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# The New and Old Originalism: A Discussion

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## THE NEW AND OLD ORIGINALISM: A DISCUSSION

*Steven Douglas Smith, Michael B. Rappaport, William Baude, and  
Stephen E. Sachs*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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# **Legal Studies Research Paper Series**

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## **The New and Old Originalism: A Discussion**

**by Steven D. Smith, Michael B. Rappaport, William Baude and Stephen E. Sachs**

### **Abstract**

These five essays, which were originally published on the [Library of Law and Liberty website](#), explore several themes involving the new and old originalism. Steve Smith's initial essay criticizes the new originalism and proposes an alternative that he calls "decisional originalism." Michael Rappaport then reacts to Smith's essay, arguing in favor of an unbiased originalism rather than the original decision. William Baude argues that the new originalism is more consistent with our current law. Stephen Sachs then defends the new originalism as respecting the rules the Framers enacted, if not always the outcomes they expected to achieve. Steve Smith concludes the exchange with a response to his critics.

## **The New and Old Originalism: A Discussion**

**by Steven D. Smith, Michael B. Rappaport, William Baude and Stephen E. Sachs**

## **Meanings or Decisions? Getting Originalism Back on Track**

**by Steven D. Smith**

*For what is the point of drawing up dumb, silent statements of laws, if anybody may attach a new meaning to the words to suit his own taste, find some remote interpretation, and twist the words to fit the situation and his own opinion?*  
[John Locke](#)

For originalists, must the guiding criterion of constitutional interpretation be original meaning (whether understood in intentionalist or public meaning terms)? You might think the answer has got to be yes. That is just what it means to be an originalist: to connect constitutional interpretation to original meaning.

I think the question is more complicated—and more fraught. Ironically, a focus on original meaning has led originalism to lose touch with its own goals. I will try in this brief essay to explain how this is so. And I will suggest an alternative that might help originalism get back on track. Until someone comes up with a better name, I will tentatively call this alternative “decisional originalism.”

### **What Originalism Opposes**

A helpful way to understand originalism is to consider how it arose. Originalism as a movement began in the 1970s and gained momentum in the 1980s, in critical reaction to Supreme Court decisions like *Roe v. Wade*. But originalists didn’t simply dislike the substantive results in these cases; they thought such decisions reflected a mistaken and even illegitimate use of the Constitution. More specifically, the Court was interpreting the Constitution’s provisions to do things that the provisions’ enactors had never intended or contemplated. And this sort of non-originalist interpretation was objectionable for two main reasons.

The most obvious had to do with authority. Our constitutional system attributes lawmaking authority to “We the People” and to our elected representatives. If those authorized agents make decisions and express these decisions in words, but other agents—judges—interpret the words to mean, require, or forbid things that those with authority did not intend or contemplate, then it seems that the constitutional assignment of authority is defeated: the

real lawmaking power lies with the unelected judges, not with the people and their elected representatives. So non-originalist constitutional decisions and doctrines reflect an impermissible assumption of authority—a usurpation—by judges.

Given our professedly democratic system, we can say, and originalists often do say, that non-originalist constitutional law is undemocratic. But the same basic objection could be made in any kind of political system—a monarchical system, for example. Suppose we think political authority rests with the king, but judges interpret the king’s decrees to mean all manner of things the king never contemplated or intended. There is once again a problem of authority—of the law in reality being made by people who were not and are not authorized to make it.

Bracket for a moment, though, the problem of authority. A second and somewhat more subtle objection to the Court’s adventurous interpretations of the Constitution has to do with rationality. Non-originalist interpreters, whether judicial or academic, typically deny that they are simply legislating and then projecting their legislative decisions onto the Constitution. Rather, they claim to be constrained by, among other things, the Founding document, even if not by the original understanding of that document. But if we take these non-originalists at their word, and if we value rational decision-making, this might seem to be the worst imaginable way of resolving major controversies over contested issues like abortion, same-sex marriage, or presidential powers.

There is at least something to be said, that is, for respecting the decisions made by constitutional framers (and for delegating what those framers left unresolved to a legislative process in which elected officials address the issues on their merits and give what seems to them the most sensible answer). Conversely, there may be something to be said for letting judges address the issues on the merits and give what seems to them the fairest or most sensible answers. Either way, decisions are at least being made by *mindful agents*—whether framers, legislators, or judges—who are thinking about the issues and striving to figure out the best answers.

By contrast, if we favor rational decision-making, then there is very little to be said for resolving difficult and deeply contested issues by assigning judges *not* to do what *they* think best, or what they believe the enactors thought best, but rather to do what they think *the words* would entail today. Now outcomes reflect not what any mindful agents have decided is the best answer to the question, but rather what “the words”—words deliberately detached from mindful decisions—are thought to require.

The only reason we do not ridicule this approach, which aspires to sever the link between law and mind,<sup>1</sup> is that we do not believe the non-originalist judges are really doing what they say they are doing. Probably they are just making their own best judgments on the substantive issues and then pretending

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<sup>1</sup> The point is developed in Steven D. Smith, “Law Without Mind,” 88 *Mich. L. Rev.* 104 (1989).

to pull those judgments out of “the Constitution” as a magician pulls out of the hat the same rabbit he himself put into it. So our criticisms emphasize not “mindlessness” but rather deceitfulness or hypocrisy (and also, primarily, lack of authority). But if constitutional interpretation actually were what its defenders say it is, the ultimate substantive decisions would be quite literally mindless.

Suppose you are persuaded by the authority objection to non-originalist constitutional law, or by the rationality objection to it, or by both. We can then describe what you oppose. Along with Locke in my epigraph, you oppose an approach in which there is a gap separating what the enactors of a constitutional provision had in mind or were trying to do, from what the provision is interpreted to require today. It is that gap that gives rise to the authority and rationality objections.

But if this is what you oppose, what should you favor? What is the correct criterion for constitutional decision-making? What criterion will serve to close the authority and rationality gap?

“Original meaning” might seem to be the answer. And maybe, given a different history of development, it could have been. If interpreters are guided by original meaning, they will be able to avoid provoking the authority and rationality objections. Won’t they?

Alas, with the benefit of hindsight, we must admit that the answer to that question is “no.” Even a devout attachment to original meaning as the criterion of interpretation does not deflect the crucial objections.

### **Originalism Subverting Originalism**

Two all-too-familiar and related developments have prevented “original meaning” from closing the gap that generated the authority and rationality objections. One is the frequent interpretation of constitutional provisions to mean (or to embody, . . . or to incorporate) some kind of “principle.” The other is the standard invocation of a distinction between “meaning” and “expected applications.”

These two techniques typically operate in tandem. We declare that the Eighth Amendment, say, embodies a principle of humane punishment. Or that the equal protection clause constitutionalizes a principle of equal regard. If we are originalists (or if we are speaking to them), we will defend these claims on originalist grounds. We will say that this principle is what the Framers intended, or what the original public meaning amounted to, or something of that sort.

From there we go on to figure out what the principle entails for some current issue—capital punishment for minors, maybe, or same-sex marriage. We conclude, perhaps, that the execution of minors or the limitation of marriage to opposite-sex couples is unconstitutional because contrary to the principle we previously extracted from the original meaning. Then, confronted with the objection that the enactors never thought they were prohibiting such

practices—that they would have been shocked to learn that the provision they enacted would have any such consequences—we patiently explain that what governs is not the enactors’ *expected applications*, but rather the original *meaning* (of which the expected applications are merely imperfect, readily rebuttable “evidence”).

