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978-1-107-01325-4 - The Challenge of Originalism: Theories of Constitutional Interpretation

Edited by Grant Huscroft and Bradley W. Miller

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The Challenge of Originalism: Theories of Constitutional Interpretation

Originalism is a force to be reckoned with in American constitutional theory. From its origins as a monolithic theory of constitutional interpretation, originalism has developed into a sophisticated family of theories about how to interpret and reason with a constitution.¹ Contemporary originalists have harnessed the resources of linguistic, moral, and political philosophy in responding to critics. Recent work is characterized by methodological concerns about how to identify the meaning of constitutional texts as well as the development of normative arguments for fidelity to them.

Despite these developments, originalism is sometimes dismissed out of hand. Critics of originalism often rely on stock arguments that neither addressed nor anticipated the arguments of contemporary originalists. Many are persuaded that originalism was dealt a fatal blow by the criticism of Paul Brest² and Jefferson Powell³ in the 1980s, culminating in the failure of Judge Robert Bork's nomination to the United States Supreme Court.⁴ But originalism has moved on considerably since that time. The multiplicity and complexity of the new variants of originalism require interlocutors to make a considerable investment in order to participate in the debate. The essays in this volume, which includes contributions from the flag bearers of several competing schools of constitutional interpretation, provide an introduction to the development of originalist thought, showcase the great range of contemporary originalist

¹The history of modern originalism is discussed in Steven G. Calabresi (ed.), *Originalism: A Quarter-Century of Debate* (2007); Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (2005).

²Paul Brest, "The Misconceived Quest for the Original Understanding", 60 B.U.L. Rev. 204 (1980).

³H. Jefferson Powell, "The Original Understanding of Original Intent", 98 Harv. L. Rev. 885 (1984).

⁴Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

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constitutional scholarship, and situate competing schools of thought in dialogue with each other. They also make new contributions to the methodological and normative disputes between originalists and non-originalists, and among originalists themselves.

The essays are grouped around four themes.

I

The essays in Part I, “Exposition and Defense,” set the stage by introducing the basic tenets of originalism and the commitments that lay at its core. They also raise the question of whether it is, in fact, reasonable to speak of an originalist orthodoxy.

Lawrence Solum’s contribution, “What Is Originalism? The Evolution of Contemporary Originalist Theory,” provides an intellectual history of originalism from the 1930s onward. He identifies the key move made by some originalists in the mid-1980s to abandon the search for original intentions in favor of original public meaning. Original public meaning – the idea that the constitution means what its intended audience would have understood the text to have meant when it was adopted – became a cornerstone of the “new originalism” propounded by Jeffrey Goldsworthy in Australia, and Solum, Keith Whittington, and Randy Barnett in the United States. Solum vividly displays the fault lines between the so-called old originalism (with its focus on original intentions), the new originalism, and living constitutionalism, through a reading of the decision of the U.S. Supreme Court in *District of Columbia v. Heller*,⁵ in which the Court provided its first in-depth consideration of the Second Amendment.

New originalists characteristically approach a constitutional text with two distinct tasks in mind: constitutional interpretation and constitutional construction. Although “interpretation” is often used compendiously to refer to the whole of legal reasoning in constitutional adjudication, new originalists limit the application of the term to the task of discovering the meaning of constitutional text. Once interpretation is complete, “construction” is the task of developing rules and principles necessary to fill the gaps left by vague or underdeterminate constitutional text in order to resolve concrete disputes.⁶

⁵ 554 U.S. 570 (2008).

⁶ Whittington develops his conception of construction in a way that emphasizes the role played by the non-judicial branches of government. See Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999), and *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999).

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On Solum's account, the originalists' acknowledgment of vagueness, under-determinacy, and the necessity for construction allows for the possible reconciliation of originalist and living constitutional approaches, an intriguing possibility to which we will return.

