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The Word that Cannot be Spoken: Notes From Jurisprudential Underground

Stephen M. Feldman*
abstract: The Word that Cannot be Spoken: Notes From Jurisprudential Underground

American law reviews have banished a word. Call it Tabooism. When authors today refer to Tabooism, they flippantly denounce it as irrational, nihilistic, dishonest, and so forth. Even so, some scholars occasionally discuss Taboo themes without acknowledging their origins. Sometimes, an author’s efforts to avoid mentioning Tabooism border on the comical. In fact, the widespread albeit clandestine reliance on Taboo themes and insights suggests that Tabooism does not deserve its banishment. Why, then, do so many scholars summarily dismiss it? The primary answer is power. Tabooism threatens central mainstream concepts that 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. When originalists, neoliberals, and other critics shove Tabooism underground, they bolster their own claims to being pronouncers of objective truths and unimpeachable principles. We end up discussing absurd questions such as whether constitutional interpretation should focus on the framers’ intentions or the original public meaning of the document. But 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.

Table of Contents:
I. The Clandestine Manifestation of Tabooism
II. Why the Taboo?
III. Conclusion
American law reviews have banished a word. This word is neither offensive nor profane. Depending on context, it previously had signified an era, a cultural concept, or a philosophical theory, but 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.” 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. 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 review editors care).


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, 137-87 (2000) [hereinafter Feldman, Voyage]; Fredric Jameson, Postmodernism, or, The Cultural Logic of Late Capitalism (1991); Nancey Murphy, Anglo-American Postmodernity
simple Westlaw 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. 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 the law reviews, Douglas Laycock dismissed a Taboo “world in which no text or symbol has any core meaning and any text can mean anything.” Robert F. Cochran condemned Tabooism for slouching “toward nihilism.” Legal historian James Hackney referenced “some fanciful [Taboo] notion [in which] there are no scientific truths.” In a book review, James Q. Whitman criticized the author merely for relying too heavily on a Tabooist, Michel Foucault. In other media, conservative columnist Jonah Goldberg condemned President (1997).

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.


Obama as a Tabooist.\(^9\) Goldberg explained: “[Tabooism] was and is an enormous intellectual 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.

**I. The Clandestine Manifestation of Tabooism**

Most critics invoke Tabooism as 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

\(^9\) Jonah Goldberg, *Obama, the postmodernist*, USA Today, Aug. 5, 2008, at 11A.

\(^10\) *Id.*

\(^11\) *Id.*


\(^14\) Dibadj, *supra* note 8, at 389.
movements. For instance, Tabooists break down disciplinary boundaries and emphasize interdisciplinary work.\textsuperscript{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 and 1930s were renowned for their reliance on social-science methods.\textsuperscript{16} Regardless, nowadays, interdisciplinary scholarship is standard fare in the law reviews. The use of history, for instance, has exploded across legal scholarship.\textsuperscript{17} But history is not the only non-law discipline to grace pages of recent law reviews. One can find articles relying on anything from Sartrean philosophy to the qualitative and quantitative methods of the social sciences, including economics, of course.\textsuperscript{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.\textsuperscript{19} From a Taboo stance, disciplinary boundaries are contingent fences that constrain creative thinking and should be disregarded whenever fruitful.\textsuperscript{20}

Interdisciplinarity is not the only Taboo insight or theme to appear in recent law reviews.\textsuperscript{21} One can find discussions of the social construction of the self and identity.\textsuperscript{22} Likewise, one can find self-reflexive ruminations on the state of legal scholarship.\textsuperscript{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?\textsuperscript{24}

\textsuperscript{19}Feldman, Voyage, supra note 3, at 166-68 (explaining interdisciplinarity as aspect of postmodern themes); Arthur F. McEvoy, \textit{A New Realism for Legal Studies}, 2005 Wis. L. Rev. 433, 442-48 (tying current interdisciplinary scholarship to postmodernism); see François Cusset, \textit{French Theory} 162-65 (Jeff Fort trans., 2008) (emphasizing the use of history to unmask illegitimate assumptions).


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. 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.” Sometimes, an author’s efforts to avoid mentioning Tabooism border on the comical. Louis Michael Seidman’s book, Our Unsettled Constitution, is a stunning example. Seidman presented a “new theory of Constitutional Law,” though in truth, he provided a persuasive Taboo description of constitutional jurisprudence and adjudication. Seidman intriguingly called his approach an “unsettlement theory.” 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. The constitutional argument, in other words, is never closed. Seidman argued that this continuing openness to constitutional argument is crucial to


26 Id. at 152 n.90. 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, 115 Harv. L. Rev. 1278 (2002).


28 Id. at 1.

29 If a theory is supposed to provide some guidance toward constitutional interpretation or 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 8-9.
maintenance of the political community. “In short, an unsettled constitution helps build a community founded on consent by enticing losers into a continuing conversation.”

