FRANK B. CROSS

The Failed Promise of Originalism

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The Undeniable Appeal of Originalism

Originalism, the theory that the Constitution should be interpreted according to the meaning or intent of the drafters, has great appeal to Americans. At one time closely associated with the conservative movement, originalism is now commonly held as an important, if not the exclusive, device for interpreting the Constitution. This has not been our historic practice. Over thirty years ago, Munzer and Nickel (1977, 1029) wrote that "one does not have to dig very deeply into the literature of American constitutional law to suspect that many constitutional provisions do not mean today what their framers thought they meant." Yet originalism still has great appeal.

A large number of Americans say they believe that Supreme Court justices should interpret the Constitution solely based on the original intentions of its authors (Greene 2009c, 695–696). In the legal academy, the amount of ink devoted to originalist theory is enormous. The revival of originalism is evident at the Court level. One quick survey found that in 1987 analysis of history figured in only 7 percent of the constitutional cases,

but by the 2007 term historical analysis was involved in nearly 35 percent of the opinions (Sutton 2009). While still representing a minority of cases, the trend line appears strong.

There was a time when originalism was considered "dead" and "trounced by many academic critics" (Barnett 1999, 611). One of today's leading originalists declared that if "ever a theory had a stake driven through its heart, it seems to be originalism" (Barnett 2004, 90). The theory was "rebooted," though, and surged in popularity. Conservative academics developed new and more persuasive theories for reliance on originalism. The approach has seen much greater attention in law schools in recent years (Ryan 2006). At the court, some claim that "the originalists have prevailed" (Smith 2004, 234).

Originalism has now gone beyond its conservative "base," and conservative bête noire Ronald Dworkin proclaimed some time ago that everyone should be an originalist (though his application of the theory differed dramatically from that of other originalists). One often hears the claim that we are all originalists now. Indeed, in her 2010 hearings on her Supreme Court nomination, Elena Kagan reported that "we are all originalists." Research reveals a dramatic increase in recent years in law review articles focused on originalism and in the use of certain originalist sources by the Supreme Court (Ginsburg 2010).

While originalism long had severe critics in the academy, especially among liberals, this seems to be changing. In addition to Dworkin, Yale's Jack Balkin has come out for originalist interpretation (Balkin 2009), and other leading liberal scholars go along, at least to a degree. The position is not universal, as a number of law professors reject originalism, with a recent article calling it "bunk" (Berman 2009). However, most concede that originalist interpretation is at least sometimes useful, and many argue that it should serve as the primary basis for constitutional interpretation. The theory is certainly in the contemporary debate over proper interpretation.

The discussion over the use of originalism has largely focused on theoretical debates, sometimes delving into great linguistic detail. This book does not focus on the theory of originalism, on which countless articles and books have been written. Rather, I focus on the practice of originalism and how that informs us of the value of the approach. Some understanding of underlying theory of originalism is important, though, to evaluate the

practice. The theoretical argument for originalism obviously has a profound appeal.

The appeal of originalism may be viewed as a sign of respect to the constitutional framers. Madison, Jefferson, Hamilton, and others are held in very high regard today. Ron Chernow (2010) has observed: "In the American imagination, the founding era shimmers as the golden age of political discourse, a time when philosopher-kings strode the public stage, dispensing wisdom with gentle civility."

Americans may treat the founders as giants or saints who created for us the Constitution that formed the backbone of our nation. There has been an "almost religious adoration" of the framers (Miller 1969, 181). Accordingly, some among the public suggest that the Constitution should be interpreted according to the founders' intent for it. The Constitution becomes our secular idol and the founders the prophets.

This simple theory is tantamount to ancestor worship and is hard to justify. Today's originalists commonly reject the approach. Originalism is "not driven by fawning celebration of historical figures" (Whittington 1999, 157). The Constitution and its framers certainly were flawed. The acceptance of slavery is the most prominent example of the framers' shortcomings, but there are others as well. The lack of rights for women is another major example of where the framers' views appear somewhat embarrassing in retrospect. And originalism is not limited to the original framers but would also extend to the later amendments to the Constitution.

Comments at the time suggest that individual framers were not themselves so enamored with the wisdom of other framers. Jefferson said that Hamilton's practice was "a tissue of machinations against the liberty of the country," while Hamilton said Jefferson was not "mindful of truth" but a "contemptible hypocrite." Hamilton said of John Adams that he was "more mad than I ever thought him and I shall soon be led to say as wicked as he is mad." Of course, Adams said that Hamilton was "devoid of every moral principle." It does not sound as if they had great trust in the judgment of their fellow framers.

Nor was it clear that the framers themselves favored an originalist interpretation for their Constitution. Some research into the period suggested that the framers did not expect that future interpreters of the Constitution would rely on the framers' purposes and expectations (Powell 1985), though

these findings are contested. The framers carefully debated the language of the Constitution and clearly thought that the text, rather than their particular intentions, should govern. Madison wrote in *The Federalist* No. 14:

> Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?

