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Originalism in the Classroom

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It is now twenty-five years since former Attorney General Meese made his famous plea before the American Bar Association for a return to "a Jurisprudence of Original Intention."[1] That event, recently commemorated within the chambers of the United States Supreme Court, took what had been a growing dispute among academics and historians and thrust it into national prominence.[2] Attorney General Meese's call changed the way the Senate and the public looked at the Supreme Court. It derailed the then standard "non-interpretive" methodology of parsing the Constitution—that is, the idea that Constitutional principles behind the text can be freely adapted to modern problems and sensibilities. It engendered new research into virtually every clause of the Constitution. It affected the way many judicial opinions are written. It made Justice Antonin Scalia a household word.

Since the attorney general's speech, the expanding and evolutionary literature on originalism has resulted in uncounted books and articles. But is originalism—including its proponents, detractors, and influence—now part of law school teaching about the Constitution?

[1]Attorney General Edwin Meese III, "Speech before the American Bar Association, July 9, 1985, Washington, DC" (Occasional Paper No. 2, The Federalist Society, Washington, DC, 1986), in *The Great Debate: Interpreting Our Written Constitution* (Washington, DC: The Federalist Society, 2010), 9, http://www.fed-soc.org/resources/id.49/default.asp.

[2]Originalism Symposium and Dinner, Supreme Court of the United States, November 10, 2010, http://www.myheritage.org/news/how-heritages-ed-meese-reshaped-the-debate-on-the-constitution/.

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Originalism Redux?

Despite its notoriety, Mr. Meese's call for originalism was not original with him. In fact, it was the Supreme Court itself that had awakened the idea in three areas of the law: (1) church-state relations, (2) the Due Process Clause of the Fourteenth Amendment (especially relating to criminal procedure), and (3) abortion.

In 1947, in the case of *Everson v. Board of Education*[3] (which found that state reimbursement of transportation costs incurred by religious schools was constitutional), both the majority opinion of Justice Black and the dissenting opinion of Justice Rutledge sought to ground the meaning of the First Amendment's Establishment Clause in Jefferson's and Madison's struggle against religious tax assessments in Virginia.[4] Both opinions asserted that Madison had transferred the views of his *Memorial and Remonstrance against Religious Assessments*, penned in 1785, to his draft in Congress four years later of what eventually came to be the Establishment Clause. Both Black and Rutledge defined the meaning of the Establishment Clause in Thomas Jefferson's "wall of separation" metaphor even though Jefferson had not enunciated it until 1801 in his letter to the Danbury Baptist Association.[5] There immediately ensued strong rebuttals against the views of Black and Rutledge in the academic literature, and the debate continues unabated today.[6]

Also in 1947, Justice Black's dissent in *Adamson v. California* (which held that the Fourteenth Amendment Due Process clause was not binding in state courts in some instances) was an extended essay (including a nearly thirty-page appendix of sources and commentary) on the original understanding of the Fourteenth Amendment.[7] He claimed that the framers of that amendment had intended it to be a vehicle to carry the legal force of the Bill of Rights (or at least the first eight amendments) into the Fourteenth Amendment and have them applicable in every particular to the states:

[3]Everson v. Board of Education, 330 U.S. 1 (1947).

[4]Professor Donald Drakeman contends that the positions of Black and Rutledge had been prefigured in the opinion of Chief Justice Waite in *Reynolds v. United States*, 98 U.S. 145 (1879). Donald L. Drakeman, *Church, State, and Original Intent* (Cambridge and New York: Cambridge University Press, 2010), 21–61.

[5]See Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State* (New York: New York University Press, 2002).

[6]Coming immediately into the fray was J.M. O'Neill, *Religion and Education under the Constitution* (New York: Harper & Brothers, 1949), discussed in Drakeman at 149ff.

[7]Adamson v. California, 332 U.S. 46, 69 (1947), Black, J., dissenting.

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed, its submission and passage persuades me that one of the chief objects that the provisions of the Amendment's first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.[8]

Black's "total incorporation" theory of the Fourteenth Amendment was roundly criticized by Justice Frankfurter, who held that the Due Process Clause of the Fourteenth Amendment incorporated nothing, but had an "independent potency" the referent of which was natural law.[9] Black was nearly beside himself in exasperation with Justice Frankfurter's "due process-natural law formula," which Black found at the root of what he charged was the subjective policy preferences of the pre-1938 Court.[10]

Two years later, Professor Charles Fairman of Stanford Law School (and constitutional law teacher of William H. Rehnquist) wrote his strongly worded rebuttal to Black in his seminal article, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" and the battle for the true original understanding was joined for a half century.[11] The protagonists of each side knew that it was the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, and not the Due Process Clause, that was the issue to be resolved, for any reference to the first eight amendments made in the congressional debates was almost always in relation to the meaning of the Privileges or Immunities Clause. The long-running contest culminated in the decision last year of the Supreme Court in *McDonald v. Chicago*, holding that the Second Amendment's right to bear arms was incorporated against the States by the Due Process Clause of the Fourteenth Amendment.[12] In *McDonald*, as well as in its predecessor *District of Columbia v. Heller* (which had held that the Second Amendment guarantees a personal right to bear arms),[13] the entire set of briefs of the parties and of the numerous amici, the oral arguments, and every opinion in the case was an

[8]Adamson v. California, 332 U.S., 71–72, Black, J., dissenting.

