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# FEDERALISM & SEPARATION OF POWERS

## AN ORIGINALIST FUTURE

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### Related Links:

- Ackerman, Bruce, “The Holmes Lectures: The Living Constitution” (2007). Faculty Scholarship Series. Paper 116: [http://digitalcommons.law.yale.edu/fss\\_papers/116](http://digitalcommons.law.yale.edu/fss_papers/116)
  - Mitchell Berman, Originalism is Bunk, 84 N.Y.U. L. REV. 1 (2009): [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1078933](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078933)
  - David Strauss, Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877 (1996): [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2999&context=journal\\_articles](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2999&context=journal_articles)
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### Introduction

Originalism is enjoying a comeback in constitutional law. The idea that the Constitution should be interpreted according to the meaning that was fixed at the time it was enacted was commonplace in the early republic. For instance, James Madison, the father of the Constitution, wrote: “I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable . . . exercise of its powers.” Originalism continued to be dominant until the New Deal.

But it then suffered two body blows. Because the Constitution’s enumeration of federal powers were thought incompatible with the need for national control of the commanding heights of the economy, the New Deal Justices no longer placed any substantial weight on historical analysis in limiting the scope of these powers. Then as the civil rights movement and sexual revolution proceeded apace, later Justices believed they needed to update the Constitution to protect individual rights—in part from the big government they themselves had enabled. It may well have been that some of their decisions, like *Brown v. Board of Education*, could have been justified through the original meaning, but the culture of originalism had so dissipated that the Justices chose to root controversial holdings in sociological and moral reasoning rather than in an historically based understanding of the constitutional text.

The culture of originalism died out not only in the courts but in the academy as well. Law professors were devoted to justifying the Warren Court and providing theories of constitutional interpretation—often amusingly called “non-interpretive” theories of interpretation—that argued for looking to evolving moral principles or political concepts rather than historical meaning as guides to interpreting the Constitution.

But the world has changed. In *District of Columbia v. Heller*, the Court extensively inquired into the historical meaning of the Second Amendment to hold that possessing a gun in the home was a constitutional right. A measure of the increasing prevalence of originalism was Justice Stevens’ dissent. He disagreed on the history but accepted the originalist methodology. *Heller* is by no means unique. In the recent case on the constitutionality of Obamacare, the five members of the Court who held that that the Commerce Clause did not permit Congress to mandate the purchase of health insurance relied on a careful reading of the text in its historical context to conclude that the authority to regulate commerce could not be understood as the authority to bring commerce into being. And by no means are all of these decisions politically conservative. For instance, in a series of decisions the Court, led by Justice Antonin Scalia, has enforced the Confrontation Clause of the Constitution to give criminal defendants broad rights to cross examine witnesses. Two Justices on the Court, Scalia and Clarence Thomas, are self-proclaimed originalists.

In the academy originalism is also undergoing a revival. Serious new ideas supporting originalism are the most vibrant area of constitutional theory. Many leading law reviews publish thoroughly researched historical analyses of specific provisions of the Constitution. Historically, most of this intellectual activity took place among conservatives. But over time libertarians have increasingly become originalists and have significantly contributed to its development. And now even liberals, like Yale law professor Jack Balkin, have abandoned their prior nonoriginalism to become originalists.

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While there is one important way the supermajority enactment rules were problematic—the exclusion of African-Americans and women—the worst consequences of that defect have been corrected. Of course, even with corrections our Constitution is likely not an exact replica of what would have been created by a truly inclusive electorate. But we cannot easily calculate what subtler changes a more inclusive electorate would have wrought beyond the nondiscrimination and voting guarantees of the Fourteenth, Fifteenth, and Nineteenth Amendments. Empowering judges to make such determinations threatens to unravel the Constitution because there would be no objective way of resolving disagreements.