Such textualism, though, can be considered a form of originalism. Our leading framers do not seem to embrace originalism. The most compelling evidence of this seems to come from James Madison himself. He was originally convinced that the Constitution did not authorize a national bank but later changed his mind, in light of legislative precedent and his appreciation of the value provided by the bank to the nation (Dewey 1971). In this, Madison plainly embraced a "living Constitution." Of course, this critique applies strongest to reliance on original intent, and today's originalists have a different approach, as will be explained in the following pages.

Had the framers wanted originalism to be the standard, they could have said so explicitly. At the very least, they could have provided a record that made the original intent as clear as possible. They did none of this. Madison took notes during the Constitutional Convention but did not make them public, as would be expected if he thought they should have authority. Records of the ratification debates on the Constitution are also quite incomplete.

At the time of the Constitution's creation, it appears that the standards for legal interpretation did not rest centrally on the intent of a law's creators. Hans Baade's historical analysis suggests that it was the "universal practice" of courts at the time to look only at the text of an act and "never" resort to the "debates which preceded it" (1991, 1010).

The worship of the framers cannot supply the basis for originalist interpretation, though one suspects that it influences many of today's originalist impulses. The framers were great men in many ways but certainly not beyond reproach, and they realized this. A greater justification is required for originalist interpretation.

There is a very cynical position on the appeal of originalism. Jamal Greene attributes its appeal to its simplicity, its catering to populist suspicion of legal elites, and cultural nationalism (2009c). This surely explains some of its appeal to the general public, as originalism is easy to understand and the public is intermittently nationalist and populist. Post and Siegel (2006, 527) suggest that originalism is "so powerfully appealing because conservatives have succeeded in fusing contemporary political concerns with authoritative constitutional narrative" that is "driven by a politics of restoration, which encourages citizens to protect traditional forms of life they fear are threatened."

These motives doubtless underlie some of the public support for originalism. Alternatively, originalism may simply appeal to a "populist taste for simple answers to complex questions" (Berman 2009, 8). One cannot fairly expect the broad general public to appreciate nuances of legal theory. To prevail in the academy and in court, however, originalism needs a stronger basis. Various academic originalists have provided this basis, relying on more robust justifications for originalism.

A stronger case for originalism is simply that reliance on originalism is required for legal decisionmaking. The Constitution, like other legal materials, is a text. When interpreting another legal text, such as a statute, it is typical to use the meanings of its words at the time of its enactment. Many judges look beyond the words of the statute to the legislative history, to attempt to discern the intentions of those who drafted and passed it.

This is considered simple legal fidelity (Solum 2008). The interpretation of any legal material relies on its text. Balkin (2007) argues that fidelity to the Constitution as law must mean fidelity to the words of the text. The words govern. But the meaning of words is impossible to discern outside their "linguistic and social contexts" (Brest 1980, 207). Originalism provides this context. A text is generally interpreted according to the meaning of its words at the time they were expressed. A legal text remains binding until it is repealed or amended. The constitutional text is that of the framing era, as amended. The framers adopted a written constitution, in contrast to England's more amorphous judicially constructed constitution. This was at least in part in furtherance of a desire for stability of interpretation. The drafters believed that the judiciary could not be trusted without a clear governing text (Whittington 1999). The drafters chose their words

carefully, trying to anticipate future circumstances, so that they could last (Gillman 1997).

The change in a word's meaning over time should not alter the interpretation of its earlier meaning. When a law continues in force over time, so does the original meaning of its words. If a nineteenth-century novelist referred to a person as "gay," meaning cheery and pleasant, that character should not now be considered to be attracted to the same sex simply because the meaning of the word has evolved. Similarly, a statute retains its original meaning until it is repealed or amended. The word *counterfeit* once meant authentic, and the word *awful* once meant great, but we would not change the meaning of an old statute because those words have transformed their meaning. James Madison noted that the "meaning of the words" contained in the Constitution might change, but the meaning of the Constitution itself should not (Whittington 1999, 58).

Justice Holmes dissented from this vision when he wrote: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used" (*Town v. Eisner* 1918, 425). Even originalists recognize that the circumstances are relevant to the correct application of a word, but they would maintain that the word keeps its fundamental meaning.

The Constitution refers to guaranteeing every state a "republican" form of government. This is appropriately interpreted, according to the original meaning, to mean representative government, not government by today's Republican Party (Balkin 2007). The constitutional reference to "domestic violence" is not speaking of spousal abuse but of internal insurrection (Solum 2008). There are plenty of other examples of this phenomenon.

Originalism simply calls for the legal text to be interpreted according to its then contemporary meaning, which is a standard approach to legal or other forms of textual analysis. The process of interpretation arguably calls for nothing else. The framers apparently believed that the Constitution "should be construed to have the meaning attributed to it by some group of persons at the time it was drafted and adopted" (Clinton 1987, 1206). James Madison said that the "true meaning" of the Constitution was that "given by the nation at the time of its ratification" (Dewey 1971, 39).

