputes. The losers can always reassure themselves that their preferred constitutional interpretation is reasonable and that the current judicial conclusion is unjust.[31] The constitutional argument, in other words, is never closed. Seidman argued that this continuing openness to constitutional argument is crucial to maintenance of the political community: "In short, an unsettled constitution helps build a community founded on consent by enticing losers into a continuing conversation."[32]

Seidman built his unsettlement theory on numerous interrelated Tabooist insights and themes. For example, Tabooists are antifoundational.[33] At least some Tabooists believe in truth and knowledge but not in objective foundations.[34] Seidman described his theory as "antifoundational," emphasizing disagreement over "foundational claims."[35]

Antifoundationalism leads deconstructive Tabooists to accentuate the indeterminacy of textual meaning. It should be stressed that these deconstructionists do not deny that texts have meaning; they argue that texts have many meanings.[36] A text (any text) is indeterminate because it cannot be reduced to one objective truth. Seidman claimed that "constitutional rhetoric provides powerful support for virtually any outcome to any argument."[37] This indeterminacy of the Constitution is central to his theory: "A preordained outcome entails a settlement; it is the very indeterminacy of the outcome that makes the constitution unsettled."[38] In underscoring indeterminacy, Seidman even referred explicitly to

---

adjudication, Seidman was not writing traditional theory. Of course, the meaning of theory can be contested. Stephen M. Feldman, *How to Be Critical*, 76 CHI.-KENT L. REV. 893, 893–97 (2000) (contrasting traditional and critical theory); *see* Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987) (rejecting theory); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980) (arguing that traditional legal process constitutional theory is impossible).

[30] SEIDMAN, *supra* note 27, at 8.

[31] *Id.* at 8.

[32] *Id.* at 8–9.

[33] *See* AMERICAN LEGAL THOUGHT, *supra* note 3, at 163–66.

[34] *See* HANS-GEORG GADAMER, TRUTH AND METHOD 295, 309 (Garrett Barden and John Cumming eds., Sheed and Ward Ltd. trans., 1989) (arguing for truth without method).

[35] SEIDMAN, *supra* note 27, at 211.

[36] JACQUES DERRIDA, DECONSTRUCTION IN A NUTSHELL 27–28 (John D. Caputo ed., 1997) (discussing the iterability of a text); *see* Stephen M. Feldman, *Made For Each Other: The Interdependence of Deconstruction and Philosophical Hermeneutics*, 26 PHIL. & SOC. CRITICISM 51, 57–59 (2000) (discussing the overlap between Gadamerian hermeneutics and Derridean deconstruction and the deconstructive emphasis on multiple meanings).

[37] SEIDMAN, *supra* note 27, at 10–11.

[38] *Id.* at 9.

deconstruction, a concept sometimes associated with Tabooism.[39] "[T]he core distinctions around which constitutional law is organized—the difference between freedom and coercion, public and private, feasance and nonfeasance—are easily deconstructed."[40] An important concept in Tabooist deconstruction is the Other.[41] The Other refers not only to suppressed textual meanings but also to marginalized and oppressed individuals and groups. Because any text has multiple meanings, when one particular meaning is stressed—for instance, identified as the correct meaning—then other meanings are suppressed. Those suppressed meanings often represent the voices or perspectives of marginalized individuals and groups. The dominant viewpoints of the mainstream thereby overcome the views of peripheral societal groups.[42] Seidman, thus, emphasized "otherness."[43] "[N]o political community will ever be universally inclusive," Seidman explained.[44] "[T]here will always be some people on the outside . . . ."[45]

Seidman's implicit reliance on Taboo insights and themes went on and on. Like a good Tabooist, Seidman emphasized paradoxes,[46] irony,[47] community,[48] and reflexivity.[49] Given all this, the most amazing aspect of *Our Unsettled Constitution* was that Seidman never used the word Taboo

---

[39] AMERICAN LEGAL THOUGHT, *supra* note 3, at 33–40, 165–66.

[40] SEIDMAN, *supra* note 27, at 10; *see id.* at 76 (arguing that any "distinction . . . can be deconstructed"). Related to deconstruction, Seidman wrote approvingly of "flipping" categories. *Id.* at 73–76.

[41] AMERICAN LEGAL THOUGHT, *supra* note 3, at 38–39, 165–66.

[42] *See id.*

[43] SEIDMAN, *supra* note 27, at 81 ("Paradoxically, the fact that the boundaries of community are unsettled helps to build community. Community must always be defined against the backdrop of otherness").

[44] *Id.* at 107.

[45] *Id.* at 107–08.