To be sure, both moves—the interpretation of constitutional provisions to embody some grand “principle,” and the separation of “meaning” from “expected applications”—are contestable. Elsewhere I have tried to resist them.<sup>2</sup> Still, both moves are perfectly familiar, and both are defended by sophisticated theorists, including some whose originalist credentials are impeccable. So at least for the moment, I want to concede that these moves may be defensible as an implementation of original meaning. And it follows, I think, at least as a logical possibility, that the original meaning of a provision like the Eighth Amendment or the equal protection clause might be articulated in terms of some “principle,” and that our best understanding of that principle might indicate that it has implications contrary to what the enactors understood and expected. If you want illustrations, just read a page or two of Jack Balkin. Or Michael Perry. Or . . . . Robert Bork on *Brown v. Board*?

On these (contestable) assumptions, it is entirely possible that a judicial decision mandating something the enactors wouldn’t have approved—would perhaps have deplored—might persuasively be justified as an application of the “original meaning.” The enactors of the Fourteenth Amendment might have been incredulous, or even appalled, at the suggestion, say, that they were somehow invalidating traditional marriage laws. Too bad for them: it turns out, maybe, that this is simply an implication of the “meaning”—the “original meaning”—of their amendment.

Let us concede, for argument’s sake, that all of these moves can be persuasively and legitimately made in the name of “original meaning.” Notice, though, that the objections that gave rise to originalism now return as objections *against* originalism, or at least against this sort of originalism. Indeed, there turns out to be not much practical difference between non-originalism and originalism. Non-originalists all along maintained that judges are constrained by the words of the Constitution—the *original* words—but may depart from the enactors’ understandings of what those words meant. Originalists now insist that judges are constrained by the *meanings* of the words, but may depart from the enactors’ understanding of what those meanings would entail or require.

How much practical difference is there, honestly, between these accounts?

An example may be helpful. Take the current controversy over same-sex marriage. Suppose, as I think we must, that the enactors of the equal pro-

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<sup>2</sup> For example, Steven D. Smith, “That Old-Time Originalism,” in *The Challenge of Originalism: Theories of Constitutional Interpretation*, edited by Grant Huscroft and Bradley W. Miller (New York: Cambridge University Press, 2011).



tection clause never imagined that it would work to invalidate traditional marriage laws, and that in the moralistic and “Christian nation” ethos of the time they emphatically would not have favored any such outcome. Stipulate as well, for purposes of argument anyway, that the words of that clause, whether taken in their original or their contemporary meaning, embody a principle of equal regard, or something of that sort, that is inconsistent with limiting marriage to opposite-sex couples. The enactors had no idea that the clause had this meaning, perhaps; or, if you prefer, they knew that it had this meaning but never imagined that the meaning would have any such implication. And yet it does: In this respect, the enactors’ “expectations” were badly mistaken.

It seems fair on these assumptions to predict (or to predict backward, so to speak) that if the enactors had foreseen this interpretation, they would have reworded the clause to avoid this lamentable (to them) result. Failing that, it is possible that they might have declined to enact the provision at all. But they didn’t foresee these developments, and so in their innocence they gave us . . . words . . . with meanings . . . with implications . . . that they would have deplored.

I have already conceded that on familiar (though contestable) assumptions, it may be plausible in this scenario to say that a judicial decree ordering what the enactors never contemplated and would not have wanted nonetheless follows from the meaning—even the “original meaning”—of their enactment. Would it be plausible, however, to say that the decree implements the enactors’ *decision*?

You can say if you like that the judicial decree is still a product—albeit an unintended, unwanted one—of the enactors’ exercise of authority. And yet it is a very odd sort of “authority” that authorizes later agents to use the putative authority’s decisions to justify measures that the authority never foresaw, never intended, and would not have wanted. Nor does such a use of “authority” amount to the deployment of human rationality. On the contrary, the judicial decree is if anything a product of the enactors’ ignorance, not of their mindful deliberation. If they had been more prescient, this current decree would have been anticipated and avoided.

In sum, if non-originalist constitutional law is objectionable for its undermining of authority and rationality, originalist constitutional law seems objectionable for exactly the same reasons.

### **A Better Criterion: The Original *Decision***

So, is there any way of avoiding this unhappy conclusion? If original meaning does not avoid the authority and rationality objections that gave rise to originalism, is there some criterion that would better serve the originalists’ purposes?

Maybe. Or at least the foregoing discussion has already suggested a possibility. Constitutional interpretation might attempt to ascertain and follow

the original constitutional decision. After all, authority exerts itself, and rationality manifests itself, in decisions. To be sure, once made, those decisions are expressed in words—words that have meanings. We necessarily use the words (among other things, such as the historical context) to try to understand and reconstruct the decisions. Still, if our goal is to respect the constitutional assignment of authority and to facilitate rational decision-making, then we should not care about either the words or their meanings for their own sakes. We pay attention to them, rather, for the purpose of ascertaining and following the enactors' decisions.

This distinction between meanings and decisions is subtle, but it is not wholly unfamiliar. Back when lawyers and scholars took common law reasoning more seriously than perhaps they do now, even a legal realist like Herman Oliphant could intelligibly contend that what binds in a legal precedent is what the court decided, not what the court said. *Stare decisis*, not *stare dictis*.<sup>3</sup>[3] My suggestion is that a similar distinction might be employed in the context of constitutional interpretation. In common law reasoning, to be sure, the distinction may seem more manifest because there is no canonical statement of the decision, anyway. With constitutional provisions (and statutes) there is a canonical wording; but that fact, I think, need not dissolve the distinction between decision, on the one hand, and textual meaning, on the other.

Just how an approach focusing on the original decision would differ from one focusing on original meaning is a complicated question, about which I cannot say much in a short essay. (Which is fortunate, because the truth is that I have no worked out position on the matter anyway.) The decisional approach could benefit, I suspect, from the kind of theoretical sophistication that has been devoted to original meaning.

For now, though, two observations may be suggestive.

There should be no great difficulty in concluding that the Fourth Amendment “search and seizure” provision applies to wiretaps. That sort of invasion of privacy might well be seen as covered by the enactors' decision even though telephones did not exist in 1789. We might imagine a conversation in which we explain to the Framers: “In the future, it will be possible for officials to invade people's privacy electronically without physically entering their dwellings. Would your decision apply to that sort of thing?” And we might plausibly suppose that they would reply, “Of course.”

Suppose, however, that someone proposes that a constitutional provision be interpreted to do something we are reasonably confident the enactors did not contemplate and very likely would not have desired. Someone proposes, for example, that the due process clause be used to invalidate restrictions on abortion. Or that the equal protection clause be used to invalidate traditional marriage laws. And we are confident, perhaps, that the enactors of those provisions would have been startled to learn of these proposals, and would have pro-

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<sup>3</sup> Herman Oliphant, “A Return to *Stare Decisis*,” *14 Amer. Bar Assoc. J.* 71 (1928).

tested, “Are you serious? Our decision had nothing to do with that sort of thing.” If such “interpretations” had been foreseen, the provisions almost surely would have been reworded to avoid the unwanted results, or would not have been enacted at all.