For a leading current originalist, Randy Barnett, the "intuitive appeal of originalism rests on the proposition that the original public meaning is an objective fact that can be established by reference to historical materials" (2009, 660). If so, constitutional interpretation becomes a question of fact, not one of indeterminate values. Some originalists would maintain that theirs is "the only way to ensure that the Constitution is really law" (Sunstein 2005, 54). Richard Posner (2000, 591) suggests that the "only good reason for originalism is pragmatic and has to do with wanting to curtail judicial discretion."

This is a "rule of law" justification. Without originalism, we have the rule of men and women, specifically the rule of Supreme Court justices. Strictly speaking, judge-created law does not violate the rule of law. The common law is characterized by such judicial discretion, and it is not generally considered contrary to the rule of law. But Justice Scalia suggests that the discretion of the common law is less lawlike than ruling by more rigid tests and that such discretion is inappropriate in the constitutional context. There is no constitutional or other legal authority for justices to create whatever law they desire.

Ultimately, the case for originalism thus appears to be that of the rule of law (Griffin 2008). The constitutional text is the law. If judges do not follow its meaning, they are promoting a rule of judges rather than a rule of law. Only the original meaning, in this view, produces truly lawful decision-making. Bevier (1996) suggests that nonoriginalism is a corruption of the rule of law itself. The rule of law basis for originalism does not make claims about the normative legitimacy of the law, though. Although rule of law is presumably better than no rule of law, its value depends on the legitimacy of the substantive law that it is enforcing. To strengthen its hand, originalism has turned to democracy as a justification for its constitutional law.

Originalism has been considered necessary for true democracy of popular sovereignty (Whittington 1999). The American people exercised democracy to create a Constitution, and its commands should be given effect. This is the basis for the Constitution's legitimacy (Farber 1989). The Constitution was ratified through a democratic process (though democracy of the time was surely imperfect), and it had no force until this time of ratification. Democracy implies that democratic actions that become the law remain effective until legally repealed. Originalism is said to be the

only means of interpretation that is faithful to what the people democratically agreed on (Whittington 1999). Allowing unelected justices to alter that popularly agreed-on meaning is to make the justices sovereign, not the people.

The Constitution can be altered through a democratic process of constitutional amendment. Amendment is challenged as a democratic process for constitutional change because as few as thirteen states can block such an amendment, no matter how small their relative population might be. While amendment is difficult and requires more than a simple majority, such supermajority requirements may be democratically beneficial (McGinnis & Rappaport 2007). Any other method of alteration of the original meaning arguably undermines democracy because it denies people the democratic right to make rules (such as the requirements for constitutional amendment) that will be applied in the future.

Originalism could be viewed in tension with democracy. It appears to exalt, in some cases, the ideas of those who died hundreds of years ago over current individuals (the "dead hand" problem). There is little theoretical reason to assume that contemporary Americans necessarily consent to all the terms drawn up in the eighteenth century. Richard Posner (1990, 138) argued that to be "ruled by the dead hand of the past is not self-government in any sense." The nature of American constitutional governance sometimes prevents current majorities from effecting their preferences on policies, demanding the difficult process of constitutional amendment for change. Earl Maltz, a defender of originalism, described democracy as "the most popular defense" for the practice but also the "easiest to dismiss" (1987b, 776–777). The Constitution itself has various antimajoritarian aspects, not least the procedures for its own amendment.

Given the acceptance of a Constitution, though, this criticism of originalism is incomplete. In practice, rejecting originalism permits the originally enacted meaning of the Constitution to be altered by some other entity. In today's system, the judiciary, particularly the Supreme Court, decides matters of constitutionality. The Court, though, is not accountable to the electorate but was made independent of the people. Any judicial changes to the original meaning, therefore, lack a democratic imprimatur. Moreover, permitting judicial modification of the Constitution arguably disrupts the separation of powers conceived at the time of ratification. A

set historical meaning with possible amendments could be considered more democratic than one set by judges. This conforms to the belief that "officials charted with *interpreting or enforcing* the law should not usurp the authority of those charged with *making* it" (Bassham 1992, 93).

Perhaps the fundamental appeal of originalism is the fear that "if judges don't follow the original understandings, they will be free to do whatever they want" (Strauss 2008, 973). A central concern of originalism "is that judges be constrained by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless" (Smith 1989, 106). The "best response" to judicial discretion is to "lash judges to the solid mast of history" (Whittington 2004, 599).

Authorizing Supreme Court justices to "do whatever they want" is generally regarded as an undesirable thing. It gives them a governmental power contrary to their role that is difficult to justify. Such authorization appears to create rule by "philosopher-kings" unconstrained by electoral accountability. Moreover, it surely undermines stability and other values of an effective legal system if the justices may alter the content of controlling law at their whims. The prevention of this practice is considered crucial to the rule of law and a central justification for originalism.