[46] Tabooists often identify and even revel in paradoxes. AMERICAN LEGAL THOUGHT, *supra* note 3, at 40, 169. For instance, if a text has multiple meanings, then some of those meanings will inevitably be in tension with others. *See* STEVEN CONNOR, POSTMODERNIST CULTURE 9–10, 18–19, 194 (2d ed. 1997) (1989) (discussing postmodern paradoxes). Seidman, too, emphasized paradox. "Unsettlement theory differs from its rivals by making the paradoxical claim that constitutional law can help build such a community by creating, rather than settling, political conflict." SEIDMAN, *supra* note 27, at 8; *see id.* at 107 ("the legitimacy paradox means that we can never achieve a completely unsettled constitution").

[47] *See* AMERICAN LEGAL THOUGHT, *supra* note 3, at 43, 180–81 (discussing irony); SEIDMAN, *supra* note 27, at 216 (discussing the irony of his unsettlement theory).

[48] *See* AMERICAN LEGAL THOUGHT, *supra* note 3, at 151–55 (discussing scientific communities, interpretive communities, and the Gadamerian notion of communal traditions); SEIDMAN, *supra* note 27, at 8–11 (emphasizing community).

[49] AMERICAN LEGAL THOUGHT, *supra* note 3, at 42–43, 176–80 (discussing how postmodern practices are self-reflexive); SEIDMAN, *supra* note 27, at 211–16 (discussing how unsettlement theory is reflexive).

to explain or identify his approach.[50] For Seidman, Tabooism was, quite simply, taboo. He never mentioned Taboo in the text. He did not discuss any of the leading Tabooists, either those from outside the law, such as Foucault and Jacques Derrida, or those from inside the law, such as Stanley Fish and Pierre Schlag.[51] Seidman mentioned Jack Balkin and even cited his early article on deconstruction,[52] but Balkin is not a thoroughgoing Tabooist.[53] He is currently more renowned as a constitutional scholar.[54]

To be sure, Seidman might have been strategically clever. Seidman did everything that an avowed Tabooist might do, but he avoided the controversial label. Why risk condemnation as a Tabooist?[55] Yet, to use an apt cliche, if it quacks like a duck, then . . . .

Some observers were not fooled. In an article surveying theories of constitutional authority and interpretation, Adam M. Samaha expressly categorized Seidman's approach as Tabooist.[56]

III. WHY THE TABOO?

The widespread, albeit clandestine, reliance on Taboo themes and insights suggests that Tabooism does not deserve its banishment. It is not nihilistic, nonsensical, or downright evil (like Voldemort). This realization brings us to a crucial question: Why do so many writers condemn Tabooism?

Traditional legal scholars critical of Tabooism rarely engage with it on the merits. Nevertheless, some critics in other disciplines have argued that

---

[50] The word 'postmodern' is not in the index. SEIDMAN, *supra* note 27, at 253–60.

[51] JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., John Hopkins University Press 3d ed. 1997) (1967); MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); STANLEY FISH, THE TROUBLE WITH PRINCIPLE (1999); PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998).

[52] SEIDMAN, *supra* note 27, at 22, 252 n.5; *see* Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987) (explaining deconstruction).

[53] *See* Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 193–201 (1996) (criticizing Balkin's conception of deconstruction in relation to justice).

[54] JACK M. BALKIN, LIVING ORIGINALISM (2011); JACK M. BALKIN, CONSTITUTIONAL REDEMPTION (2011).

[55] In recent years, a handful of scholars have expressly discussed postmodernism or invoked postmodern theorists. *E.g.*, JULIE E. COHEN, CONFIGURING THE NETWORKED SELF 29–30, 70–73, 119–20 (2012) (invoking postmodernism); Laura A. Cisneros, *Paging Dr. Derrida: A Deconstructionist Approach to Understanding the Affordable Care Act Litigation*, 54 SANTA CLARA L. REV. 19 (2014) (relying on Derridean deconstruction); B. Jesse Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the "Pragmatic Moment*," 91 TEX. L. REV. 1815 (2013) (relying on postmodern literary theory); Justin Woolhandler, *Toward A Foucauldian Legal Method*, 76 U. PITT. L. REV. 131 (2014) (relying on a Foucauldian approach).

[56] Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 668–69 (2008).

Tabooism is legitimately dismissed because it is analytically indefensible.[57] For example, the legal philosopher Ronald Dworkin argued that a proposition is true if and only if it is *objectively* true.[58] The proposition must correspond with "some external, objective, timeless, mind-independent world."[59] Thus, according to Dworkin, when Tabooists assert that objective truth does not exist, then Tabooism is caught in a logical conundrum. Tabooists must tacitly assume the objective truth of their own assertions, or "they could only present their views as subjective displays in which we need take nothing but a biographical interest."[60] From Dworkin's standpoint, no coherent thinker could possibly claim that his or her philosophical or jurisprudential position is a mere subjective declaration relevant only to the author.