Working independently of the American originalist scholars, Jeffrey Goldsworthy's research in the Australian constitutional context arrived at many of the same conclusions and principles of constitutional interpretation as Solum and Whittington. In "The Case for Originalism," Goldsworthy identifies eight propositions about the nature of constitutions and the rule of law that support the originalist project:

1. A constitution necessarily has a meaning prior to judicial interpretation of it.
2. To change the meaning of a law is to change the law.
3. The original meaning of a constitution is its "utterance meaning," which must be distinguished from its original literal meaning and its originally intended meaning.
4. Constitutional amending formulas bind judges as well as other officials and preclude change through judicial "interpretation."
5. Change to the constitution through interpretation undermines the constitution, the rule of law, the principle of democracy, and the principle of federalism.
6. Judges are duty-bound to determine and clarify the pre-existing meaning of the constitution but can supplement that meaning when it is not sufficiently determinate to resolve the problem at hand.
7. Although judges cannot deliberately change the constitution, constitutional law can and does legitimately evolve over time (and to this extent, originalism is perfectly consistent with "common law constitutionalism" and "living constitutionalism").
8. Consistent application of any constitutional theory, including originalism, might lead to grave injustice in a particular case and if it does, judges might be morally bound to disobey the constitution, but this has nothing to do with the true meaning of the constitution.

Goldsworthy elaborates on each of these principles, drawing on Canadian and Australian law to illustrate. He engages with Solum and Whittington in stating the case for originalism and defending it against critics, most notably Mitchell Berman, whose recent criticism of originalism has attracted considerable attention.⁷ Goldsworthy argues for a moderate form of originalism

⁷ Mitchell N. Berman, "Originalism is Bunk" 84 N.Y.U. L. Rev 1 (2009).

that is flexible enough to adapt to meet contemporary needs and values – the very claim usually made in support of arguments for living constitutionalism. Goldsworthy appears to go further than Solum in reconciling originalism and living constitutionalism, arguing that “[a]s both theories are purged of their weaknesses, they are moderated and eventually merge. Originalists wonder what more, by way of flexibility and capacity for ‘evolution’, non-originalists could possibly want.”⁸

In “On Pluralism within Originalism,” Keith Whittington explores the distinction between constitutional interpretation and constitutional construction and exploits it to provide a bridge between originalism and other forms of constitutional argumentation. The interpretation/construction distinction is crucial, he argues, for creating “avenues for originalist theory to identify what role originalism itself can play within constitutional practice and how it can be effectively integrated into a broader theory of constitutional maintenance and elaboration.”⁹ Whittington defends originalism against the charge that it is closed to all alternative modes of constitutional interpretation, arguing that various forms of constitutional argumentation may be acceptable provided that they are designed to discover and implement the original meaning of the constitution. As he puts it, the key point of difference between originalists and non-originalists lies in their conceptions of the legitimate scope of judicial authority, and “is fundamentally a disagreement over the necessary warrants for judges to disregard legislation.”¹⁰

II

New originalism represents only one stream of contemporary originalist thought – one member of the family of originalist theories.¹¹ Others who agree with the new originalists about the importance of what Solum describes as the “fixation thesis” – the idea that the semantic meaning of a constitutional text is fixed at the moment of its enactment – nevertheless disagree with them about the appropriate methodology for determining that meaning. “Old” originalists maintain that the meaning of a constitutional text is fixed by the original intentions of its authors. In his contribution to Part II,

⁸ 65.

⁹ 76.

¹⁰ 86.

¹¹ Solum, Goldsworthy, and Whittington represent only one stream of new originalist thought. Consider also the “original methods” originalism of John O. McGinnis & Michael B. Rappaport, “Original Interpretive Principles as the Core of Originalism,” 24 Const. Comment: 371 (2007).

“Interpretation and Intention,” Larry Alexander argues in “Simple-Minded Originalism” that although intention-based originalism is “considered heretical among most legal academics . . . it is so orthodox among ordinary folks as to escape notice.”¹² Alexander defends the use of author’s intended meaning to interpret constitutional texts against critics of originalism, particularly Berman. He also defends intended meaning against concerns about the practical obstacles to determining original intentions, while attacking the concept of “original public meaning” deployed by the new originalists as artificial and highly manipulable.