From this position, the actual intent of the framers themselves about originalist interpretation is not relevant. The framers might have actively opposed originalism, but that would not refute the contention that the rule of law requires an originalist interpretive practice. It is commonly recognized that the framers' desire that their personal intent be followed does not necessarily dictate our method of interpretation (Bassham 1992). Correspondingly, their desire that their personal intent *not* be followed should not dictate our decisions. If we believe that the rule of law or democracy requires originalism, it scarcely matters that the framers modestly rejected the approach. If the original understanding were unwise or even deemed morally wrong, originalism says that is nonetheless the law, to be applied until it is changed.

A related defense of originalism is that of fairness and neutrality (Maltz 1987). Since the early twentieth century at least, Americans have been somewhat skeptical of the Supreme Court and its motivations. The justices sometimes appeared more as politicians, making rulings driven by their ideological preferences rather than by the law. Because the justices have life

tenure and cannot be held accountable in elections, and because constitutional decisions cannot be overridden by elected officials, Supreme Court decisionmaking has intermittently frustrated many Americans. Judges seemed to have overstepped their proper bounds and assumed inappropriate political power. A modern survey of historical analysis at the Court has suggested that it has checked the excesses of both ideologies (Richards 1997).

Reliance on originalism would professedly control such judicial activism. Justices would defend limits to government power but defend only the rights that the framers identified in the Constitution. New rights would not be established out of penumbras. This view applies only to the Bill of Rights, however. It is plausible that originalism in the interpretation of the Articles could produce more activist decisionmaking, such as holding that the Commerce Clause does not authorize certain federal actions, making them unconstitutional. This potentially could radically alter federal government action.

Even with respect to the Bill of Rights, the Ninth Amendment provides an open-ended text that could encourage an originalist to expand the individual rights protected by the Constitution in a fashion that could be labeled as activist. The argument for restraint commonly presumes that the fundamental content of originalism is in fact restraintist, without providing much support. The better case is that originalism preserves the rule of law, whether activist or restraintist. To the degree that this produces undesirable results, it is for the people to change them through democracy.

Some surely defend originalism for nonneutral grounds, though, believing that it will produce their desired conservative results. In this theory, originalism was not successful because of its objectivity or certainty but because of its purported conservatism. Some viewed liberal jurisprudence as "a form of corruption that has degraded the wisdom and virtue found in the Constitution's original conception" (Levin 2004, 109). Rather than truly defending originalism, though, this position simply uses the theory as a convenient instrument for ideological objectives.

The Reagan administration pushed for originalism specifically to counter the Warren Court's liberal decisions. These decisions were viewed as pursuing a liberal agenda independent of what the Constitution truly dictated. The theory was "politically attractive" because it "implied conservative policy results as opposed to the prior wave of liberal Supreme Court

decisions" (O'Neill 2005, 9). At this time, originalism became a vehicle for the mobilization of conservatives (Post & Siegel 2006). This conservative originalism, though, collapsed back into the case against "judicial activism." The conservative critics objected that the Warren Court had gone too far in protecting rights.

Originalism's early conservative following resulted from a desire for judicial restraint. Raoul Berger, perhaps the ur-originalist, complained that the Court was usurping power by failing to follow the original understanding (1983). Conservatives opposed Warren Court decisions invalidating statutes as judicial activism and contended that originalism would not have justified such decisions. For Ed Meese, "a jurisprudence of original intent was essential to judicial restraint" (Greene 2009b, 680). He "understood originalism as a way to limit the reach of constitutional adjudication" (O'Neill 2005, 157). Originalism, for example, arguably provided no basis for reproductive rights of the sort found in *Roe v. Wade*. According to Rush Limbaugh, the "only antidote" to "judicial activism is the conservative judicial philosophy known as originalism." This is also the originalism of Robert Bork.

Some of the most prominent contemporary originalists, however, reject judicial restraint as an argument for originalism. Earl Maltz (1994) suggested that originalism was not necessarily consistent with more judicial restraint. They may criticize judicial "passivism" for failing to strike down legislation that violates the Constitution (Whittington 1999). Randy Barnett believes that originalism should be used assertively to limit the federal government's legislative actions. For these leading originalists, originalism may be a tool for aggressive judicial activism in order to return the interpretation of the Constitution to its roots. Many of today's originalists commonly believe that the power of the federal government has far outstripped its constitutional bounds.

Reagan-era originalism was motivated in part by the Supreme Court's expanded recognition of individual rights and invalidation of democratic action (O'Neill 2005). Many of today's leading originalists, though, urge more expanded recognition of individual rights and invalidation of democratic action. Randy Barnett, for example, urges greater judicial activism in support of individual liberty, in direct opposition to the originalist philosophies of Bork and Scalia (Barnett 2005). His originalism is said to be

"the antithesis of the originalism of Scalia, Bork, and the many others who seek to preserve democratic rule by limiting the scope of judicial power to interfere with the output of democratically elected legislators" (Colby & Smith 2009, 256).