[9]Adamson v. California, 330 U.S. 46, 60, 65, Frankfurter, J., concurring.

[10]Adamson v. California, 330 U.S. 46, at 79, Black, J., dissenting.

[11]Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," *Stanford Law Review* 2, no. 1 (December 1949): 5–139.

[12]McDonald v. Chicago, 130 S.Ct. 3020 (2010).

[13]District of Columbia v. Heller, 554 U.S. 570 (2008).

analysis on what the framers and ratifiers of the Fourteenth Amendment had meant or understood. But on whose history of the original understanding was correct, the majority opinion simply punted. It turned aside the thousands of pages of academic literature and relied instead on the Court's tradition of using the historically unsupportable Due Process Clause as the vehicle for fastening the limitations of the Bill of Rights onto the States. Precedent had triumphed over original understanding.

Under the Warren Court, the Supreme Court took a close alternative (selective incorporation) to Black's total incorporationist theory and combined it with Frankfurter's independent potency concept of the Fourteenth Amendment to involve itself in setting judicially constructed public policy. The Court selectively but aggressively incorporated most of the Bill of Rights into the Fourteenth Amendment through the Due Process Clause (the Privileges or Immunities Clause remained a virtual dead letter despite the burgeoning literature about it), and at the same time, the Court went outside of the Bill of Rights to find new substantive rights, centering around sexual intimacy and reproduction.

The proponents of federalism were much dismayed. The states were increasingly hemmed in, not only by the selective incorporation of various parts of the Bill of Rights, but by the Court's expansive interpretation of the content of the rights, especially in the area of criminal procedure. Although Attorney General Meese noted in his address to the American Bar Association (ABA) that the Court had seemingly become more reasonable in its decisions on criminal law, he nonetheless suggested that an original understanding of the Fourteenth Amendment would not countenance incorporation (under either the Privileges or Immunities Clause or the Due Process Clause).

The third case that triggered a renewed debate over originalism was *Roe v. Wade*.[14] But unlike the *Everson* and *Adamson* opinions, which were explicitly based on an attempted originalist interpretation, Justice Blackmun's opinion in *Roe* was resolutely anti-originalist—not only in that it could not call upon any evidence of original understanding of the abortion right, but also in that it set its face against even the historical tradition of anti-abortion laws. Tellingly, the most significant reaction against *Roe's* lack of reasoning came not from conservative scholars, but from liberal academics. In his oft-quoted and

[14]Roe v. Wade, 410 U.S. 113 (1973).

devastating critique, John Hart Ely stated that Roe was "a very bad decision" because "it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[15]

Former Watergate special prosecutor Archibald Cox agreed, saying that the Court had failed to articulate "a principle of sufficient abstractness to lift the ruling above the level of a political judgment."[16] Louis Lusky, who as clerk to Justice Stone is credited with authoring the famously expansive *Carolene Products* footnote 4,[17] described *Roe v. Wade* as "freehand constitution-making."[18] Laurence H. Tribe wrote at the time, "One of the most curious things about Roe is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."[19] The criticisms of *Roe* did not mean, of course, that liberal commentators had embraced originalism. It did mean, however, that it was morally imperative that the Court utilize a principled basis for its decisions. After *Roe*, originalism could justly take the field as at least one legitimate and principled method of constitutional interpretation, and after Attorney General Meese's speech, it could assert its claim as the most principled form of constitutional analysis.

Originalism before Originalism

The cases of *Adamson*, *Everson*, and *Roe* had engendered an enormous outpouring of historical investigation—both to dispute and to defend the

[15]John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal* 82, no. 5 (April 1973): 947.

[16]Archibald Cox, *The Role of the Supreme Court in American Government* (New York and Oxford: Oxford University Press, 1976), 113.

[17]United States v. Carolene Products Company, 304 U.S. 144, 152 (1938). In footnote 4, Justice Stone noted that although the Court would be deferential towards economic legislation passed by Congress and the states, it would not presume constitutionality in situations where access to the political process was restricted, where fundamental rights were involved, and where particular groups of people were singled out for discrimination.

[18]Louis Lusky, *By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution* (Charlottesville, VA.: The Michie Company, 1979), 14, 263.