Note that this defense of the goodness of the Constitution avoids the Scylla of completely formal defenses of originalism and the Charybdis of completely contestable assertions of what constitutes goodness. The structure is also consistent with perhaps the most common defense of originalism: that it generally ties judges to rules. These rules consist of the interpretative rule of originalism itself as well as the substantive rules in the Constitution. But to the virtue of rule-following, it adds the even more important virtue of following likely beneficial rules.

From these premises it follows that the desirability of the Constitution requires that judges interpret the document based on its original meaning because the drafters and ratifiers used that meaning in deciding whether to adopt the Constitution. It was this meaning that gained the supermajority support, not the meaning of some contemporary judge or political philosopher.

It also follows that modern courts should interpret the Constitution according to the same interpretive methods that the enactors would have used—a process we call “original methods originalism.” The reason for interpreting the Constitution as the enactors would have is that the meanings they deemed applicable were part of the expected costs and benefits of the provisions and thus crucial to obtaining the consensus that produced a good constitution. Discarding these rules severs the connection between the document that existing judges implement and the document passed by a past consensus of enactors. To embrace originalism without embracing the enactors’ interpretive rules is like trying to decode a message using a different code than the authors of the message employed.

The benefits of originalism so understood can be easily contrasted with the defects of living constitutionalism—the primary competitor to originalism in constitutional theory. Under that jurisprudence judges update the Constitution themselves to reach their view of good results. But living constitutionalism gives a very small number of Justices the power to generate norms through their decisions, whereas good constitutional lawmaking requires the broader participation of many citizens. Second, the Supreme Court is drawn from a very narrow class of society: elite lawyers who then work in Washington. In contrast, actual constitution making includes diverse citizens with a wide variety of attachments and interests. Finally, constitutional lawmaking should be supermajoritarian, while the Supreme Court rules by majority vote. In short, these reasons suggest that the doctrines created by Supreme Court Justices are likely to lead to worse consequences than doctrines flowing from the Constitution’s original meaning.

Sometimes it is said that the Supreme Court as a matter of practice tends to follow the will of the majority when it makes up new constitutional doctrine. We doubt this claim, because Supreme Court Justices are more responsive to elite than popular opinion. But even if were true, it would not show that living constitutionalism is as good as originalism, because supermajority consensus rather than a bare majority is needed to make a truly beneficial constitution.

## II. CREATING A COMPREHENSIVE ORIGINALISM

The supermajoritarian justification for originalism helps make originalism more comprehensive as well. So-called “new originalists,” or, more accurately in our view, “constructionist originalists” believe that original meaning controls the interpretation of provisions that are not ambiguous or vague, but that constitutional construction provides judges and other political actors with discretion to resolve ambiguity and vagueness based on values not derived from the Constitution. But under the view offered here, construction based on extra-constitutional values would be legitimate only if the original interpretive rules endorsed construction. But we find no support for constitutional construction, as opposed to constitutional interpretation, at the time of the Framing or even at the time of subsequent amendments. Rather, the evidence suggests that ambiguity and vagueness in a provision were resolved by the enactors and their generation by considering evidence of history, structure, purpose, and intent. Thus, originalism has the capacity to provide the answer to all questions of constitutional interpretation. While it is true that not all provisions are clear, the best approach is to choose the better supported meaning of the possible interpretations. And the original rules of interpretation help guide one to that result.

Moreover, besides lacking a connection to historical practice, construction is also inferior to originalist interpretation on normative grounds. Because there is no accepted method for construction, some judges will choose one way to resolve constructions, whereas others will choose another way. Some judges may not even commit to one way of resolving constructions, but instead may use different methods in different cases. As a result, the construction process is likely to be less consistent and coherent than resolving ambiguity and vagueness by reference to the applicable interpretive rules. Moreover, construction undermines one of the basic purposes of a constitution: if the constitution is to limit government, then it is important that the government judicial officials do not have the power to vary or supplement the constitution with extra constitutional values. Always choosing the best interpretation of the text possible with the aid of the original methods makes for a more unified and attractive constitutional jurisprudence.

