

## Why Should Anyone Be an Originalist?

di Jeffrey A. Pojanowski

**Abstract:** *Perché dovremmo essere tutti originalisti?* – This essay offers a defense of originalist constitutional interpretation grounded on the moral purposes of positive law. This essay draws on the natural law tradition to argue that a reasonably just set of constitutional rules merits the interpreter’s moral obligation. This is so not because a given constitution is perfectly just, nor because the constitution “just is,” but rather because a practically reasonable person should promote the moral benefits of a posited and durable, framework of cooperation that passes the threshold of moral acceptability. And, because practical reason underdetermines what kind of constitution a polity should choose, many modern constitutions clear that threshold.

**Keywords:** Natural law; constitutional interpretation; originalism.

### 1. Introduction

For many lawyers around the world, originalist constitutional interpretation is a phenomenon peculiar to the United States. Like NFL football, it seems a bizarre, perhaps barbaric, legal game that makes only rare appearances abroad.<sup>1</sup> Or, to the extent originalism is beginning to spread beyond the United States,<sup>2</sup> non-Americans may regard it as a kind of jurisprudential McDonalds—an unhealthy export that threatens to swamp more refined, local alternatives.

Professor Larry Solum’s statement before the Senate Judiciary Committee does not speak to originalism’s reach abroad, nor does he purport to argue that non-Americans should give originalism a fair hearing. Yet his normative defense of originalism can offer those outside the United States food for thought as they

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<sup>1</sup> See, e.g., G. Letsas, *Strasbourg’s Interpretative Ethic: Lessons for the International Lawyer*, 21 *European Journal of International Law*, 2010, 509 (stating the European Court of Human Rights “has been very dismissive of originalism”); S. Brittain, *The Case for an Originalist Approach to Constitutional Interpretation in Ireland*, 13 *Trinity College Law Review*, 2010, 71 (noting, somewhat ruefully, Ireland’s “living document” approach to constitutional interpretation).

<sup>2</sup> See J. Allan, *Australian Originalism Without a Bill of Rights: Going Down the Drain with a Different Spin*, 6 *The Western Australian Jurist*, 2015, 1-32 (“Outside the US it is only in Australia that originalism still has a pulse.”); Y.C. Tew, *Originalism at Home and Abroad*, 52 *Columbia Journal of Transnational Law*, 2014, 780 (identifying originalist practices in Malaysia and Singapore). Canada, home of its own brand of American football league, is generally understood to be hostile to originalism, but recent scholarship suggests that conclusion may be overdrawn. See, e.g., B. Oliphant, L. Sirota, *Has the Supreme Court of Canada Rejected ‘Originalism’?*, 42 *Queen’s Law Journal*, 2016, 107 (noting that, while Canadian courts are hostile to originalism, the jurisprudence is not necessarily incompatible with originalism).

consider interpretation of their own foundational documents. This brief contribution builds on Professor Solum's defense of originalism and presents what I think are the most compelling reasons to embrace originalism—or to reject it. Given the forum, I will also endeavor to offer reasons that are germane to scholars of constitutionalism beyond the U.S. context.

My argument, which dovetails with but is not identical to Professor Solum's, is grounded on the moral purposes of positive law. Although originalism is often associated with a kind of arch positivism, my argument draws on the natural law tradition to argue that a reasonably just set of constitutional rules merits the interpreter's moral obligation. This is so not because a constitution is perfectly just, nor because the constitution "just is," but rather because a practically reasonable person should promote the moral benefits of a posited and durable, framework of cooperation that passes the threshold of moral acceptability. And, because practical reason underdetermines what kind of constitution a polity should choose, many modern constitutions clear that threshold.<sup>3</sup>

## 2. Arguments For Originalism: Three Imperfect Starts

Before moving to my positive argument, I would like to flag three important, but I believe imperfect, defenses of constitutional originalism. The first kind of argument is conceptual: legal *interpretation* is by its nature originalist in character. If one seeks to understand what a text means, one must identify its original public meaning or what its authors' originally intended to communicate.<sup>4</sup> Reading that seeks any other kind of meaning (such as, "what makes this text the best it can be today?") is not interpretation, but rather re-authoring by the reader. Re-authoring may be morally permissible, and not all constitutional law is interpretation, but to the extent there is interpretation, it is by definition originalist.<sup>5</sup> Yet even if we accept this controversial definition of what "interpretation" *is*, one needs a further argument for why originalist interpretation *ought* to reign supreme in constitutional law, as opposed to doctrinal development over and above the original law.