These are counterfactual questions, obviously, and sometimes people will disagree about the answers. But we do ask such questions, and sometimes we feel reasonably confident about the answers. Despite this confidence, as we have already seen, a focus on original meaning in this situation leaves the enactors’ expectations as an easily avoidable obstacle. “Sure,” we say, “the Framers would have been surprised or maybe even appalled, but their ‘expected applications’ aren’t what matters.” Conversely, if the controlling criterion were the original decision, I suspect it would be more difficult to toss aside the enactors’ conscious, mindful understanding of and expectations about what they were actually deciding. (Though, alas, nothing is impossible for a sufficiently motivated judge or advocate.)

## **Conclusion**

A proposal to look to the “original decisions” over the “original meaning” as the controlling criterion is in some respects inconvenient. A “decision” may seem a more amorphous thing than either the words (which are right there on the page in front of us) or their meanings. Decisions would require interpretation, and perhaps reconstruction.

Nonetheless, this is the approach implied by the authority and rationality objections. As a practical matter, political authority is or should be the authority to make decisions. And rationality is similarly exercised in the making of decisions. The making of decisions is what lawmakers reflect on and struggle over; it is what authority performs, and what rationality devotes itself to. And it is what constitutional interpretation and adjudication should respect. A focus on decisions might thus allow originalists to return to their purpose of resisting judicial decrees that usurp authority and undermine rationality in our constitutional system.

## **Between the Original Decision and Abstract Originalism: An Unbiased Approach to Original Meaning**

by **Michael B. Rappaport**

It is an honor to participate in this forum with my colleague Steve Smith and with Will Baude and Steven Sachs – all of them friends. Steve Smith’s essay continues his criticism of the new originalism in favor of the old originalism – a position that Steve previously defended in his paper “[That Old-Time Originalism](#).” But unlike his earlier essay, which sought to defend the old originalism as the correct version of original meaning, Steve now advances a new type of originalism – original decision originalism – as a means of addressing what he regards as the defects of the new originalism.

Steve’s concern is that original meaning analysis has come to be distorted through what I call abstract interpretation. The Framers of the Constitution may have expected a constitutional provision to address a matter in a certain way. But by interpreting a provision to have an abstract meaning, current day judges can reach results that the Framers would have rejected.

Steve believes that two related interpretive techniques are responsible for this distorted form of originalism. First, interpreters read many constitutional provisions to incorporate principles rather than rules or other types of meaning. Second, interpreters treat the Framers’ beliefs about how their provisions would be applied as mere expected applications, distinct from the genuine original meaning. Together these techniques lead to abstract meanings that are interpreted to reach results neither expected nor intended by the Framers.

Steve believes that these unexpected results are problematic for two reasons. First, they ignore the authority of the Framers as to the Constitution, giving the real power to judges. Second, they lead to a type of law without mind – a type of irrationality – in that the meaning provisions are given would not have been contemplated by any one.

I sympathize with Steve’s complaint’s about abstract originalism, but in the end I have to part company with his proposal. First, while I agree that originalist interpretation can be undermined by placing too much emphasis on principles and too little weight on expected applications, I nonetheless believe that both principles and the distinction between expected applications and original meaning have a role in originalist interpretation. Second I do not believe that the cause of genuine originalism would be advanced by promoting original decision originalism. Instead, the best solution is to rigorously apply an unbiased originalism that rejects interpretation based on the interpreter’s values.

## The Bias Towards Abstract Meaning

Steve's concern that originalism is being distorted to reach abstract meanings is well founded. There are two ways that this can happen. One way is simply to misread the evidence of the original meaning. But another way is to adopt an interpretive methodology that is biased toward abstract meanings.

Jack Balkin's interpretive approach – which strongly favors both principles and a strong distinction between original meaning and expected applications – is a major object of Steve's concerns. I [agree](#) that Balkin's methodology is problematic.

In my view, the correct way to determine the original meaning is to look at the language in context without any biases in favor of one result or another. But Balkin seems to argue that one should interpret the original meaning to have a thin meaning so that it can be given content over time that accords with modern values. As he [writes](#):

Inevitably, then, we face a choice in the present about what aspects of cultural meaning should constitute “original meaning” for purposes of constitutional interpretation. *There is no natural and value-free way to make this selection. . . .* It is a choice that is informed by the purposes of a constitution and the promotion of the kind of legitimacy (democratic, social, procedural, or moral) we want our government to have. (emphasis added)

Balkin then goes on to explain that he adopts an interpretive approach that allows modern interpreters to supply a significant amount of content, because of his view about “what makes [constitutions] legitimate for generations long after their adoption. . . . [A]dopters must put their trust in later generations to carry out the plan and adapt it to new circumstances.” What supports this theory of meaning? As Balkin explains, it is his view of the proper values – of what makes a constitution legitimate.

Rather than adopt an interpretive approach based on one's values, however, an originalist ought to discern the original meaning in the most accurate way possible. That may involve judgment calls, but it should not be based on one's values. If one selects one's interpretive approach based on one's values, it will be one's values, rather than the original Constitution, that determines the Constitution's original meaning.

Balkin also freely employs the distinction between original meaning and expected application. Because the original meaning is thin, the Framers' expectations about the application of a constitutional clause may lead to one result, but those expectations would not preclude future originalists from applying that thin meaning differently, while still being faithful to the original meaning.

But if it were just Balkin and a few others who favored this approach, Steve would be less concerned. He notes, however, that Robert Bork makes a similar argument when discussing *Brown v. Board of Education*. Bork argues

that the Equal Protection Clause adopts an equality principle. While the Framers of the 14<sup>th</sup> Amendment might have believed that separate but equal was consistent with equality, it turns out, through experience, that the two cannot be reconciled. And therefore Bork believes that the equality principle requires that we reject separate but equal.

Moreover, it is not just with respect to *Brown* that Bork adopts this approach. In *Ollman v. Evans*, Judge Bork took a similar position, appearing to argue that if the Framers' rules or expectations for libel actions turned out to be inconsistent with the principle of freedom of the press, the former should be modified.

Unfortunately, Bork does not really justify his approach. While there is not space to adequately discuss the issue, the short answer is that if the Framers actually chose a 14<sup>th</sup> Amendment that adopted a form of equality that allowed separate but equal (a position I doubt), judges cannot then decide that the original meaning forbids such segregation because the judge believes that segregation does not produce genuine equality.

Steve argues that if even orthodox originalists like Bork can endorse an originalism that departs from the results that the Framers would have intended and expected, then originalism has lost its way.

### **The Correct Interpretive Approach**

While I agree with Steve that both Balkin and Bork's approaches are problematic, that does not tell us what the correct theory is. Unlike Steve, I believe that one cannot rule out principles or entirely dispense with the distinction between original meaning and expected applications.

Let's start with principles. The term principle does not have a single meaning, but let's assume that it means a provision that has an abstract meaning that is not tied to concrete results. Should we rule out principles, as Steve seems to want, going instead with the concrete results that the Framers appeared to desire? I do not think we can go that far.

In my view, an originalist approach should look to the meaning of the constitutional language in an unbiased manner, neither favoring nor disfavoring principles. Under this approach, a constitutional provision may end either having or not having an abstract meaning, depending on the evidence.