## III. A CULTURE OF ORIGINALISM

Whatever the theoretical justification for a legal theory, its practical success depends on support from the legal culture of its time. For years, academics and the broader legal culture have been hostile to originalism. As a result, scholars have not developed the cumulative knowledge of the historical meaning of both particular provisions and the original methods that would support the Supreme Court in a comprehensively

originalist application of constitutional law. Nor have Justices who consistently write originalist opinions received widespread praise for their performance.

But in a world dominated by originalism, academics can work to create the knowledge that would improve the performance of originalist judges and reinforce their inclination to be consistently originalist. Indeed, this new culture could help usher in a golden age of originalism because the modern world has characteristics particularly friendly to a theory of constitutional interpretation that rests on knowledge of the past.

First, law professors today have more specialized knowledge and as a result generate more comprehensive and accurate information within their specialized field. In the area of originalism, we are already witnessing the fruits of substantial specialization. Some originalist professors largely concentrate on questions of methodology. Others focus on a deeper understanding of the original meaning of particular constitutional provisions. Because historical knowledge of particular eras helps provide the context to clarify original meaning, some originalists specialize in particular periods of American history, like the Founding era in which the original Constitution was framed or the Reconstruction period in which the Thirteenth, Fourteenth, and Fifteenth amendments were enacted. Still others specialize in certain subject matter areas of the Constitution, like the provisions that divide the foreign affairs powers among the branches of the federal government. Despite such specialization, the modern academy circulates information ever more rapidly through conferences, online commentary, and blog posts, assuring that the various areas of knowledge do not remain hermetically sealed.

Yet another advantage for originalism is the variety of political ideologies to which originalists now adhere. The more heterogeneous the ideological priors of originalists, the richer originalist inquiry becomes. Bias must be made to counteract bias. Less committed scholars then can judge which side has the better assessment.

Already originalism has been greatly enriched as professors with different ideological perspectives have embraced it. The renaissance of originalism in the modern era began with a particular ideological valence—the conservative critique of the Warren Court. This critique, exemplified by the writings of Robert Bork, had a strong majoritarian flavor. As a result, the initial inclination of the originalist movement was to find an original meaning that gave space to the political branches, at the state and federal levels, to enforce the contemporary social norms they chose.

But this perspective may well have reflected as much the views of the Progressive Era and the New Deal as that of the Constitution's original meaning. Subsequently, more libertarian scholars discovered in the history an original meaning that protects individual liberty and limits the reach of the states, the federal government, or both. Even more recently, some liberal law professors have become originalists. They have found in the original meaning of the guarantees of equality in the Fourteenth Amendment politically liberal results.

To be sure, not every scholar can be equally correct. Ideology itself will prompt false starts and wrong turns. Sometimes originalist inquiry into original meaning is distorted

by ideology. But over time, new scholars will enter these debates, sift through the various claims, and help the profession reach a better consensus.

The technology of our age also facilitates originalism. As more and more historical documents appear online, the past becomes more accessible to all. As more sophisticated techniques of search and categorization are honed, we can better evaluate the nuance and context of the Constitution's text. Modern information technology brings the past closer to the present than ever before.

This phenomenon of using modern technology to immerse us in the past is an important trend throughout the humanities. Recently, an English professor was able to recreate picture by picture an exhibit that had substantial impact on Jane Austen. In constitutional law, the same kind of technology allows us to look at every recorded usage of a word like commerce to better triangulate the meaning of the term in the Commerce Clause. Big data is a boon to all who seek to gain value from information. Originalism gains from new tools for understanding the rich historical context of our founding document in order to resolve ambiguities and vagueness.

The final step in an originalist world would be reconciling the originalist future with the often non-originalist past of Supreme Court decisions. It is not surprising that originalists have for the most part not yet seriously confronted the challenge of integrating originalism with precedent. This task did not seem fruitful until originalism gained enough power to potentially serve again as the warp and woof of the law. But once originalism has been connected to the desirability of its results, it is easier to fashion rules for precedent that would reflect the tradeoff between following the original meaning and following precedent.

