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POLITICAL CAPITALISM AND CONSTITUTIONAL DOCTRINE. ORIGINALISM IN THE U.S. FEDERAL COURTS

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Political Capitalism and Constitutional Doctrine. Originalism in the U.S. Federal Courts [1]

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Abstract

The article argues that the constitution is an important dimension of political capitalism. It focuses on a constitutional doctrine in force in the United States, particularly within the Supreme Court: originalism. Originalism consists in a method of interpretation based on the original meaning of the constitution. The article offers a brief presentation of originalism. It then questions to what extent it provides a safeguard against political interference in the economy. Eventually, the article argues that originalism can be considered as part of political capitalism owing to the support provided by groups of interest in favor of originalist judges appointment.

Key Words: originalism, political economy, political capitalism, US Supreme Court

JEL codes : D72, H77, K30

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Introduction

Analysis in terms of political capitalism highlights various phenomena such as rent seeking, regulatory capture, and collusion between political and economic elites. In his review of political capitalism approaches, R.G. Holcombe (2015) stresses the importance of the constitutional framework of political capitalism. The constitution can therefore be considered an important dimension of political capitalism.

This article aims at digging deeper into the constitutional framework under the political capitalism perspective. It will focus on a constitutional doctrine in force in the United States, more particularly within the Supreme Court: originalism that is based on quasi-exclusive attention devoted to the original meaning of the constitutional text (Kirat and Marty, 2022). Does originalism favor conservative bias by leading to a restrictive interpretation of Statutes[2]?

The Supreme Court is a privileged place of observation in that it constitutes the central locus of constitutional interpretation in the U.S. system. The court is also characterized by several fundamental features: Justices are appointed for life by the President of the United States through a vetting procedure involving the Senate (Jeanneney, 2024). The Court has also the discretionary power to hear cases and constitute "the final stopping point for many politically sensitive issues" (Bonica and Sen, 2021, p.98). Throughout its history, the Court has periodically endorsed open or closed approaches to interpreting the Constitution, thereby supporting or hindering any initiatives by the political powers or lower courts to promote progressive policies or liberal interpretations of American law.

Nevertheless, the prominence of Supreme Court justices and their key role should not obscure the fact that the federal courts have a major impact on the dynamics of American law and have many features in common with the Supreme Court[3]. A first one is related to their appointment processes also by the President, under a kind senatorial scrutiny[4], and a very strategical way

[2] Originalism is not in itself a conservative interpretation, as can be seen from the debates surrounding the interpretation of the Sherman Act (see below), and may not be exclusive to the United States. For example, in the case of the European Union, in the Illumina Grail judgment of the Court of Justice (joint cases C-611/22 and C-625/22, Illumina Inc and Grail LLC vs European Commission, September 3rd, 2024), the broad interpretation of Article 22 of Regulation 139/2004 on merger control was rejected on the basis of an interpretation of the original meaning (Lindeboom, 2025). This interpretation hindered the Commission's ability to deal with mergers below the structural thresholds, a particularly important issue in the context of Big Tech acquisitions (Lindeboom, 2025).

[3] The Supreme Court has 9 judges and deals with 70 to 80 cases each year. By contrast, the 94 US district courts have 663 judges and the 12 US circuit courts (federal courts of appeal) 179. The former handled around 358,000 cases in 2018 and the latter more than 49,000 (Bonica and Sen, 2021, p.98).

[4] The principle of 'senatorial courtesy' implies that the President consults the senators on nominees to federal courts located in their electoral districts (Giles et al., 2001).

(Pottle and Rogowski, 2002). A second one concerns their possible susceptibility to the influence of arguments in favor of a policy of limiting political activism. The research conducted on corporate foundations' involvement in training programs for judges based on Law and Economics has shown that these programs have had an impact on the way they judge (see Ash & al., 2025; Kirat & Marty, 2020). We consider, however, that the visibility specific to Supreme Court judges justifies restricting the analysis to their level.

Originalist judges, particularly those appointed by Trump during Trump's first term as President (Neil Gorsush, Brett Kavanagh, and Amy Coney Barrett), are themselves actors in political capitalism, with lobbies or groups of interest supporting financially their nomination to the Supreme Court. What is more, the originalist judges essentially hand down pro-business decisions or defend such positions in their dissent. Such phenomena are highlighted in the hearing reports of the Senate Judiciary Committee, which provide a large part of the empirical basis for the paper.

The article will be structured as follows: the introduction will outline the literature on the relationship between political capitalism and the Constitution and situate originalism within this framework. It will raise the central question of the paper: is originalism a guarantee against the capture of the regulator and the collusion between politics and economics? Or, conversely, can it be one of its vectors? This question will be answered in three stages. Section 1 offers a brief presentation of the doctrine of originalist constitutional interpretation. Section 2 questions to what extent originalism provides a safeguard against political interference in the economy. Il will deal with the Commerce clause and antitrust. Section 3 argues that originalism can be considered as part of political capitalism owing in particular to the support provided by groups of interest in favor of originalist judges appointment.

Section 1. The doctrine of originalist interpretation of the Constitution

We present the doctrine of originalist interpretation in general term. We then frame the doctrine in the political capitalism perspective.

1. What is originalism?

Broadly speaking, originalism is a doctrine of literal interpretation of the Constitution, which consists of interpreting the Constitution with reference to the original text alone. It is a counterattack on the practice of policy-oriented creative jurisprudence (the ‘living constitution’ doctrine of the Warren court). It is part of a political philosophy that is clearly hostile to

significant federal powers (and therefore more in favor of the local States), and in theory should reduce the State's exposure to business lobbies and interest groups, because the originalist doctrine restricts the intervention of the Federal State.

Originalism can be defined in two-fold way: negatively, i.e. in regard of other interpretations methods which are disregarded; positively, i.e. owing to the method of interpretation claimed.

Considering the first way, originalism runs counter to the pragmatic, creative interpretation which was a hallmark of the U.S. Supreme Court under Chief Justice Warren between 1953 and 1969 but also, to some extent, under Chief Justice Burger who succeeded him. Sometimes described as the "progressive period", it was during the Warren era that the Supreme Court put an end to racial segregation (*Brown v. Board of Education* in 1954), strengthened the rights of the defence in criminal matters (Miranda v. *Arizona* in 1966) and accompanied the development of federal regulation. This constitutional jurisprudence of the Warren era was based on the premise that the federal Constitution should be interpreted in an open-ended manner, according to the circumstances and needs of the time, thus following the theory of Justice Oliver W. Holmes.

Contrary to this approach, the proponents of originalism advocate adherence to the text of the Constitution or, in some cases, to the intentions of the Founding Fathers, the framers and "ratifiers" of the 1787 Constitution. This gives the federal judge a much more limited role, in contrast to the Warren-era of judge-cum-legislator, which originalist critics accuse of having no legal basis or legitimacy. The major flaw of the living Constitution is that it is based on the moral and philosophical preferences of nine unelected judges, who thereby set up a form of "executive" which overrides the separation of powers (Duncan, 2016; Manning, 1997).