Consider the following example. Imagine that the Equal Protection Clause incorporated a principle that prohibited special laws – laws that drew an unjustified distinction between classes of people. Distinctions between people could be justified if they sufficiently related to what was deemed the public good. There is some evidence that the original meaning of the Equal Protection Clause adopted such a principle. (Although I do not believe this is the correct understanding of the Clause, that does not undermine the force of the example.)

The question under this view of the Clause is what is a sufficient public interest to justify distinctions. One likely way that such distinctions could be justified is by showing that they conformed to traditional moral principles that were widely followed at the time of the 14<sup>th</sup> Amendment. But what happens when those traditional moral principles come to be questioned in society? Under one interpretation, those traditional moral principles will continue to justify the distinctions. Under a second interpretation, those traditional moral principles will lose their justificatory force if they are no longer accepted in the society. (A key question is how much loss of acceptance is required for them to lose their force, but leave that aside.)

These two interpretations lead to different results for the constitutionality of laws allowing only traditional marriage. Under the first interpretation, gay marriage would never be required by the 14<sup>th</sup> Amendment because it violated traditional moral principles written into the Constitution. Under the second, if gay marriage came to be widely accepted as morally legitimate in our society, then laws allowing only traditional marriage would violate equality.

In my view, each of these positions is plausible. The choice between them will depend on an interpretation of the original materials. One cannot know the answer without doing the historical and legal research and evaluating the evidence.

Now consider the question of expected applications. Expected applications provide evidence of the meaning of constitutional provisions, since the enactors of a provision certainly know something about its meaning. But statements made by enactors are not dispositive, because those statements might be made without sufficient thought or for political reasons.

But even if one believes expected applications always apply a provision correctly, such applications do not always indicate the meaning of a provision. Assume, as seems clear, that people at the time of the 14<sup>th</sup> Amendment's enactment would have believed that it did not require same sex marriage. This belief would not help us decide between the above two interpretations. If the first interpretation were the correct one, the belief that the 14<sup>th</sup> Amendment did not require same sex marriage would reflect the fact that traditional moral principles were written into the Constitution. But if the second interpretation were correct, the belief would merely reflect the fact that traditional moral principles were accepted in 1868. That belief would not suggest that the same result would hold if those principles were no longer accepted.

Steve argues that an interpretation that departs from the clear expected applications is problematic on grounds of authority and rationality, but his objections can be answered. Steve claims that the departure from the expected applications does not respect the authority of the Framers, because their decision is not being followed. But this is not really true. If the second interpretation above were correct, then the meaning the Framers adopted – which would allow discriminations only when supported by traditional moral principles that

continue to be accepted – would be fully respected. The Clause’ application would be changed because the relevant circumstances would have changed.

It is true that the Framers would not have anticipated that gay marriage would come to be accepted, but that is not really pertinent. Under the second interpretation, the Framers did not adopt a provision specifically addressing marriage. Instead, they enacted a nondiscrimination principle that allowed discrimination that was tied to widely held moral beliefs, and those beliefs would have changed. In fact, if judges allowed discrimination against same sex marriage in those circumstances, they would be flouting the Framers’ authority.

A similar point holds for the rationality objection. If the second interpretation were correct, then the Framers would have chosen a principle that rejected distinctions that were not supported by moral principles currently held by the society. The Framers’ minds would have been followed.

Of course, these conclusions would depend on the second interpretation being correct, and it might not be. But disagreements over the correct original meaning is a common occurrence within originalism. One therefore needs to be careful in discovering the original meaning. But accurately determining that meaning requires that one examine the evidence with an unbiased interpretive approach, not favoring or disfavoring abstract meaning based on one’s own values.

### **Problems with Original Decision Originalism**

Instead of employing such an interpretive approach, Steve wants to develop a new interpretive method, which would seek would he calls “the original decision.” The idea is that the Framers made a decision; and by following that decision, rather than the meaning of their words, we will avoid both the authority and rationality objections.

Steve’s attempt to stake out a kind of originalism that will be free of contamination by abstract originalism reminds me of a similar move by C.S. Peirce, who upon discovering that some other philosophers were using the term pragmatism in a way he disapproved, announced the coinage “pragmatism,” saying that it was “ugly enough to be safe from kidnappers.” Original decision originalism is designed to avoid abstract interpretations that lead to applications that are not expected by the Framers.

I have several concerns with this approach. First, I do not believe it is likely to be successful. People who favor a more abstract originalism will reject it, arguing that it is result oriented. Even worse, abstract originalists will claim that they are the true originalists, while people who favor original decision originalism are merely following an artificial kind of originalism designed to avoid the genuine original meaning.

Second, I am not sure that original decision originalism will do the work that Steve hopes it will. Sure, one might define the original decision to coincide with the expected applications, but one might define meaning that



way too. If one lets the phrase “original decision” speak for itself, then it is possible that the Framers’ decision might be an abstract one – they decided on an abstract rule and we should follow it. Ultimately, Steve might find the pragmatists starting to claim not only the term pragmatism, but also pragmatism.

## **Conclusion**

In the end, I do not believe that original decision originalism is the best way to address the problems of abstract originalism. In part, that is because abstract meaning cannot be ruled out entirely, but it is also because the original decision is not likely to effectively limit abstract originalism.

I do plan to use original decision originalism as an argument against abstract originalism. If abstract originalists argue that their values support reading provisions to be abstract, then one might ask why other originalists with different values should not interpret provisions to be concrete.

Ultimately, though, I do not think there is any alternative to arguing for an unbiased originalism – one that simply looks into the original materials in an attempt to determine the original meaning. Many, although not all, of Steve’s concerns about abstract originalism can be addressed here – by showing that a fair interpretation of the provisions often does not lead to an abstract meaning. But that result must come at the conclusion of the historical inquiry, not from the interpretive premises.

## Originalism and the Positive Turn

by William Baude

For more than a decade, the “New Originalism” has been identified with a focus on the Constitution’s original meaning (not its original intent) and with the admission that original meaning won’t perfectly constrain judges. Steven Smith challenges that version of originalism. The challenge should be rejected, but in the course of rejecting it we may better understand a new development in the new originalism: the positive turn, or thinking of originalism as *our law*.

The new originalism has long faced two different kinds of critics: the external and the internal. The external critics are not originalists at all. Some of them simply reject all forms of originalism, but many instead argue that the new originalism is inferior to the old one. The old originalism, they say, at least had the courage of its convictions. “At least we were arguing about something!” these critics might cry. “Now, I don’t know what the debate is about anymore!”

Originalists themselves often mistrust these external critics. After all, those who are unsympathetic to a philosophy often have bad judgment about what are the best parts of that philosophy. Other external critics may not have kept with originalism’s development.

New originalism also has internal critics. The internal critic continues to adhere to, or at least sympathize with, the “old” originalism. This critic’s worry is that an originalism that yearns to be too flexible or too popular may lose whatever it was that made originalism good in the first place.

In recent years, Steven Smith has become the most important internal critic, as his Liberty Law Forum [essay](#) continues to show. Smith argues that it is time for originalists to do away with “original meaning.” Meaning is too manipulable, he says, too easily detached from the actual goals of the original enactors. We should instead look for what he calls the “original decision.”

