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Recommended Citation

Kirk, Garrett, "The Validity of Originalism in 2021". *The First-Year Papers (2010 - present)* (2020).
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I never had any interest in law when I was younger. The only memory that truly stands out to me is when I recall my mother and father being shocked at the news that a man named Antonin Scalia had died. I had no idea who this person was, and why it was such a big deal that he had passed away. I distinctly remember my mother telling me how he had been a harsh and polarizing figure on the Supreme Court, despite his enormous intellect. I didn't realize it at the time, but I would soon become enamored with this figure during a course my junior year of high school, which would lead me down the path of investigating his signature interpretive theory: constitutional originalism.

This class, informally known as Gov and Civ, was not even about law, and we only devoted one unit to the Supreme Court. This chapter of the class was more than enough to spark my interest in the land's highest court. I soon became intrigued by different jurisprudential philosophies, and I became captivated by the different members of the Court. However, there was one Justice in particular that stood out to me. In my free time I would fervently watch interviews and read about the same Supreme Court Justice my mom had once told me about when I was little, Antonin Scalia.

The man I watched in the interviews seemed different than the person I read about online. Scalia came off as charismatic, jovial, and witty. As I read some of his judicial opinions I started to realize how intellectually brilliant he truly was. Regardless of whether or not I agreed with the outcome of the decision he was voting on, I felt that he was able to turn the most bland case into an interesting and compelling read. I also was surprised by how he used his intelligence to fire not-so-subliminal shots at some of his colleagues whom he disagreed with. Even though I am pretty apolitical, I was deeply inspired by the way he was able to manipulate language to get his point across. I know some people admired Scalia because they were deeply conservative and agreed with his political ideology, but this is not the case for me. My admiration for the deceased has nothing to do with politics and everything with how he influenced my perception of law. In Scalia's opinions he was able to make a seemingly mundane issue compelling. As I continued my research on Scalia, the same word repeatedly emerged. Originalism. When I looked up what originalism was, my initial reaction was that I must be misunderstanding the theory, as it seemed far too basic to ever work.

I wondered what led Scalia to choose originalism as his guiding doctrine to reading the law. I asked myself, *Why would Scalia want to defer to the will of these slave-owning white men from hundreds of years ago? How is originalism even possible, giving that life is so different now than it was when the Constitution was drafted?* I wanted to write about originalism primarily because it interested me, but also because I felt that by diving deeper into the subject I would be able to formulate my own ideas about whether I agreed with it or not.

The United States Constitution was drafted in the year 1787, and even after over 200 years there are still arguments surrounding how this document should be applied to America today. There are two broad schools of thought on this issue. The first is the idea of a living Constitution. Living constitutionalists believe this document to be malleable, that the Constitution is meant to bend and change to reflect the ideas and beliefs of the American people. The latter

school of thought is that of the dead Constitution. Supporters of this method of interpretation believe that the meaning of this document remains fixed, and that the law of the land does not change by itself, only through passed legislation (Solum 2). Within these broad categories there are numerous branches of interpretation, such as consequentialism, intentionalism, and purposivism for the living Constitution, along with strict constructionism, textualism, and originalism for the dead Constitution (Calabresi).

Steven Calabresi, a professor of Law at the Northwestern Pritzker School of Law and Chairman of the Federalist Society defines originalism, saying that “originalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law. The original meaning of constitutional texts can be discerned from dictionaries, grammar books, and from other legal documents from which the text might be borrowed” (Calabresi).

One complaint about originalism is that it is not a reasonable interpretive device, since there were certain scenarios that the Founding Fathers were not able to envision, such as the internet, or the application of the Second Amendment to military-grade weapons when the most potent gun in 1787 was a musket. One of the most adamant proponents of originalism, the late Supreme Court Justice Antonin Scalia, addresses this grievance in one interview by saying “you should not interpret language strictly, nor should you interpret it sloppily, you should interpret it reasonably” (“Text and Intent”). Scalia then goes on to give the example of reasonable interpretation for the First Amendment, saying that somebody who would be interpreting the text hyper-literally (in this case, a strict constructionist), would construe the First Amendment to prohibit hand written letters since it is not press or speech, when clearly this is not what the law means, as free speech functions as a synecdoche to include hand-written letters (“Text and Intent”).

Another complaint about originalism is that it is too difficult to find the original meaning of the words. Originalists counter this premise by noting that scholars decipher the meaning of texts far older and longer than this 4,543 word document (“Constitution Facts”). Originalists also contend that if we agree that it is too challenging to find the original meaning of the text, then it should be impossible to find the original intentions and thoughts of those who drafted the document, as living constitutionalists claim (Gorsuch).

