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Rethinking the Value of Originalism

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In the 1980's, the Reagan Revolution established new norms and expectations in American political and, importantly, legal spheres. Mainstream politicians, including President Ronald Reagan, and legal scholars argued for "originalism" as a method of constitutional interpretation. New organizations, including the influential Federalist Society, were established to build a pipeline of conservative jurists and lawyers, and led to a wellspring of conservative legal research. These efforts have been transformational in American jurisprudence.

Ken Kersch aptly describes the era between the presidential elections of Franklin Roosevelt and Ronald Reagan as "conservatism's political wilderness years."[1] To be sure, Reagan's ascension to the White House marked a seismic shift in the American mindset, but perhaps the most influential shift was in legal views in the country's highest offices. As noted by Ed Meese, a Reagan era Attorney General, in 1988 President Reagan "asked judges to put 'an end to the fanciful readings of the Constitution that produce such decisions as *Roe v. Wade*.'"[2]

During Reagan's presidency, The Federalist Society was established to challenge the liberal legal order in the academy and in the courts. President Reagan himself commented that "[t]he Federalist Society is changing the culture of our nation's law schools. You are returning the values and concepts of law as our founders understood them to scholarly dialog, and through that dialog, to our legal institutions."[3] As recent decisions in *Dobbs*,

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[1] KEN I. KERSCH, *CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM*, 2019, 27.
[2] Edwin Meese, III, *The Case for 'Originalism'*, THE HERITAGE FOUNDATION (Jun 6, 2005), https://www.heritage.org/commentary/the-case-originalism.
[3] Ronald Reagan, *Remarks to the Federalist Society for Law and Public Policy Studies*, RONALD REAGAN.

Kennedy, and *Bruen* illustrate, with every justice in the majority in each of these three cases are affiliated with the Federalist Society, the efforts to remake the Court have come to fruition.[4]

Despite its adherents, as we argue here, originalism and its tenets have three fatal flaws. First, the idea is based on a questionable, if not outright faulty understanding and use of history. Broadly, originalism believes "that constitutional meaning was fixed at the time of the textual adoption..." which is legally significant and "authoritative in most circumstances."[5] In some respects, originalism's flawed relationship with history could be expected given practical difficulties alone. Simply put, "words are tricky to start with; words in legal documents are worse."[6] Further, attempting to reveal a single historical understanding oversimplifies constitutional history.[7] As stated by Møller, scholars "…who lift evidence from the work of historians often take a cavalier approach…" to debates and uncertainty in complex historical treatments.[8]

Additionally, new originalism has seemingly turned away from the work of historians altogether.[9]

PRESIDENTIAL LIBRARY & MUSEUM, Sept. 9, 1988, https://www.reaganlibrary.gov/archives/speech/remarks-federalist-society-law-and-public-policy-studies.

[4] LIDIA JEAN KOTT & NOAH FELDMAN, TAKEOVER: HOW A CONSERVATIVE STUDENT CLUB CAPTURED THE SUPREME COURT, 2021. DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION, NO. 19-1392, 597 U.S. (2022); KENNEDY V. BREMERTON SCHOOL DISTRICT, 597 U.S. ___; NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC. V. BRUEN, 597 U.S. ___

[5] Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM LAW REV. 375, 378 (2013).

[6] Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, HARV. JOURNAL OF LAW AND PUBLIC POLICY 87, 89 (1984).

[7] See PETER ZAVODNYIK, THE AGE OF STRICT CONSTRUCTION: A HISTORY OF THE GROWTH OF FEDERAL POWER, 1789-1861 36-79

[8] Jørgen Møller, *The Problem of History*, 55 PS: POLITICAL SCIENCE & POLITICS, 525, 526.

[9] Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS HISTORY (Mar. 20, 2017), http://www.processhistory.org/originalism-history/#_ftn5.

Another issue is that many originalists, including Justice Antonin Scalia, believe that "when the Constitution's text is ambiguous or silent on a subject...," one must consult "long-standing American tradition..."[10] However, this practice has led to "cherry picking" and incomplete historical narratives.[11]

Second, there remains an open question about what originalism means.[12] Kersch notes that the sources of originalism were diverse voices that were not "consistently originalist in the narrow sense of insisting upon eighteenth-century understandings, or requiring either judicial deference to legislators (judicial restraint) or… focusing on judges and their duties…."[13]

Yet, even since the 1980's, when originalism as a method of constitutional interpretation began to come into its own, there has been significant disagreement—even by conservative adherents—about what originalism constitutes and mandates. Justice Antonin Scalia, who was perhaps the most demanding adherent to originalism, was influential well beyond his conservative circles.[14] In the debate between whether originalism was based

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[10] Margaret Talbot, Supreme Confidence: The Jurisprudence of Justice Antonin Scalia, THE NEW YORKER (March 28, 2005), https://www.newyorker.com/magazine/2005/03/28/supreme-confidence.

