



MICRO-SYMPOSIUM:  
RICHARD POSNER'S "WHAT IS OBVIOUSLY WRONG  
WITH THE FEDERAL JUDICIARY"

ORIGINALISM'S BITE

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IS ORIGINALISM TOOTHLESS? Richard Posner seems to think so. Repeated theorizing by “intelligent originalists,” one of us happily included, has rendered the theory “incoherent” and capable of supporting almost any result.<sup>1</sup> Apparently we’ve “come close to conceding” that “originalism is nonsense.”<sup>2</sup> In this Posner echoes other critics who say that our versions of originalism “don’t matter,”<sup>3</sup> are “no different than the form embraced by living constitutionalists (and liberals),”<sup>4</sup> are “trivial,”<sup>5</sup> and don’t “tell[] us something important about what the Constitution is [or] how to interpret it.”<sup>6</sup>

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<sup>1</sup> Richard A. Posner, *What Is Obviously Wrong With the Federal Judiciary, Yet Eminently Curable, Part II*, 19 GREEN BAG 2D 257, 259, 264 & n.12 (2016).

<sup>2</sup> *Id.* at 258-69.

<sup>3</sup> Eric J. Segall, *Originalism as Faith*, 101 CORNELL L. REV. ONLINE (forthcoming 2016) (manuscript at 7), [ssrn.com/abstract=2752545](https://ssrn.com/abstract=2752545).

<sup>4</sup> *Id.* at 8; *see also id.* at 14.

<sup>5</sup> James E. Fleming, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 1* (2015).

<sup>6</sup> *Id.* at 19.

We appreciate the attention, but we fear we've been misunderstood. Our view is that originalism is best seen as a theory of law, one in which "the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision."<sup>7</sup> More specifically, "[o]ur law is still the Founders' law, as it's been lawfully changed."<sup>8</sup> This means that originalism permits arguments from precedent, changed circumstances, or whatever you like, to the extent that they lawfully derive from the law of the founding.

This kind of originalism, surprisingly common in American legal practice, is catholic in theory but exacting in application. It might look tame, but it has bite.

### FALSIFIABILITY

Misunderstandings like Posner's may stem from two related confusions. The first fails to distinguish the general nature of originalist theory from the much more specific empirical claims needed to sustain any given result. In our work we've noted many judicial opinions that made what we see as originalist arguments: *Obergefell* made originalist arguments; *Brown* made originalist arguments; *Blaisdell* made originalist arguments.<sup>9</sup> But that alone doesn't establish whether these cases were *right*, as a matter of originalism. Those who disagreed with these cases made originalist arguments too, and it's unlikely that *both* sides were right.

We maintain that originalist arguments are fundamental to American legal practice, and *also* that many of these arguments are *mistaken*. We point out many Supreme Court opinions consistent with originalism by way of demonstrating the ubiquity of originalist arguments – something Posner acknowledges, though he laments it.<sup>10</sup> But the fact that lawyers and judges *invoke* originalism doesn't show that their specific claims are right, any

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<sup>7</sup> William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

<sup>8</sup> Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015).

<sup>9</sup> Baude, *supra* note 7, at 2376-78, 2380-83; Sachs, *supra* note 8, at 854; Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2283 (2014).

<sup>10</sup> Richard A. Posner, *What Is Obviously Wrong With the Federal Judiciary, Yet Eminently Curable, Part I*, 19 GREEN BAG 2D 187, 199-201 (2016).

## Micro-Symposium: Originalism's Bite

more than a man's waving a yardstick shows that he is tall. To make an argument is to risk falsification.<sup>11</sup>

This confusion over falsification is evident in Posner's complaint that it's ridiculous to describe *Obergefell v. Hodges* as originalist when it "has no constitutional pedigree."<sup>12</sup> Posner's assertion reflects an intuition that the Court misunderstood the law that the Fourteenth Amendment established, or misapplied this law to the facts, or something. It suggests that the Court was *wrong* to say that "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."<sup>13</sup> This passage makes a claim about the law in 1868; to assert it is to make a constitutional, originalist case for *Obergefell*. To deny it is *also* to make an originalist case, this time against *Obergefell* – and to recognize the falsifiability of originalist claims.