[19]Laurence H. Tribe, "The Supreme Court, 1972 Term, Forward: Toward a Model of Roles in the Due Process of Life and Law," *Harvard Law Review* 87, no. 1 (November 1973): 7. More typical of non-liberal scholars' reactions was Judge Richard Posner's statement that *Roe* raises the question "whether the Constitution is no more that a grant of discretion to the Supreme Court to mold public policy in accordance with the Justices' own personal and shifting preferences." "The Uncertain Protection of Privacy by the Supreme Court," in *The Supreme Court Review* 1979 (1979): 173, 199. Justice Blackmun's clerk, Edward Lazarus, wrote frankly in 2002, "As a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible." "The Lingering Problems with *Roe v. Wade*, and Why the Recent Senate Hearings on Michael McConnell's Nomination Only Underlined Them," Legal Commentary, FindLaw, October 3, 2002, http://writ.corporate.findlaw.com/lazarus/20021003.html.

respective majority opinions. Scholars and Supreme Court justices were "doing" originalist research, but what made it the correct method? Clearly, what was needed was a theoretical defense of originalism as a method of interpretation.

Robert Bork provided the opening salvo in what has become the most fecund debate in constitutional interpretation, not just in the last forty years, but since the time of the founding itself. His 1971 article, "Neutral Principles and Some First Amendment Problems," set the terms for what was to come.[20] The initial paragraph of that article provided a descriptive and normative evaluation of the problems besetting the whole of the enterprise of constitutional law:

> A persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not merely in the work of the courts but in the public, professional and even scholarly discussion of the topic. The result, of course, is that courts are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes. In the present state of affairs that expectation is inevitable, but it is nevertheless deplorable.[21]

Bork eschewed the attempt, in this article, to develop "a general theory of constitutional law,"[22] let alone a rigorous notion of originalism (that would come with his later articles and books).[23] But in showing that "a legitimate Court must be controlled by principles exterior to the will of the Justices,"[24] and in searching for the "proper methods of deriving rights from the Constitution,"[25] he undercut the pretentions of the courts and of the commentators at the time to base their decisions on a "non-interpretivist" theory of the Constitution. The significance of Bork's foray ran through the entire developing debate. According to one source, "Neutral Principles and

[20]Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47, no. 1 (Fall 1971): 1–35.

[21]Ibid., 1.

[22]Ibid.

[23]See, for example, Robert Bork, *The Tempting of America* (New York: The Free Press, 1990).

[24]Bork, "Neutral Principles," 6.

[25]Ibid., 17.

Some First Amendment Problems" has been cited in 1,563 subsequent scholarly articles.[26]

In Professor Lawrence Solum's short history of originalism, Bork's commencement of the debate was followed by Justice William Rehnquist's critique of "The Notion of a Living Constitution" in 1976, and the next year by Raoul Berger's broadside, *Government by Judiciary*.[27] The growing corpus of historical investigations into original intent, as well as the articulate attacks on the freewheeling methods of interpretation being employed by judges, impelled a counterattack by the defenders of the status quo. Professor Paul Brest, who actually coined the term "originalism," put forward an articulate critique of originalism in 1980.[28] Thus, by the time Attorney General Meese had made the issue one of national import, the contest had already been joined.

It was because of Brest's critique and that of H. Jefferson Powell,[29] among others, that the theory of originalism underwent internal modifications and renewed rigor.[30] As has often been reported, originalism evolved from notions of the original intent of the framers to that of the ratifiers to "original meaning" to "original public meaning." Today, there are many different schools of originalist theory as well as continuing critics. Although some critics of originalism continue to echo Justice Brennan's unfounded and calumnious criticism of Attorney General Meese's position as "little more than arrogance cloaked as humility,"[31] the debate has moved far beyond Brennan's own projection.

Originalism in the literature today is the major interpretive theory with which all sides contend. True, Ronald Dworkin continues to embrace

[26]See HeinOnLine, http://home.heinonline.org/.

[27]Lawrence B. Solum, "What Is Originalism? The Evolution of Contemporary Originalist Theory," in *The Challenge of Originalism: Essays in Constitutional Theory*, ed. Grant Huscroft and Bradley W. Miller (Cambridge University Press, forthcoming 2011). William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54, no. 4 (1976): 693–706. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Indianapolis, IN: The Liberty Fund, 1977).

[28]Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (1980): 205.

[29]H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98, no. 5 (March 1985): 885–948.

[30]I refer the reader to Lawrence Solum's article for an excellent summary of the development of originalist theory and of the writers who carry on the tradition.

[31]William J. Brennan, Jr., "To the Text and Teaching Symposium, Georgetown University, October 12, 1985, Washington, DC" (Occasional Paper No. 2, The Federalist Society, Washington, DC, 1986), in *The Great Debate: Interpreting Our Written Constitution* (Washington, DC: The Federalist Society, 2010), http://www.fed-soc.org/resources/id.50/default.asp.

"non-interpretivism"[32] (sometimes confusingly termed "interpretivism"). And John Hart Ely's "representative reinforcing" model[33] seeking to expand access to and accountability of the political branches, and drawing upon the *Carolene Products* footnote 4, also continues to have adherents, arguably including Justice Stephen Breyer.[34] But it is originalism that frankly occupies pride of place as the focus of interpretive debate among academics.[35]

The Impact of Originalism

The debate over the bona fides of originalism has been accompanied by an extraordinary range and depth of research into the original meaning of most of the significant clauses of the Constitution. That research has proceeded so far that it is fair to say that this generation of lawyers, judges, and scholars has available more knowledge about the original understanding of the Constitution than any since the founding. The knowledge has proceeded to the extent that former attorney general Edwin Meese, Dr. Matthew Spalding, and I were able to collect such findings into *The Heritage Guide to the Constitution*, in which 108 scholars contributed to summarize and elucidate the original meaning of each clause in the Constitution.[36] (An appendix, which is only a partial listing of books and articles published on the subject of originalism over the past decades, is available on www.nas.org, the website of the National Association of Scholars.)