Whether restraint characterizes originalism is questionable. Consider the voting pattern of the two justices most associated with the originalist philosophy—Scalia and Thomas. Justice Scalia has referred to himself and Thomas as the only originalists on the Court (Scalia 2007, 44). Yet they are among the most activist justices on the current Court (Lindquist & Cross 2009). This is especially true for review of federal statutes, where Scalia and Thomas have a remarkably high rate of invalidation (Lindquist & Cross 2009, 61). Originalism is not clearly associated with judicial restraint.

The argument for restraint is often framed as commitment of its own to democratic processes. By not acting, the judiciary leaves matters to the resolution of the elected branches of government. However, this forms a weak basis for originalism. Restraint in enforcing the Bill of Rights might be seen as democratic, but originalism may not call for restraint. Originalists believe the Constitution should be enforced to restrain democracy. A common call for originalism suggests that the Articles have not been enforced against democratic usurpation of congressional power, which is hardly restraintist in nature. One suspects that the argument for restraint is truly an argument over whether the commenter politically desires the consequences of that judicial restraint.

Whether activist or restraintist, originalism cannot truly be defended based on its political consequences. For any given individual, preferring a particular policy outcome, originalism might seem an appealing way to produce it. However, there is no reason to privilege the preferences of that, or any other, individual. Moreover, as I will show, the policy implications of originalism are not so clear as to ground reliance on originalism on expected results.

Yet another case for originalism might be found in stability, which formed part of Bork's original case for the theory. A stable law has many advantages, including the ability of private actors to adapt their actions in advance to the law. Fixed constitutional language lends stability to the governing law, a value recognized by the framers (Clinton 1987). Of course, stability is not necessarily a virtue; from Chief Justice Marshall on, people

have recognized that the Constitution needs to be somewhat adaptable to changed circumstances.

While the true original meaning might be considered fixed and stable, our interpretations of that meaning may not be. With original meaning "a settled constitutional understanding is in perpetual jeopardy of being overturned by new light on the adopters' intent—shed by the discovery of historical documents, re-examinations of known documents, and reinterpretations of political and social history" (Brest 1980, 231). The "most plausible interpretation of a historical text changes over time" as new documents are discovered and old ones reanalyzed (Kleinhaus 2000, 123). Historians frequently change their positions on historical controversies, and reliance on their views could produce "weather-vane jurisprudence" (Bassham 1992, 95). "Revisionist" history is not uncommon.

Reliance on original meaning thus could possibly be relatively less stable than alternative interpretive regimes. Reliance on precedent would arguably be even more stable, at least in today's legal world. Originalism would require an "extraordinarily radical purge" of prevailing law (Bassham 1992, 95). The stability debate is also affected by the relative constraining effect of different legal interpretive methods. To the extent that an interpretive principle is less constraining on judges, it is also likely to yield less stable law. Originalism's effect on legal stability is highly uncertain.

Legally speaking, originalism may require no functional justification. Originalism may be regarded as the linguistically appropriate manner to apply a text, regardless of its association with democracy, or restraint, or stability, or any other external value. Such a simplistic approach may be unpersuasive, though, as constitutional interpretations have significant societal effects. If an approach produced very undesirable effects, there is no reason for society to embrace it simply because it is linguistically more defensible. It is not enough to simply put forward the "how" of interpretation; defending originalism needs a "why" as well.

The best functional case for originalism lies in its claimed objectivity and neutrality. Here it is necessary to distinguish between political appeal and logical appeal. Much of the political appeal of originalism no doubt lies elsewhere, grounded in much weaker rationales often biased by individual ideological assumptions. But this does not itself demean the theory. If a position is amply supported by good arguments, the simultaneous presence

of bad supporting arguments does not undermine it. However, the inferior political arguments for originalism may undermine its use in practice.

Some argue that other nations' courts largely eschew originalism (Greene 2009b). If originalism is truly necessary to democracy, or judicial constraint, or the rule of law, this seems odd. Nations such as Canada and Australia, which reject originalism, appear to be democratic and to have a constrained rule of law judiciary. Greene (2009b) suggests that originalism is culturally contingent and has an appeal in this country that is missing elsewhere. However, this claim is not conclusive, and it seems unlikely that other nations utterly ignore original meaning of texts, which is a standard interpretive method.

Because of its political appeal in the United States, originalism may be vulnerable to manipulative use. Justices or others may invoke originalism as rhetorical support for conclusions grounded in other reasons. The earliest examination of the use of originalist evidence found that "while the high tribunal frequently utilizes convention debates and proceedings to rationalize and buttress a stand taken, the intention of the framers thus disclosed will not control the decision rendered" (tenBroeck 1938, 448). Rather than using originalism to find a result, the justices presented it as window dressing to make that result more palatable to readers. Thus, the use of originalism has been called "any-port-in-a-storm expedience" used to justify attractive policy results (Chenoweth 2009, 244). The very public appeal of originalism makes it an attractive device to manipulate.