[11] Joshua Zeitz, *The Supreme Court's Faux 'Originalism'*, POLITICO (June 26, 2022), https://www.politico.com/news/magazine/2022/06/26/conservative-supreme-court-gun-control-00042417 ; Maurizio Valsania, *Abortion decision cherry-picks history – when the US Constitution was ratified, women had much more autonomy over abortion decisions than during 19th century*, THE CONVERSATION (Jul. 6, 2022, 8:21 AM), https://theconversation.com/abortion-decision-cherry-picks-history-when-the-us-constitution-was-ratified-women-had-much-more-autonomy-over-abortion-decisions-than-during-19th-century-185947.

[12] "As originalist arguments have proliferated and deepened, some have questioned whether there is anything distinctive left to the label." Whittington, *supra* note 5, at 377.

[13] KEN I. KERSCH, *supra* note 1, at 27-28.

[14] Jedediah Purdy, *Scalia's Contradictory Originalism,* THE NEW YORKER (February 16, 2016), https://www.newyorker.com/news/news-desk/scalias-contradictory-originalism arguing that "Scalia's later career showed that as originalism gained in influence, it became susceptible to many uses, not all of them conservative.

on the intent of the constitutional Framers or the meaning of the words they left, Scalia said, "I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words."[15] Yet, to other prominent conservatives, the *intent* matters a great deal.[16] Perhaps most ironically, originalist theory and use has evolved—which leads one to wonder how adherence to the founding era can be adhered to at all.[17]

Finally, strict adherence to originalism fails to account for the values, norm, and history of precedent. As David Schultz aptly notes, there are three reasons for precedent. First, it is the foundation of common law. Schultz writes that "in common law systems, a decided case should in part be guided by past court decisions, and it should also serve as a guide for future courts."[18] As David Strauss asserts, our constitutional system has adopted key principles of common law. Throughout the judicial development of the United States, the concept of precedent has become "as important as the written U.S. Constitution itself."[19]

Moreover, Schultz acknowledges that existing precedent has an incredible impact on the rule of law. "Following precedent … ensures certainty and

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[15] Talbot, *supra* note 10.

[16] Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986), "… a judge should consider himself or herself bound by the original *intentions* of those who framed, proposed, and ratified the Constitution" (our emphasis), 823.; Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NATIONAL CONSTITUTION CENTER (n.d.), https://constitutioncenter.org/interactive-constitution/white-papers/on-originalism-in-constitutional-interpretation; Whittington, *supra* note 5.

[17] Whittington, *supra* note 5., arguing that "The terms of the debate have shifted somewhat over time, from talking about 'original intent' to talking about 'original meaning.' The turn to original meaning reflects some theorical and practical adjustments in emphasis within the literature on originalism.", at 378-379.

[18] DAVID SCHULTZ, CONSTITUTIONAL PRECEDENT IN US SUPREME COURT REASONING 3-8 (2022).

[19] DAVID A. STRAUSS, THE LIVING CONSTITUTION 3 (2010).

predictability in the law."[20] There are numerous reasons why judicial precedent is imperative to the rule of law. Precedent allows courts to act on the guidance of past courts rather than being forced to invent new interpretations themselves.[21] Only through adhering to precedent can modern courts provide guidance for their successors and establish the confidence of the populace in judicial consistency.

Schultz also asserts that "[Precedents] are meant, in part, to restrict the decision-making or discretion of judges…"[22] To be sure, "the doctrine of *stare decisis* … is not an inexorable command" as the Supreme Court acknowledged in *Lawrence v. Texas*, but it does serve as an effective indicator of how the justices will rule.[23] Throughout the history of the Supreme Court, existing precedent is rarely overturned.[24]

In conclusion, "originalism" as practiced by the current majority of the Supreme Court, and advocated by organizations such as The Federalist Society, is not a coherent judicial theory. There is a lack of common agreement regarding the premises of the theory and poorly applied history is a feature, not a bug of the theory.[25] Because originalism relies on the (either) the words or the intent of the Constitution's Framers, ironically it fails to even account for the common law and the role judges play in it—an original understanding of the Framers.

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[20] DAVID SCHULTZ, *supra* note 1 at 8.

[21] Daniel A. Farber, The Rule of Law and the Law of Precedents, 90 MINN. L. REV. 1173, 1177 (2005).

[22] DAVID SCHULTZ, *supra* note 1 at 6.

[23] LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 559 (7th ed. 2018).

[24] Brandon J. Murrill, CONG. RSCH. SERV. R45319, The Supreme Court's Overruling of Constitutional Precedent 50 (2018).

[25] "Much originalism is premised on the belief that history is more objective than philosophy. … [T]his claim is false in practice. … History and prominent historians can be cited as supporting virtually every argument made in front of the [Supreme] Court." Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, *in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 70, 88 (Earl M. Maltz, ed., 2003).