Not only has originalism fueled one of the most extraordinary outpourings of academic literature in American legal history, it has changed the way attorneys argue and the manner in which the Supreme Court justices formulate their opinions and their justifications. Because of the church-state issue, and because

[32]Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) and *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985).

[33]John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1981).

[34]Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Knopf Doubleday, 2007) and *Making Our Democracy Work: A Judge's View* (New York: Knopf, 2010).

[35]Among the many contributors to the development of an originalist interpretive modality, the following authors have been particularly prominent (this is but a partial listing): Larry Alexander, Jack M. Balkin, Randy E. Barnett, Stephen Calabresi, Robert Clinton, Christopher L. Eisgruber, Richard Fallon, Jeffrey Goldsworthy, Kurt T. Lash, Gary Lawson, Thomas McAfee, Michael W. McConnell, Gary L. McDowell, John O. McGinnis, Robert G. Natelson, Michael Stokes Paulson, Roger Pilon, Saikrishna B. Prakash, Stephen B. Presser, Jack Rakove, Michael B. Rappaport, Richard B. Saphire, Antonin Scalia, Lawrence B. Solum, Lee J. Strang, Keith Whittington. I apologize to those scholars whose names I have inadvertently left out. This list also does not include the dozens of scholars engaged in historical research, the "doing" of originalism.

[36]Edwin Meese, Matthew Spalding, and David Forte, *The Heritage Guide to the Constitution* (Washington, DC: The Regnery Company, 2005).

of the incorporation debate, originalist discourse has become part of the Supreme Court's lexicon of decisions in both areas for half a century. But it has also arisen in other constitutional areas of dispute. Thus, Justices Stevens and Thomas can argue the original understanding of the Qualifications Clause in the Term Limits case.[37] Justices Scalia and Thomas debate whether the history of our struggle with England informs whether the First Amendment was designed to protect anonymous political speech.[38] They also engage each other on the meaning of the Necessary and Proper Clause.[39] Justices Kennedy and Thomas debate what the original understanding of the Twenty-First Amendment is.[40] Justice Scalia defends the rights of defendants according to the original understanding of the Confrontation Clause.[41]

At the same time, originalist arguments in briefs before the Supreme Court have been more common than has been supposed. Of course, most issues before the Supreme Court are statutory, but where there is a constitutional issue, originalist arguments (even if only "law office history" used purely for advocacy purposes) are not unusual. By the 1984–1985 Supreme Court term (the term before Attorney General Meese's ABA address), originalist arguments had already become frequent. That term, there were one hundred fifty cases heard by the Supreme Court, and an unusually high number, sixty-nine, dealing with constitutional questions.[42] In twenty-three of the cases, at least one of the parties made what can fairly be termed an originalist argument.

The resort to originalist arguments continues. In the 2008–2009 term, the Court heard eighty-one cases, of which twenty-nine dealt with a constitutional question. Thirteen cases contained an originalist argument by at least one of the parties. In 2009–2010, the Court heard eighty-four cases, thirty-four of which had a constitutional question presented, though in this last term, only eight cases saw one or more of the parties using an originalist argument. One, however, was the "super-originalist" case, *McDonald v. Chicago*, noted above. Thus, originalism, in one form or another, seems here to stay in the vocabulary of legal arguments before the Supreme Court.

[37]U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

[38]McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

[39]Gonzales v. Raich, 545 U.S. 1 (2005).

[40]Granholm v. Heald, 544, U.S. 460 (2005).

[41]Crawford v. Washington, 541 U.S. 36 (2004).

[42]Among them, twenty-four cases centered on criminal procedure, eight on the Speech and Press Clauses of the First Amendment, and six on the Religion Clauses of the First Amendment (which always seem to elicit an originalist argument).

Originalism in the Classroom

The impact of originalism on constitutional law, constitutional theory, and on the cross-examination of judicial appointees to the federal bench has been dramatic. The popular press regularly publishes articles on "originalism" or its antagonist, the "living Constitution." Nearly every presidential candidate now runs on a platform of the kind of judicial philosophy he would try to enshrine in his judicial appointments. In a dramatic modification of our constitutional structure, presidents are now seen as "electors" of the men and women on the courts who can make or remake our public policy. The extraordinarily influential Federalist Society states as one of its central purposes: "it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."[43] One would think that originalism ought to be part of what students learn when they study law, particularly constitutional law.

In every law school (or virtually every law school) in the United States, "Constitutional Law" is a required course. There is a fairly wide range of constitutional law textbooks available to the instructor. The major titles in the market today are:

Barnett, Randy E. *Constitutional Law: Cases in Context*. New York: Aspen, 2008.