I disagree, for reasons that are simultaneously narrow and deep. On its own terms, I think Smith’s proposal should largely collapse back into original meaning. But Smith’s proposal also reveals a foundational disagreement about originalism’s goals, and I think Smith is on the wrong side of it.

Let’s start by taking Smith’s proposal on its own terms—that the “original decision” is “a better criterion” than the “original meaning.” His idea is that we should look to what the Framers wanted (or would have wanted) rather than what is implied by the words they chose. Too much loyalty to the form of the words gets us too far from the authority and rationality of the Framers.

But Smith’s proposed replacement may not really take us anywhere. Decisional originalism, faithfully applied, should lead us in a circle back to original meaning. The original decision includes the decision to use a certain set of words. The original decision, moreover, includes the decision to express

oneself at one level of generality rather than another. When we use the original meaning of the constitutional text “to try to understand and reconstruct the decisions,” we should not slight these conceptual and writerly kinds of decisions. They are decisions about what legal propositions to freeze in amber and what propositions to make contingent on future events.

Consider Smith’s example of same-sex marriage. The originalists who argue for a right to same-sex marriage argue that the Fourteenth Amendment’s meaning was an anti-discrimination principle that was broader than race and might include sexual orientation. Smith asserts that this result is obviously contrary to the “enactors’ decision” reflected by the Fourteenth Amendment. But how does he know? The thrust of the original meaning argument is that the authors of the Fourteenth Amendment *decided* to empower Congress or the courts to recognize and invalidate new forms of discrimination, potentially including this one. That argument needs to be met on its own terms—to say that this is not what the authors decided is to say that this is not the Amendment’s original meaning.

(I suppose one could think that the Framers used a form of nominalism, where words were simply tokens for concrete, expected applications. But that, too, is a claim about original meaning.)

To be sure, the method of original meaning can be manipulated by those who act in bad faith. And it will not always produce the same answer even to those who act in good faith. There are lots of questions internal to originalism about contested meanings, ranges of meaning, and which institutions should judge meaning and how. (That’s why there’s so much scholarship on originalist theory.) But if Smith’s “decisional originalism” were to be pursued systematically, the same questions would recur: What was the decision? At what level of abstraction? How do we know? Who is empowered to answer these questions now?

Reading Smith’s essay, one almost wonders if the real goal of his proposal is to keep the idea of original meaning but declare a mulligan on its implementation. Maybe Smith just wants to wipe away all of the work that has been done on original meaning thus far and start asking the same questions under a new name. (At least that’s what I take him to mean when he says that “maybe, given a different history of development,” original meaning “could have been” the proper way to interpret the Constitution.)

But the same people who have caused original meaning to “lose touch” will presumably ask the same questions about decisional originalism if it is pursued. If so, we will be having the same debates again, and the change in terminology will have accomplished little. Far better just to have those debates now, within the framework of original meaning (as Smith has indeed done in some of his other work). The new paradigm will not get originalism “back on track” so much as push it back a few stops, only to run the same route.

If the substance of Smith’s proposal is so close to original meaning, it might seem that we have no cause to disagree. But I suspect that something

deeper is going on here—something that might explain why Smith views the current project of original meaning as unsalvageable while I do not.

That deeper issue is nothing less than the fundamental justification for originalism. Smith's answers are deeply connected to the wisdom and authority of the past. For him, the goals of originalism are adhering to the authority of the Framers and accessing their wisdom and rationality. But that's not the only way to see originalism's goals.

Here's an alternative, part of what I've called "the positive turn" in originalist thought. Originalism is important because it's part—maybe more than just part—of our current legal practice. It's part of our practice in two related ways.

First, there's the Constitution itself. For all that our constitutional doctrine and legal practices have changed over time, we've kept the same basic, written framework. That framework is the text of the Constitution, including various amendments enacted under the text's procedures for amendments. The document is central to modern practice. Public officials take an oath to support "this Constitution," and it remains the ultimate source of legal authority. And the document has a date and signatures on it that mark its origin and authorship. The original Constitution (as amended) is our law today.

Contrast this with Smith's new framework for originalism. The reason we care, and should continue to care, about the original "meaning" of the Constitution is because the Constitution is the law now. Original "decisions" are legally enduring only to the extent that they were encoded in the Constitution's text. So Smith's focus on the authority of the Framers gets things backward. He thinks we care about the Constitution because of the authority of those who framed it. On the contrary, I think we care about the Framers only because they happened to write the Constitution that is still our law.

Second, it is not just the text itself that is the law. Our specific legal practices give primary weight to the original meaning of the text and the original legal rules for interpreting it. The Supreme Court sometimes rejects other normative arguments in favor of the original meaning. But it has never openly rejected original meaning. The biggest apparent challenge to originalism might seem to be cases that rely on non-originalist precedents. But the doctrine of precedent is itself one of the original legal rules for constitutional interpretation. A doctrine of precedent is a testament to, not a contradiction of, the legal status of originalism.

Again, contrast this with Smith's new framework for originalism. Part of the reason the Court does not openly reject originalism is that it often finds that the original meaning is ambiguous or vague or flexible. This makes it easier for our modern practices and the original meaning to coexist without conflict. Smith is right to worry that this flexibility is manipulable, but as I've said above, I think his worry goes too far. If the true original meaning is not really so flexible, originalists should prove it. And if it is flexible, then originalists should accept that. That's our legal process. In any event, if the decisional

originalism approach Smith proposes really is much stricter than the original meaning, it will be much more inconsistent with our law.

The Justices also *say* that they apply the potentially general original meaning. At her confirmation hearing, Justice Kagan said 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. So in that sense, we are all originalists.” And in a recent interview Justice Alito said something very similar: “I start out with originalism. . . . I do think the Constitution means something and that that meaning does not change. Some of its provisions are broadly worded.” In unforeseen circumstances, he went on, “I think all you have is the principle and you have to use your judgment to apply it. I think I would consider myself a practical originalist.” Smith’s skepticism about broad principles in the Constitution places him at odds with these views of the law.

This emphasis on originalism’s legal status—which I and others have proposed—is the positive turn. What does it accomplish? The positive turn answers the dead-hand argument famously leveled against originalism: The earth belongs to the living, so why should constitutional law be controlled by the decisions of the dead? The Constitution continues to control precisely because we the living continue to treat it as law and use the legal institutions it makes, and we do so in official continuity with the document’s past. The same thing is true of the other parts of our law—old statutes, old precedents, and old deeds all continue to have legal force today unless other valid legal rules upset them. So the decisions of the dead still govern, but only because we the living, for reasons of our own, receive them as law.

Smith’s vision, by contrast, seems to double down on the dead-hand problem. He is not satisfied with adhering to the original meaning of the actual legal documents that have carried forward from the Founding. He wants to adhere also to legal documents they would have written, if they’d better imagined the future. That account of authority cannot be justified by its current legal status. So Smith is advocating more than the continued control of the dead hand; he would reanimate the hand to help it squeeze more into its grip.

To be sure, there is plenty that the positive turn fails to accomplish. For instance, there is no guarantee that it will demonstrate that *Roe v. Wade* is wrong and illegitimate. And if there is sufficient revolution in our practice—if we were to start burning the text of the Constitution in the streets, or impeaching originalist judging as a high crime—in that event, the positivists will eventually have to sign on with the new regime. The exhilarating thing about rule by the living is that the living can change their minds. But until we do, the Constitution’s original meaning is the law we have.

