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Originalism and the Good Constitution, by John O McGinnis and Michael B Rappaport

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ORIGINALISM AND THE GOOD CONSTITUTION, by John O McGinnis and Michael B Rappaport[1]

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ORIGINALISM—THE VIEW THAT THE CONSTITUTION should be interpreted according to its original meaning at the time it was enacted[2]—is an important, albeit highly controversial, principle of constitutional interpretation. In *Originalism and the Good Constitution,* John McGinnis and Michael Rappaport present a new normative defence of constitutional originalism that connects this interpretive method directly to the concept of a good constitution. Their innovative—and at times provocative—defence confronts the fundamental challenges that continue to plague originalism: does originalism perpetuate the dead hand of the past? How can the original meaning be justified, given that African Americans and women were excluded from the enactment of the Constitution in 1787? How can originalism be reconciled with two hundred years worth of non-originalist precedent?

In chapters one and two, the authors set the groundwork for their normative defence of constitutional originalism. Their framework, premised on a welfare consequentialist approach to constitutional interpretation, is simple: the beneficence of the Constitution is connected to the supermajoritarian process from which it arose.[3] Accordingly, an originalist interpretation is appropriate

1. (Cambridge, Mass: Harvard University Press, 2013) 298 pages.
2. *Ibid* at 1.
3. *Ibid* at 3.

because it captures the meaning that passed through the supermajoritarian process. As such, the results generated by originalism are likely to be beneficial.

In chapter three, the authors conclude that supermajority rule is superior to majority rule. Supermajority rule creates consensus, fosters non-partisan participation, and generates a veil of ignorance that helps promote and better protect minority rights.[4] Chapter four illustrates the ways in which the US Constitution is consistent with supermajority rules. In particular, the authors highlight the symmetry between the process used to enact the original constitution[5] and the process used to enact subsequent constitutional amendments,[6] both of which are supermajoritarian in nature. Notably, the current amendment process allows each generation to import its own values into the Constitution. McGinnis and Rappaport use this feature of the amendment process to counter the oft-cited criticism that originalism permits the "dead hand of the past to control the present."[7]

In chapter five, the authors contend that using the amendment process to update the Constitution is superior to relying on judicial updating. In chapter six, the authors explicitly address the three greatest failures of the supermajoritarian process: the exclusion of African Americans and women from the original process of constitutional enactment and the enfranchisement only of states, not citizens, to enact the Constitution and subsequent amendments.[8] The authors canvass three plausible solutions. Owing to the fact that these failures have, in large part, since been rectified through constitutional amendments, the authors conclude that the most optimal solution is to follow the good, albeit imperfect, US Constitution.[9]

The first half of this book focuses on the authors' normative defence of originalism. Chapters seven and eight fill in the positive content of originalism by showing that the enactors interpreted the Constitution according to the applicable

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4. *Ibid* at 33-61.
5. US Const art V. The requirements imposed under Article V amount to a double supermajority requirement.
6. US Const art VII.
7. *Supra* note 1 at 77.
8. *Ibid* at 100.
9. See US Const amend XIII, XIV, XV, XIX. The Thirteenth Amendment ended slavery, the Fourteenth Amendment prohibited state infringement of civil rights, and the Fifteenth Amendment forbade racial discrimination in the protection of voting rights. The Nineteenth Amendment guaranteed women the right to vote, ensuring that women from that time forward could fully participate in the constitutional amendment process.

originalist interpretive rules of the time. Consequently, the actual meaning of the Constitution requires an application of these original interpretive methods.

In chapters nine and ten, McGinnis and Rappaport challenge the notion that originalism is inconsistent with precedent.[10] They propose an optimal doctrine of constitutional precedent, which, generally speaking, dictates that precedent should be respected in two cases: when overruling it would result in enormous costs and when the precedent is entrenched and thus likely to be re-enacted via constitutional amendment.[11]

The authors conclude their defence of originalism by envisioning a world where originalism is the dominant view of constitutional jurisprudence. It is suggested that, only then, can we achieve "law that is enduring and objective, law that is of high quality, and law that is subject to revision by the people of each generation."[12] Overall, McGinnis and Rappaport successfully temper some of originalism's strongest discontents. They offer a comprehensive defence of originalism that reflects the complex intricacies underlying modern constitional interpretation. This book, applicable to both Americans and Canadians alike, stands as an important contribution to the literature on originalism and the growing debate over constitutional interpretation.

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10. *Supra* note 1 at 156. Gary Lawson was among the first to argue that originalism is inconsistent with precedent. Lawson's argument remains one of the most powerful and persuasive. See Gary Lawson, "The Constitutional Case Against Precedent" (1994) 17:1 Harv JL & Pub Pol'y 23. See also Gary Lawson, "Mostly Unconstitutional: The Case Against Precedent Revisited" 5:1 Ave Maria L Rev 1.
11. *Supra* note 1 at 179-85.
12. *Ibid* at 197.