It is important to recognize that originalism is not a coherent and uniform pattern of interpretation. There exists a variety of approaches. Thus, at least three variants can be identified:

(1) Originalism of original intents, which argues that the meaning of the Constitution must be found in the intentions of the Framers or the ratifiers of the 1787 Constitutional text. Bork, Berger, Rehnquist et Meese seem to adhere to this variant. (Solum, 2011, p. 6 to 8).
(2) Original public meaning variant, which consider that the meaning of the text is determined by the meaning of words and sentences prevailing at the moment where the Constitution has been framed and ratified (Ramsey, 2017).

(3) Original methods originalism, which sustains that the meaning of the Constitution is the one which could have been derived from the methods of interpretation prevailing at the moment where the constitutional clauses have been framed and ratified (McGinnis et Rappoport, 2007, p. 374).

Campbell (2024) recently claimed that originalism recovers two distinct variants, she calls "tracks". For her, two variants of originalism implement different ways of considering the past. "Track one" views the past "in a backward-looking way, using modern criteria to identify earlier constitutional content". "Track Two" originalism uses "historical criteria to identify the fundamental law of the past" (2024, p. 1439). In other words, track one originalists use a present-day lens, based on their own assumptions about the determinants of law, while track two originalists use historical lens, based on the Founders' assumptions about the determinants of law (Campbell, 2024, p. 1439). While not illustrating her claim, Campbell stressed that the two tracks do not lead to convergent results.

Originalist judges and theorists claim that reference to the sole text of the Constitution and its original meaning is a guarantee of neutrality in terms of political, philosophical or societal preferences. This claim is contested; the alleged interpretative neutrality is frequently invalidated. Balkin (2016) points out that the boundary between the 'living constitution' and originalism is not clearly established. In his view, constitutional law comprises not only precise rules (e.g. those governing judicial appointments) but also principles and standards, which are open, flexible concepts whose meaning and content cannot be fixed once and for all. Similarly, Pfersmann (2019) points out that "Indeterminacy and vagueness are obviously built into the original text and leave therefore a high amount of discretion to future concretizing acts. It follows by necessity that decisions implying such discretionary competence will not and cannot be neutral with respect to the choices left over to legislators, judges or the executive" (Pfersmann, 2019, p. 3203).

Eventually, it is interesting to note that Posner (2013, p.178) also expresses a clear mistrust of the historical approach claimed by the originalists. According to him, judges are not competent historians, and he fears, moreover, law office history practices. In other words, defendants in litigation would base their strategies on the search for appropriate historical arguments, even when isolated from their context, a 'convenient past'. Historical originalism exposes itself to the risk of arbitrarily selecting appropriate facts to support a political point of view by omitting to mention any element that goes in a different direction from the thesis being defended. In the same vein, Posner (2013, p.182) rejects textual originalism arguing it both ignores the limitation

of legislator's foresight and the mere fact a statute is "collective product that may leave many questions of interpretation to be answered by courts". He refutes textual originalism seeing it as a "gotcha jurisprudence".

2. Originalism under the political capitalism perspective. Setting the scene

The literature on political capitalism does not address originalism any more than other theories of interpretation. It addresses the problem of the constitution and constitutional rules succinctly. We review different approaches to political capitalism and draw consequences for our field.

A general approach has been proposed by Holcombe (2015): "Political capitalism is an economic system in which business controls government more than government controls business" (Holcombe, 2015, p. 61). Clarifying his thoughts, and inspired by Public Choice, he writes: "Within the framework of constitutional economics, the rent seekers, the regulated firms, and the interest groups are not merely reacting to the constraints government has placed in front of them; they are designing those constraints themselves, for their benefit" (Holcombe, 2015, p. 58). This assertion is based in particular on the book of Beard (1913) who conducted an economic interpretation of the Constitution of 1787, considering that the Constitution is an economic document which concretized the economic interests of the delegates to the Philadelphia Convention: the dominant elites who were the bourgeoisie with monetary and financial interests on the one hand, industrial and commercial interests on the other.

Holcombe's assertion above deserves application not to the constitution per se but to the originalist method. This will consist in determining whether rent seekers, regulated firms and interest groups have any benefit to be had in the Supreme Court of originalist judges. To do so is to satisfy the following Holcombe's proposition: "A development of a more complete theory of political capitalism therefore begins with the subdiscipline of constitutional political economy, to describe the mechanisms that allow the elite to design an institutional structure that enables them to maintain their status and to favor themselves over the masses" (Holcombe, 2015, p. 58).

Referring to Kolko's work on regulation during the Progressive era, particularly railroads, he states that "…the regulation itself was invariably controlled by leaders of the regulated industry, and directed toward ends they deemed acceptable or desirable…. It is business control over politics (and by 'business' I mean the major economic interests) rather than political regulation of the economy that is the significant phenomenon of the Progressive Era" (Kolko, 1963, p. 2-

3). Applying this framework of analysis amounts to empirically verifying whether the interests of business are privileged by originalist judges.

Applying a Max Weber-inspired reading of Iranian society and institutions in terms of political capitalism, Vahabi (2023) defines « … political capitalism as specific forms of profit making or rather rent-seeking". It assumes five general characteristics:

1. the prevalence of nonmarket predatory mechanisms of profit-making in monetary terms. Therefore, "The profit is extracted from distribution sphere through appropriative activities in different modes of production wherever market, money relationships, and financing exist".

2. the conflation of sovereignty and property.

3. a collusion of state and private sectors on the basis of rent-seeking activity.

4. a strong tendency toward bureaucratization within market relationships.

5. "From a sociological viewpoint, political capitalism promotes the interests of a small group of elites against the interests of majority of the people » (Vababi, 2023, p. 117).

Vahabi focuses his analysis on the predatory State, which coerces the economy to appropriate resources and does not separate ownership from sovereignty. We do not see ourselves in the perspective of predation, so we cannot retain characteristics 1 - 2 above, which concern a 'predation' variant of political capitalism. Characteristic 3 raises the question of whether the originalist interpretation of the Constitution can be a shield against collusion between the public and private sectors. Characteristic 4 raises the question of whether economic liberalism and the distrust of federal government are means of controlling the bureaucratisation of market relations. Finally, characteristic 5 asks whether the originalist interpretation is a bulwark or a vector for the promotion of elite interests.

Section 2. Is originalism a safeguard against political interference in the economy?

In the section we will examine the originalist doctrine as a safeguard against political interference in the economy. Three dimensions will be addressed: a) the limitation of federal intervention via the interpretation of the Commerce Clause; b) the promotion of business particularly via the antitrust laws enforcement; c) the fostering of States rather than federal government interventions.

2.1.The interpretation of the Commerce Clause.

The Commerce Clause is a provision of the United States Constitution. Article I, Section 8, grants Congress the power to regulate trade and commerce with foreign states, between the States of the Union and with the Indian tribes. This provision is fundamental in that it grants Congress a power of economic regulation, which has been extended over time, notably during the New Deal period. However, this provision has also been interpreted extensively by the federal courts, making it possible to extend the power of Congress to situations in which trade takes place at the intrastate level.

The scope of the Commerce Clause was extended as early as 1824 by a Supreme Court decision *Gibbons v. Ogden* which defined two types of interstate commerce that could be regulated by Congress: (a) situations in which trade flows across state lines; and (b) local activities that affect interstate commerce or the national interest. This second case, which bears the stamp of Justice Marshall, was a major innovation in the interpretation of the Commerce Clause, and thus in the extent of the regulatory power devolved to the federal level, at the expense of the states. This interpretation became known as the "Dormant Commerce Clause". This clause determines whether an activity located in a state, which does not result in interstate trade flows, can be regulated by Congress, which is the case when it leads to "substantial effects" on interstate commerce.