(Indeed, we see originalism as actually rather good at distinguishing good arguments from bad ones. It's certainly better at doing so than "pragmatism" – under which it's wickedly difficult to tell whether its practitioners are doing it right or wrong, especially in Posner's hands.<sup>14</sup>)

Our main point is this: General theories, open to a wide variety of facts, can be highly demanding once you fill in the details. The scientific *method* doesn't prejudice whether the moon is made of green cheese. But the scientific *evidence* for that claim is terrible, and applying the method should tell you so. That claims can be labeled terrible *only after examining the evidence* is a strength of the method, not a weakness. The presence of lunar conspiracy theories or crank claims about quantum physics doesn't show that tools like space exploration or particle colliders lack bite; on the contrary, space exploration and particle colliders show the conspiracy theorists and cranks for what they are.

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<sup>11</sup> We won't discuss in this brief space whether these arguments are insincere. See Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44 (2016). We've flagged the issue before, see Baude, *supra* note 7, at 2386-89; Sachs, *supra* note 8, at 855; Sachs, *supra* note 9, at 2283, and will address it in a separate project.

<sup>12</sup> Posner, *supra* note 1, at 259 (citing 135 S. Ct. 2071 (2015)).

<sup>13</sup> 135 S. Ct. at 2598.

<sup>14</sup> See generally David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791 (2009).

In the same way, originalism doesn't prejudge whether Justice Kennedy or Justice Scalia is correct about the Fourteenth Amendment. It identifies tools and criteria for deciding who is right.

### ABSTRACTION

A related confusion is directed not at originalists in particular but at interpreting texts in general. Posner endorses a fictional judge who thought constitutional law was “just politics, filtered through a few vague phrases in an old document written by people who couldn't possibly fathom what the world looks like today”;<sup>15</sup> he portrays judicial pragmatism as inevitable when dealing with circumstances unforeseen by the drafters.<sup>16</sup> Another of our critics, Eric Segall, asks us quizzically: “How can the meaning of words be simultaneously ‘fixed’ and ‘abstract’?”<sup>17</sup>

Framers of legal texts deal with unforeseen circumstances by *using their words* – enacting abstract rules that tell us how to handle new facts. These abstract rules are still fixed, because they move from new facts to new outcomes in an unchanging way. (House seats change with each census, but the rule for allocation is fixed by Article I – even if the framers didn't foresee the Baby Boom or the State of Hawaii.) All rules say that some facts matter and others don't;<sup>18</sup> all standards depend on certain facts in a certain way.<sup>19</sup> To paraphrase Christopher Green, whose work too few scholars have read, the choice of what legal rule or standard to enact is the choice “about what sorts of changes should make a difference.”<sup>20</sup>

So we think Judge Posner is guilty of a non-sequitur when he finds it “silly to ask whether . . . the Fourth Amendment forbids electronic surveillance of suspected crooks or spies,” because “[t]he amendment's authors

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<sup>15</sup> Posner, *supra* note 1, at 257-58 (quoting JAY WEXLER, TUTTLE IN THE BALANCE 66 (2015)).

<sup>16</sup> *Id.* at 259.

<sup>17</sup> Segall, *supra* note 3 (manuscript at 4).

<sup>18</sup> Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 544 (1988).

<sup>19</sup> Timothy Endicott, *The Value of Vagueness*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 1, 16-17 (Andrei Marmor & Scott Soames eds., 2011).

<sup>20</sup> Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 583 (2006).

and ratifiers had no opinion on electronic surveillance.”<sup>21</sup> The framers didn’t know about smartphones, sure, but they knew about property and violations of positive law – categories that mattered for the Amendment, and which apply no less to wiretaps.<sup>22</sup> Similarly, the Fifth Amendment’s framers didn’t foresee the automobile (or even the railroad), but it’s not silly to ask if cars and trains are property under the Due Process Clause (they are).<sup>23</sup> Law deals in abstractions.