Modernist critics, such as Dworkin, often present conclusions as either-or binary oppositions: Either we have objective knowledge, or we have free-floating subjectivity and unconstrained relativism. No other possibility exists. Tabooists reject precisely this type of binary reasoning.[61] Yet, modernist critics repeatedly cast Tabooism itself into such an either-or opposition. Consequently, when Dworkin points out that Tabooists reject objectivity, then he sees only one other possibility, free-floating subjectivity. Dworkin's argument, in other words, reduces to a mere reaffirmation of his own modernist viewpoint—a position that Tabooists would never accept.[62]

To clarify, most Tabooists repudiate the concept of objective truth, but many do not reject the concept of truth. Consider Thomas Kuhn and his groundbreaking book, *The Structure of Scientific Revolutions*.[63] Many critics mistakenly read Kuhn and his Tabooist argument as concluding that scientific truth does not exist and that science is therefore impossible,[64] but Kuhn himself did not intend such a conclusion.[65] To the contrary, as a "devoted celebrant of the scientific venture," he intended to explain how

---

[57] *See, e.g.*, JOHN M. ELLIS, AGAINST DECONSTRUCTION (1989) (literary theorist arguing that Derrida is logically imprecise).

[58] Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996).

[59] *Id.* at 87.

[60] *Id*. at 88.

[61] Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 262–79 (1992).

[62] "Each group uses its own paradigm to argue in that paradigm's defense." THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 94 (2d ed. 1970).

[63] *Id*.

[64] *E.g.*, ISRAEL SCHEFFLER, SCIENCE AND SUBJECTIVITY (1967).

[65] RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 52–54 (1983); PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 532–35 (1988).

science was possible even though the traditional conception of objectivity was unacceptable.[66]

Dworkin's criticism of Tabooism is representative of those who have engaged it on the merits.[67] The critics shoehorn Taboo themes into modernist boxes, and naturally, Tabooism ends up looking like a misshapen monstrosity. Of course, most legal scholars do not directly confront Tabooism on the merits. Instead, they flippantly denounce it as irrational , nihilistic, or the like. Consequently, we return to the question: Why do so many writers summarily condemn Tabooism?

The primary answer is power, which is precisely what the powerful do not want to discuss.[68] Power, specifically how it operates in and through society and culture, is one of the most important Taboo themes;[69] Shoving Tabooism underground is itself an act of power. Tabooism threatens central mainstream concepts many people cherish: the independent and self-reliant subject who is a sovereign center of control; the grounding of truth and knowledge on objective foundations; the fairness of our society in allocating rewards based on merit.[70] By banishing Tabooism, its opponents protect and bolster these concepts. Ironically, then, Tabooism, which studies power, is itself the victim of power.. Its opponents have successfully cast Tabooism into the role of the Other, to be marginalized and ignored. When its opponents denounce Tabooism as dishonest,

---

[66] NOVICK, *supra* note 65, at 532. Elsewhere, I have referred to those postmodernists who totally reject truth as antimodernists, while those who accept truth (but not objectivity) as metamodernists. Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 CONTEMP. POL. THEORY 296, 299–304 (2005); *see* STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY 256–57 (1991) (distinguishing extreme from reconstructive postmodernism).

[67] John Searle made a similar type of either-or argument against postmodernism by opposing metaphysical realism against antirealism. He depicted postmodernism as antirealism, which he found unacceptable. JOHN R. SEARLE, MIND, LANGUAGE AND SOCIETY: PHILOSOPHY IN THE REAL WORLD 1–38 (1998).

[68] To be sure, some postmodernists can be difficult to read because of poor jargon-filled writing. *E.g.*, JUDITH BUTLER, GENDER TROUBLE (1990); JACQUES DERRIDA, THE DOUBLE SESSION (1972), *reprinted in* A DERRIDA READER 171 (Peggy Kamuf ed., 1991). Sometimes the difficulty arises, however, because the postmodernist is attempting to disrupt readers' modernist expectations and prejudices. The postmodernist, in other words, is trying to break the modernist mold and therefore tries to avoid becoming entangled in modernist terminology.

[69] BUTLER, *supra* note 68, at vii–ix, 1–2; MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 81–102 (Robert Hurley trans., 1978); FOUCAULT *supra* note 51, at 26–31; Michel Foucault, WHY STUDY POWER: THE QUESTION OF THE SUBJECT, *Afterword* to HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 212 (2d ed. 1983); *see* AMERICAN LEGAL THOUGHT, *supra* note 3, at 40–41, 169–74 (discussing power as postmodern theme).

