1 ORIGINALISM AND JUDICIAL REVIEW

We are all Originalists.

Justice Elena Kagan[1]

Faith: A firm belief in something for which there is no proof.

Merriam-Webster Dictionary[2]

How should judges interpret and apply the US Constitution, which in many important aspects is over 200 years old? America's founding fathers owned slaves, denied women most basic rights, and inhabited a world devoid of the modern technologies that shape our everyday life. Even the important Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, ending slavery and extending the promise of equality to all Americans regardless of race, were ratified by the people a half-century before women could vote. Should today's judges try to discover what the constitutional text meant at the time of its enactment so very long ago, what it means today, or both? If the answer is both, how much weight should judges give to the text's original meaning when it is inconsistent with our modern values and priorities? These questions frame the originalism debate.

Originalism today is a theory of law and politics. Therefore, this book summarizes and analyzes the academic debates over originalism, how elected officials and the popular media discuss the subject, how judicial nominees and legal experts have talked about originalism in judicial confirmation hearings, and how judges use or don't use originalist sources in their written opinions.[3]

The 1787 Constitution and its Amendments place limits on our elected leaders, but we rely primarily on unelected, life-tenured federal judges to enforce those restrictions. Judicial decisions interpreting the Constitution sometimes define who we are as a people and a country.

Speaking at the dedication of a new Supreme Court building almost one hundred years ago, Chief Justice Charles Evan Hughes emotionally said, referring to the Supreme Court, the "republic endures, and this is the symbol of its faith."[4] This book asks how our highest Court should resolve hard cases implicating this country's most fundamental values and commitments.

Some of those constitutional commitments are precise, such as that the president must be thirty-five, and each state is entitled to two senators, regardless of population. Other provisions, the ones that most often lead to lawsuits, are phrased more broadly. For example, the government may not abridge "freedom of speech," or impose "cruel and unusual punishments."[5] No state shall deny to any person the "equal protection of the laws" or "due process of law."[6] Judges have a difficult time interpreting and applying these kinds of limitations because the language itself cannot resolve most litigated cases, and scholars often disagree about the history surrounding the ratification of these provisions.

Lawyers, judges, legal scholars, and Supreme Court commentators frequently debate the importance of the Constitution's original meaning to present-day cases.[7] Some believe that originalist sources, such as the ratification debates and early Court decisions, should play a decisive or primary role, whereas others think that originalism is just one of many considerations that judges should consider when deciding cases. Other important factors may include tradition, political practices, modern cases, pragmatic concerns relating to the authority of the judiciary, and the real-world consequences of each case.

In addition to disagreeing over the relevant sources of constitutional interpretation, the legal community hasn't reached consensus over how deferential judges should be to other political decision makers such as legislatures (state and federal) and chief executives (presidents and governors). For example, Chapter 2 argues that the founding fathers thought judges should overturn state and federal laws only when such enactments clearly violated the Constitution. Only a small minority of constitutional scholars or judges embrace that position today, and outside a few specific areas of constitutional law, the Supreme Court has not acted with that degree of deference on a consistent basis for well over a century.

Court observers also disagree over how appropriate it is for judges to decide cases based on their own values, politics, and unique experiences. Some scholars and commentators think judges should try their best to keep personal values in check when deciding legal disputes, while others argue that the vague text and contested history in dispute in most constitutional cases means that the subjective value preferences of the judges ultimately influence their decisions. Where that is true, the argument goes, judges should carefully examine and explain the personal values that form at least part of the rationale for their written opinions.

As a descriptive matter, Supreme Court justices sometimes employ the Constitution's original meaning to justify their legal decisions. The justices are excellent lawyers who know how to present evidence to support their arguments and distinguish counterarguments that stand in the way of their preferred results. When original meaning is helpful, the justices use it, and often with great rhetorical flourish.

The justices' use of original meaning to explain and justify their decisions has many positive benefits. We define our national identity in part by our Constitution, which serves as a constant reminder to the American people of intergenerational agreements that we do not need to renegotiate. When the justices connect us to our past by supporting their decisions with persuasive evidence of prior agreements, they cultivate and maintain a distinctively American approach to hard public policy questions. In addition, judicial appeals to original meaning might suggest that the justices are following the decisions of the founders not imposing their own personal values.[8] The justices want the American people to have faith that their decisions are grounded in prior law, not personal predilection, and references to originalist sources make that goal easier.