More than a century later, the Supreme Court clarified the Dormant Commerce Clause in its ruling on *NLRB v. Jones & Laughin* (1937) which spelt out its reasoning on this clause in terms of "substantial effects" on interstate commerce. Even though commercial activities might well have a strictly local dimension when considered separately, once they had an actual close and substantial relationship with interstate commerce, and their control was essential to protect commerce from restraint or obstruction, then it was incumbent on the federal Congress to exercise that control.

In the 1942 Supreme Court decision *Wickard v. Filburn*, the concept of "substantial effects" was put to the test in aggregate terms. In this case, a farmer had exceeded the production quotas set during the New Deal by the Agricultural Adjustment Act and retained a portion of the crop for his own consumption. The Supreme Court held that the farmer's individual decision was trivial, but that if all farmers behaved in the same way, the overall effects would be detrimental to interstate commerce, e.g. the risk of lower agricultural prices due to oversupply. The reservation of a portion of production for self-consumption had the knock-on effect of damaging interstate commerce.

In the 1960s, the Supreme Court extended the "substantial effects test" by creating the "rationality test". In the 1964 decision *Heart of Atlanta Motel v. U.S.*, the Court ruled that federal regulation was valid if Congress had a "rational basis" for believing that an action could have a "substantial effect" on interstate commerce.

Originalist judges do not agree with the extension of federal powers permitted by the "substantial effects test". Two Supreme court Associate Justices were active in the matter: Clarence Thomas and Antonin Scalia. For them, the text of the Constitution does not give such enormous powers to Congress, nor does it contain the "substantial impact test" or the "Dormant Commerce Clause". In his dissent in the *Camps Newfound/Owatonna v. Town of Harrison* case, Thomas writes that this "dormant clause" "has no basis in the text of the Constitution, makes no sense, and is impracticable" (quoted in McGoldrick, 2019, p. 3.) As for the "substantial effects test", Thomas denies it any legitimacy. He was resolutely hostile to the New Deal jurisprudential trend that has led to Congress having virtually all police powers over the nation.

In his critique of the Dormant Clause and the substantial impact test, Thomas gives greater weight to the 10th Amendment than to the Commerce Clause. Indeed, the 10th Amendment puts the onus on the powers of the states (seen as sovereign). The states also have reserved powers, as long as these powers have not been delegated to the federal government. On this point, Scalia disagreed, believing that the writings of Madison and Hamilton in The Federalist showed that these founding fathers considered it useful to build up a federal jurisdiction for the regulation of commerce, if only to ensure uniformity of rules throughout the territory, which is crucial for the development of the internal market (McGoldrick, 2019, p. 23). This position of Scalia, however, did not prevent him from also being hostile to the "potential impact test' (Lund, 2020). Justice Thomas, on the other hand, "believes that Congress, not the Court, should be in charge of protecting interstate commerce" (McGoldrick, 2019, p. 51).

2.2.Antitrust. The promotion of business interests against the Government

The major figure of originalism applied to antitrust was not a Supreme court Associate Justice but a U.S. Court of Appeals judge: Robert Bork, was also a leading figure in the Chicago School on the question of antitrust.; His writings have profoundly influenced the ways in which U.S. federal courts have handled this question. Although he passed away in 2012, his positions continue to fuel criticism and controversy, as shown for example by Lina Khan's (2017) writings on *Big Techs* antitrust and regulatory issues. The case of Bork is of interest for different reasons. Firstly, because he embodied a conception of competition and antitrust that aroused

strong reservations in the Senate during his aborted nomination to the Supreme Court by President Reagan. His nomination was seen as likely to pose major risks to the effectiveness of US antitrust policy (US Senate, 1987, p. 6257). Secondly, it allows us to put into perspective the relationship between the Chicago School, of which he was one of the leading figures, and originalism. Nevertheless, basing an antitrust policy on the intentions of the 1890 Sherman Act drafters could be seen as problematic when faced with a case-by-case analysis based on an evaluation of contemporary practices concerning for example, consumer welfare, as suggested *inter alia* by Posner.

While vertical restraints were considered illegal *per se* by the courts, Bork saw them as an economically efficient form of organisation. Rather, he encouraged antitrust authorities to consider them on a case-by-case basis, while taking care to assess their positive effects on consumers. His reinterpretation of the obscure text of the Sherman Act came out clearly in favour of consumer welfare. Similarly, he was particularly critical of the past practice of competition regulation, especially during the Warren era, of safeguarding small and medium-sized firms against large firms. Therefore, Bork (1966, 1967) embodied the first generation of originalism, that is, historical originalism, founded on the intents of the legislators.

In this context, the case of the Sherman Act – which Robert Bork sees as merely a consumer welfare prescription on the basis of a historical analysis of the legislator's intentions – is interesting. Indeed, following the same approach, Khan (2017), Lande (2013) or Lande and Zerbe (2020) reach diametrically opposed conclusions. Khan (2017) considers that the Sherman Act was a law "for diversity and access to markets; it was against high concentration and abuses of power" (Khan, 2017, p.740). From this perspective, it was not about targeting a particular outcome (allocative efficiency) but rather protecting competition itself and preserving market freedoms. So, the Sherman Act had not only an economic aim also a political one, i.e. the defence of competition was a defence of democracy itself. Lina Khan's (2017) interpretation of the Sherman Act reaches the same conclusion as that of Robert Lande (1982). The intention of the legislator was not one of efficiency but more a question of preventing unfair welfare transfers between economic agents to the detriment of those without market power. Within the context of this historical interpretation, it would be "bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws" (Pitofsky, 1979, p.1051).

Lande's (2013) approach leads to the same conclusions as Khan's (2017) but it is all the more interesting to consider as it applies originalist methods to the Sherman Act itself. In the first instance, the Sherman Act is analysed from the perspective of legislative history – to capture

the intent of the legislature – and, in the second, from the perspective of the plain meaning advocated by Scalia. The analysis of the terms used in the parliamentary drafting of the text confirms Lande's (1982) interpretation that the Sherman Act aimed more at sanctioning welfare transfers that could not have taken place in the absence of a free market than at promoting allocative efficiency. As mentioned above, Scalia did not apply his method to the field of Antitrust. So, in cases concerning competition, it is a question of applying Scalia's textual analysis – by using dictionaries that are as contemporary as possible – and the related decisions that are as close in time as possible to the texts under analysis (Scalia and Garner, 2012, p.78).

The link to efficiency is highly problematic here, given that the criticism of trusts did not concern their inefficiency. There was a consensus on the economic interests of concentration (Kirat and Marty, 2021). According to Lande (2013), within the Section 1 of the Sherman Act the notion of "Restraint of trade" was not directed at business arrangements that are inefficient. It addresses a practice that unilaterally distorts consumer choice. (Lande, 2013, p.2372)

The textualist analysis for Section 2 of the Sherman Act leads to a similar conclusion. According to Lande, the notion of extortion cannot be linked to the vocabulary of efficiency and must be linked to that of unfair welfare transfer. To support his reasoning, Lande (2013, p.2375) cites an Act passed by the General Assembly of the State of Georgia (1861) and an English Common Law precedent, enabling him to trace a line of jurisprudential continuity regarding the meaning of the term.