Originalism, and frankly the entire conception of a dead Constitution raises serious questions of morality and ethics for me. The Constitution is great in some ways, as it was able to establish the United States as a democratic entity and first world power. I respect the Founding Fathers’ intelligence, foresight, and will to create a document that forever changed the course of human history. However, their actions and beliefs compared to the standards of today’s society are seen as clear indications of bigotry and prejudice. While they favored liberty for those who looked and behaved like them, the Constitution under the Founding Fathers kept people of color as slaves, did not allow women the right to vote, and prohibited many other rights that are staples of our society today (Greene 1-6).

This idea of rule by dead hand poses the question of whether the Constitution should be abolished, since it was written without input of the complete population of citizens of the United States. While I am not advocating that the Constitution should be completely thrown away, I am wary of any method of interpretation that decides what rights we are allowed by the standards of 1787 rather than 2021. It feels difficult for me to fully support a method of interpretation that suggests going back in time and interpreting the Constitution based on what these

slave-owning white men agreed upon. This is what scares me most about originalism and the entire idea of a dead Constitution, that following this interpretive theory will stall the just social progress and evolution of equality that we have slowly seen since the document's inception. I worry that originalism will move America backwards in time towards the days of slavery and bigotry (Greene 1-6).

The alternative to a dead method of interpretation is a living Constitution. Originalists quip that this would be great for interpreting the law if everybody agreed on what the ideal laws are for the country, but this is not the case. Additionally, some people believe this idea goes against the idea of separation of powers and gives judges more power than they are intended to have. Certain people believe that in a living Constitution judges become the law-makers. Skeptics of this method say that in a living Constitution, the people who have the most power are those who are sworn in for life. One of the merits of the current system is that legislators are held accountable to the people. If citizens disagree with the laws their representatives are passing, they have the power to take away their support for that candidate. Under a living Constitution, nine Supreme Court Justices hold all the power to bend and change the law any way they see fit, with arguably no restrictions. There are supporters of originalism who genuinely believe it is necessary to combat what they see as the possible despotism that the framers of the Constitution wanted to get away from.

The idea of originalism makes sense to me when I consider how people interpret current laws, regulations, and ordinances. When I see a red light I obey the law and don't run the light. I don't see the light and think, *This doesn't apply here, since the law was created to prevent traffic accidents, and I am a skilled enough driver to drive safely.* A reasonable person would not think this, they would obey the law instead of inserting their own wants and desires. However, not all laws should necessarily be interpreted the same way, so perhaps this thought is moot. This metaphor also presents certain questions that reflect the difficulty of interpreting the Constitution today, such as whether or not it is acceptable to run the light if you are driving somebody who needs urgent care to a hospital, or if it's acceptable for a police officer to run a red light in the pursuit of protecting citizen's liberties.

The idea of originalism also resonates with me when I think about how language changes over time, as a consistent reading of legal provisions could prevent courts from erroneous interpretations. When one reads a book, the proper way to understand the text is to know what the words meant when they were written, not what they may mean now. While the word "gay" may refer to a man or woman who loves somebody of the same gender, a person would be incorrect to interpret the term as this when reading a 17th century text where they described a gay man, as the word gay only began to shift from meaning happy, publicly, in the 1960's (Bollinger). The originalist idea of words having fixed meaning has some appeal to me, as it is possible to envision scenarios where the meanings of words change over generations, resulting in a law that is far different from what the legislature intended.

Additionally, how does one surmise the intentions of the legislature? This seems to me like a far more challenging process than finding the original meaning of the text. This challenging intentionalism process leaves much room for subjectivity, and for the judge to insert their own predilections where they see fit. The similar but slightly different approach to intentionalism is purposivism, where a text is to be interpreted based on the intended purpose of the statute

(Scalia and Garner 19). Justice Wendell Oliver Holmes said that “we do not inquire what the legislature meant; we ask only what the statute means” (Jackson). As Antonin Scalia said, if the purpose of a law is what is most important, a judge “is free to climb up this ladder of purposes and to ‘fill in’ or change the text according to the level of generality he has chosen” (Scalia and Garner 19).