The strength and weakness of originalism may be seen in the opinions of *District of Columbia v. Heller* (2008), addressing the meaning of the Second Amendment to the Constitution. The Court's majority focused its reasoning heavily on originalism, relying on dictionaries, the ratification debates, and other originalist materials to find an individual right to bear arms. However, the dissent did likewise, using evidence from the ratifying conventions and declarations by Madison and Washington. Both sides relied heavily on originalism. The votes of the justices divided along conventional ideological lines, though, with the conservatives finding that originalism supported a broader individual right to gun ownership and the liberals finding that originalism supported only a narrower right.

Heller reveals the power of reliance on originalist interpretation, given its widespread use, but also the weakness of such reliance, given the Court's

division. Both sides in the case found ample originalist support for their opposite conclusions. Some originalists argue that Stevens took the wrong approach to originalism, but this finding, if true, does not cure the problem of originalism's application. The fact that he took the wrong approach would simply demonstrate that justices will take a wrong approach when necessary to justify their preferred outcome. Perhaps Stevens was using originalism in a manipulative fashion. The only thing that kept this hypothesized manipulation from succeeding was apparently the ideological composition of the Court.

The emphasis of the opinions has caused *Heller* to evidence the "triumph of originalism" (Greenhouse 2008, WK4). Yet with the opinion divided five to four along conventional ideological lines, some questioned whether originalism really was the source of the opinions. Nor were the details of the opinion so originalist. When Justice Scalia cited instances when arms could be regulated by the government notwithstanding the Second Amendment, he offered no originalist support whatsoever for his position. Once the right is recognized, the nature of these limitations becomes the crucial legal issue, and Scalia ignored originalism on that crucial issue. A conservative has argued that these details of Scalia's opinion departed so blatantly from originalism that the opinion should not be considered a good one (Lund 2009). *Heller* looks suspiciously as if each of the nine justices began with a preferred outcome to the case and then scoured the originalist record for evidence to support that outcome. Even assuming that an optimal originalism supported Scalia's basic finding, he quickly departed from that when inconvenient to his opinion.

The possibility of insincere (or incompetent) invocation of originalism is the focus of this book. The fundamental strengths of the case for originalism involve decisionmaking according to the rule of law and partisan neutrality. But if originalism is readily manipulated to different ends, it will not achieve those goals. In this event, the appeal of originalism is its downfall. The appeal of originalist interpretation means that insincere justices will claim to rely on originalist materials to legitimize their results, even though originalism had little to do with producing those results. Justice Scalia has cynically suggested that it would be "hard to count . . . on the hairs of one's youthful head the opinions that have in fact been rendered not on the basis

of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable to mean" (Scalia 1989, 852).

This manipulative effect is visible in the academic debate over originalism. One suspects that conservatives favored originalism because they believed it would produce conservative results. Liberals originally opposed originalism, perhaps for this very reason. When some liberals have subsequently embraced originalism, it is accompanied by arguments that originalism would produce liberal results. To a degree, Balkin (2007, 518) concedes this point. He notes that interpretive theory may not drive interpretation and argues that one purpose of interpretive theory is "to explain and justify our existing forms of development in hindsight." He sees originalism, in part, as a tool to justify interpretations driven by societal social movements while attempting to preserve some fidelity to the original text. Keith Whittington (2004, 609) argues that the "primary virtue claimed by the new originalism is one of constitutional fidelity." Yet this makes unproved presumptions about its honest application.

The ideological effect of originalism undermines this fidelity, and this problem may be even stronger at the Supreme Court level. Because originalism is appealing, especially to the public, persuasiveness will call for opinions to appear originalist and respond to the political appeal of the theory. Some of the liberals now embracing originalism may be perfectly sincere, but one suspects that others are being only strategic. Laura Kalman (1998, 238) concluded that legal liberals were "stuck with originalism," so that they should use the approach to advance their liberal goals. This recommendation illustrates how originalism may be used as a tool for other ends, rather than a governing principle of constitutional interpretation. The theoretical attractiveness of originalism to the public makes it a particularly desirable tool to pursue other ends and may even embolden the justices to go further than they otherwise might.

This impulse makes it more difficult to evaluate originalism. How does one distinguish true sincere originalism from insincere invocation of the theory to gain greater public acceptance of a holding? If "self-described originalist judges manipulate or ignore historical facts, then the approach is not constraining and of little value" (O'Neill 2005, 211). Of course, occasional insincerity is not condemning if originalism is generally authentic. Even if originalists occasionally manipulate the process to achieve ideologi-

cal ends, over "the longer term" the reliance on the philosophy may be important (O'Neill 2005, 213). And the claims that originalism is an objective and neutral legal standard, if true, should prevent undue insincere use of the theory. Yet these claims must be tested.