Lande and Zerbe (2020) pursue this textualist analysis by adopting the method defined by Scalia and Garner (2012). The approach consists of seven steps: 1) research into the definitions of the words in contemporary dictionaries; 2) analysis of the notion of monopolization in pre-1890 British Common Law; 3) analysis of cases dealt with by the Supreme Court and by the federal courts in the decade following the enactment of the Sherman Act; 4) historical analysis of the period (to capture the plain meaning of the notions, as Scalia did in Heller); 5) analysis of the terms not literally but fairly and reasonably; 6) test of the absurdity doctrine: this is to check whether the textual analysis does – or does not –lead to an absurd result (Meese, 2014); 7) considering only those exceptions that are explicitly written into the statute. At the end of this analysis, Lande and Zerbe (2020) conclude that the attempt to monopolize, which constitutes a violation of Section 2, corresponded to the fact of acquiring a position of monopoly whatever the means (by merit or through "anti-competitive" practices).

In contrast to Bork, Paul (2021) has proposed a reading of the Sherman Act not in terms of the expected result (the maximisation of consumer welfare) but in terms of process, i.e. the guarantee of competition that complies with common law standards of conduct. More recently, Hovemkamp (2024) defends a textualist interpretation of the Sherman Act and the Clatyon Act to read the objectives of antitrust laws in the sense of rejecting the 'expansionist' approach as defended by the New Brandeis movement.

Hence, the limits Posner places on the use of history, particularly in terms of an opportunistic search for arguments on the basis of partial and biased analyses, appear to be particularly important in the field of antitrust law.

Overall, the position of the Chicago School has moved towards an *a priori* acceptance of the strategies of dominant operators concerning competition rules, leading to a shifting of the burden of proof onto the plaintiffs and significantly raising the bar. In this respect, originalist theories could, potentially, create an extremely favourable situation for the defendants, (Newman, 2019). Thus, as Ginsburg and Owings (2014) pointed out, conservative influence has had a real effect on the ways in which antitrust litigation is judged.

3. Local vs. federal regulation

The structure of the government has been intensively discussed by the Founder Fathers in particular in the various issues of The Federalist Papers prior the ratification of the 1787 Constitution of the United States. Despite some differences between them, the Framers of the Constitution agreed on the need for strong federal powers, with checks and balances, in a complex federal system in which two sovereignties coexist: that of the federal institutions and that of the States (Lacorne, 1991; Mongoin, 2012). The 10th amendment, ratified in December 1791, stipulates that « The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. »

As Chemerinsky (2001) asserts, the Supreme Court's interpretation of the 10th amendment has fluctuated over time between two conceptions: a nationalist approach and a federalist approach.

According to the first, the powers of the federal government should be defined very widely, so as to enable it to deal with social problems. Thus, the 10th amendment must not be an obstacle to the extension of congressional power; the judiciary is not intended to protect the states. The second argues exactly the opposite: the 10th amendment limits the powers of the national government; the judiciary has a key role in protecting the states' immunity against federal

powers (Chemerinsky, 2001, p. 7-8). The nationalist model prevailed throughout the 19th century[5] ; from 1890 to 1937, the federalist view prevailed - supporting the idea that the 10th amendment 'reserved a zone of activities for the states' (Chemerinsky, 2001, p. 15); from 1937 to the 1990s, the nationalist view predominated. In the early 1990s a 'federalist revolution', favoring a 'new federalism', took place, with the arrival on the Supreme Court of 5 justices nominated by Presidents Reagan and Bush: Associates Justices O'Connor, Scalia, Thomas, and Kennedy. Rehnquist became Chief Justice thanks to Reagan. Rehnquist wrote an article against the theory of the living constitution but, unlike Scalia and Thomas, is not marked by originalism.

Justice Antonin Scalia have been an active judge on federalist issues. As an example, in *Printz* (1997) he questioned the constitutional rule that Congress has no power to compel a state official to ensure the execution of federal laws. Since the Constitution is silent on this point, Scalia believed this point of law should be resolved by reference to the structural relationships that existed between the federal government and the states at the time of the Founding Fathers. He believed that this relationship was structurally based on federalism with a clear separation of federal and state powers. Therefore, allowing Congress to have power over state officials would undermine the power structure constructed in the early days of the Republic (Ramsey, 2017, pp. 1949-1950).

Overall, the federalist revolution as carried out by the Supreme Court has led it to declare unconstitutional ambitious federal laws in the name of the 10th Amendment. These laws concerned gun control in school zones, violence against women, the cleaning up of nuclear waste and background checks for handguns (Chemerinsky, 2001, p. 16).

As mentioned above, we can see here the extent of the implications of interpreting a constitutional text.

Section 3. Originalism as part of political capitalism

In this section we propose an interpretation of originalism as part of political capitalism. We will analyze the processes by which judges are appointed and their rulings made. Three points will be highlighted: a) the fact that interest groups or lobbies financially support the appointment of originalists to the Supreme Court; b) the fact that judges make decisions that

[5] Chemerinsky affirms that, in 1824, in *Gibbons v. Ogden*, « Chief Justice John Marshall viewed the Tenth Amendment as a reminder for Congress to point to its authority in the Constitution » (Chemerinsky, 2001, p. 15), which amounts to saying that « there is no Tenth Amendment limit on Congress's power » (ibid.).

are favorable to interest groups (such as, for instance, the National Rifle Association). c) Third, the ideology by itself can explain the policy of originalist judges. This section echoes Anderson's seminal article on court capture (Anderson, 2018), which is a topic that the literature on regulatory capture overlooks.

1. Nomination process: financial support from groups of interest

According to the U.S. Constitution (Article II, Section 2, Clause 2), "Supreme Court justices are appointed through a two-stage process: they are proposed by the President and must be confirmed by the Senate" (Zoller, 1998).

Debates in the Senate Judiciary Committee are fundamental to the appointment of associate justices or, when the office is vacant, the Chief Justice. The committee is made up of 18 senators. The procedure begins with statements from the committee members; then a statement from the nominee proposed by the President is made, followed by a debate between the committee members and the nominee. Next come the witnesses, who are generally either federal judges or professors of law. Non-governmental organizations and civil society associations may also submit written opinions, which are incorporated into the records. At the end of the confirmation procedure, the judiciary committee's report is published.

From the Judiciary Committee records, a series of information provided by Senators hostile to the candidates to Supreme court office underline the reality and weight of financial support provided by groups of interest.