[70] In attacking postmodernism, Thomas L. Pangle wrote: "I mean to sound an alarm at what I see to be the civic irresponsibility, the spiritual deadliness, and the philosophic dogmatism of this increasingly dominant trend of thinking." THOMAS L. PANGLE, THE ENNOBLING OF DEMOCRACY: THE CHALLENGE OF THE POSTMODERN AGE 5 (1992).

nihilistic, and so forth, then the opponents reinforce their own position. They are righteous champions for principles, objectivity, and goodness.

Consider originalism as a mode of constitutional interpretation. Originalists claim that if judges (and other interpreters) follow the proper (originalist) method, then the judges will discern the single objective meaning of the constitutional text.[71] Followers of so-called old originalism maintain that constitutional interpretation must focus on the text and framers' intentions.[72] Followers of new originalism maintain that constitutional interpreters should discern the original public meaning of the text.[73] Either way, originalists claim that their methods purify interpretation by filtering out political bias.[74] Judges who refuse to follow originalist methods are condemned as rogues, arbitrarily imposing their own political preferences.[75] Originalism, in short, purports to be an escape from political power.[76]

Tabooism undermines originalism in at least two ways. First, the originalist claim that there exists a single, discoverable, fixed textual meaning is false. Tabooist deconstruction emphasizes that any text is iterable[77] Exactly because the text can be read and reread in different contexts, its meaning changes. Regardless of the author's intent, textual meaning is never fixed or static.[78] Rather than being exhausted by a single

---

[71] Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 611 (2004); *see* Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011) (referring to this originalist point as "the fixation thesis").

[72] RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Walter Benn Michaels, *A Defense of Old Originalism*. 31 W. NEW ENG. L. REV. 21 (2009).

[73] ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997); ROBERT BORK, THE TEMPTING OF AMERICA 6, 143–44 (1990).

[74] Stephen G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. UNIV. L. REV. 663, 701 (2009); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551–52 (1994); *see* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1114 (2003) (originalism is "working itself pure").

[75] J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1141 (1991).

[76] *See* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011) (celebrating advances in and a growing consensus around originalist research).

[77] DERRIDA, *supra* note 36, at 27–28; JACQUES DERRIDA, SIGNATURE EVENT CONTEXT (1972), *reprinted in* A DERRIDA READER 80, 99–107 (Peggy Kamuf ed., 1991) (discussing iterability). "[T]he intended meaning of an utterance is revealed as forever incapable of being stabilized in the moment of communication, such that repeatable signs (in the act of rereading or rewriting) may activate new meanings by their iterative capacity." RAOUL MOATI, DERRIDA/SEARLE: DECONSTRUCTION AND ORDINARY LANGUAGE 38 (Timothy Attanucci & Maureen Chun trans., 2014).

[78] "The legibility of the text overflows and liberates itself from its original intended meaning. In other words, the text continues to be readable independently of the localized meaning that it assumes in a determined context of communication." MOATI, *supra* note 77, at 34.

reading, "truth keeps happening."[79] Thus, when Supreme Court justices disagree about the meaning of the Constitution, their disagreement arises from the iterability and surfeit of meaning in the text. In most instances, the justices sincerely interpret the text from their respective horizons. When Justices Alito and Ginsburg disagree, neither one is lying or being disingenuous.[80] Second, the originalist claim to purge power (and politics) from constitutional adjudication is a dangerous fantasy. The Tabooist emphases on power and the Other underscore that originalism celebrates a society—the society of the framing and ratification—of subordinated women, racial and religious minorities, and the poor.[81] It was a society that enslaved one-fifth of its population and denied voting rights to the vast majority of its people.[82] Yet, originalism tells us to look solely to that society for principles of equality and liberty. Unsurprisingly, such an approach to constitutional interpretation propagates while ostensibly justifying inequality and the subordination of the same peripheral groups.[83]

Whereas originalism is an interpretive theory significant within constitutional jurisprudence, neoliberalism is a broad theory encompassing the economic marketplace, democratic government, and society in general.[84] When neoliberalism first emerged before World War II, it accepted some government intervention in the market. During the Cold War, however, the neoliberal defense of the economic marketplace intensified with "apocalyptic" zeal.[85] Milton Friedman led the way in celebrating the invisible hand of capitalism. "The market, with each individual going his own way, with no central authority setting social priorities, avoiding duplication, and coordinating activities, looks like

---

[79] JOEL WEINSHEIMER, GADAMER'S HERMENEUTICS: A READING OF TRUTH AND METHOD 9 (1985).