## Saving Originalism's Soul

by Stephen E. Sachs

What shall it profit originalism, to gain academic adherents but lose its soul? As Steven Smith [tells it](#), the “new originalism” has made a disastrous Faustian bargain, with Jack Balkin playing Mephistopheles. It may have gained sophistication and intellectual respect, but it’s lost its ability to resist falsehood and manipulation—and lost the firm roots that made “[That Old-Time Originalism](#)” great.

To Smith, the new originalism lacks any claim to the Framers’ authority. Because it looks to the meanings of the Framers’ words, and not to their substantive expectations, it can be made by skilled sophists to justify things “the enactors wouldn’t have approved—would perhaps have deplored,” like rights to abortion or to same-sex marriage. If the Framers had foreseen such consequences, their Constitution “would have been reworded to avoid the unwanted results, or would not have been enacted at all.” That makes the new originalism irrational, a product (at best) of the Framers’ “ignorance” and lack of foresight, not their “mindful deliberation.” Instead, Smith counsels a return to the “original decision,” which (he argues) rules out any deplorable consequences that the Framers would have opposed.

Smith’s portrayal is tempting, too. But the old originalism was abandoned for a reason, namely that it was wrong. The Framers didn’t enact particular outcomes fixed in amber; they enacted various rules of law, rationally authorizing future actors to put those rules into effect. When those original legal rules require us to consider outside facts, their applications will change as the facts change on the ground. Which facts were supposed to matter is a question of law, language, and history—and not of policy preferences, whether the Framers’ or our own. In the end, the soul of originalism remains safe—and the only answer to originalism done badly is more originalism, done well.

An originalism that could frustrate the Framers might seem like an oxymoron. To understand it, consider a simple example suggested by Chris Green, who’s written [the definitive work](#) in this area. How many seats in the U.S. House of Representatives should each state get? One approach is to fix the numbers: Maryland six, North Carolina five, and so on. Another is to fix a rule that depends on outside facts—say, that states get seats according to their future populations.

Each approach has benefits. The advantage of a rule is that you don’t need clairvoyant Framers to know all the facts. (“Maryland has six, then after 1800 it will have eight, then . . .”) As judged by the first U.S. Census, the geniuses at Philadelphia [guessed wrong](#) about the relative sizes of North Carolina and Maryland. But the rule they adopted let the outcomes track reality.

On the other hand, rules leave the Framers dependent on people other than themselves. If future actors fail (or deliberately refuse) to feed the right facts into the right formulas, the rules won’t do what their Framers wanted.

And because rules refer to actual, rather than stipulated, facts, the Framers might have been wrong about those facts, about how their rules would work in practice, or even about whether they were good rules at all.

Sometimes that's worth it. To paraphrase another of Green's examples, when Congress authorized the President to use military force in 2001, the target wasn't the Taliban or Al Qaeda by name, but rather the "persons he determines planned" the 9/11 attacks. Should the President honestly determine that it was Hezbollah all along, then Hezbollah it is, whether or not the enactors would have expected that result, or even would have deplored it. Nor is that strange: the possibility of disagreement was *why* the enactors based the authorization on the President's determination rather than their own. You legislate in general terms only if you're more worried about getting the specifics wrong yourself than about some other actor getting them wrong. (That's why we have general laws against murder and theft—not because juries never make mistakes, but because we can't hire psychics to write very long bills of attainder.)

The core defect of Smith's "decisional originalism" is that the Framers' "original decisions" were often decisions *to rely on outside facts*—even facts that the Framers might not have expected, even facts that might lead to outcomes they would have deplored. No matter how faithful the judges, the Framers' own rules can still produce unforeseen results. Article V, for example, relies on the uncontrollable facts of what two-thirds of each House and three-fourths of the states might someday desire. The Framers' choice to permit amendments in this way might end up mandating things that individual Framers deplored—women's suffrage, say, or uncompensated abolition, or a popularly elected Senate.

Maybe, had the Framers been more prescient, they'd have added specific exclusions to prevent these measures, the way they did to preserve Senate apportionment and the pre-1808 slave trade. Yet we still treat these amendments as law, because Article V says we should. To put it another way, the Framers made a *decision* to restrict the amendment process in certain ways and not in others; the risk that they were unconsciously permitting "deplor[able]" amendments was a risk they were willing to take.

(Note that the same thing happens when the rules don't change. Maybe the Framers, seeing today's America, would regret their choice to apportion the Senate equally. Legally, who cares? The Constitution is law, and hypothetical Framers' regrets are not.)

When the Framers have deliberately chosen to rely on facts, Smith's authority and rationality objections turn out to be fallacies of composition. Particular outcomes the Framers didn't want can result from general legal regimes that they did. Outcomes that are the product of Framer ignorance—because the Framers, had they been more prescient, would have acted to prevent them—don't make the overall legal regime irrational, or mean that it results from anything but mature deliberation. Relying on outside facts, including facts about other people's future preferences, is an eminently rational response to the lim-

its of human knowledge. And there's a deep rationality to a system in which we follow the rules [until they're lawfully changed](#), whether or not their consequences seem ill-advised.

Smith's deeper critique of original meaning is that it involves a bait-and-switch. The Framers enacted various provisions with the words available to them; later interpreters like Jack Balkin came along and turned those words to unforeseen and deplorable ends. Smith is willing to assume that the Balkins of the world get the original meaning right, and that their surprising conclusions follow from their premises. But these concessions are half-hearted. It's hard to avoid the sense that Smith is fighting his own hypotheticals—that he doesn't really believe, say, that the Fourteenth Amendment originally communicated a “principle of equal regard,” or that this principle today entails the rights to abortion and to same-sex marriage. Much of the rhetorical force of Smith's essay results from these smuggled-in doubts. If one actually took the hypotheticals at face value—both what the words meant, and what those meanings require today—then Smith's discomfort with the new originalism is far harder to understand.

Start with the interpretive question. How do we find out the decisions that the Framers made? The standard new-originalist answer is to focus on the original meaning of the Framers' words. Human language can be properly applied, in a relatively precise way, to circumstances far beyond the speaker's ken. Old rules about “stolen goods” apply naturally to iPads, the tax laws include income in Bitcoin, and so on, without giving themselves over to gauzy living-constitutionalist refrains about social evolution and whatnot. That's because the language of the rules makes some changes relevant and not others. To rely again on Green, “the choice of language is a choice about what sorts of changes should make a difference.”

Conceivably, one could treat Smith's theory as itself a claim about original meaning. For example, maybe the Founding generation understood the Constitution's language to implicitly exclude any deplorable applications—the way we understand “[have you eaten?](#)” to mean recently rather than ever. In that case, Smith's concern for deplorable consequences might be part of what the text would have communicated at the time—it just *is* the original meaning, properly understood. But that claim seems unlikely, as a matter of historical linguistics; and if Smith assumes it's wrong, so can we.

Instead, Smith urges us to focus on the Framers' original decisions, as distinct from the meanings of their words. That has a certain logic to it; the meaning of an instrument contributes to its legal content, but it isn't everything we need to know. For instance, in contract cases involving mutual mistake, a particular term (like the ship “*Peerless*”) might have no unique meaning as a matter of linguistics, but our contract law will construe it according to a particular set of rules (e.g., favoring the more innocent party). Maybe Smith's proposals about deplorable consequences were actually part of the Framing-era legal rules governing interpretation. But while a legal system *might* work that



way, that's not how we usually understand our system today—and Smith offers no evidence that the Framers understood it that way, either.