The Senators hostile to the nomination of Brett Kavanaugh and Amy Coney Barrett, who were nominated by President Trump, have emphasized the importance of the support they have received from private organizations with a politically and ideologically conservative orientation. Senator Richard Durbin highlights the support given to Brett Kavanaugh[6] by the Heritage Foundation, the Federalist Society, the National Rifle Association (NRA), the Judicial Crisis Network and the Chamber of Commerce. Thus, Big corporate interests stand solidly behind his nomination (p. 41, p. 949). Senator Whitehouse finally stresses the fact that "The NRA has poured millions into your confirmation… They clearly have big expectations on how you'll vote on guns" (p. 998). The Senate report includes a non-signed list of decisions issued by Brett Kavanaugh when he was in office as a Washington D.C. Court of Appeals judge. The

[6] The following elements concerning Brett Kavanaugh are extracted from the U.S. Senate's Judiciary Committee Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States, One Hundred Fifhteen Congress, 2nd session, Serial No. J–115–61, S. HRG. 115–545, Part 1 of 2, September 4, 5, 6, 7, and 27, 2018.

list, entitled “Brett Kavanaugh: Delivering for Right-Wing and Corporate Interests?” includes decisions assorted with the following headlines: Unleashing special interest money into elections; Protecting corporations from liability; Helping polluters pollute; Striking down commonsense gun regulations; Keeping injured plaintiffs out of court ; Expounding a nearly limitless vision of presidential immunity from the law; Gutting workers’ rights.

The confirmation hearing of Amy Coney Barrett[7] have been less extensive about the corporate interests than in the Kavanaugh hearing. However, it has been said that the Judicial Crisis Network announced that it has launched a campaign as part of an all-out effort to confirm Judge Amy Coney Barrett to the Supreme Court. According to Senator Feinstein, “The Judicial Crisis Network has spent $7.3 million to date on the grassroots mobilization effort so far. The group expects to spend at least $10 million on the effort.” Senator Feinstein puts the emphasis on the fact that “The Judicial Crisis Network still does not provide transparency about its donors”; he also reminds that this organization have been a key support of the nomination of Justice Gorsuch.

2. Decisions in favor of groups of interest

In the course of the confirmation hearing of Brett Kavanaugh in the Senate Judiciary Committee, Senator Whitehouse refers to an empirical studies of the rulings of the “Robert Five” justices, i.e. the conservatists justices at the supreme court[8] that Brett Kavanaugh will surely join owing to his decisions issued as a Court of Appeals judge : in favor of “corporate interests, unleashing special interest money into elections, protecting corporations from liability, helping polluters pollute, striking down commonsense gun regulations, keeping injured plaintiffs out of court against corporations” (p. 50). The empirical study of the “Robert Five” justices from the 2005 term to the 2017-2018 term have been elaborated and released by the American Constitution Society. It concludes that 73 decisions issued with a 5-4 majority are clearly in favor of Republican politics from two points of view : allowance of “big money” in electoral campaign and lowering the mandatory pre-clearance requirement for electoral ballots in the historically racial discrimination practising states ; among the 73 decisions, others went in a significant manner in favour of big corporate interests and were advancing a « Far-Right Social Agenda » (on issues such as gun control and abortion).

[7] The following elements concerning Amy Coney Barrett are extracted from the U.S. Senate’s Judiciary Committee Confirmation Hearing on the Nomination of Honorable Amy Coney to be an Associate Justice of the Supreme Court of the United States, October 2020.

[8] Justices Roberts, Alito, Kennedy, Thomas, and Scalia or Gorsuch.

In 2008, in *District of Columbia v. Heller*, the majority of the justices, led by Scalia, affirmed a clear originalist position on the right to possess firearms on the basis of the 2nd Amendment. This decision is consistent with the *U.S. v. Lopez* ruling of 1995, in which the Supreme Court struck down as unconstitutional the Gun Free School Zones Act of 1990, which outlawed the possession of firearms in or near schools. This position in favour of the freedom of citizens to own firearms is in line with the policy of the NRA, which, as mentioned above, has actively supported the appointment of conservative and originalist judges. *McDonald v. City of Chicago*, issued on June 28, 2010, goes in the same direction: « the U.S. Supreme Court ruled (5–4) that the Second Amendment to the U.S. Constitution, which guarantees "the right of the people to keep and bear Arms," applies to state and local governments as well as to the federal government »[9].

Regarding corporate interests, the Constitutional Accountability Center (CAC) and the online newspaper *Politico* have posted a series of analysis of the conservative justices towards business firms. The CAC considers since 2010 the U.S. Chamber of Commerce as a proxy of big business interests at the Court. In a study of the 2017-2018 term, the CAC experts stress the fact that the Chamber of Commerce won over 70% of its cases. This figure is of sharp contrast to the 56% success rate that prevailed before the late Rehnquist court (from 1994 to 2005) and the 43% success rate before the late Burger court (1981-1986). According to the CAC report, « Justices Alito, Gorsuch, Kennedy, Roberts, and Thomas cumulatively voted for the Chamber's position 86% of the time. By contrast, the more liberal bloc made up of Justices Breyer, Kagan, Ginsburg, and Sotomayor voted for the Chamber's position 50% of the time[10]. ». The CAC report concludes that the pro-business policy of conservative originalist judges consolidates the U.S. Chamber of Commerce in « its efforts to skirt regulation and legal accountability ».

The Newspaper *Politico* reports a President Trump's email to the heads of major business firms ensuring them that the Kavanaugh's nomination at the Supreme Court[11] would strengthen the

[9] https://www.britannica.com/event/McDonald-v-City-of-Chicago

[10] See : https://www.theusconstitution.org/think_tank/a-banner-year-for-business-as-the-supreme-courts-conservative-majority-is-restored/

[11] The American Constitution Society raises serious concern about the Trump nominations to the Supreme Court: "the era of Chief Justice Roberts, the Supreme Court's Republican-appointed justices have delivered landmark victories for corporate and right-wing interests in dozens of cases, like Citizens United v. FEC, Shelby County v. Holder, and Janus v. AFCSME. Have the conservative justices on the Court been effectively "captured" by these corporate and right-wing interests? If so, what role has the nominations process played and what can be done to

battle against overregulation, protects American businesses, and "killing" President Obama's most destructive new environmental rules.[12]

Ash & Chen (2018) quantitative analysis of Courts of Appeals and Supreme court decisions, focusing on Brett Kavanaugh, confirm our analysis of the conjunction of societal conservatism and pro-business and free market policy of originalist judges. Ash & Chen provide substantial additional elements. They argue that Kavanaugh dissents more often than other justices, in particular when the majority decision is written by a Democrat-appointed judge. The specific nature of the dissenting opinion must be emphasised. It incurs costs both for its author and for the rest of the Court (collegiality costs). These various costs are acceptable only if the judge derives a specific benefit from them, which may be due to a reputational effect or a partisan motivation. The second type of motivation may, for example, appear in a distribution of dissenting opinions that is more frequent during election periods (*election-season dissents*), as illustrated by Ash and Chen (2018). Similar conclusions could be drawn from other economic sectors, such as financial markets and securities regulations (Fedderke and Ventoruzzo, 2015).

Their analysis also demonstrates that Republican-appointed judges tend to have negative opinions concerning liberals, trade-unions and farmers while Democrat-appointed judges tend to have positive opinions. In the same way, the precedents cited, and the articles of the Constitution referred to in the court's decisions and in the individual opinions are all markers or signals of a republican or democratic sensibility.