Stanley Fish’s contribution, “The Intentionalist Thesis Once More,” similarly carries the intentionalist brief against its interlocutors, and in particular Berman. Fish rejects the contributions of the new originalists as “scholastic, a dizzying structure of cycles and epicycles built on a mistake,”¹³ and, like Alexander, holds that there is only one correct answer to the question, “what is the meaning of a text?” As he puts it, “a text means what its author or authors intend.”¹⁴ But Fish is skeptical that there is any value in searching for a methodology to interpret constitutional texts. Such a methodology is unavailable, he argues, because interpretation is an empirical rather than a theoretical task. It may, in a particular case, turn out to be impossible to figure out what the intention was. Nevertheless, Fish argues that recovering that meaning is the only job that the interpreter has.

What is at stake between new and old variants of originalism – particularly when it appears that the original intention behind the constitutional text is ignoble – is displayed concretely in Bradley Miller’s contribution, “Origin Myth: The *Persons Case*, The Living Tree, and the New Originalism.” Miller revisits the case revered in Canada as the font of living constitutionalism (that is, the constitution as a “living tree”) and argues that it has been misunderstood and misrepresented in Canadian constitutional law. Properly understood, he argues, the decision of the Judicial Committee of the Privy Council overturning the decision of the Supreme Court of Canada (which had held that women were not “qualified persons” eligible for appointment to the Canadian Senate) reflects the triumph of proto-new originalism over original intentions originalism, rather than the triumph of “living tree” interpretation over originalism *simpliciter*. He argues that Canadian constitutional law, once purged of this misreading, is consistent with originalist forms of argumentation.

¹² 87.

¹⁴ 100.

¹³ 99.

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III

The essays in Part III, “Originalism and Constitutional Settlement, consider the implications of a normative argument often made for originalism (one also identified by Goldsworthy), namely that constitutions are political agreements that settle some matters and preclude change outside their formal amending formulas.

In “Originalism’s Constitution,” Grégoire Webber asks what originalism assumes about the nature of a constitution and explores the functions that written constitutions perform in an attempt to assess the relevance of originalist theory. Seeking to understand originalism through the model of a constitution, he constructs a fictional constitution (called the “original constitution”) that allows for the core commitments of originalism to be satisfied. To this end, Webber identifies three constitutional commitments that are necessary for originalism to guide constitutional interpretation and construction: The original constitution is written at the founding and changed only by its amendment procedure; the original constitution provides rule-like prescriptions; and the original constitution occupies a delimited domain, leaving some sphere of decision making to democratic activity.

Relying on the model of originalism’s constitution, Webber argues that originalism is controlling only where interpretation is determinant. Yet, for so many real-world constitutions, interpretation only goes so far. Real-world constitutions leave much to be accomplished through construction; they are in many respects incomplete as statements of law and therefore unable to satisfy the condition precedent for originalist interpretation. Many things were left out of the written constitution and open for later determination, and the task of constitutional authoring that was begun at the moment the constitution was written is, on Webber’s account, an ongoing one, guided but not determined by originalism, and participated in by judges and political actors alike.

James Allan and Grant Huscroft both address originalism through the lens of the institutional function of judicial review. In his contribution, “The Curious Concept of the Living Tree (or Non-Locked-In) Constitution,” Allan hypothesizes about the process of adopting a written constitution and the intentions that underlie it. He argues that the practice of constitution making makes no sense outside of the intention that the settlement reflected in the constitutional text be honored, and that those deliberating over the meaning of the constitutional text seek to ascertain what this settlement was. For Allan, the settlement function performed by a constitutional text necessitates ascertaining intentions, which entails, he argues, the old originalism articulated by Alexander and others.

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Huscroft is sympathetic to Allan's argument but takes a different tack and ventures more deeply into questions of methodology in his contribution, "Vagueness, Finiteness, and the Limits of Interpretation and Construction." He acknowledges the interpretive difficulties caused by the vague and under-determinate language that characterizes contemporary bills of rights and seems to open up a vast role for judicial review. He argues, however, for the recognition of what he considers the ultimate limit on the interpretation of bills of rights – a limit that originalists and living constitutionalists alike must respect: Bills of rights are supposed to be finite instruments. That is, they protect only the rights they enumerate, and the vagueness of those rights neither invites nor allows courts to provide a rights-based answer to every problem that can conceivably become the subject of litigation.