Smith's concern seems to be that the original-meaning inquiry can't reach reliable conclusions, as opposed to collapsing into a standardless search for principles. Did "cruel" in the Eighth Amendment express a "principle of humane punishment," or did it stand in for specific punishments that the Framers didn't like? Or did it mean "ban those specific punishments, plus any others that we'd want to ban if we knew about them"? For contemporaries, as Smith notes, these alternatives make little practical difference; and there's some danger in resting our law on thin evidentiary reeds.

But interpretation, though hard, is also unavoidable. Consider Smith's account of the Fourth Amendment. Although wiretaps were wholly unknown to the Framers, we still know (he says) that the "original decision" was to restrict them. That may be right. But if so, it's because we extract from the Fourth Amendment a rule—or, dare we say it, a principle—concerning a general concept of privacy. To apply that principle faithfully, we need to know its original contours; specific prohibitions that flesh-and-blood Framers had in mind are merely evidence of this law, not the law itself. We have to distinguish meanings from expected applications, simply because no applications of the Fourth Amendment to wiretaps (or to cell phones, the Internet, or people not yet born) were "expected" in the 18<sup>th</sup> century.

At this point, the wheels have come off the theory. The "decisional originalist," having broken free from the Framers' language in search of tighter constraints, ends up with an even more philosophically complex method of even greater plasticity. How are we to know, as Justice Alito *once asked*, "what James Madison thought about video games," if not by looking at the language that he helped enact? What did the Framers really think about church and state, over and above what they wrote in the Establishment Clause? Whose informal opinions count, and what do we do if they disagreed? Altering the original law and language based on the Framers' presumed desires, or the Spirit of the Age, or whatever, opens up loopholes that a Jack Balkin of decisional originalism could drive a truck through.

Perhaps there's another way to cabin things. Maybe the Framers might accept correction about unforeseeable *facts* (state populations, wiretaps, whatever), but not about changes in *values*. So if they disapproved of abortion, say, no amount of Balkinizing would be able to make it part of the Constitution—even under a "principle of equal regard."

Wise legislators usually avoid making open-ended moral commitments in the law. That's why the Constitution talks about "establish[ing] Justice" in the Preamble. The operative provisions are designed with an eye to justice, sure, but they also constrain future actors, unlike a direct instruction like "Congress shall make no unjust law." All else being equal, we should hesitate to read constitutional language as if it actually contained a "Justice Clause."

The problem is what to do if the Framers did include something like a Justice Clause. To a new originalist, if that turns out to be the correct historical reading, then it's part of the law, even if future actors have different views of what justice requires. Insisting that the provision can only refer to the Framers' own particular convictions, and not to what justice actually requires, attributes to the 18<sup>th</sup> century a startlingly relativist and subjective approach to moral questions. If some clause of the Constitution regulated carcinogens, its Framers presumably cared about whether a substance actually causes cancer, and not just whether they thought it would. So why can't they have been interested, when enacting a Justice Clause, in whether a law is actually unjust?

Obviously this all depends on the history. But preserving each of the Framers' substantive conclusions intact might mean discarding the actual law they made. That deserves exactly the same criticisms that Smith wrongly makes of the new originalism. If the Eighth Amendment, let's assume, really bans all inhumane punishments—and if the juvenile death penalty, let's assume, really is inhumane—then why on earth should today's judges permit it? On whose authority would they continue an inhumane practice, when that's precisely what the Eighth Amendment was written to stop? What's rational about preserving the Framers' mistakes, when by assumption that's not what they told us to do?

The soul of originalism is a method, not a collection of results. The theory is aimed at getting the law right, not at advancing any particular political platform. It rules nothing out in advance, looking to what the law and history actually reveal. This openness to potential surprises is a strength, not a weakness: it shows that the theory is robust—that it can handle a variety of different kinds of evidence.

That flexibility, it's true, raises a risk of manipulation. Smith not-so-subtly accuses Balkin, Michael Perry, and even Robert Bork of bending the historical record to support their preferences. But he writes as if such manipulation were largely unstoppable—as if only a fundamental change in interpretive method could build a firewall strong enough to resist it. It'd be far simpler, though, to argue that the manipulators are wrong: that they misunderstand what the Framers did and what results follow therefrom. Is that not enough? And if they aren't wrong, shouldn't that lead Smith to reexamine his own views?

Like anything else, the new originalism can be done poorly, or even fraudulently. That doesn't mean that we should stop doing it—any more than “junk science” should lead us to ban science, or motivated reasoning should lead us to abandon reason. Not every bargain is a Faustian one; some trade-offs really are worthwhile. In each case, we do what we can with the tools that we have. And in the end, as G.K. Chesterton put it, “if a thing is worth doing, it is worth doing badly.”

## Decisional Originalism: A Response to Critics

by Steven D. Smith

I'm sincerely honored that [Mike](#), [Will](#), and [Steve](#) (whose expertise in these matters, both individually and collectively, greatly exceeds my own) would make the effort to comment on my [essay](#). The comments advance powerful objections to "decisional originalism," as I've reluctantly called it. Even so, I'm not persuaded— not yet anyway— to abandon the idea. I'll try briefly to explain why (without purporting, in a short rejoinder, to answer *all* of the many questions raised).

### *Authority, Rationality, and the "Positive Turn"*

First issue: why should anyone favor originalism anyway? I suggested that originalists have been concerned about two problems: authority and rationality. Non-originalist approaches to constitutional interpretation, by distancing current legal doctrines and decisions from the authoritative and mindful political decisions that produced the constitutional texts, squarely present both problems. But then so do expansive or flexible understandings of "original meaning" that may end up supporting outcomes that the enactors never contemplated and might have vigorously disapproved. Or so I argued.

Will challenges this answer to the "Why originalism?" question. The "fundamental justification for originalism," he suggests, is not the desire to respect authority and promote rationality in our law; rather, "[o]riginalism is important because it's part — and maybe more than just part — of our current legal practice." It's part of "*our* law." Will calls this view "the positive turn" in originalism.

Now on one level I entirely agree with Will. Originalist inquiries and arguments *are* part of our legal practice; if they weren't, we wouldn't have the same interest in them. (Though non-originalist decisions are also part of our practice.) The "positive turn" conveys an insight that is important in ways we can't explore here. But does this insight provide any *justification* for originalism? I don't see how.

Suppose you ask me why I make important decisions by flipping coins, or consulting a horoscope, or studying the Bible. And suppose I respond, "I do it because that's my practice." My response may be true enough, but it doesn't answer your question. You already know this is part of my practice— that's why you're asking about it— but you're wondering if there is some justification for this particular practice which, as your question suggests, you find puzzling or problematic. And, without more, saying "It's my practice" (or, basically, "I do it because that's what I do") fails to supply any such justification. The same is true, I think, for collective practices, including legal practices— including originalism.