[80] Stephen M. Feldman, *Do Supreme Court Nominees Lie? The Politics of Adjudication*, 18 S. CAL. INTERDISC. L.J. 17 (2008).

[81] *See* STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 23-26 (2008) (discussing subordination of different groups during the framing era).

[82] *See* RICHARD BEEMAN, PLAIN, HONEST MEN 310–11 (2009) (discussing slavery at the time of the constitutional convention); JOHN HOPE FRANKLIN & ALFRED A. MOSS, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 68–104 (7th ed. 1994) (discussing African Americans, slavery, and the early years of nationhood); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 1–60 (2000) (detailing limits on suffrage).

[83] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW (2012 ed.) (emphasizing the mass incarceration of African Americans).

[84] DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005); DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS (2012); *e.g.*, FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

[85] JONES, *supra* note 84, at 120; *see id.* at 141 (linking neoliberalism and libertarianism); *e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

chaos to the naked eye," he wrote.[86] "Yet through [Adam] Smith's eyes we see that it is a finely ordered and delicately tuned system . . . which enables the dispersed knowledge and skill of millions of people to be coordinated for a common purpose."[87] As the twentieth-century wore on, Friedman and other neoliberals not only extolled the wonders of the marketplace but also began to attack democratic government. Friedman described an "invisible hand in politics [that] is as potent a force for harm as the invisible hand in economics is for good."[88] Even if government actors have the best of intentions, he argued, they inevitably pursue harmful goals. Elected government officials "become the front-men for special interests they would never knowingly serve."[89] Government attempts to rationally plan for progress necessarily end in disaster.[90]

In short, neoliberals are market fundamentalists.[91] They insist that the best society is one that leaves the maximum degree of decision making to the individual in the marketplace and the minimum to politics and government.[92] The marketplace is rational and efficient. Because of hard work and merit, each individual earns his or her successes—and failures. Democracy, meanwhile, is necessarily corrupt and inefficient. According to Arthur Brooks, president of the American Enterprise Institute, "[t]he best government philosophy is one that starts every day with the question, 'What can we do today to get out of Americans' way?'"[93]

Tabooism threatens neoliberal ideology in at least three ways. First, neoliberalism is built on *homo economicus*—the economic self of neoclassical economics.[94] *Homo economicus* seeks to maximize the

---

[86] Milton Friedman, *Adam Smith's Relevance for 1976*, *in* SELECTED PAPERS NO. 50, at 15–16 (1976).

[87] *Id.* at 16.

[88] *Id.* at 18.

[89] *Id.*

[90] "Human reason can neither predict nor deliberately shape its own future." FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 94 (2011 definitive ed.). "Progress by its very nature cannot be planned." *Id.* at 95.

[91] FRED BLOCK & MARGARET R. SOMERS, THE POWER OF MARKET FUNDAMENTALISM 3 (2014) (explaining market fundamentalism).

[92] FRIEDMAN, *supra* note 85, at 24.

[93] Arthur Brooks, *Why the Stimulus Failed*, NATIONAL REVIEW (Sept. 25, 2012, 4:00 AM) (http://www.nationalreview.com/article/328432/why-stimulus-failed-arthur-c-brooks).

[94] "The neoclassical economists' Homo Economicus has several characteristics, the most important of which are (1) maximizing (optimizing) behavior; (2) the cognitive ability to exercise rational choice; and (3) individualistic behavior and independent tastes and preferences." Chris Doucouliagos, *A Note on the Evolution of Homo Economicus*, 28 J. ECON. ISSUES, No. 3 (1994); *see* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (discussing and criticizing concept of homo economicus); *See also* Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973 (2000).

satisfaction of its own preexisting interests, and thus it prefers the private sphere, the economic marketplace.[95] As a rational self-maximizer, *homo economicus* contemplates its community and government only if doing so might work to its own advantage.[96] For instance, *homo economicus* might seek to remove government obstacles, such as environmental regulations, which threaten profits.[97] And when possible, *homo economicus* would manipulate the government to create laws or policies that might increase its rents (or profits), even if doing so harms others.[98] Reason for *homo economicus* is instrumental. The economic self rationally assesses the various means of satisfying its interests and chooses the most efficient—the means that achieves the individual's greatest benefit at the lowest cost.[99] Tabooism, however, undermines this economic conception of the self. Neoliberalism insists that *homo economicus* is the natural and preexisting self—whether we like it or not, we are economic selves[100]—but Tabooism emphasizes the social construction of the self or subject. When we are born, we are thrust into a sociocultural context.[101] We interact with parents and other caregivers, friends, strangers, and with various kinds of media, such as television, computers, and books. From this multitude of interactions, we learn patently and latently our values, interests, and expectations.[102] Feminists refer to this socially constructed self as a "relational self."[103]

On this view, even the most independent, self-reliant, and emotionally self-contained among us are nevertheless social beings who are connected to and dependent on a great many others for material and emotional support, for the development of our capacities, for the sources of meaning

---

[95] *See* ROBERT BELLAH ET AL., HABITS OF THE HEART 75, 154 (1985) (describing how, for many individuals, desires appear to bubble up from within).