Originalists need some means of determining the boundaries of legitimate construction when textual meaning runs out, whereas living constitutionalists must make sense of rights having eschewed the idea that they may have some fixed, core meaning. Bills of rights are typically limited in their scope by design, and the absence of some rights that might have been enumerated may reflect a decision to deny constitutional authority to them, despite the strong moral claims they present. In other words, the silence of a bill of rights may have normative significance. Drawing on experience with the *Canadian Charter of Rights and Freedoms*, Huscroft argues that the deliberate silence of a bill of rights limits the scope of legitimate construction for originalists as well as the scope for "growth and expansion" of the bill of rights under a living constitutionalism approach. Some purported constitutional rights, such as economic and social rights, were deliberately excluded from the *Charter*, and courts must give effect to the constitutional settlement this decision reflects rather than take advantage of vaguely worded guarantees to amend in effect, the *Charter*.

IV

Part IV, "Challenges and Critiques," includes criticisms of the originalist project from three very different positions. Stephen D. Smith is a friendly critic, but in "That Old-Time Originalism" he questions the value of the new originalism's increasing analytical sophistication and calls for a return to the old intentions-based originalism of Alexander and Fish. Exchanges between Solum and Berman, he says, "provide a lengthy and dazzling list of conceptual claims, shadings, and distinctions,"¹⁵ and Smith worries about the barriers to

¹⁵ 226.

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entry created by a scholasticism of the discipline. More fundamentally, he questions whether originalism is collapsing under the weight of its sophistication “into its long-time nemesis, the idea of the ‘living constitution’.”¹⁶ He fears that “originalism is no longer available as a distinct approach to further (or at least attempt to further) the worthy purposes . . . for which it was devised – namely constraining courts in history-grounded ways and, even more importantly, serving democracy by enabling democratic institutions to enact constitutional provisions with relatively definite and fixed meanings.”¹⁷

Among the non-originalist critics of originalism, Mitchel Berman is peerless in his ability to engage with originalist scholars on their own ground. In his contribution, “Reflective Equilibrium and Constitutional Method,” Berman breaks new ground, articulating a methodology to test the soundness of any normative constitutional theory (originalist or otherwise) based on Rawlsian reflective equilibrium. The test case for his theory is debate over the interpretation of the natural-born citizenship clause of the United States Constitution that occurred in the lead-up to the American presidential election in 2008. Berman argues that the legal outcomes of cases should follow our “strong considered judgments” about the correct legal outcomes, and if a methodology produces judgments at odds with these convictions that is good reason to reject the methodology. Berman sees this requirement as particularly challenging for contemporary originalism.

Berman answers a number of originalist objections and focuses on rebutting the intentionalist thesis offered by Stanley Fish. He argues that the intentionalist thesis conflates the separate issues as to what the speaker meant with what the text he uttered actually means, and that the argument from rationality proffered in support of the intentionalist thesis is not sound. Stanley Fish replies in a postscript to his contribution, insisting that there is no distinction between what the speaker meant and what his text means. Words cannot mean something apart from what their author meant them to mean: “(n)o intention, no text, no meaning, no point to interpretation.”

Brian Bix mulls over the contributions of the new originalists and sets out two challenges for originalist theorists to overcome in his contribution, “Constitutions, Originalism, and Meaning.” First, he questions the cogency and stability of the new originalist’s distinction between assessing the meaning of a text and applying that meaning in an adjudicative or legislative process. Bix cautions that unlike descriptive interpretive contexts where something objective in the world (like “water” or “gold”) determines what counts as water and gold, the referent in interpreting legal concepts (like “valid contract”) is

¹⁶ 230.¹⁷ 232–3.

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far more controversial. He urges the new originalists to engage more fully with those legal philosophers, such as Dworkin and Gadamer, who maintain that the interpretation of a text and its application in any particular instance are not separate actions but a single unitary process.

Bix also questions whether originalists intend for their theories to be understood “as a general or universal theory rather than one dependent on contingent claims about our/one nation’s constitutional text, history, and politics.”¹⁸ To what extent does the originalist project make sense within a constitutional setting – unlike the United States – in which judicial review is expressly authorized? Why should one mode of constitutional argumentation be applied universally to very different constitutions? Bix suggests that plausible answers could be developed by reference to the normative significance of intentions (an idea clearly resonant with Alexander, Allan, Goldsworthy, Huscroft, and Webber), or through Joseph Raz’s service conception of authority.