In this respect, I don't understand how "the positive turn" provides help with the familiar dead-hand objection, as Will thinks. Suppose I make all major decisions by speculating about and then doing what my great-grandmother Matilda would have advised, and you suggest that I'm being irrationally servile. I should think for myself, you say (parroting Kant)— make my own decisions. Suppose I respond, "I *am* making my own decisions. Granny doesn't *force* me to do anything; I follow her advice only because I *choose* to do that." My response will be true: ancestors (whether my great-grandmother or "the Framers") can't step out of the grave and compel us to do anything. But that observation does nothing to justify a practice of choosing to defer to them.

But maybe I'm missing Will's real point here. Will may be arguing that the "new originalism" has managed to get itself accepted in our legal practice only because of its leniency in loosening up the constraints of the enactors' concrete decisions. That's why Justice Kagan and Justice Alito (and Jack Balkin, and Michael Perry) are willing to call themselves originalists, maybe— because their sort of originalism is only minimally restrictive. If this is what Will means, he may well be right. But this is like saying that Catholics (or communists, or conservatives) will be more acceptable to people who distrust them if they will just be less Catholic (or less communist, or less conservative). Well, maybe so, but . . .

### *The Primacy of the Constitutional Decision*

We care about originalism because it figures in our legal practice, as Will says; but at least one reason we are justified in trying to make it part of our practice is that it addresses concerns about authority and rationality. That's my impression, anyway. But then we can go on to ask what sort of originalism is most responsive to those concerns.

My proposal is that it would be helpful in this respect to focus not so much on the original *meaning* as on the original *decision*. (That's a shorthand and somewhat unfortunate way of putting the point, but I hope it works for now.) All three commenters are skeptical; they think a focus on decisions would present the same possibilities, challenges, and risks of abuse that other versions of originalism do. Originalism has been invoked in support of some pretty problematic interpretations, yes, but the commenters think the only remedy is to do better, more careful, less tendentious originalist work.

Actually, I'm 90 percent in agreement with these comments, but I need to try to explain the residual 10 percent. Theorists of legal interpretation have used various analogies: to ordinances ordaining "No vehicles in the park," to old recipes for fried chicken, to grocery lists, to signs declaring "Keep Off the Grass." All of these examples involve communications. But it matters to interpretation, I think, what sort of thing is being communicated. A recipe? An instruction? A poem? In the case of positive enacted law, I suggest, what is being communicated is a political decision. And if that is so, our interpretations will

be more sound if that is what we look for— for a decision, not merely a . . . “meaning.”

In this sense, decisional originalism is not a competitor, exactly, with either “intentionalist” or “public meaning” originalism (whichever you prefer). The suggestion, rather, is that what we should look for in the framers’ intentions or in the public understanding— what we should try to recover, or reconstruct— is not just an intended or publicly understood “meaning” but rather an intended or publicly perceived and ratified *decision*.

To be sure, enactors make decisions *about words*, as the comments correctly observe. But that description, while true in a certain sense, seems to me less than perspicuous. Much as it would be true but inapt to say that what writers do is make decisions about which letters on the keyboard to press.

Sometimes (as with the Obamacare law) legislators may never have read the words at all. Constitutional provisions are shorter, of course, and presumably most enactors will have read and thought about the words. Even so, it seems more cogent — more revealing of what is really going on — to say not that enactors decide *what words to make law*, but rather that they try to find words that will *express their decisions*. The political decision is primary; the choice of wording is instrumental. And our interpretations of the words should thus be guided by a search for the decision. (Or, if you prefer, you might say that this is the sort of meaning we should look for— the meaning of the decision.)

But now some concessions. As the commenters point out, a focus on decisions would not obviate the need to do the historical work, with all of the possibilities of indeterminacy, good faith error, and willful misconstrual that always attend such work. Also, a “decision” is not reducible to “expected applications.” As Steve correctly points out, enactors may decide to adopt a rule whose implications will depend on future facts. It is at least conceivable, as Mike says, that enactors could decide to constitutionalize some abstract “principle.” More generally, although the notion of a “decision” is utterly familiar, it is also complex and in need of clarification of the kind that philosophically sophisticated scholars like Larry Solum and Larry Alexander have provided for in notions like “meaning” and “text.” (Do you detect a plea for help here?)

So then, what is gained by urging a focus on decisions? My suggestion, once again, is that an emphasis on “decisions” might focus our attention on what we really care about (or should care about), and thus might do a better job of closing the authority and rationality gaps than other approaches seem to do. To be sure, decisional originalism might be stretched and abused just as other forms of originalism can be. My hope— I can’t quite call it an “expectation”— is that an emphasis on decisions would make these stretchings and abuses easier to spot, and thus to avoid (or resist).

## *Decisions and “Principles”*

How so? As an illustration, consider one crucial example. It is true that enactors could decide to constitutionalize a “principle” — a “principle of equal regard,” maybe — and then we’d have the same possibilities and difficulties we have already. That *could* happen. But it seems unlikely. As we know from experience, it is relatively easy to read words in an old text as carrying a “meaning” containing some abstract “principle.” Indeed, prominent jurists and scholars find it next to impossible to read the words (of the Fourteenth Amendment, for instance) in any other way. It is harder, I think, to picture political actors making a political decision to enact some “principle” whose implications they only dimly foresee, and thus to authorize future adjudicators to enforce their own “conceptions” of what that principle entails.

Why? Well, think about it this way: on what assumptions would such an open-ended authorization to the indefinite future make political sense?

Suppose first that a generation of framers sees itself as privileged to occupy a sort of moral high ground; future political actors, they think, are likely to be less enlightened or less public-spirited. (I’ve argued elsewhere that the Philadelphia framers understood their situation in this way.) These framers would presumably want to build as much concrete content into their constitution as possible, as a hedge against what they anticipate will be the degraded notions and self-serving inclinations of their less fortunate successors. On these assumptions, constitutionalizing open-ended principles that their successors will probably only misconstrue and abuse would be a horrible political strategy.

Conversely, imagine a more optimistic set of framers who believe in the likelihood of political, moral, and philosophical progress. Why would such framers want to bind their more enlightened successors to some principle that they themselves only imperfectly understand? Why not just let their blessed descendants choose for themselves what principles to follow?

Probably there are scenarios in which an open-ended authorization could seem sensible. Maybe the framers foresee an ethically and epistemically inegalitarian future in which *elites* (including judges, and of course law professors) will be more virtuous and enlightened than the present generation, but the people generally — the folks, as Bill O’Reilly would say — will be *less* enlightened. So the idea would be to constitutionalize an amorphous principle that future elites can use to herd and corral the benighted masses. But this scenario seems far-fetched (as a *projection*, anyway — perhaps not as a description of contemporary elite sensibilities), and unappealing— not something we would be eager to accommodate.

In sum, although framers could choose to constitutionalize some abstract principle, this seems implausible. The move to abstract principle seems implausible, that is, if we ask about political *decisions* (as opposed to textual *meanings*).

*To sum up.* The central claim is that political authority manifests itself primarily in the mindful making of political *decisions*, and only derivatively and instrumentally in the enactment of *words*. That claim is contestable, of course. But if it is correct, then our interpretations should look to the words (and the context, and other relevant indicia) in an effort to recover or reconstruct the decisions. Conversely, if we lose sight of the centrality of decisions and instead understand ourselves more loosely to be looking simply for the meanings of the words, we facilitate the kinds of unmoored abstractions that have so often diverted originalism from its purpose of respecting the constitutional assignments of authority and of promoting rational political decision-making.

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