[96] Neoliberalism characterizes "the individual as rational, calculating and self-regulating, [as] fully responsible for life options whatever the structural constraints." Maria Pallotta-Chiarolli & Bob Pease, *Recognition, Resistance and Reconstruction*, *in* The Politics of Recognition and Social Justice 1, 11 (2014).

[97] *Cf.*, Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399 (1973) (arguing that legal procedures should be tailored to increase efficiency).

[98] DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 15 n.10, 34 (1991) (defining rent-seeking).

[99] *See* JEFFRIE MURPHY & JULES COLEMAN, THE PHILOSOPHY OF LAW 212–18 (discussing different conceptions of economic efficiency).

[100] Economists supposedly ground homo economicus on the description of "everyday conduct." Edward J. O'Boyle, *Requiem for Homo Economicus*, 10 J. MKTS. & MORALITY 321, 333 (2007). As such, "no single concept [is] more significant to the economic way of thinking than homo economicus." *Id.*; *see id.* at 324 (stating that, in economics, homo economicus is "never-changing").

[101] Jack Martin & Jeff Sugarman, *Between the Modern and the Postmodern: The Possibility of Self and Progressive Understanding in Psychology*, 55 AMERICAN PSYCHOLOGIST 397, 400–01 (2000).

[102] JENNIFER NEDELSKY, LAW'S RELATIONS 19 (2011).

[103] *Id.* at 45.

in our lives, and for our very identities.[104]

From the Taboo perspective, then, we are not fated to be *homo economicus*. We care for and are cared for by others. We are not automatons rationally calculating how to best achieve our own self-interest.[105]

The significance of the socially constructed or relational self leads to the second Taboo critique of neoliberalism (which overlaps with the second critique of originalism). Namely, there is no escape from power.[106] There is nothing prior to or outside of the sociocultural forces that shape us, no escape from the relationships that make us who we are. Those forces, those relationships, are integral to our existence.[107] According to neoliberalism, we are most free in the laissez-faire economic marketplace; the removal of government engenders individual autonomy. But the Taboo emphasis on the persistence of sociocultural, or relational power, reveals the sophistry of this foundational neoliberal assumption. In our world of multinational corporations (MNCs) and the Internet, powerful economic entities are anxious to shape (or socially construct) us for their benefit—that is, for their economic profit. They are happy to tell us, over and over again, that we are born to consume, that we rationally maximize our satisfaction in the marketplace.[108] The absence of government only enables these corporate actors to manipulate us more readily. For instance, when we access websites such as Google and Amazon, we typically and tacitly relinquish data about our personalities, habits, and preferences.[109] Corporations gather, process, and analyze this data in multiple ways, all to their economic profit.[110] They can sell this data or use it to channel Internet users toward the purchase of additional products and services. Through all these market manipulations, the users are told and usually believe that they

---

[104] MARILYN FRIEDMAN, AUTONOMY, GENDER, POLITICS 94 (2003).

[105] Homo economicus, contrary to feminist theory, "has neither a childhood nor a context. He grows out of the ground like a mushroom." KATRINE MARÇAL, WHO COOKED ADAM SMITH'S DINNER? A STORY ABOUT WOMEN AND ECONOMICS 61 (Saskia Vogel trans., 2016).

[106] AMY ALLEN, THE POLITICS OF OUR SELVES 177 (2008) ("there is no outside to power"); Judith Butler, *Contingent Foundations*, *in* SEYLA BENHABIB ET AL., FEMINIST CONTENTIONS 35, 39 (1995) [hereinafter Butler, Contingent] (emphasizing that the recognition of power is the precondition for social critique).

[107] Amy Allen, *Foucault, Feminism, and the Self: The Politics of Personal Transformation*, *in* FEMINISM AND THE FINAL FOUCAULT 235, 236, 240, 243 (Dianna Taylor & Karen Vintges eds., 2004).

[108] In our neoliberal world, "many in the professional middle class in Western societies have adapted their subjectivities to individualistic norms that separate the individual from the social. Modern subjectivities in neoliberal market economies are constituted primarily through roles as workers and consumers." PALLOTTA-CHIAROLLI & PEASE, *supra* note 96, at 2.