Barron, Jerome A., Dienes, C. Thomas, McCormack, Wayne, and Redish, Martin H. *Constitutional Law*. 7th ed. Newark, NJ: LexisNexis Matthew Bender, 2006.

Braverman, Daan, Banks, William C., and Smolla, Rodney A. *Constitutional Law; Structure and Rights in Our Federal System*. 5th ed. New Providence, NJ: LexisNexis Matthew Bender, 2009.

Brest, Paul, Levinson, Sanford, Balkin, Jack M., Amar, Akhil Reed, and Siegal, Reva B. *Processes of Constitutional Decisionmaking: Cases and Materials*. 5th ed. New York: Aspen, 2006.

Chemerinsky, Erwin. *Constitutional Law*. 3rd ed. New York: Aspen, 2009.

Choper, Jesse H., Fallon, Richard H., Jr., Kamisar, Yale, and Shiffrin, Steven H. *Constitutional Law: Cases, Comments, Questions*. 10th ed. St. Paul, MN: West, 2006.

[43]"Our Purpose," About Us, The Federalist Society for Law and Public Policy Studies, http://www.fed-soc.org/aboutus/.

Choper, Jesse H., Fallon, Richard H., Jr., Kamisar, Yale, and Shiffrin, Steven H. *Constitutional Law: Leading Cases*. 10th ed. St. Paul, MN: West, 2010.

Crump, David Grossman, Eugene, and Day, David S. *Cases and Materials on Constitutional Law.* 5th ed. Newark, NJ: LexisNexis Matthew Bender, 2009.

Curtis, Michael Kent, Parker, J. Wilson, Douglas, Davison M., Finkleman, and Paul, Ross, William G. *Constitutional Law in Context*. 3rd ed. Durham, NC: Carolina Academic Press, 2011.

Epstein, Lee and Walker, Thomas G. *Constitutional Law for a Changing America: Institutional Powers and Constraints*. 7th ed. Washington, DC: CQ Press, 2011.

Farber, Daniel A., Eskridge, William N., Jr., and Frickey, Philip P. *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century.* 4th ed. St. Paul, MN: West, 2009.

Kanovitz, Jacqueline R., Klotter, John C., and Kanovitz, Michael I. *Constitutional Law.* 12th ed. New Providence, NJ: LexisNexis Matthew Bender, 2010.

Kmiec, Douglas, Presser, Stephen B., Eastman, John C., and Marcon, Raymond B. *The American Constitutional Order: History, Cases, and Philosophy.* 3rd ed. Newark, NJ: LexisNexis Matthew Bender, 2009.

Maggs, Gregory E., and Smith, Peter J. *Constitutional Law: A Contemporary Approach*. St. Paul, Minnesota: Thomson/West, 2009.

Massey, Calvin R. *American Constitutional Law: Powers and Liberties*. 3rd ed. Austin: Wolters Kluwer Law & Business, 2009.

Murphy, Walter F., Fleming, James E., Barber, Sortirios A., and Macedo, Stephen. *American Constitutional Interpretation*. 4th ed. New York: Foundation Press, 2008.

Paulsen, Michael Stokes, Calabresi, Steven G., McConnell, Michael W., and Bray, Samuel L. *The Constitution of the United States*. New York: Foundation Press, 2010.

Rotunda, Ronald D. *Modern Constitutional Law: Cases and Notes*. 9th ed. St. Paul, MN: West, 2009.

Shanor, Charles A. *American Constitutional Law: Structure and Reconstruction: Cases, Notes, and Problems*. 4th ed. St. Paul, MN: West, 2009.

Stone, Geoffrey R., Seidman, Louis M., Sunstein, Cass R., Tushnet, Mark V., and Karlan, Pamela S. *Constitutional Law.* 6th ed. New York: Aspen, 2009.

Sullivan, Kathleen M., and Gunther, Gerald. *Constitutional Law.* 17th ed. St. Paul, MN: West, 2010.

Varat, Jonathan D., Cohen, William, and Amar, Vikram David. *Constitutional Law: Cases and Materials*. 13th ed. New York: Foundation Press, 2009.

Weaver, Russell L. Friedland, Steven I., Hancock, Catherine, Scott, Wendy B., and Lively, Donald E. *Constitutional Law: Cases, Materials, and Problems.* 1st ed. New York: Aspen, 2006.

As should be expected, the bulk of the texts focus on "doctrine," that is, the major applications of constitutional law as determined by the Supreme Court. All rely on the traditional Langdellian method of case analysis. Commentary, other note cases, historical references, and problems can also be found. Originalism may appear in particular opinions of the Justices, in the presentation of historical materials, and explicitly as a method of interpretation, but on the whole, cases and opinions are what students read. Obviously, for originalism to be part of the education of the constitutional law student, the instructor must broach the subject. The question is, how much do modern constitutional law texts invite the instructor to deal with the subject either within the cases or in the interstices between the cases? How much attention do the texts pay to originalism as an interpretive methodology?