In order to assess originalism’s validity, we must evaluate the burden it places on the judge, and how this interpretive theory does or does not coincide with the role the judiciary is supposed to fulfill. According to the Code of Conduct for United States judges, one of the essential tenets for this position is “a judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism” (“Code of Conduct for United States Judges”). Clearly judges must act fairly and not be influenced by their own predilections or political opinions, yet there are still some differences in theory among judges about how these judicial duties should be exercised. Some judges believe their role is to interpret only what has been written, and leave the ability to change the law to the legislature. Chief Justice John Roberts said that “Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire” (“Chief Justice Roberts Statement”).

Other members of the judiciary believe the Constitution is purposely vague, and that it is the job of the judge to fill in the gaps between what the Founding Fathers wrote in 1787 and the societal standards in 2021. Justice Elena Kagan sees her role as a judge in a more liberal manner, saying that “sometimes [the Framers] laid down very specific rules, sometimes they laid down broad principles. Either way, we apply what they say, what they meant to do. And so, in that sense, we are all originalists” (Baude). Kagan seems to interpret originalism far more loosely than Scalia, providing an alternate perspective of the originalist doctrine.

Is a judge supposed to interpret the law only based on what is already there? Or is a judge supposed to change the law in order to reflect the changing current of societal expectations and beliefs? On one hand, I see the argument for a judge who would want to interpret the Constitution loosely. This is a document that was written hundreds of years ago in a time and place completely different than the world we live in today. The Founders must have purposely left their words and phrases unclear, as the subsequent generations would interpret them to fit the normative behavior and beliefs agreed upon by their society. If we interpret the words as they were written and understood at the time they were enacted, we will be living life under the tenets and values of 18th century America instead of today’s nation. It is not as if these judges are taking the law into their own hands, as the law is so purposely unclear. It is not certain the scope of how phrases like equal protection of the law and due process of law are to be interpreted. Does equal protection mean that same sex marriage must be legal? Does equal protection mean affirmative action is unconstitutional? Does due process mean the death penalty is constitutional? There are an infinite number of questions that only grow as society progresses and new circumstances are applied to the Constitution (“Constitution: A Living Document or Not?”). The idea that the document in its entirety is an all-encompassing instrument readily applicable to any and every situation can seem foolish.

As I continued to research originalism, I began to realize that my perception of this supposedly objective judicial philosophy was not nearly as pure and impartial as I had thought it to be. I began to realize that the assumptions I had made about originalism were misplaced, that I so hoped Scalia would be right about this interpretive theory. Sadly, the more I read about the topic the more disappointed I became. What's so interesting about the narrative that dead constitutionalists cite when slandering liberal judges, is that these originalists and strict constructionists sometimes abuse the law in exactly the way they accuse liberal judges of doing. There seems to be a common thread floating amongst the legal stratosphere that we need to get rid of judicial activism in the courts, that the liberals serving on the bench are partisan legislators disguised as judges. Certain people denounce the idea of a living Constitution because they say that it gives the judges too much power, that these judges are rewriting the law to fit their own political agenda when they should be adhering to what is written. The irony in this is that the same people who preach fidelity to the text only choose to follow their dead constitutional doctrine when it fits their personal beliefs. Proponents of originalism accuse the living constitutionalists of tyrannical behavior and say that they are taking away the agreed-upon rights of the American people, when originalists are the ones who cite hundred-plus year old texts to try to take agreed-upon rights such as abortion, gay marriage, and affirmative action away. A more liberal manner of constitutional interpretation could be useful in bridging the political divide between parties. Because of the increasingly polarizing nature of politics it is more and more difficult to get legislation through Washington, so giving judges more rein to help this country could be a practical solution.

The preamble, which establishes the purpose of the Constitution and how it should act says "We the People of the United States, in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America" ("The U.S. Constitution: Preamble").

This part of the document establishes an interesting point about democracy and how it should operate. Clearly forming a more perfect union is the purpose of this Constitution, but that does not mean that people are free to act however they want as long as it is working towards this end. We all want to sustain and reinforce the rights of life, liberty, and the pursuit of happiness, but this does not give citizens free rein to become vigilantes and take the law into their own hands whenever they see fit. The same is true for the judiciary, and all three branches of government. A key component of our government is separation of powers. The English government that was in power before the U.S. was tyrannical with power overly-centralized and concentrated in the hands of a few people. This caused the English to establish laws that didn't reflect the will of the people. The Founding Fathers wanted to get away from this despotism, and one way they did this was through properly apportioning the duties afforded to each section of our democracy. By distributing power throughout three different branches of government, no one person or group is able to rule unfairly over the citizens as the English once did.