That Supreme Court justices sometimes use ratification-era evidence to support their decisions, however, reveals only a small part of a much more complicated story. In many divisive cases, the Constitution's original meaning played at most a marginal role in the justices' analysis compared to prior decisions and their personal evaluations of consequences. Some notable examples include decisions perceived at the time by many scholars as progressive such as *Brown v. Board of Education* (separate but equal schools can never be equal),[9] *Roe v. Wade* (right to

abortion is constitutionally protected),[10] and *Obergefell v. Hodges* (same-sex marriage is constitutionally required),[11] as well as cases perceived by scholars at the time to be conservative such as *Citizens United v. FEC* (corporations and unions have the same free speech rights as individuals),[12] *Seminole Tribe v. Florida* (states have sovereign immunity under the Constitution even when sued by their own citizens),[13] and *Shelby County v. Holder* (states have equal state sovereignty that Congress must recognize absent a strong interest).[14]

One famous originalism critic observed that in most well-developed areas of constitutional law, "originalist sources . . . played a very small role compared to the elaboration of the Court's own precedents. It is rather like having a remote ancestor who came over on the Mayflower."[15] Another scholar, writing shortly after Justice Scalia's death, argued that "before and after Scalia, justices will use history when they believe it supports their . . . conclusions and ignore it when they believe it doesn't."[16]

There is abundant political science literature suggesting that the justices' values writ large, including but not limited to partisan politics, much more than legal interpretations of text and history, drive the Court's decisions.[17] If these scholars are correct, and the Constitution's original meaning matters to the justices only when that meaning supports their policy preferences, then it is at best unclear how important originalism is to the Court's decisions.

Scholars who belong to the school of thought known as Legal Realism also believe that the justices use the original meaning of the Constitution, and all other formal legal doctrines, strategically to support their preferred policy results.[18] These academics argue that there are just too many decisions at odds with or not supported by text, original meaning, or prior cases to reach any other conclusion.[19] Legal realists argue that judges should take account of pragmatic concerns and consequences much more than formulaic legal rules.

This book argues that political scientists and legal realists are correct that the justices' decisions are driven primarily by their personal values. Therefore, the justices should be transparent about the minimal role original meaning plays in constitutional litigation. This lack of originalist focus could possibly change, but until it does, the justices should honestly and accurately describe the basis for the decisions they make.

Some judges, law professors, and lawyers object to legal realism on the basis that it fails to take seriously how judges themselves see their roles. No justice, for example, would admit that it is her personal value preferences, not the law, that drives her decisions. No nominee to the bench would ever make such a statement during her confirmation hearing. The legal realist account, therefore, neglects this internal perspective and is inaccurate.

There are three major responses to that argument. First, the American people often assume and take for granted that politicians will bend the truth, to say the least, from time to time. That same realistic stance should apply equally to judges, and most of all to Supreme Court justices, who have almost complete discretion because their decisions are not reviewed by any higher court.

Second, none of us truly understand the complex motivations that drive many of our important decisions. I may think I choose a certain course of action for one set of reasons, but much more may be impacting that choice than I know. Some degree of objectivity outside the internal perspective can bring light to many decisions people make, including judges. As Judge Posner has remarked, "the internal perspective has proved inadequate" to explain how judges actually behave.[20]

Third, and most important, as Chapters 7–9 of this book show, the justices' decisions bear a remarkable, though certainly not perfect, correlation to what we would expect to be their policy preferences. At the end of the day, it really doesn't matter how the justices perceive themselves if their collective decisions bear an uncanny resemblance to what we would expect their policy preferences to be. As Professor Frank Cross has observed, "It is difficult to find a professed originalist, in the judiciary … who believes that the original meaning of the Constitution is significantly different from his or her personal policy preferences."[21] I would extend that quote to non-originalist Justices as well.

For the purposes of this book, my legal realist claim is narrow. It is limited to Supreme Court cases (unlike other judges, the justices are not bound by prior decisions), and it is not true that the justices can reach any possible conclusion in every case. The justices can, however, usually rule for either party within the boundaries of what most people

would agree is reasonable judicial decision making. The issue this book addresses is what role, if any, originalism plays and should play in that decision making.