A longitudinal analysis of constitutional law texts reveals that originalism has gained more specific attention by many authors and editors, especially in the 1980s and 1990s. But, in the main, constitutional law texts remain doctrinally focused, as arguably they should be, for law schools are, for the most part, training lawyers not academics. Yet, as part of a higher education enterprise since the nineteenth century, law schools seek to train students to become *educated* lawyers. Is originalism now part of the education of lawyers?

At present, constitutional law texts fall into three groups. The first group remains thoroughly focused on doctrine with only brief and occasional references to historical or interpretive materials. The second group is also focused on doctrine, but over the years has made the issue of interpretation, including originalism, and the role of history a more pertinent part of the presentation of the material. The third group treats interpretation as the central question, and either accords originalism a prominent or predominant place, or presents historical materials that speak to an originalist point of view.

Among the top ranked fifty law schools, six authors account for two-thirds of all sales in the 2010–2011 academic year, three of whom have over half of the market share:

Chemerinsky	(Aspen)	18.5%
Stone	(Aspen)	18.2%
Sullivan	(Foundation)	16.6%
Maggs	(West)	5.0%
Kanovitz	(LexisNexis)	4.8%[44]
Choper	(West)	4.1%[45]

[44]Although Kanovitz's text has been reported as having 4.8% of the market, only one section of a constitutional law course has adopted it—which leads to the assumption that because her work is more of hornbook summary, it might have been assigned as secondary supplementary reading rather than as a primary text, nonetheless boosting her sales.

[45]These figures were provided to the Cleveland-Marshall College of Law Library by the publishing representative of Wolters, Kluwer Law & Business (Aspen) publishing company, February 14, 2011. The figures for the number of sections that assigned the various texts (rather than the volume of sales) are somewhat different:

Textbook Series	Author	Edition	# of sections used at top 50 law schools
Constitutional Law	Sullivan	17th	30
Constitutional Law	Stone	6th	27
Constitutional Law	Chemerinsky	3rd	21
Processes of Constitutional Decisionmaking: Cases and Materials	Brest	5th	12
Constitutional Law: Cases in Context	Barnett	1st	6
Constitutional Law: Cases and Materials	Varat	13th	6
Constitutional Law: Cases, Comments, Questions	Choper	10th	5
Constitutional Law in Context, Volume 1	Curtis	3rd	4
Constitutional Law in Context, Volume 2	Curtis	3rd	4
Constitutional Law: A Contemporary Approach	Maggs	1st	4
Constitutional Law	Barron	7th	3
Constitutional Law: Leading Cases	Choper	10th	3
Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century	Farber	4th	3
American Constitutional Law: Powers and Liberties	Massey	3rd	3
Modern Constitutional Law	Rotunda	9th	3
American Constitutional Law: Structure and Reconstruction: Cases, Notes, and Problems	Shanor	4th	3
Constitutional Law for a Changing America: Institutional Powers and Constraints	Epstein	6th	2
Constitutional Law	Chemerinsky	2nd	1
Constitutional Law	Kanovitz	11th	1
American Constitutional Interpretation	Murphy	4th	1
Constitution of the United States	Paulsen	1st	1
Constitutional Law	Sullivan	16th	1
			Total: 144

This survey was compiled from the number of bookstore adoptions as researched by Beth Farrell, librarian, Cleveland State University College of Law Library.

Erwin Chemerinsky's *Constitutional Law* (first in sales volume, adopted in twenty-two sections) specifically deals with methods of constitutional interpretation in its presentation of doctrine. The author gives attention to the framers' intent and the historical context of a number of major issues, including judicial review, presidential power, the incorporation of the Bill of Rights, the First Amendment, and economic liberties. Professor Chemerinsky is not a partisan of originalism, but he understands that it is part of the central question of what is an appropriate method of constitutional interpretation.

The Geoffrey Stone *Constitutional Law* text (second in sales volume, adopted in twenty-seven sections) has significant historical introductions to the main areas of constitutional law, including references to about thirty originalists. The book discusses the "history and theory" of the Constitution, natural law, formalism and realism, the English roots behind the First Amendment, and the history and philosophy that lay at the base of notions of freedom of speech. In the 1986 first edition, there is a brief mention of "interpretivism vs. non-interpretivism." In the1991 second edition, ten pages are devoted to methods of interpretation, including originalism and non-originalism. The third edition reduces the treatment slightly.

Sullivan and Gunther's *Constitutional Law* (third in sales and adopted in thirty-one sections) is heir to the longest running constitutional law textbook series in law school history, beginning with Professor Noel Dowling in 1937. Perusing the eighth through the seventeenth editions (1970 to 2010), one finds increasing attention to historical materials beginning more particularly in the ninth edition and continuing at the same level to the present, though the total pages devoted to historical background are small in relation to a text that exceeds fifteen hundred pages. The subjects that the authors give some historical reference to are judicial review, the federal system, and individual rights. Originalism as an interpretive method gains little mention. It may be that the antecedents to the current edition, which arose long before originalism became a dynamic of constitutional interpretation, have kept the Sullivan and Gunther text centered on doctrine and the cases. Nonetheless, sprinkled throughout the text are more than three dozen references to originalist authors or topics.