3. Ideology as a driving force: no need of direct groups of interests' intervention

During his first term as President, Trump made it clear that he would only appoint judges to the Supreme Court who could overturn *Roe v. Wade* and the *Affordable Care Act* (Obamacare). Apart from this case, Hollis-Brusky (2020) points out three interesting facts: firstly, since the 1980s, there has been a growing polarization of the Supreme Court, between conservative judges appointed by Republican Presidents and liberal judges appointed by Democratic Presidents[13]; secondly, judges belong to an unelected elite of jurists, who "tend to act on elite

reverse this trend and ensure the Court serves only the interest of impartiality, objectivity, and the rule of law? » See: Dark Money and the Courts: The Right Wing Takeover of the Judiciary | ACS

[12] https://www.politico.com/story/2018/07/09/brett-kavanaugh-business-groups-trump-705800 (posted 7/09/2018)

[13] The link between the partisan affiliation of the President and the future votes of the judges appointed is not always self-evident, even though the polarisation of the Court (and of American politics) leads to greater

values because justices are almost always selected from the most affluent and highly educated stratum of Americans." (Hollis-Brusky, 2020, p. 10). And finally, the growing importance of the Federalist Society in promoting a conservative counter-revolution to the hegemony of liberal ideas in most Ivy League law schools (Teles, 2008).

Short, Hill & Brown (2024) argue that the satisfaction of business interest can occur in alternative process than regulatory capture: they call this "ideological capture" which "occurs when experts design regulatory frameworks that marginalize important public values and produce favorable outcomes for business interests even in the absence of lobbying" (Short, Hill & Brown, 2024, p. 1).

For instance, Amy Coney Barrett wrote, in a 2016 article co-authored with John C. Nagel; that "Adherence to originalism arguably requires …, the dismantling of the administrative state, the invalidation of paper money, and the reversal of Brown v. Board of Education" (Coney Barrett & Nagel, 2016, p. 1-2). In a series of questions & answers for the congressional records, Senator Feinstein remarks that "Justice Scalia believed the Affordable Care Act (ACA) is unconstitutional. You [Amy Coney Barrett] yourself have noted that he argued it "should be renamed 'SCOTUSCare[14]' in honor of the Court's willingness to 'rewrite' the statute in order to keep it afloat. A similar reticence about Obamacare also characterizes Brett Kavanaugh in relation to an article published by The Federalist under the title "Brett Kavanaugh said Obamacare was Unprecedented and Unlawful." (U.S. Senate, Amy Coney Barrett confirmation hearing, p. 949).

Finally, Anderson (2018) underlies that the formal institutional safeguards such as political independence of judges, life-time tenure or general jurisdiction in some cases break down, exposing courts to capture. He distinguishes between classic forms of capture (bribes, jobs, campaign contributions) and new, informational and cultural forms. He admits that cultural capture is difficult to grasp empirically, but it is even more likely because the court is specialized and spatially anchored, with close proximity between judges, the bar and firm lawyers.

predictability of choice. In the past, judges appointed by Republican presidents could progressively vote in a progressive way, as Harry Blackmun's opinion in Roe v Wade (1973), for example, showed. The same was true of David Souter, appointed by George H. Bush (unlike Clarence Thomas). However, although the Court still often rules unanimously (Bartels, 2015), the political divisions are confirmed when it deals with major cases for American politics (Bonica and Sen, 2021, p.112), such as campaign finance control, voting rights, same-sex marriage, conflicts between federal and state immigration legislation, affirmative action and trade union financing.

[14] SCOTUS is the acronym of « Supreme COurT of the U.S. »

The connections between politics and constitutional interpretation can be re-examined in the light of Oliver Wendel Holmes' analysis in his fundamental article *The Path of the Law* (Holmes, 1897):

> *"I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right".*

Oliver Holmes's reasoning is rooted in debates on the role of the Supreme Court that started at the very foundation of the American Republic, and which have a particularly important echo in the current context. For instance, under the pseudonym of Brutus, Robert Yates published an Anti-Federalist in which he worried about the dangers of a judiciary that combined lifetime appointment with a lack of political accountability (Yates, 1981). This fear was shared by Alexander Hamilton, as Hollis-Brusky (2020) points out. The specific powers enjoyed by judges in the American system require them to demonstrate that their positions are not the result of political preferences but of reasoned judgement (Hamilton, 1819). Conversely, judges who are not accountable expose political power to the risk of being obstructed, which may be due to factors intrinsic to the judges (their training, their preferences) but also to extrinsic factors that may be linked to capture strategies. As part of a strategy of political capture, the ability to target five judges (out of nine) is an advantage that is all the greater because they are appointed for life and are not democratically accountable (Hollis-Brusky, 2020). In this respect, a strategy aimed at the judiciary can be far more effective (and efficient) than one aimed at the legislature.

These strategies may entail processes for selecting judges or influence on their intellectual frameworks.

Firstly, regarding the selection process, the literature shows that the ideological polarization between Republicans and Democrats that has been at work since the 1980s has resulted in increasingly ideologically biased appointments[15] (Devins and Baum, 2016). This dynamic leads to a vicious circle in which each appointment aims to compensate for the effects of previous appointments or to secure a given orientation of the Court. The divisive nature of the appointments also leads to increased political analyses of the rulings and positions taken by the various judges, initiating a vicious circle distancing the perception of the interpretations made by the Court from that of an exclusively legal reasonable judgement (Rogowski and Stone, 2019), which in turn increases the political nature of these same appointments (Gibson, 2007).

Secondly, in terms of intellectual capture, the increasing homogeneity of judges' training and backgrounds can encourage the implementation of such strategies by think tanks and other organizations that are particularly active on the market of ideas (Holis-Brusky, 2015). The role of think tanks and their intellectual productions are all the more essential in the case of the Supreme Court, as majority, concurring and dissenting opinions are included in the court's decisions and play an essential role in disseminating a given conception of the role of the law, the desirable scope of state intervention, and so on (see Ash and Chen, 2018). This intellectual legitimization is even more decisive given that the American legislative branch is increasingly unable to offset the effects of the Supreme Court's constitutional interpretations with legislation to mitigate their consequences (Eskridge and Chistiansen, 2014). Think tanks also play a crucial role in the senatorial confirmation process of nominees through lobbying activities (Caldeira and Wright, 1998). Despite the political polarization, and perhaps even because of it, the confirmation of a nominee by the Senate does not necessarily go without saying. Less sensational than the case of Robert Bork in the 1980s, which we noted above, we could highlight the case of Harriet Meiers, nominated in 2004 by George W. Bush, whose nomination was withdrawn in response to the reluctance of Republican senators in favor of Samuel Alito, who presented a much more conservative profile on social issues such as abortion (Bonica and Sen, 2021)[16]. The influence of lobbies in the appointment process is therefore all the more decisive.

[15] Over and above the considerations specific to the procedures for appointing judges and the political strategies that underpin them, it is important to consider the impact of the ideology of each of the judges concerned on the positions that they will be called upon to take (Bonica and Sen, 2021).

[16] Nous pourrions également citer comme exemple de polarisation politique en matière de nomination le refus du Sénat d'approuver en 2016 le choix de Merrick Garland pour remplacer Antonin Scalia (Tobias, 2017).

In short, even if the role of ideology, and more specifically of conservative ideas, is certainly highly important, it is more complementary than an alternative to a more direct means of seeking to capture the Courts.The balance between ideological capture and the conscious politicisation of judges has often been discussed in the literature. Does the conservative or progressive inclination of a particular judge stem from a mindset, principles of legal analysis or a theory of interpretation that directs him or her towards 'partisan' findings, or is it a matter of seeking a particular public policy outcome? Chen and Reinhart (2024) suggest that, in the case of federal judges, the analysis should be based on political orientation rather than theoretical inclination. Their study shows that federal judges tend to adjust their departure date (retirement or resignation) so that it coincides with a situation in which both the President and the Senate majority are aligned with that which prevailed at the time of their appointment. This strategic approach would argue more for a conscious partisan loyalty than for an unconscious bias. All these factors tend to support the hypothesis that the polarisation of the American political debate has a significant impact on the judicial debate, and thus poses a problem of checks and balances, a risk that was already anticipated in the constitutional discussions[17].