A. ORIGINALISM THEN AND NOW

Over the last fifty years, the originalism debate has changed dramatically. The first wave of strong originalists, responding to the liberal decisions of the Warren and early Burger Courts, argued that the Court should not strike down state and federal statutes absent a strong showing by the plaintiff that those laws clearly violated the framers' original intent.[22] This kind of deferential approach to judicial review could form the basis of a coherent and defensible method of constitutional interpretation. This brand of originalism, however, has largely died away, and only a handful of academics or judges today support it.[23]

Many modern originalists believe that it is the original meaning of the text, not the intentions of the framers, that matter, and they do not adopt a strong presumption of legislative validity. Indeed, some self-styled originalists today argue that ratification-era evidence "runs out" in constitutional cases, and when that occurs, judges must "construct" legal doctrines to decide those disputes.[24] According to some of these "New Originalists," these judicial "constructions" should not contradict the original meaning of the text, but also cannot be derived from that text. When judges enter what these scholars call the "construction zone," originalist sources are of little use to the ultimate resolution of the controversy.[25] An interesting question is why so many scholars self-identify as originalists even though they admit that original meaning analysis does not help resolve many litigated constitutional cases.

Some of the scholars who believe in the "construction zone" use the label "originalist" as a rhetorical or political device to indicate a generally conservative or libertarian approach to constitutional adjudication,[26] while others suggest that their preferred method of interpretation is more legitimate than theories put forward by legal scholars who reject the originalist label.[27] These New Originalists criticize "living constitutionalism," which they argue allows judges too much discretion to impose their personal values in the guise of constitutional law. For example,

Professor Larry Solum, in testimony in front of the US Congress during the Neil Gorsuch confirmation hearing, said that "originalist judges do not believe that they have the power to impose their own values on the nation by invoking the idea of a 'living constitution.'"[28] This critique of those who believe in the "living constitution" rings somewhat hollow, however, given the admission by many New Originalists that text and original meaning are of little use when the Court enters the so-called construction zone.

The overwhelming need for many judges and scholars to emphasize originalism as the dominant mode of constitutional interpretation may also stem from a desire to have faith that the Supreme Court decides cases under the law, not according to the justices' personal values. This faith, however, gets in the way of a fruitful discussion of how the highest Court in the land engages in its most critical function – the resolution of constitutional cases often implicating our most fundamental values. If one of the primary goals of originalism is to limit the effects of the justices' personal politics and preferences on constitutional decision making, a better approach would be for judges to adopt a deferential, clear error rule for constitutional cases. However, many New Originalists contend that they are more concerned with judges interpreting the Constitution correctly than constraining judicial discretion. This disagreement among originalists about its most important purposes suggests we must define originalism carefully.

B. WHAT IS ORIGINALISM?

What does it mean to say that someone is an originalist? At her confirmation hearing in 2010, liberal Justice Elena Kagan said, "We are all Originalists."[29] In 2017, Justice Gorsuch, a conservative, approved Kagan's comment at his confirmation hearing.[30] Yet, there are substantial differences between Justices Kagan and Gorsuch, as well as other judges and legal scholars, over how best to interpret the US Constitution and how substantial a role original meaning should play in that interpretation. Even among self-proclaimed originalists, their theories are "rapidly evolving . . . constantly reshaping themselves in profound ways in response to . . . critiques, and not infrequently

splintering further into multiple, mutually exclusive iterations."[31] There is no single definition of originalism just as there is no overarching agreement among non-originalists as to the best way for judges to interpret the Constitution. However, some broad and important generalizations can lead to a workable starting point to discuss the originalism debate.

Few constitutional scholars or judges argue that original meaning is irrelevant to constitutional interpretation.[32] In the words of Professor Mitch Berman, "not a single self-identifying non-originalist of whom I'm aware argues that original meaning has no bearing on proper judicial constitutional interpretation. To the contrary, even those scholars most closely identified with non-originalism . . . explicitly assign original meaning or intentions a significant role in the interpretive enterprise."[33] Another eminent scholar has said that most non-originalists "accord the text and original history presumptive weight, but [simply] do not treat them as authoritative or binding. The presumption is defeasible over time in the light of changing experiences and presumptions."[34]

I am also not aware of any scholar or judge who believes that applying the original meaning of the Constitution to modern problems should be the exclusive method of constitutional interpretation in every case. Although a few early originalist scholars, such as Raoul Berger and Lino Graglia, came close to holding this belief, neither said that original meaning must always trump non-originalist case law. Moreover, both men linked their advocacy of originalism to a strong presumption in favor of the validity of state and federal legislation. These scholars advocated for judicial deference just as strongly as they did for originalism.