We can see, therefore, that of the three top-selling texts, two give originalism a respectable hearing. Sullivan and Gunther, on the other hand, remains more or less grounded firmly in doctrine. Of the next three, Gregory Maggs's *Constitutional Law: A Contemporary Approach* has a significant

historical introduction and a section dealing with interpretation, including originalism. The cases are effectively interspersed with questions calling upon the student to make comparisons, analyses, and interpretations. Jacqueline Kanovitz's *Constitutional Law*, on the other hand, is structured like a hornbook and admits of virtually no interpretive treatment, in contrast to Maggs. Jesse Choper's *Constitutional Law: Cases, Comments, Questions* (adopted by five sections) had virtually no interpretive materials in its third edition in 1970, obviously before originalism as a method had come upon the scene. In the later editions, some interpretive references are included, usually as brief notes following major cases or major constitutional issues, such as abortion or desegregation. Interpretive treatment is still only episodic, though the text does cite the works or comments of over thirty authors involved in originalism.

Among the other texts on the market, one finds a number of them that, as with Sullivan and Gunther, remain centered on doctrine and case analysis. *Constitutional Law: Cases and Materials*, by Jonathan Varat (adopted by six sections) does deal with original understanding in interpreting the Second Amendment and the Equal Protection Clause. Nonetheless, its primary focus on doctrine leads it to give the opinions of originalists like Clarence Thomas little exposure. Although in his writings, Calvin Massey supports originalism as the best method of constitutional interpretation, his textbook, *American Constitutional Law: Powers and Liberties* (adopted by three sections), is designed to be somewhat more concise than others in the market, and necessarily limits the amount of interpretive materials. Similar, another originalist, Ronald Rotunda, has chosen not to include a significant amount of interpretive material or historical sources in *Modern Constitutional Law: Cases and Notes* (adopted by three sections). Another text that avoids any significant interpretive material in face of presentation of doctrine is Russell L. Weaver's *Constitutional Law: Cases, Materials, and Problems*. Jerome Barron's *Constitutional Law* (adopted by three sections) has a small historical and interpretive section that barely touches the surface of the subject. The rest is pure case law and doctrine. Charles Shanor's ten-page treatment in *American Constitutional Law: Structure and Reconstruction: Cases, Notes, and Problems* (adopted by three sections) is also minimal.

One group of texts treats interpretive methods, including originalism, extensively. In addition to Chemerinsky's and Stone's works respectively (above), a particularly serious effort has been the work by Paul Brest with its

appropriate title, *Processes of Constitutional Decisionmaking: Cases and Materials* (adopted by twelve sections). Since the first edition in 1975, Professor Brest and his coauthors have made the debate surrounding originalism a consistent motif in their treatment of constitutional law. This is, of course, not surprising, as Brest is one of originalism's most famous critics and the man who coined the neologism. Daniel Farber's *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century* (adopted in three sections) includes a modest amount of interpretive material, including original intent theories, often in a critical light. David Crump, *Cases and Materials on Constitutional Law*, also includes a respectable amount of interpretive material. The longest textbook on the market is the two-volume *Constitutional Law in Context* (adopted in four sections) by Michael Kent Curtis. Although Curtis is not a devotee of originalist theory, the "context" of his book is history. Rather than an extensive discussion of interpretive method, Curtis loads into his treatment of the cases a heavy dose of historical materials, necessitating perforce an originalist perspective.

Other texts embrace originalism directly. They include the three editions of Douglas Kmiec, *The American Constitutional Order: History, Cases, and Philosophy*; Michael Stokes Paulsen, *The Constitution of the United States*; Randy E. Barnett, *Constitutional Law: Cases in Context*; and Daan Braverman, *Constitutional Law: Structure and Rights in Our Federal System*, which does not include much interpretive work on originalism, but contains extensive historical materials. Of these four, Barnett has been adopted by six sections of constitutional law in the top fifty law schools, Kmiec one, and the rest none at all.

We can see, therefore, that the notion of an originalist perspective on the meaning of the Constitution and its allied interest in historical materials has made headway in a large number of assigned texts. Seventy-nine sections of constitutional law courses taught in the top fifty law schools have adopted constitutional law texts that, in my estimation, accord originalism or history serious consideration. Fifty-eight sections relied on texts in which originalism has little overt presence.

That originalism may be included explicitly in a textbook is no guarantee that it will be made an object of study in the classroom. Conversely, the fact that originalism is not within a textbook does not mean that an instructor will not apply it during classroom instruction. Finding out how much of the interpretive method of originalism is actually spoken about or taught is an

undertaking of enormous complexity and clearly beyond the scope of this article.

However, in response to enquiries I made on listserves dealing with constitutional law and constitutional history, I received a number of interesting and enlightening replies. Not surprisingly, those who made the effort to reply were more likely already engaged in the subject, both supporters and detractors.