Conclusion

In conclusion, we would highlight three key points:

1. The interest of developing the 'constitutional law' dimension in the problematic of Political Capitalism
2. But the text of the Constitution is not enough; we must consider its application and, above all, the methods of interpretation.
3. The case of the Supreme Court is specific; a research perspective could concern the application of our approach to other cases than the United States.

Our analysis shows the channels through which originalism can lead to conservative restrictions on government intervention in the economy. However, this conservative influence cannot be seen as being exerted through the law but could also be seen from the perspective of economic theory itself. Oliver W. Holmes invited us to do so in his dissenting opinion in the 1905 Lochner case, which was related to the limitation of working hours by the State of New York (US Supreme Court, *Lochner v New York*, 198 US 45, 1905):

[17] It should be emphasised that several episodes in American history have been marked by conflicts between the Supreme Court and the executive and legislative branches. The conflict between Franklin Delano Roosevelt and the Supreme Court in the 1930s is a perfect example of this (Glock, 2019).

> *"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. [...] The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics ... [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States . . ."*.

The conservative bias inherent in originalism has similarly been analyzed by Posner himself (Posner, 2013, p.353) as contributing to the appeal of this approach: "[…] conservative judges reacting to the Warren Court (and to a lesser extent to the Burger Court) found formalism to be an effective disguise for conservative activism". The danger, raised in particular by Hirschl (2009) and Doerfler and Moyn (2021), is that under the guise of constitutional legal proceduralism, federal judges, especially Supreme Court justices, can exert a decisive influence on the dynamics of American law and obstruct any progressive policy.

Additionally, if originalism leads to an interpretation that unduly restricts the ability of the legislature and the courts to adopt a broad and progressive reading of the law, it has also been shown that Law and Economics can reinforce pro-business or anti-government biases in economic matters (Ash et al., 2025).

However, conservatism may find support in economic theory even beyond the influence of Law and Economics. The prescriptions of economists may be subject to biases comparable to those noted for originalist jurists. For example, in The Political Limits of Economics, Luigi Zingales (2020) showed that the very strong propensity of economic analysis to highlight the failings of the political process to achieve objectives of general interest did not allow it to ignore its own

biases in terms of normative prescriptions. Indeed, under the impetus of Public Choice, numerous studies have highlighted the irrational nature of voters' choices, the inconsistency and incoherence of public policy over time, and so on. However, as Luigi Zingales has shown, economists' prescriptions are also characterized by several biases ranging from *Nirvana Fallacy* to Group Thinking phenomena, as well as biases linked to an identification of the general interest with those specific to the socio-professional group to which they belong (Sapienza and Zingales, 2013).

References

Anderson, Jonas, "Court Capture", *Boston College Law Review*, Vol. 59, 2018, 1543- 1594 https://digitalcommons.wcl.american.edu/facsch_lawrev

Ash Elliott, Chen Daniel L. and Naidu, Suresh, « Ideas Have Consequences: The Impact of Law and Economics on American Justice », *The Quarterly Journal of Economics*, 2025, forthcoming

Ash, Elliott & Chen, Daniel L.; "What Kind of Judge is Brett Kavanaugh? A Quantitative Analysis", *Cardozo Law Review de novo*, 2018, p. 70-100.

Bartels, Brandon, "The Sources and Consequences of Polarization in the US Supreme Court" *in* Thurber, James and Yoshinaka, Antoine, eds., *American Gridlock: The Sources, Character, and Impact of Political Polarization,* Cambridge University Press, p.171-200.

Beard, Charles A., *An Economic Interpretation of the Constitution of the United States*, New York, Macmillan (1st edition 1913, 2nd edition 1935), Electronic edition edited by Gary Edwards.

Bonica, Adam and Sen, Maya, "Estimating Judicial Ideology", *Journal of Economic Perspectives*, 35(1), 2021, p.97-118.

Bork, Robert H., Legislative Intent and the Policy of the Sherman Act", *The Journal of Law & Economics*, vol. 9, October 1966, p. 7-48.

Bork, Robert H., « The Goals of Antitrust Policy », *American Economic Review,* vol. 57, n° 2, 1967, p.242-253.

Caldeira, Gregory A., and Wright, John R., "Lobbying for Justice: Organized Interests Supreme Court Nominations, and United States Senate", *American Journal of Political Science*, 42(2), 1998, p.499-523.

Campbell, Jud, 2024, “Originalism’s Two Tracks”, *Boston University Law Review*, vol. 104, p. 1435-1450.

Chemerinsky, Elvin, “The Federalism Revolution”, *New Mexico Law Review*, vol. 31, 2001, p. 7-30.

Chen, Daniel L., and Reinhart, Eric, “The Disavowal of Decisionism: Politically Motivated Exits from U.S. Courts of Appeals”, *Review of Law and Economics*, 20(2), 2024, pp. 289-321.

Coney Barrett, Amy, Nagle, John Copeland, “Congressional Originalism”, *Journal of Constitutional Law*, Vol. 19 (1), October 2016, p. 1-44.

Devins, Neal and Baum, Lawrence, “Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court”, *The Supreme Court Review,* 2016(8), 2017, pp.301-365

Doerfler, Ryan D., and Moyn, Samuel, “Democratizing the Supreme Court”, *California Law Review*, 109, 2021, p.1703-1772.

Dunca, Richard F., “Justice Scalia and the Rule of Law: Originalism vs. The Living Constitution”, *University of Nebraska College of Law, Faculty Publications*, n° 200, 2016. http://digitalcommons.unl.edu/lawfacpub/200

Eskridge, William, and Christiansen, Matthew, “Congressional Overrides of Supreme Court Statutory Interpretation Decisions 1967-2011”, *Texas Law Review*, 92, 2014, p. 1317 et s.

Fedderke, Johannes W., and Ventoruzzo, Marco, “Do Conservative Justices Favor Wall Street: Ideology and the Supreme Court’s Securities Regulation Decisions”, *Florida Law Review*, 67(3), 2015, p.1211-1280.

Gentzkow, Matthew, Shapiro, Jesse M. and Taddy, Matt, “Measuring Group Differences in High-Dimensional Choices: Methods and Application to Congressional Speech”, *Econometrica*, 87, 2019, p.1307-1340.

Gibson, James L, “The Legitimacy of the US Supreme Court in a Polarized Polity”, *Journal of Empirical Legal Studies*, 4(3), 2007.

Giles, Micheal W., Hettinger, Virginia A. and Peppers, Todd, “Picking Federal Judges – A Note on Policy and Partisan Selection Agendas”, *Political Research Quarterly*, 54(3), p. 623-641.Ginsburg, Douglas H., & Owings, Taylor M. “Since Bork”, *Journal of Law, Economics & Policy*, 10 (3), 2014, p. 599-614.