Of course, the Court will not follow every twist and turn of originalism arising in the legal academy. There is a necessary division of labor between the high theory of law professors and the quotidian practice of the courts. But that division does not mean that the turn to originalism in legal academy will not have an effect on the wider world. The Chicago school of antitrust economics has transformed antitrust law, although the Courts have not written all the nuances of the theory of industrial organization into competition law.

#### IV. ORIGINALISM AND THE REINVIORATION OF THE AMENDMENT PROCESS

To be successful, a renaissance of originalism should also lead to a revival of the constitutional amendment process. When citizens recognize that they can no longer change the Constitution by getting the Supreme Court to update it according to their preferences, they will naturally focus on changing it through the only avenue left to them—the amendment process. A renewed focus on the constitutional amendment process can transform the constitutional identity of the citizenry. In an originalist world, a generation will naturally see itself not simply as subjects of the Constitution but also as its potential framers. Each generation then can contribute to our fundamental law no less than previous generations, including those of the Founding, Reconstruction, and Progressive eras.

There can be no normatively attractive originalism without

the amendment process. The case for originalism depends on a beneficial process, like Article V, that permits each generation to change the Constitution. But there also can be no effective amendment process without originalism. Without originalism, constitutional change can occur through other means, allowing groups to change the Constitution without amending it and leaving the amendment process a dead letter. Proper constitutional interpretation and a vigorous constitutional politics march under a single banner: no originalism without the amendment process and no vigorous amendment process without originalism.

As the culture of originalism takes hold, Article V should be restored to its central place in the constitutional order—a place it had from the early republic through the early twentieth century—when transformative constitutional amendments could be passed. Indeed, it is impossible to count all the amendments that have not been born because of nonoriginalism. Part of the tragedy of nonoriginalism is the “Lost Amendments”—amendments that would have represented a generation’s contribution to high-quality fundamental law, but were not enacted because the Supreme Court wrongfully intruded into the process.

Originalism’s renewal of the constitutional amendment process would have substantial benefits for our politics. First, because political and social movements could not depend on the courts to change the Constitution, they would then have to focus on persuasion in the high politics of the constitutional amendment process. This dynamic encourages more political compromise, harnessing the energy of social movements to move the nation forward while tamping down on their tendency to polarize the polity. Constitutional compromise was at the heart of the nation’s founding. But as political and social movements came to believe they could get their wish list by engaging the courts rather than their fellow citizens, that art of compromise was lost. That loss reflects yet another aspect of the tragedy of nonoriginalism.

The amendment process delivers constitution making back into the hands of the people. Rather than leaving fundamental decisions about new societal norms to the judicial elites, the reinvigorated constitutional amendment process would tap into the dispersed judgments and diverse attachments of people across the nation. While there has been much discussion of the virtues of popular constitutionalism, a real popular constitutionalism—one that is likely to leads to good results—is possible only through a vigorous amendment process.

#### V. THE CONSTITUTION AS FORMAL LAW, HIGHER LAW, AND OUR LAW

Originalism provides the only theory that reconciles three normatively attractive features of a constitution, making it formal law, higher law, and our law. Originalism provides a binding, determinable meaning, making the Constitution formal law like other written law. The supermajoritarian process that generates the Constitution and its amendments provides substantial assurance of its goodness and therefore of its higher law quality. Finally, the amendment process that originalism protects permits each generation to make the Constitution its

own, by deciding whether to place its additional provisions in the Constitution on much the same terms as previous generations did.

First, originalism makes the Constitution formal law. Originalism’s essential claim is that the meaning of law is fixed at the time of its enactment, placing limits on government and permitting citizens to rely on it into the indefinite future. Considering the original methods as part of originalism helps resolve ambiguities and vagueness by reference to other materials fixed by history. It thus reinforces the objective and formal nature of constitutional law, promoting additional stability and reliance.