[109] BRUCE SCHNEIER, DATA AND GOLIATH 6–7, 39 (2015).

[110] FRANK PASQUALE, THE BLACK BOX SOCIETY 5, 19 (2015); TIM WU, THE MASTER SWITCH 205–06 (2011 ed.).

(we) are free.[111] But the Taboo perspective, emphasizing the constant presence of power, underscores that we are being bought and sold for profit.[112] The Internet is not a power-free zone. In the end, the neoliberal promise of (marketplace) freedom is a dangerous myth that induces us to acquiesce to corporate control and domination.[113]

This emphasis on power interrelates with a third Taboo critique of neoliberalism. Neoliberal ideology maintains that, in a laissez-faire marketplace, economic success and failure is based on hard work and merit. Each individual gets his or her just rewards. Rationality and efficiency govern, so power and politics are removed from the economic equation. But just as Tabooism underscores that there is no escape from power, it also maintains that there is always an Other. American society harbors many economic losers: the unemployed, the underpaid, and the unpaid.[114] Neoliberalism marginalizes the economically dispossessed by insisting that they deserve their fate. After all, we all operate pursuant to the same impersonal marketplace forces, neoliberals declare. But Tabooism reveals that this neoliberal declaration is mere rhetoric (or ideology) attempting to legitimate the inequities of our society. For instance, economists and the marketplace itself tend to systematically disregard or undervalue housework, caregiving, and other work traditionally performed by women.[115] Or, to take a different type of example, a child born to an indigent single parent is unlikely to have similar educational and professional opportunities as a child born into a wealthy two-parent family.[116] No individual deserves to inherit wealth and opportunity any more or less than any other individual, but neoliberalism tells us that politics and power do not determine economic winners and losers. Neoliberalism teaches that some *deserve* to be poor (to be the Other), but Tabooism will not accept this rationalization for gross inequality and despair.[117] Tabooism emphasizes that sociocultural power inevitably creates the Other.

---

[111] SCHNEIER, *supra* note 109, at 60–72; *see* WU, *supra* note 110, at 300–04 (emphasizing concentrated power in private sphere).

[112] "If something is free [on the Internet], you're not the customer; you're the product." SCHNEIER, *supra* note 109, at 62.

[113] *See* ZYGMUNT BAUMAN & REIN RAUD, PRACTICES OF SELFHOOD 110–15 (2015) (emphasizing corporate efforts to shape our preferences and desires).

[114] *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014) (discussing inequality); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (2013 ed.) (same).

[115] MARÇAL, *supra* note 105, at 16–17, 30, 59.

[116] *See* BAUMAN & RAUD, *supra* note 113, at 98–99 (emphasizing how wealth and inequality affect power or control).

[117] *Id*. at 64 (criticizing neoliberal ideology).

IV. CONCLUSION

By dismissing Tabooism out of hand, originalists, neoliberals, and others avoid confronting it on the merits.[118] They denounce it as nonsense, irrationality, or the like, and by doing so, they bolster their own claims to being pronouncers of objective truths and unimpeachable principles and values. But such claims to objectivity and irreproachability are problematic. When people are too self-righteous, when they are convinced that only they know the truth, then no room remains for negotiation and compromise. As Oliver Wendell Holmes, Jr., wrote, "when men differ in taste as to the kind of world they want the only thing left to do is to go to work killing."[119] In the United States today, we have not yet reached a stage where Democrats and Republicans are openly killing each other—though we certainly have enough mass shootings—but Democrats and Republicans have polarized to a degree that our democracy is paralyzed.[120]

Declarations of escape from power and politics, typical of originalism and neoliberalism, do not help gridlock. Such declarations inevitably and ostensibly legitimate the imposition of clandestine power and leave us dwelling on distractions.[121] For example, is climate change a hoax designed

---

[118] Like other opponents of postmodernism, originalists are apt to mischaracterize and denigrate it rather than discussing its merits. For instance, in his historical defense of originalism, Johnathan O'Neill mentions or alludes to postmodernism and hermeneutics at least three times. JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 8, 137, 194 (2005). He wrote: "More radical critics of this type sometimes claimed that constitutionalism and the rule of law were impossible." *Id*. at 8. Interestingly, O'Neill cited my book in support of this proposition. *Id*. at 219 n.24 (citing AMERICAN LEGAL THOUGHT, *supra* note 3); *see* O'NEILL, *supra*, at 253 n.13, 268–69 n.12 (citing *Voyage* for similar proposition). While I appreciate the citation, my book did not suggest that postmodern constitutional scholars argue for such a viewpoint (O'Neill does not cite to a specific page number in my book). In fact, those scholars that come closest to questioning the possibility of the rule of law in constitutional jurisprudence are political scientists devoted to the attitudinal model, a quantitative approach. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). From their perspective, Supreme Court decision making is based solely on political attitudes. Martin Shapiro, *Judges As Liars*, 17 HARV. J. L. & PUB. POL'Y 155, 156 (1994). I do not agree with this outlook. Stephen M. Feldman, *Fighting the Tofu: Law and Politics in Scholarship and Adjudication*, 14 CARDOZO PUB. L., POL'Y & ETHICS J. 91, 114–30 (2015) (explaining that legal interpretation and therefore Supreme Court decision making is always a dynamic combination of law and politics).