V

For all of its sophistication, originalism is viewed in some quarters as a protest movement rather than a scholarly endeavor.¹⁹ It has been the subject of parody and deprecation, sometimes by those who understand it least, and it has been ignored by many – including some who otherwise extol the benefits of comparative constitutional law scholarship.²⁰ Originalism has been all but banished from constitutional discourse in Canada in favor of a “living tree” conception of the constitution,²¹ and it finds few proponents in other western countries with written constitutions. When it comes to interpreting bills of rights, proportionality and balancing – concepts that may be antithetical to originalism – appear to be ascendant.

Nevertheless, the key ideas behind originalism – that constitutions reflect commitments that should be honored and that their text necessarily constrains the range of possible interpretation (and construction) – have appeal even for those who purport to reject originalist premises. No court, so far as we are

¹⁸ 299.¹⁹ E.g., Robert Post and Reva Siegel, “Originalism as a Political Practice: The Right’s Living Constitution”, 75 *Fordham L. Rev.* 545 (2006).²⁰ E.g., Justice Michael Kirby, “Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?” (2000) 24 *Melbourne U. L. Rev.* 1.²¹ See Justice Ian Binnie, “Constitutional Interpretation and Original Intent” and Grant Huscroft, “A Constitutional ‘Work in Progress’? The Charter and the Limits of Progressive Interpretation”, both in Grant Huscroft & Ian Brodie (eds.), *Constitutionalism in the Charter Era* (2004) and Bradley W. Miller, “Beguiled by Metaphors: The Living Tree and Originalist Constitutional Interpretation in Canada” (2009) 22 *Can. J.L. & Juris.* 331.

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aware, considers things like the intentions of the framers, the original meaning of the words they adopted, or even common expectations and understandings about the constitution to be irrelevant to the task of applying the text of the constitution to resolve real disputes. The dispute between originalists and non-originalists centers not on the *relevance* of these things but on the *authority* that they should be accorded.

The “challenge of originalism” refers not only to the challenge that originalist theory poses to the living constitution and other forms of non-originalist theory, but also to the challenge that originalist theory faces from within. As Steven Smith cautions, the developments that offer the promise of reconciling originalism and living constitutionalism raise the prospect that originalism might become subsumed within living constitutionalism and thereby lose its *raison d’être*. Some scholars are ready to pronounce that originalism has become indistinguishable from non-originalism.²² This is, of course, a debatable point, but it is clear that originalist scholars face a considerable challenge in articulating an approach to constitutional construction that renders originalism sufficiently flexible to resolve unanticipated claims of right, on one hand, while remaining true to the settlement function of constitutions on the other. Living constitutionalists are justly criticized for paying lip service to the settlement reached in a constitutional text, only to assert that the meaning of the text – especially of rights provisions – is so vague that the possibilities for judicial construction turn out to be almost boundless. Originalists must be wary of any approach to construction that has the similar effect of rendering constitutional meaning largely irrelevant.

Originalist theory has little purchase outside of the United States and it is under pressure within the United States – not only from American critics but also from the prospect of the growing influence of foreign constitutional law in American courts. Because the institution of judicial review is less controversial outside the United States, such concerns about judicial power as exist are more likely to sound in the counsel of judicial restraint – in particular, arguments for deference to the elected branch²³ – rather than in endorsements of theories perceived to be designed to limit judicial power at the outset. Nevertheless, if, as contemporary proponents such as Solum and Barnett argue, originalism is not primarily concerned with limiting judicial review, but is instead a matter

²² See e.g., Peter J. Smith, “How Different Are Originalism and Non-Originalism” 62 *Hastings L. J.*, 707 (2011).

²³ See e.g., Aileen Kavanagh, “Deference Rather than Defiance: The Limits of the Judicial Role in Constitutional Adjudication” in Grant Huscroft (ed.), *Expounding the Constitution* (2008) 184.