Seidman built his unsettlement theory on numerous interrelated Tabooist insights and themes. For example, tabooists are antifoundational. They (at least some of them) believe in truth and knowledge but not in objective foundations. Seidman described his theory as “antifoundational,” emphasizing disagreement over “foundational claims.” Antifoundationalism leads deconstructive Tabooists to accentuate the indeterminacy of textual meaning. These deconstructionists, it should be stressed, do not deny that texts have meaning. To the contrary, they argue that texts have many meanings. 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.” 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.” In underscoring indeterminacy, Seidman even referred explicitly to deconstruction, a concept sometimes associated with Tabooism. “[T]he core distinctions around which constitutional law is organized—the difference between freedom and coercion, public and private, feasance and

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32 Id. at 8-9.

33 Feldman, Voyage, supra note 3, at 163-66.


35 Seidman, supra note 27, at 211.


37 Seidman, supra note 27, at 11.

38 Id. at 9.

nonfeasance—are easily deconstructed.” An important concept in Tabooist deconstruction is the Other. The Other refers not only to suppressed textual meanings but also to marginalized and oppressed individuals and groups. Because any text has multiple meanings, then 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 overcome the views of peripheral societal groups. Seidman, thus, emphasized “otherness.” “[N]o political community will ever be universally inclusive,” Seidman explained. “[T]here will always be some people on the outside….”

Seidman’s implicit reliance on Taboo insights and themes went on and on. Like a good Tabooist, Seidman emphasized paradoxes, irony, community, and reflexivity. Given all

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40 Seeidman, 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.


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.” Id.

44 Id. at 107.

45 Id. at 107-08.

46 Tabooists often identify and even revel in paradoxes. Feldman, Voyage, 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 (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 Feldman, Voyage, supra note 3, at 43, 180-81 (discussing irony); Seidman, supra note 27, at 216 (discussing the irony of his unsettlement theory).

48 See Feldman, Voyage, supra note 3, at 151-55 (discussing scientific communities, interpretive communities, and the Gadamerian notion of communal traditions); Seidman, supra note 27, at 9-11 (emphasizing community).

49 Feldman, Voyage, supra note 3, at 42-43, 176-80 (discussing how postmodern practices are self-
this, the most amazing aspect of *Our Unsettled Constitution* was that Seidman never used the word Taboo 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…. And 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.\(^56\)

**II. Why the Taboo?**

50The word ‘postmodern’ is not in the index. Seidman, *supra* note 27, at 253-60.


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 Tabooism is legitimately dismissed because it is analytically indefensible.\textsuperscript{57} For example, the legal philosopher Ronald Dworkin argued that a proposition is true if and only if it is \textit{objectively} true.\textsuperscript{58} The proposition must correspond with “some external, objective, timeless, mind-independent world.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\textsuperscript{57}See, e.g., John M. Ellis, \textit{Against Deconstruction} (1989) (literary theorist arguing that Derrida is logically imprecise).


\textsuperscript{59}\textit{Id.} at 87.

\textsuperscript{60}\textit{Id.} at 88.

\textsuperscript{61}Dennis Patterson, \textit{Postmodernism/Feminism/Law}, 77 Cornell L. Rev. 254, 262-79 (1992)
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, needless to say, would never accept.\(^6\)

   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*.\(^6\) Many critics mistakenly read Kuhn and his Tabooist argument as concluding that scientific truth does not exist and that science is therefore impossible.\(^6\) But Kuhn himself did not intend such a conclusion.\(^6\) To the contrary, as a “devoted celebrant of the scientific venture,” he intended to explain how science was possible even though the traditional conception of objectivity was unacceptable.\(^6\)

   Dworkin’s criticism of Tabooism is typical among those who have engaged it on the merits.\(^6\) They 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?

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\(^6\)“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).

\(^6\)Id.

\(^6\)E.g., Israel Scheffler, *Science and Subjectivity* (1967).


\(^6\)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).
The primary answer is power, which is precisely what the powerful do not want to discuss. Power is one of the most important Taboo themes: How does power operate in and through society and culture? The shoving of Tabooism underground is an act of power that has serious consequences. Tabooism threatens central mainstream concepts that 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. 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: It is marginalized and ignored. When its opponents denounce Tabooism as dishonest, 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. Followers of so-called old originalism

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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, 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, reprinted in Hubert L. Dreyfus & Paul Rabinow, Michel Foucault: Beyond Structuralism and Hermeneutics 208, 208, 212 (2d ed. 1983); see Feldman, Voyage, 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).

maintain that constitutional interpretation must focus on the text and framers’ intentions.\textsuperscript{72} Followers of new originalism maintain that constitutional interpreters should discern the original public meaning of the text.\textsuperscript{73} Either way, originalists claim that their methods purify interpretation by filtering out political bias.\textsuperscript{74} Judges who refuse to follow originalist methods are condemned as rogues, arbitrarily imposing their own political preferences.\textsuperscript{75} Originalism, in short, purports to be an escape from political power.\textsuperscript{76}

Tabooism undermines originalism in at least two ways. First, the originalist claim to discover a single fixed textual meaning is false. Tabooist deconstruction emphasizes that any text is iterable.\textsuperscript{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.\textsuperscript{78} Rather than being exhausted by a single reading, “truth keeps happening.”\textsuperscript{79} Thus, when Supreme Court justices disagree about the meaning of the Constitution, their disagreement arises from the

\begin{footnotesize}


\textsuperscript{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).