A different reason is normatively particular. To the extent that an original constitution contains morally appealing legal propositions, it is good for courts to be originalist about them. We can call this the Happy Constitution theory of

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<sup>3</sup> For an extended argument along these lines, see J.A. Pojanowski, K.C. Walsh, *Enduring Originalism*, 105 *The Georgetown Law Journal*, 2016, 97. This contribution draws heavily on that article's discussion.

<sup>4</sup> Originalists differ on the proper interpretive target. Many, like Professor Solum (and Justice Gorsuch), seek to identify the original public meaning of the text. Others, like Professor Larry Alexander, look for the original intended meaning of the text authors. See, e.g., Larry Alexander, *Originalism, The Why and the What*, 82 *Fordham Law Review* 2013, 539.

<sup>5</sup> And to the extent one is not originalist about the constitution, one is likely to be originalist about something else, such as non-originalist judicial opinions. Or at least one will be if one seeks to engage in a form of legal reasoning that is not identical with first instance moral reasoning.

originalism.<sup>6</sup> Critics sometimes argue that originalism is a marriage of convenience for American conservatives who prefer a smaller, decentralized government. Whatever the basis of that charge—and it is clearly not applicable to Professor Solum—an originalism that depends on a particularized moral assessment of the original constitution rests on shaky ground. Such American originalists would have no principled argument against non-originalists who like a larger, more activist federal government. From this perspective, originalism is more a political project than a theory of interpretation. That would be awkward for a movement that prides itself on the rule of law and judicial neutrality.<sup>7</sup>

A third reason is more legalist in character. Constitutional law does not consist only of primary rules. Rather, there are second-order rules of interpretation, and if that law of interpretation<sup>8</sup> points officials towards originalism, courts should follow the law and be originalists.<sup>9</sup> This angle of argument, which draws on H.L.A. Hart's understanding of secondary rules, adds a welcome level of sophistication to originalist theory. But this positivist analysis also has limits. First, one has to conclude that the positive law of interpretation is in fact originalist. That is contestable in the United States and, to the extent it is false in jurisdictions abroad, the positivist argument does not offer non-U.S. courts and scholars any reason to be originalist.<sup>10</sup> Furthermore, even if the positive law of interpretation is originalist, an interpreter needs moral reasons to persist in being originalist. Positive law changes all the time, and the secondary rules of interpretation may be particularly prone to shifting right under our noses. As with the conceptual argument above, one needs to move from the *is* to the *ought*.

### 3. A More General Normative Argument for Originalism

In recent work, my co-author and I have offered a more general, normative argument on behalf of originalist constitutional interpretation.<sup>11</sup> Rather than embracing legal positivism or relying on American exceptionalism, we offer a defense grounded in classical natural law reasoning—one that may be more generalizable to constitutionalism beyond the United States.

The argument begins with recognizing that communities of any substantial size and complexity require a legal framework for cooperation. One could say that having such a framework is a moral imperative necessary to promote the common

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<sup>6</sup> Cf. H.P. Monaghan, *Our Perfect Constitution*, 56 *The New York University Law Review*, 1981, 353.

<sup>7</sup> See S.E. Sachs, *Originalism as a Theory of Legal Change*, 38 *Harvard Journal of Law & Public Policy*, 2015, 817, 819 (“If originalism is just a law reform project, it loses much of its rhetorical force.”).

<sup>8</sup> Cf. W. Baude, S.E. Sachs, *The Law of Interpretation*, 130 *Harvard Law Review*, 2017, 1079.

<sup>9</sup> See, e.g., W. Baude, *Is Originalism Our Law?*, 115 *Columbia Law Review*, 2015, 2349; Sachs, *supra* note 7.

<sup>10</sup> To be clear, Professors Baude and Sachs do not claim other jurisdictions should adopt originalism. Baude argues that his positivist theory helps explain why American originalism is a global outlier. Other countries simply have different positive laws of interpretation.