[119] Letter from Holmes to Laski (Dec. 3, 1917), *in* I HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1925, 115, 115–16 (Mark DeWolfe Howe ed.) (1953).

[120] *See* NOLAN MCCARTY ET AL., POLARIZED AMERICA (2008) (discussing polarization); Drew Desilver, *Congress Ends Least-Productive Year in Recent History*, PEW RESEARCH CENTER (Dec. 23, 2013), http://www.pewresearch.org/fact-tank/2013/12/23/congress-ends-least-productive-year-in-recent-history/# (discussing failure of Congress to act); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804 (2014) (discussing government dysfunction). I do not mean to suggest that Democrats and Republicans are equally responsible for gridlock.

[121] BUTLER, *supra* note 68, at 39 (emphasizing that recourse to philosophical positions supposedly

to legitimate harmful government regulation? Should constitutional interpretation focus on the framers' intentions or the original public meaning of the document? Should we eliminate the Internal Revenue Service and other government agencies?

Tabooism can move us beyond these absurdities. The Taboo era (think of digital technology, MNCs, and globalization) ushers in new questions.[122] We are ill-served if we act as if we still lived in 1789. Tabooism can give us a language that would facilitate dialogue; that would encourage us to focus on pressing issues related to power, inequality, freedom, democracy, and globalization. For instance, when the self is socially constructed, how do individuals retain a degree of autonomy?[123] How does such autonomy relate to specific constitutional rights, such as free-expression?[124] When digital technology substantially enhances people's lives, how do we retain privacy despite corporate control of the Internet?[125] How can we harmonize the recognition of diverse ethnic, racial, religious, and gender identities with respect for each individual qua individual?[126] These are serious questions deserving of extensive debate. Discussion, though, cannot even get off the ground when any issues that smack of Tabooism are treated as taboo.

"beyond the play of power" constitutes "the most insidious ruse of power").

[122] *See* STEVEN BEST & DOUGLAS KELLNER, THE POSTMODERN ADVENTURE 1-11 (2001) (emphasizing that scientific, technological, and economic changes have ushered in postmodernism); *id*. at 205-48 (linking postmodernism to global corporate power).

[123] Unquestionably, the problem of autonomy is a key issue within the paradigm of postmodernism. BAUMAN & RAUD, *supra* note 113, at vii–viii; Todd May, *Foucault's Conception of Freedom*, *in* MICHEL FOUCAULT: KEY CONCEPTS 71 (Dianna Taylor ed., 2011). Nevertheless, in recent years, feminists have focused on the interconnection between the relational self and autonomy. PERSONAL AUTONOMY AND SOCIAL OPPRESSION: PHILOSOPHICAL PERSPECTIVES (Marina A.L. Oshana ed., 2015); AUTONOMY, OPPRESSION, AND GENDER (Andrea Veltman & Mark Piper eds., 2014); RELATIONAL AUTONOMY (Catriona Mackenzie & Natalie Stoljar eds., 2000).

[124] NEDELSKY, *supra* note 102, at 231–71 (reconceiving constitutional rights from a relational perspective); Susan J. Brison, *Relational Autonomy and Freedom of Expression*, *in* RELATIONAL AUTONOMY 280 (Catriona Mackenzie & Natalie Stoljar eds., 2000) (considering the implications of relational autonomy for free expression).

[125] COHEN, *supra* note 55, at 107–52 (discussing privacy in digital age).

[126] Here are additional questions. When near one-hundred percent of the American population are marketplace consumers, why does voting hover around fifty percent? Drew Desilver, *U.S. Voter Turnout Trails Most Developed Countries*, PEW RESEARCH CENTER (May 6, 2015), http://www.pewresearch.org/fact-tank/2016/08/02/u-s-voter-turnout-trails-most-developed-countries/. In fact, those who do not adequately participate as consumers—for instance, thieves and indigents—are often denigrated as the outcasts of society, yet those who do not vote are considered justifiably alienated from Washington. Why is that?