Glock, Judge, “Unpacking the Supreme Court: Judicial Retirement, Judicial Independence, and the Road to the 1937 Court Battle”, *Journal of American History*, 106(1), 2019, p.47-71.

Gorsuch, Neil, « Why Originalism Is the Best Approach to the Constitution », *The Time*, September 6, 2019: https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/

Hamilton, Alexander, “The Federalist; n°78”, *The Federalist Papers*, reed. Clinton Rossiter, Mentor Books, New York, 1999.

Hirschl, Ran, *Towards Juristocracy: The Origins and Consequences of New Constitutionnalism,* Harvard University Press, 2009.

Hollis-Brusky, Amanda, “Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture”, *Testimony before the Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Internet, United States House of Representatives*, September 22, 2020 - https://www.congress.gov/116/meeting/house/111025/witnesses/HHRG-116-JU03-Wstate-Hollis-BruskyA-20200922.pdf

Hollis-Brusky, Amanda, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, Oxford University Press, New York, 2015

Holmes, Oliver W., "The Path of the Law”, *Yale Law Journal*, vol.10, pp. 457 et s., 1897

Hovenkamp, Herbert, “The Antitrust Text”, *Indiana Law Journal,* 99, p.1063-1130.

Jeanneney, Julien, *Une fièvre américaine – choisir les juges de la Cour Suprême*, CNRS éditions, Paris, 2024.

Khan Lina M., "Amazon's Antitrust Paradox”, *Yale Law Journal*, n° 126, 2017, p. 712-805.

Kirat, Thierry & Marty, Frédéric, "How Law and Economics was Marketed in a Hostile World : L'institutionnalisation du champ aux Etats-Unis de l’immédiat après-guerre aux années Reagan", *Cahiers d'Economie Politique,* n°78, 2020/2, 2020, pp.173-202.

Kirat, Thierry & Marty, Frédéric, "The Late Emerging Consensus Among American Economists on Antitrust Laws in the Second New Deal (1935-1941)”, *History of Economic Ideas*, XXIX/2021/1, p.11-51 https://doi.org/10.19272/202106101001

Kirat, Thierry & Marty, Frédéric, "Les effets économiques de l'originalisme constitutionnel aux États-Unis", *Revue Interdisciplinaire d'Etudes Juridiques*, 89, 2022/2, 2022, pp.3-38.

Lacorne, Denis, *L'invention de la république. Le modèle américain*, Paris, Hachette-collection. Pluriel, 1991.

Lande, Robert H., & Zerbe, Richard O., "The Sherman Act is a No-Fault Monopolization Statute: A Textualist Demonstration", *American University Law Review*, vol. 70, 2020, p. 497-588. https://scholarworks.law.ubalt.edu/all_fac/1115

Lande, Robert H., "A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice", *Fordham Law Review*, 81, 2013, p.2349-2403.

Lande, Robert H., "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged", *Hasting Law Journal*, vol. 34, 1982, p.65-151.

Lindeboom, Justin, "Illumina/Grail: Flawed Originalism and the Judicial Hunch", *Journal of Antitrust Enforcement*, 2025*, forthcoming.*

Lund, Nelson, "Antonin Scalia and the Dilemma of Constitutional Originalism », *Perspectives on Political Science*, 48 (1), 2019, p. 7–13. https://doi.org/10.1080/10457097.2018.1513752

Manning, John F., "Textualism as a Nondelegation Doctrine", *Columbia Law Review*, vol. 97, 1997, p. 673 et s

McGinnis, John O. & Rappaport Michael, « Original Interpretive Principles as the Core of Originalism », *Constitutional Commentary*, vol.24, 2007, p. 371-382.https://scholarship.law.umn.edu/concomm/540

McGoldrick, James M. Jr., "Why Does Justice Thomas Hate the Commerce Clause?" *Pepperdine University School of Law, Legal Studies Research Paper Series*, Paper No. 2019/9.

Meese, Alan J., "Justice Scalia and Sherman Act Textualism", *Notre Dame Law Review*, 92(5), 2014, p. 2013-2052.

Mongoin, David, "Le Fédéraliste Revisité", *Jus Politicum*, n°8, 2012. http://juspoliticum.com/article/Le-Federaliste-revisite-539.html

Newman, John, "Reactionary Antitrust", *Concurrences*, 4-2019, p.66-72

Paul, Sankjuta, “Recovering the Moral Economy Foundations of the Sherman Act”, *Yale Law Journal*, 131(1), 2021, pp.175-255

Pfersmann, Otto, "Comparative Hermeneutics of Constitutional Revision Clauses and the Question of Structural Closure of Legal Systems”, *Cardozo Law Review*, vol. 40, 2019, p. 3191-3016.

Pitofsky, Robert, « The Political Content of Antitrust », *University of Pennsylvania Law Review*, 127, 1979, p. 1051-1075.

Posner, Richard A., 2013, *Reflections on Judging*, Cambridge (MA)-London, Harvard University Press.

Pottle, Justin, and Rogowski, Jon, “Political Context, White House Centralization, and the Timing of Presidential Nominations, to the Federal Courts”, *Presidential Studies Quarterly*, 52(3), 2022, p.626-647.

Ramsey, Michael D., « Beyond the Text: Justice Scalia's Originalism in Practice », *Notre Dame Law Review*, Vol. 5 n°. 92, 2017, p. 1945-1975.

Rogowski, Jon C., and Stone, Andrew R., “How Political Contestation Over Judicial Nominations Polarizes Americans’ Attitudes Toward the Supreme Court”, *British Journal of Political Science,*51(3), 2021, p.1251-1269.

Sapienza, Paola, and Zingales, Luigi, "Economic Experts vs. Average Americans”, *American Economic Review*, 103(3), 2013, p.636-642.

Scalia, Antonin, & Garner, Bryan A., *Reading Law: The Interpretation of Legal Texts*, West Publishing, 2012.

Short, Nicholas, Hill, Sophie, Brown, Jacob R. « What is Ideological Capture and How Do We Measure It?: Using Antitrust Reform to Understand Expert-Public Cleavages », unpublished paper, 2024.

Solum, Lawrence B., « What is Originalism? The Evolution of Contemporary Originalist Theory », Georgetown University Law Center, 2011.https://scholarship.law.georgetown.edu/facpub/1353

Teles, Steven M., *The Rise of the Conservative Legal Movement*, Princeton and Oxford, Princeton University Press, 2008.

Tobias, Carl., “Confirming Supreme Court Justices in a Presidential Election Year”, *Washington University Law Review*, 94(4), 2017, p.1089-1108.

Vahabi, Mehrdad, *Destructive Coordination, Anfal and Islamic Political Capitalism. New Reading of Contemporary Iran*, Palgrave-Macmillan, 2023.

Yates, Robert, (1981), “Letters of Brutus” in *The Anti-Federalist*, XI, Herbert Storing, ed., vol. 2, Part 2, University of Chicago Press, pp.417-422

Zingales, Luigi, « The Political Limits of Economics”, *AER Papers and Proceedings*, vol 110, 2020, p.378–382.

Zoller, Elisabeth, « Présentation de la Cour suprême des Etats-Unis », *Cahiers du Conseil constitutionnel* n° 5 (Dossier : États-Unis) - novembre 1998. https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/presentation-de-la-cour-supreme-des-etats-unis

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