Social scientists have examined the use of *The Federalist* in the Supreme Court, between 1953 and 1993 (Corley, Howard & Nixon 2005). They found that conservatives were somewhat more likely to cite to this source in pursuit of a limited government agenda. They also found that the justices were more likely to cite *The Federalist* in a very divided case, such as a five to four vote, and more likely to cite *The Federalist* when a justice on the other side of the divide cited this source. The justices were much more likely to cite *The Federalist* when their decision struck down a federal law as unconstitutional or formally altered a precedent. From these patterns, the authors concluded that *The Federalist* was cited "in a strategic fashion to bolster the legitimacy of the court when opinions assert judicial power" (Corley, Howard & Nixon 2005, 336). They concluded that use of the originalist source was tactical. Rather than truly relying on originalism for their decisions, the justices were invoking it to lend credence to their decisions. Thus, by "emphasizing reference to the historical document and the meaning or intentions of famous Framers, [justices] can evoke emotional responses that alternatives to originalism cannot directly match" (Wright 2008, 689).

The study gives some reason to question the citations to *The Federalist*. The citations may not be evidence of reliance on the source but instead an attempt to enhance the legitimacy of the opinion. Durschlag (2005, 315) suggests that the source is cited for an "ethos of objectivity" and a "perception of infallibility," as *The Federalist* is the "secular equivalent to citing the Bible." His review of decisions concluded that it was difficult to identify more than a small handful of cases where *The Federalist* even arguably played a decisive role in explaining the decision. Yet Justice Souter has officially declared that at least in one case (*Printz v. United States*, 1997) *The Federalist* determined his position, so it may happen.

Originalism may simply offer an "illusion of objectivity" that is convenient to a judiciary wishing to protect that illusion (Shaman 2010, 92). Another study (Hume 2006) considered a number of "rhetorical sources" including *The Federalist* and found that they tended to be invoked strategically, when the justices render a very controversial decision. The fact that

the justices not uncommonly use *The Federalist* in both majority and dissenting opinions (Festa 2007) furthers the suspicion that its use may simply be tactical, to publicly bolster support for their position.

Sometimes, the justices will rely on private letters from one or another prominent framer. I looked for references to the correspondence of John Adams, James Madison, George Washington, John Jay, and Thomas Jefferson. References to the letters of Jefferson were far more frequent than references to any of the others examined. This is somewhat suspicious because Jefferson was not involved in the actual drafting of the Constitution. Nor would one expect that he had greater insight into the text's original meaning than did others. Jefferson is a rather iconic framer, though, and use of his letters might be seen as rhetorically more powerful than reliance on the letters of others.

Justices may "be moved to use slanted or fabricated history to justify results they favor on other grounds (Munzer & Nickel 1977, 1033). The effect of ideology is not a new issue. Justice Marshall's "great decisions consist largely of reading his own Federalist party predilections into the Constitution" (Wolfe 1996, 18). Yet claims of ideological judicial decisionmaking have become much more prominent in recent years. Social scientific studies, discussed later in this book, demonstrate the considerable influence of justices' ideology on the Court's decisions. This is not necessarily malicious; Gadamer contends that it is impossible for even a well-meaning person to understand the past free from his or her own prejudices. Originalism may tempt the justices to decide cases by their own biases and cloak those conclusions in the purported beliefs of the ratifiers, to avoid the need to otherwise justify their biases (Strauss 2008).

Beatty (2004, 9) contends that "no matter how good it sounds in theory, in practice it can't meet the standards it sets for itself." He contends: "Telling judges they must give effect to the original understanding of the constitution doesn't provide them with any guidance or direction and imposes no constraints because there are countless understandings from which they can choose" (Beatty 2004, 9).

Steven Calabresi contends that the justices tend to more often resort to originalism when dealing with issues of great importance (Calabresi 2008). The implication is that originalism is most valuable for the Court in the most salient cases. However, a contrary implication is obvious. Originalism

is important to the Court, not to decide the important cases but to legitimize their decisions in these cases. Rather than a constraint, it is a strategy.

Frank Easterbrook has suggested that originalism *is* the constraint on judges. But one struggles to find a contemporary originalist who believes that the original meaning of the Constitution significantly contradicts his or her own political preferences. Demosthenes reportedly said that "nothing is easier than self-deceit" and that what a "man wishes, that he also believes." The justices "frequently divide on questions of original meaning, and the divisions have a way of mapping what we might suspect are the Justices' leanings about the merits of the cases irrespective of originalist considerations" (Primus 2010, 79). If this tendency influences originalist interpretation, it undermines its value. Scalia and others suggest that precedents are not truly constraining because they can be readily distinguished and evaded, but the same principle may apply to originalist interpretation.

This issue is the central question behind this book. I will elide the theoretical debate over the correctness of interpretive originalism, because this debate would be irrelevant to the actual law, if originalism could not be formally realized. If originalism is so manipulable in practice, the debate over its validity could have a theoretical philosophical value but lends little to actual judicial decisionmaking practice. The test of application, though, is not whether originalism is perfectly constraining on judges but whether it is relatively constraining, perhaps only "better than the next best alternative" (Macey 1995, 306). Thus, for Justice Scalia, originalism is a "lesser evil" (Scalia 1989), flawed but better than any alternatives. It may be that a theoretical dedication to originalism as an interpretive method may become instilled in the justice's mentality and overcome his or her ideological objectives (Gillman 1997). Such a finding alone would not justify reliance on originalism, but it would be a significant supporting prop.