<sup>11</sup> See Pojanowski and Walsh, *supra* note 3. This section draws on that discussion extensively.

good and protect human rights. A legal system is not the only institution that can promote those goals, but it is a necessary one, for some tasks require the shared, coordinated effort that individual initiative, community custom, or spontaneous ordering cannot provide. A constitution, written or unwritten, is the necessary foundation for this legal framework of cooperation. Therefore, there is at least a *pro tanto* argument that a practically reasonable person should support the legal system, and thus its constitution.<sup>12</sup>

Now, this does not mean every conceptually possible constitution deserves respect and support. Because human law exists to serve moral purposes, a legal regime that sufficiently undermines the common good and human rights does not merit any reasonable person's adherence. The interesting questions, however, concern imperfect constitutions—not hypothetically perfect or morally monstrous ones. A powerful strain of the natural law tradition teaches that, while moral principles provide general guidance and side constraints, many practical questions concern matters of judgment that the natural law may guide, but does not precisely determine. People of good will may disagree within a range of reasonableness and even if competing answers are mutually incompatible, it is possible that neither one would violate more permanent moral principles.

This is especially so for questions facing framers of constitutions. The natural law may not speak clearly on unicameral versus bicameral legislatures; presidential versus parliamentary governance; whether to have an entrenched bill of rights versus legislative protection; the exact list and precise contours of entrenched bills of rights; the role of the courts in balancing competing rights; the variety and selection of government officials; the extent of direct versus representative democracy; the extent of delegation to administrative agencies, and the like. Within the range of reasonableness—and as a matter of humility, any one person might want to be generous in defining that range—there are many permutations of acceptable constitutions. At the level of political morality, it may matter more than a polity chooses one of the acceptable alternatives, as opposed to getting the precisely right one (if there can be such a thing). Thus, even if one has moral qualms about particular provisions of the constitution, any constitutional regime that passes a threshold of moral respectability has a moral claim to our support and respect.

For this legal choice to be efficacious, however, it must be known and reasonably durable. Were the constitution's legal norms treated as merely good advice, a polity would not enjoy the moral benefits that positive law exists to provide in the first place. This does not mean people should not seek to change their constitutions, though it may be unreasonable to make a good-enough constitution too easy to amend. Rather, one should respect the (morally acceptable) constitution until it is changed by the means provided for by its framing. This is where originalism figures most prominently. If one does not seek to identify and treat the original law of the constitution as binding, one imperils the moral benefits

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<sup>12</sup> There is a thorny question about whether the coordination benefits are sufficiently great that the obligation extends to the entire system, as opposed to particular legal commands. For an argument that it does, see J.M. Finnis, *Law as Co-ordination*, 2 *Ratio Juris*, 1989, 97. For a more skeptical take, see J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, 1994, 325–54.

constitutionalism exists to offer the polity. We are back to square one, adrift in a sea of competing, unentrenched norms.

This defense of originalism incorporates and completes the three imperfect defenses of originalism I flagged in Part I. First, it agrees with the conceptual argument that the core of “interpretation” involves identifying the original law created by the legal text, but it also provides a moral reason why one ought to seek that meaning and treat it as superior to putative constitutional norms inconsistent with that original law.<sup>13</sup> Second, it is a normative argument for originalism, but not because the particular constitution’s norms fit the interpreters’ ideals as a matter of political morality. The second-order moral benefits of entrenched constitutional law are sufficiently strong, and the realm of reasonable disagreement is sufficiently broad, that an interpreter should be faithful to a constitution she has substantial first-order disagreements with so long as it passes a threshold of moral acceptability. Finally, it bolsters arguments grounded in the law of interpretation. To the extent there is theoretical disagreement about whether originalism is our law of interpretation, it gives normative reasons for resolving that dispute in an originalist direction; if originalism is in fact our law of interpretation, it gives us reasons to continue persist along those lines.