The real difference between originalists and non-originalists, therefore, is not whether founding-era evidence should play any role in how judges interpret the Constitution, but how strong a role. For the purposes of this book, an originalist judge or scholar is someone who believes the following three propositions: (1) the meaning of the constitutional text is fixed at the time of ratification; (2) judges should give that meaning a primary role in constitutional interpretation; and (3) pragmatic modern concerns and consequences are not allowed to trump discoverable original meaning (although adhering to precedent

might).[35] A non-originalist is someone who believes that postratification facts and consequences may trump original meaning, or are just as important as original meaning, to judges faced with difficult constitutional questions.[36]

There are long-standing debates among originalists over whose intentions matter (the drafters or the ratifiers) and the appropriate sources judges should consult when they attempt to ascertain original meaning. For example, James Madison did not allow the release of his constitutional convention notes until after his death many years later, at least partly because he felt that those notes should be irrelevant to judges trying to interpret the Constitution.[37] Should those notes be relevant today? Although this book touches on these kinds of questions, its primary focus is on what Justice Antonin Scalia famously called "the great divide" in constitutional law.[38] This "divide" is the difference between originalists and non-originalists over how much weight to give evidence of the original meaning of constitutional text, not internal debates between and among originalists over what kind of ratification-era evidence is fair game for judges and scholars.[39]

There is a difference between judges reviewing history and past political practices to help decide cases and their use of originalist-era sources. For example, in a recent separation of powers case involving the president's power to make recess appointments when the Congress is out of session, the justices reviewed the long history of these appointments from the founding to the present.[40] This focus on the importance of historical evidence occurring well past (sometimes hundreds of years past) the founding would not be considered by most scholars and judges an originalist method of interpretation. Originalism may possibly be consistent with the relevance of historical events far removed from ratification, but not if those events can trump original meaning, which is quite often the case.

Chapter 2 examines what the founding fathers thought about constitutional interpretation and how the justices engaged in judicial review prior to the Civil War. This summary shows that, although judicial review was contemplated by the men who wrote the Constitution and the voters who ratified it, they expected judges to employ this powerful tool only when the alleged constitutional violation was clear (unless the challenged law dealt directly with judicial power or procedure).

Chapter 3 discusses in broad strokes how the Supreme Court used originalist-era evidence from the late nineteenth century to the end of the Warren and Burger Courts. This period may seem unduly lengthy for just one chapter, but the reality is that our modern conversation about the proper use of originalism is largely, though certainly not exclusively, the product of the last fifty years. As one judge noted, the "modern form of originalist theory actually appeared in the 1980s as the American public, government officials, and academics felt the effects of the Warren Court's decidedly non-originalist jurisprudence."[41]

Around the time the Warren Court ended, a few legal scholars, who I will label the "Original Originalists," began critiquing the liberal judicial decisions of the 1960s and early 1970s on the basis that the justices failed to rest their judgments on the Constitution's text or the framers' original intent. These scholars argued that unelected, life-tenured judges should not strike down state and federal laws absent clear evidence that those laws violate the Constitution. In the words of Thomas Colby, "[o]riginalism was born of a desire to constrain judges. Judicial constraint was its heart and soul . . ."[42]

Around the same time, conservative politicians began embracing this originalism critique as an argument against *Roe v. Wade*'s legitimacy and a few of the Warren Court's criminal procedure decisions. By the time Ronald Reagan won the presidency in 1980, the legal and political groundswell for an originalist movement was in place.[43] Chapter 4 details the work of these Original Originalists and the social, legal, and political forces that brought their work to light.

Liberal critics including both legal scholars and Supreme Court justices challenged these originalist assumptions and arguments. Chapter 4 also summarizes and evaluates this side of the debate and its implications for both the Supreme Court and our societal conversation about the meaning of the Constitution.

In response to these liberal critics of originalism, a second wave of conservative academics, with the able assistance of Justice Antonin Scalia, tried to change the doctrine to make it more acceptable to scholars and judges. These second-generation New Originalists developed a more visible political posture converting the originalism debate from a largely inside the legal academy and "inside the Beltway"