Originalists may suggest that the only alternative to originalist interpretation is unbridled judicial discretion. Sometimes they suggest that the absence of any competing theory of interpretation makes originalism inevitable as "it takes a theory to beat a theory." These analyses are too simplistic; other factors such as precedent may bind justices today, and they are amply grounded in theory. Originalists are correct, though, in making the matter a comparative one. Originalism need not be a perfect theory to be justified; it need only be better than the alternatives.

Originalism is often juxtaposed with the notion of a "living" Constitution. The latter notion, though, has little content. It recognizes a need to adapt the original Constitution but contains no intrinsic directions on how this should be done. The living Constitution is not itself an interpretive theory.

In practice, the essential alternative to originalism in Supreme Court interpretation is now typically pluralism (Griffin 2008). Cardozo embraced this approach, referring to it as a "wise eclecticism" of methods. Pluralism means that the justices would choose the interpretive method (such as originalism, or precedent, or pragmatism), depending on the facts of the case before them. Ideally, they would choose the theory best suited for the individual case, but their ability and willingness to do so is unestablished.

Logically, it seems that giving such added flexibility as to interpretive method in pluralism would increase the discretion of the justices and, by so doing, increase their ability to manipulate results for ideological ends. Thus, exclusive reliance on a single interpretive method such as originalism could well be more constraining that the alternative of choosing among multiple methods. Many defenders would argue that originalism would be the most constraining of *any* single method available to the Court. Originalism is thought to offer a "comparative advantage in being able to constrain justices by providing fairly objective and specific criteria to evaluate judicial performance" (Whittington 1999, 39). Originalists recognize indeterminacy but believe that their methods will resolve important contested questions that are determinate. Justice Scalia (1997) has argued that originalism is at least somewhat limiting, as no originalist would have concluded that capital punishment or restraint on abortion was unconstitutional.

If, however, originalism is not in fact constraining on the justices, that fact totally undercuts the case for the method. While it most obviously undercuts the constraint justification, it also undermines the democratic justification and the rule of law justification (because the theory is manipulated and inauthentically applied). The debate over the theory of originalism has generally overlooked the practice, but the theory is of little real value if it cannot be operationalized in practice.

Justice Scalia (1989) has recognized that exclusive originalist decision-making at the Supreme Court is rare. The "vast majority of Supreme Court decisions interpreting the Constitution have been nonoriginalist in their methodology" (Shaman 2010, 87). While originalism is said to have "sub-

stantially reoriented constitutional theory, its influence on the Court was not as deep" (O'Neill 2005, 205). Originalism seems one alternative for use by the pluralist Court. Yet there has been a dearth of actual scholarship on the use of originalist sources in judicial opinions (Festa 2007), so any conclusion can only be a tentative one.

The vast majority of constitutional decisions at the Court are decided on the basis of precedent or other materials, without any reference to original meaning (Fallon 1997, 106). Yet every justice in the Court's history has relied to some degree on originalism (Merrill 2008). The Court's use of originalism has increased over the years, and at least some recent decisions rely centrally on the method. Some argue it should be used much more in constitutional interpretation. This book reviews the history of its use, with an eye on the promise of possible greater reliance on originalism. My analysis of usage is confined to that of the Supreme Court. This is arguably too narrow, as the Constitution is interpreted by lower courts, legislators, executive officers, and the citizenry, but the Court is the primary determinant of constitutionality and where most of the dispute over originalism lies.

Using originalism to interpret the Constitution has great appeal. As the Supreme Court is increasingly the subject of public attention, that appeal has been recognized by many justices. Even critics of originalism have "understood intuitively the persuasive power of an appeal to historical authority in legitimizing legal arguments" (Festa 2008, 492). As they invoke originalism, though, the process may represent a sincere attempt to uncover the original meaning of the constitutional text, or it may be just a means of cloaking a decision founded on other grounds with the mythic status of the framers. Although a great deal has been written about originalism, this issue is the crucial one and has been largely unexplored.

A claim that originalism is the ideal method of constitutional interpretation has little real value if that ideal cannot be realized in practice. The debate over originalism has generally been quite abstract, however. Those who have debated the theory of originalism "rarely test their views on the merits of originalism by reference to the realities of constitutional adjudication" (Rosenthal 2012, 1187). To be practically meaningful, a theory must be tested in practice (Friedman 1998, 668).

This book examines the practice of originalism at the Supreme Court. I review the history of its usage throughout the centuries with an emphasis

on the recent era. Originalism has in fact gained great prominence recently, perhaps because of the perception that the Court wields great government power. In many cases, though, the apparent use of originalism appears to be a fig leaf covering other motivations for a decision of the Court. By reviewing the use of prominent originalist sources by the justices, I search for evidence of the method's constraining effect.