#### 4. Limits and Implications

This argument does not determine what outputs an originalist system of constitutional law will generate. Originalism in the U.S. context might suggest a very limited national government, whereas an originalist approach to European constitutions may well require an activist social democratic state. Nor does it determine the role of the court. The original constitution may suggest a limited role for judicial review or it could delegate courts substantial power to create and enforce rights. To answer these questions, one has to do the lawyers’ work of identifying what the original law of the constitution prescribes. All this theory tells you is that a practically reasonable interpreter of the constitution should be faithful to that original law unless it falls below a threshold of moral unacceptability.<sup>14</sup>

From this perspective, one can reject originalism for a few reasons. First, one might think that a particular constitution is in fact morally unacceptable. At risk of being impertinent, I would aver that most non-U.S. critics of originalism do not live under such regimes; in fact, they are likely to see their constitutions as morally superior to that of the United States, where originalism is most popular. It should be *easier* for them to be originalists abroad. Of course, these non-originalists’ moral theories may be more demanding than the moderate strain of the natural law tradition I have been invoking. Non-originalism, therefore, might

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<sup>13</sup> This does not entail that all constitutional law consists of identifying original intent or public meaning. Implementing doctrines and gap-filling *consistent* with the original law of the constitution may be permitted or perhaps even required.

<sup>14</sup> Nor does this theory tell a court what to do about non-originalist precedent on the books or what do in the face of constitutional silence. Perhaps the constitution will offer some guidance on this question, but a more fleshed out theory of adjudication requires additional, difficult work.

be founded on a belief that the range of reasonableness is far narrower, that questions of political morality admit of quite precise answers, and that constitutional interpreters can be trusted to identify them. This is a hard question of meta-ethics, but I wish such believers good luck on a Kantian quest I would be hesitant to undertake.

Second, and relatedly, one might reject originalism if one values the systemic, moral, rule-of-law benefits of an entrenched constitution less than the benefits of particularistic legal decisionmaking. From that angle, developing constitutional law exclusively through morally infused, case-by-case reasoning sometimes inspired (but never bound by) original law is simply a morally better way to run a system. Any ensuing uncertainty would be worth the cost, especially if one is unsure that original law is any more determinate. Again, this may reflect an implicit faith in the determinacy of particular questions of political morality, or at least a deeper trust in constitutional interpreters' ability to identify and expound shared, principled, and stabilizing norms.<sup>15</sup> The less you share such a faith, however, the more appealing the prospect of settling for the original settlement. Perhaps we should not be surprised that originalism has flourished in the United States, a nation whose intellectual and political traditions are more skeptical of ambitious philosophical theorizing than its Continental counterparts.

Finally, one reject originalism for, well, originalist reasons. If the original law of the constitution's provisions delegated decisionmaking authority to subsequent interpreters, or if the original "law of interpretation" that formed the backdrop of the constitution's framing were non-originalist, it is *originalist* to treat the constitution as a living document.<sup>16</sup> A person who, like me, values stability more and trusts courts less may not be happy with such a choice. Yet my own reasoning indicates (i) that I have to accept such a regime unless it falls below a minimum threshold of moral acceptability *and* (ii) that such a threshold cannot be too demanding. I am skeptical that the history will take this originalist non-originalism line of argument very far with respect to the United States constitution, but it is hardly unimaginable that other constitutions could be very different in this respect. In the face of such proof, a proponent of my argument has to be open to the possibility of accepting living-tree interpretation for originalist reasons.<sup>17</sup>

## 5. Conclusion

Originalism, as a matter of legal and political theory, is not irresistible, but it is more powerful than many of its detractors suspect. Originalism does not depend on

<sup>15</sup> A regular consumer of, say, the European Court of Human Rights' jurisprudence might want to ask whether such work product regularly emanates from Strasbourg.

<sup>16</sup> See Sachs, *supra* note 6, at 858 ("The Constitution, and the Founders' legal system as a whole, was only as crisp and determinate as it actually was....In the absence of a clear modern consensus for this view, it seems more consistent with our current conventions to look to our original law, and to the rules of change—precise or flexible—that it actually contained.").

<sup>17</sup> Of course, if that delegation of authority to interpreters includes the power to make the constitution more rule-like and less jurisprudential, it would be acceptable for an originalist like myself to encourage judges to shape the living tree in that very direction. The legal jiu-jitsu can go both ways.



a cartoonish version of arch-positivism or a particularly American kind of political conservatism. An appeal to natural law in defense of originalism may at first glance appear grandiose or have a whiff of moral absolutism. Yet the form of natural law that underwrites this defense is far more modest than the ambitious moral theorizing lurking behind many rejections of originalism. The moral benefits of identifying and being faithful to original positive law suggest that originalism is a theory to take seriously in the United States and beyond.