Even if Posner is right that we can’t live by text alone, he misses what originalism has to offer. As we understand it, originalism supplies many resources for deciding cases and resolving ambiguities, like precedent and liquidation and common-law backdrops. But it supplies those resources for *internal* reasons, as (falsifiable) consequences of theory and history, not as side-constraints or mere faint-heartedness. Hence, it’s not enough for a judicial opinion to simply avoid disparaging originalism while deciding a case some other way; it has to use a methodology that’s itself pedigreed to and permitted by the founders’ law.

Many judges – almost all, we think – try to do this, or represent that they *should* try. But not all of them succeed.

## THE BITE

These confusions seem to have led Posner and others to a broader misunderstanding of our project. Some readers seem to think that our goal is to make originalism safe for the modern world – neither requiring popular precedents to be overturned,<sup>24</sup> nor threatening the legitimacy of the administrative state.<sup>25</sup>

But for better or worse, we make no such guarantees: We come not to bring peace but a sword. Originalism is a commitment to follow our original law, as lawfully altered; that commitment can and almost surely will

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<sup>21</sup> Posner, *supra* note 1, at 258.

<sup>22</sup> See generally William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821 (2016).

<sup>23</sup> Baude, *supra* note 7, at 2357.

<sup>24</sup> Fleming, *supra* note 5, at 18-19.

<sup>25</sup> Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 759 n.165 (2016).

require rejecting some contemporary practice. Any “meaningful theory . . . has to be willing to spend a little time in exile.”<sup>26</sup>

In our theoretical work we’ve tried to avoid getting sucked into specific historical or doctrinal controversies, as that might detract from our arguments about *theory*. But perhaps the time has come to start naming names. Without having done the research ourselves, we doubt (say) that the original Constitution let states impair contracts on claims of “economic emergency”<sup>27</sup> – or that this power was ever lawfully conferred since. We likewise doubt the pedigree of modern cases on executive agreements;<sup>28</sup> jury numbers or unanimity;<sup>29</sup> counsel comment on failure to testify;<sup>30</sup> one-person one-vote;<sup>31</sup> diversity jurisdiction for D.C. citizens;<sup>32</sup> “commerce” regulation of wholly intrastate activity;<sup>33</sup> administrative adjudication of private rights;<sup>34</sup> and maybe even commandeering state officers<sup>35</sup> or Article III limits on standing.<sup>36</sup> Maybe the cases are right despite our doubts, or at least tolerable under original doctrines of *stare decisis*. (Again, we haven’t done the research.) And maybe more, or more controversial, cases belong on that list. But the fact that originalism brings these cases into doubt, or even disrepute, shows that the theory has real bite.

We see these individual cases as largely irrelevant to the battle over interpretive theory. But their fates may well be implications of that battle, and are all the more reason to take theory seriously.



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<sup>26</sup> Sachs, *supra* note 9, at 2298.

<sup>27</sup> Home Building & Loan Ass’n v. Blaisdell, 290 U.S. 398, 444 (1934).

<sup>28</sup> Dames & Moore v. Regan, 453 U.S. 654 (1981).

<sup>29</sup> Apodaca v. Oregon, 406 U.S. 404 (1972); Williams v. Florida, 399 U.S. 78 (1970).

<sup>30</sup> Griffin v. California, 380 U.S. 609 (1965).

<sup>31</sup> Reynolds v. Sims, 377 U.S. 53 (1964).

<sup>32</sup> Nat’l Mutual Ins. Co. v. Tidewater Co., 337 U.S. 582 (1949).

<sup>33</sup> Wickard v. Filburn, 317 U.S. 111 (1942).

<sup>34</sup> Crowell v. Benson, 285 U.S. 22 (1932).

<sup>35</sup> Printz v. United States, 521 U.S. 898 (1997).

<sup>36</sup> Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).