A number of instructors attempt an in-depth treatment. For example,

> I spend quite a bit of time on originalism and other interpretive methods (especially "living constitutionalism") when I teach Con Law I (Structure) and II (Individual Rights). With almost every major doctrine and case, I ask the students if the Court's decision has any basis in the historical Constitution (the answer is typically no). I would estimate that I spend about 15–20% of my class time on originalism broadly defined (including analysis of historical materials and classical political/constitutional theory).

> The answer is a lot. It enters our discussion on virtually every case. Indeed, I cannot think of a day when we fail to discuss original meaning. The question to which we come back time and again is how to determine it.

> [I]t is possible for "originalism" to get a much more fair presentation in Constitutional Law courses than it was previously. Certainly, "originalist" questions and methodology remain "on the table" throughout my course.

> From the first day in Constitutional Law I teach my students to identify the five types of legal argument (text, intent, precedent, tradition, and policy). As the semester progresses they learn to create arguments of each type—each type of argument is based upon a different information set, a different category of evidence.

> Students seem much more disposed toward originalism than their instructors or textbooks, or the judges, and they are not happy about that. They want to be legal idealists, not legal realists, and resent what they perceive as scholarly indoctrination masquerading as instruction. They have little sympathy for stability in jurisprudence, and are often willing to throw out 200 of precedents if that is what it takes to get it right.

Most responders to my inquiry admitted finding it difficult to address the subject adequately because of time constraints and the limited availability of sources in most textbooks:

> I introduce originalism, along with other theories, at the beginning of my Con Law I class, and try to focus student attention on the interpretive method that is used by the Court in the cases they encounter. I would say that consideration of originalism is a secondary theme in my Con Law course, but I do make sure they know about it and think about it and other methods in deciding how best to apply the Constitution in our time.
>
> We discuss these issues pretty extensively in Con Law I. The difficulty is that cases in most casebooks are so cut down that they omit much of the historical material; it's hard to assign 200 pages of historical debate in the Term Limits case, for instance, but hard to assess whether originalism is really workable (much less who's right about the relevant history) if you don't slog through it.
>
> I'll add teaching originalism is quite difficult given that most existing textbooks, political science or otherwise, have very little that would inform students on what constitutional language meant in 1789.
>
> I advert to theory, but basically teach Con Law as a straight doctrinal course.
>
> I would say "a little, but not much." In Constitutional Law I, our required first-year course, the pressure to cover doctrine is substantial, and many of the students aren't really ready for con law theory.

Other professors owned that they found it difficult to wean students from their previous political prejudices:

> The originalist question looms large in the Conlaw course I teach. But students typically take a stance on the question early on (or even before they enter the class), making the classroom discussion more of a defense of a position previously taken.
>
> My impression is that most law students have heard of "originalism" (pro and con), but have the same confused sense of it (pro and con) that most law professors do.

The bulk of respondents, however, admitted that with the necessary emphasis on doctrine, originalism could only be occasionally interjected, unless one were teaching a specialized seminar:

> The pressure to cover doctrine is substantial, and many of the students aren't really ready for con law theory. So they end up with little exposure to originalism.

> [N]ot in any systematic way. Usually we talk about it in the context of a particular contemporary legal question, and we talk some about the role of the original understanding in answering the question. But I don't treat interpretation as a stand-alone issue.

Some others thought originalism wrong or misleading or incomplete or just plain nonsense, or, as Justice Brennan charged, created to advance a political agenda:

> It has proven to be devoid of content and a shell for conservative and sometimes libertarian agenda. As it always was intended to be. It has done great harm socially in polarizing the population by giving them an illusion to rally around—as specious, disingenuous theory as has ever been propounded. And knowingly so.

> Cheap date. Promotion is for politically instrumental purposes. Should say: "living constitution mace." Doesn't have hardly any influence, I imagine, in philosophy of law classes. Or, if it does, it probably plays the same role that skepticism plays—to get the kids practicing their karate chops. This is to say nothing of it's [*sic*] social phenom. Very effective political nonsense.

> There is nothing that can come of the expression "the original meaning of language" other than confusion and nonsense.

> [W]e would not want to leave students with the implicit assumption that the part is the whole or that they are gaining an originalist understanding of The Constitution—or even really of the Founder's Constitution, because that assumes founding stopped in 1791, which in reality it did not.

> The restrictions on the federal government in the name of originalism are made up history, like putting Barbie dolls into the archeological dig.

Conclusion

Compared to the contest over constitutional interpretation in the literature, and certainly in contrast to the passions evinced by the professoriate, constitutional law textbooks are fairly staid and neutral. They are a canvas of

doctrine, with some interpretive suggestions, allowing the teacher to elucidate, criticize, or ignore the originalist perspective as is his wont.

Still, we can say that as in the opinions of the Supreme Court justices, in the sometimes vitriolic debate in the literature, and in the slaphappy world of the blogosphere, originalism in the classroom is praised, or ridiculed, or vilified, or studied with respect. In other words, originalism is alive and well.