Broadly and simplistically speaking, the role of the judiciary is to interpret the law. It makes sense that if people consider judges to be making the law rather than solely interpreting it, this would seem like a violation of separation of powers and a step in the direction of tyranny. However, there is an argument to be made that conservative judges have their own moments of judicial activism on the bench. Originalists are able to shape the law in the manner they see fit by interpreting it strictly. Whenever an area of the Constitution is vague, originalist judges interpret

the law in a manner that just so happens to coincide with their own political agenda, as they cloak themselves in the protection of so-called loyalty to the text. However, when a law they think ought to be clearly defined is not, they have the ability to make a provision inexplicably appear. When Antonin Scalia was a member of the Supreme Court he was often accused of picking and choosing when he applied his originalist doctrine. The irony of originalism is that it perpetuates everything that it says to go against. Originalism has the potential to move our society back in time towards the beliefs and policies of the 18th century.

I think what keeps me from outrightly denouncing originalism is that it appeals to my fear of usurpation of power by a single branch of government. It is marketed as an objective approach that casts politics aside and decides cases based on previous laws. When I see how originalism is applied however, I don't like what I see. Instead of restraining the judges, it restrains the American people, taking away rights agreed upon and renewed by common law precedent, and moving the society farther and farther back to how life was in 1787. I appreciate that originalism limits judicial power, but there must be other interpretive methods that can accomplish this goal, while still advancing American liberties. It's also not as if originalism is an unbiased method, it clearly pushes forward the conservative agenda under the guise of apoliticism.

At the same time, I see the merits of originalism, especially theoretically. It makes sense to me that people would be skeptical of the idea of a living Constitution, since this could be interpreted as an abridgment of power. Living constitutionalists assume that the Constitution is meant to be interpreted reasonably, since clearly that is what the Founding Fathers wanted. But as Antonin Scalia said, "it is precisely because people differ over what is sensible and what is desirable that we elect those who will write our laws—and expect the courts to observe what has been written" (Scalia and Gardner 22). I understand the idea that it is not the job of the judge to guess what the Founders meant, the intention of the Founders should be reflected in the laws passed by the legislature. Additionally, one could argue that it is not the job of a judge to rewrite the law to reflect what they see fit. I see how living constitutionalist theories such as purposivism and intentionalism could be scantily clad guises for judicial activism. Whilst searching for the Founder's intention or the purpose of the law, the judge could inevitably choose what they think the purpose or intention ought to be, rather than what it is. Separation of powers exists for a reason, and one of those reasons is to constrain the judiciary (Scalia and Gardner 30).

I think there is a way to find a median between the liberal and conservative jurisprudential approaches, and that middle ground comes through respecting and emphasizing precedent. The English common law tradition adopted by the United States is the best way for the law to evolve organically over time while still reflecting changing societal standards. I believe that this premise is able to answer many questions about the role of the judiciary. Respecting prior rulings of courts may be able to solve many problems, but there are still questions of the best way to interpret the Constitution, such as what to do when there is little to no prior precedent in a case.

In theory, I like the idea of a dead Constitution more, but in practice I favor the idea of a living Constitution. Even though it is said that originalism begins with the 'objective' words in the text, it is difficult for me to consider them impartial when the original language in the Constitution was only agreed upon by straight, slave-owning white men. I like the faithfulness to the text that is emphasized in originalism, but when this results in judges consistently coming to extremely conservative results and shrugging their shoulders and saying it was a coincidence, it

makes me take a step away from this method. This doesn't mean that I think judges should have complete and total freedom to interpret laws however they see fit. I believe there have to be general guidelines and methods that are strict enough so that judges are not swayed by their own personal agenda, yet loose enough that they aren't forced to come to an absurd ruling in the name of doctrinal faithfulness.

While arguments can be made from both sides of the aisle about the validity of each respective interpretive theory, the current state of judicial discussion has shifted away from cerebral debates and darted into a state of chaos that is embarrassing and frightening. The judiciary, an institution that is supposed to remain apolitical, has become infected with partisanship and political squabble. While some people criticized Antonin Scalia for the outcomes he arrived at in his rulings, he preached doctrinal fidelity and exemplified intellectualism in the Court. When Supreme Court Justices are used as ploys to advance a particular political agenda, there is serious risk to the stability of America as a democracy. The Judiciary needs to stand as an unbiased establishment that holds judges to a standard of professionalism and integrity, and once that standard is upheld, the debate can resume about the validity of different modes of constitutional interpretation.

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