In contrast, living constitutionalism undermines the objectivity of law. By its very nature, it seeks to base constitutional decisions on something other than the original meaning of the written text. What constitutes that secret sauce of constitutional decision making is something on which living constitutionalists themselves disagree. But the additional element, whether evolving moral principles or the current majority’s view of good constitutional norms, is guaranteed to fluctuate, undermining stability and reliance on rights that the original meaning of the Constitution provides.

Second, under originalism, the Constitution is higher law because it is of higher quality than the ordinary legislation that it displaces when the two conflict. The appropriate supermajority rules used to enact the Constitution’s provisions are likely to produce such higher quality entrenchments. The desirability of these provisions justifies judges in displacing ordinary law with higher law. Moreover, our argument creates an identity between formal law and higher law. Because the Constitution is higher law in virtue of the consensus that gave rise to it, we have shown that it should be interpreted according to the interpretive rules the Framers’ generation would have deemed applicable to it—interpretive rules that reflect originalism as conventionally understood.

Living constitutionalism, in contrast, has no plausible theory of why its process of constitutional interpretation likely leads to good results. Updating the Constitution through judicial interpretation has none of the virtues of the consensus producing procedures that are at the heart of a good process for constitution making. Constructionist originalism has similar problems whenever it resorts to construction. The principles chosen for construction do not have to reflect majoritarian support, let alone consensus. They do not relate to a process that is likely to render constitutional decisions beneficent.

Third, the Constitution is also our law. It is ours by virtue of the fact that each generation can amend the Constitution under the same rules as previous generations could amend and under rules similar to those employed by the founding generation. The democratic and deliberative process of constitutional amendments assures that all voters have a chance to participate. It is manifestly a structure where “We the People” remain the pivotal decision makers.

But a vibrant amendment process and vigorous constitutional politics that draw in the citizenry at large are possible only through originalism. It is originalism that sustains the amendment process, because it forces those who want to

change the Constitution to use that process rather than persuade the Court to transform the Constitution without requiring a consensus of the American people.

The judicial updating inherent in living constitutionalism is necessarily in tension with a constitution belonging to the whole people. Supreme Court decisions may sometimes reflect popular social movements, but social movements are various and conflicting. The Tea Party does not agree with Occupy Wall Street. Secularists fight with those who want a politics animated by Christian values. It is Justices who choose which movement to embody in their decisions. Their decisive role assures that under living constitutionalism We the Elite Lawyers rather than We the People rule.

To be clear, we are not making an ideological point. Elites sometimes favor interests on the right and sometimes interests on the left. But the social movements that the Supreme Court chooses to heed almost always have elite support.

Originalism has the great advantage of making the content of our law coextensive with formal law and higher law. Some of the formal law was enacted by the original Constitution, and the rest was enacted by the similarly stringent process of constitutional amendment. Thus, all constitutional law derives from a similar process of intense public deliberation.

The union of our law, higher law, and formal law is a great achievement of originalism—a correspondence of elegance and beauty that helps sustain the republic. The final aspect of the tragedy of nonoriginalism is that years of nonoriginalist jurisprudence have obscured the powerful identity between these avatars of law which is a large part of the genius of the system of government we have inherited.

Our understanding of the making of the Constitution and its proper interpretation serves to link together several important strands of a desirable legal regime. The Constitution, enacted through supermajority rules and interpreted based on its original meaning, places a limit on government that protects people's liberty and preserves a desirable constitutional order. The amendment provisions, however, operate to ensure that each generation may contribute to the Constitution based on largely the same procedures. But the supermajoritarian requirement means that, whatever changes are made to the Constitution, must have been enacted through a process which promotes consensus provisions that protect minority rights. Overall, the Constitution functions as fundamental law that may change over time, but only if those changes are likely to have the same desirable qualities as the original Constitution.