\textsuperscript{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.

\textsuperscript{79} Joel Weinsheimer, Gadamer’s Hermeneutics: A Reading of Truth and Method 9 (1985).
\end{footnotesize}
iterability and surfeit of meaning in the text. In most instances, the justices sincerely interpret the text from their respective horizons. When Alito and Ginsburg disagree, neither one is lying or being disingenuous.\textsuperscript{80} Second, the originalist claim to purge power (and politics) from constitutional adjudication is a dangerous fantasy. The Tabooist emphasizes on power and the Other underscores that originalism celebrates a society—the society of the framing and ratification—that subordinated women, racial and religious minorities, and the poor.\textsuperscript{81} It was a society that enslaved one-fifth of its population and denied voting rights to the vast majority of its people.\textsuperscript{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.\textsuperscript{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.\textsuperscript{84} When neoliberalism first emerged before World War II, it accepted some government intervention in the market, but during the Cold War, the neoliberal defense of the economic marketplace intensified with “apocalyptic” zeal.\textsuperscript{85} Milton


\textsuperscript{83}See, e.g., Michelle Alexander, \textit{The New Jim Crow} (2012 ed.) (emphasizing the mass incarceration of African Americans).

\textsuperscript{84}David Harvey, \textit{A Brief History of Neoliberalism} (2005); Daniel Stedman Jones, \textit{Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics} (2012); e.g., Friedrich A. Hayek, \textit{The Road to Serfdom} (1944).

\textsuperscript{85}Jones, \textit{supra} note 84, at 120; \textit{see id.} at 141 (linking neoliberalism and libertarianism); e.g., Milton Friedman, \textit{Capitalism and Freedom} (1962).
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 chaos to the naked eye,” he wrote. “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.”

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.” 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.” Government attempts to rationally plan for progress necessarily end in disaster.

In short, neoliberals are market fundamentalists. 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. 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

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87 *Id.*

88 *Id.* at 18.

89 *Id.*


92 Friedman, *supra* note 85, at 24.
American Enterprise Institute, “The best government philosophy is one that starts every day with the question, ‘What can we do today to get out of Americans’ way?’”

Tabooism threatens neoliberal ideology in at least three ways. First, neoliberalism is built on homo economicus—the economic self of neoclassical economics. Homo economicus seeks to maximize the satisfaction of its own preexisting interests, and thus it prefers the private sphere, the economic marketplace. As a rational self-maximizer, homo economicus contemplates its community and government only if doing so might work to its own advantage. For instance, homo economicus might seek to remove government obstacles, such as environmental regulations, which threaten profits. 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. 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. Tabooism, however, undermines this economic conception of the self. Neoliberalism insists that


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); Tanina Rostain, Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement, 34 Law & Soc’y Rev. 973 (2000) (same).

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).


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).


homo economicus is the natural and preexisting self—whether we like it or not, we are economic selves\textsuperscript{100}—but Tabooism emphasizes the social construction of the self or subject. When we are born, we are thrust into a sociocultural context.\textsuperscript{101} We interact with parents and other caregivers, friends, strangers, and also 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.\textsuperscript{102} Feminists refer to this socially constructed self as a relational self.\textsuperscript{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 in our lives, and for our very identities.\textsuperscript{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.\textsuperscript{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.\textsuperscript{106} There is no prior to or outside of the sociocultural forces that shape

\textsuperscript{100} Economists supposedly ground homo economicus on the description of “everyday conduct.” Edward J. O’Boyle, \textit{Requiem for Homo Economicus}, 10 J. Markets & Morality 321, 333 (2007). As such, “no single concept [is] more significant to the economic way of thinking than homo economicus.” \textit{Id.}; \textit{see id.} at 324 (stating that, in economics, homo economicus is “never-changing”).


\textsuperscript{103} \textit{Id.} at 45.

\textsuperscript{104} Marilyn Friedman, \textit{Autonomy, Gender, Politics} 94 (2003).

\textsuperscript{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, \textit{Who Cooked Adam Smith’s Dinner? A Story About Women and Economics} 61 (Saskia Vogel trans., 2016).

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. And through all these market manipulations, the users are told and usually believe that they (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


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.


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.
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 more than does 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.


¹¹⁵Marçal, supra note 105, at 16-17, 30, 59.

¹¹⁶See Bauman & Raud, supra note 113, at 98-99 (emphasizing how wealth and inequality affect power or control).

¹¹⁷Id. at 64 (criticizing neoliberal ideology).
III. Conclusion

By dismissing Tabooism out of hand, originalists, neoliberals, and others avoid confronting it on the merits. 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.”

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.

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 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

¹²¹ Butler, Contingent, supra note 106, at 39 (emphasizing that recourse to philosophical positions supposedly “beyond the play of power” constitutes “the most insidious use 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. 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?
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.