

Originalism Then and Now

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Eric J. Segall, *Originalism as Faith*.
Cambridge University Press,
254pp., \$25 paper.

Jonathan Gienapp, *The Second Creation:
Fixing the American Constitution in the
Founding Era*. Belknap Press of Harvard
University Press, 464pp., \$35 cloth.

ORIGINALISM IS AN APPROACH to constitutional interpretation that aims to constrain the discretion of judges by tethering them to the meaning the Constitution had for those who wrote and ratified it (and likewise with later amendments). Always latent in American constitutionalism, it re-emerged in the 1970s to challenge the results-oriented, ahistorical, and politicized “living constitution” approach used by the Warren and early Burger Courts to “update” the Constitution to their own views of contemporary norms. The first wave of originalists said that the original Constitution did not mean what these Courts had claimed in some of their most far reaching and liberal-reformist opinions. Led by figures such as Raoul Berger and Robert Bork, originalists wanted the Court

to do less, and to defer more to legislative majorities. Binding judges to the original meaning would provide a firmer and more objective basis for decisions than their own views of what the times required. First-wave originalists believed this method would limit the Court’s reach into the nation’s most divisive political issues, and was further necessary to maintain the separation of powers and the rule of law.

In *Originalism as Faith*, Eric J. Segall argues that this form of originalism gave way to what is now called “new originalism.” Eschewing the older posture of judicial deference, it claims authorization in the past for aggressively “activist” assertions of judicial review in the service of conservative political goals. A sizeable portion of the book is devoted to exposing the unhistorical, non-originalist bases of judicial decisions made by various self-described originalists.

Another favorite tactic of the new originalists, much decried by Segall, is to distinguish between “interpretation” as a search for original meaning, and “construction” as the contemporary, value-laden, and ultimately political act of creating constitutional meaning when authentic originalist interpretation is impossible or indeterminate. The interpretation/construction distinction was first offered by the political scientist Keith E. Whittington as a way to describe and guide the efforts of *nonjudicial* political actors who must govern in the absence of clear original meaning. Segall argues that, in the hands of conservative and libertarian judges and law professors, construction now licenses discretionary judicial decision making that is designed to achieve desired ideological outcomes. Accordingly, he concludes that the new originalism has become indistinguishable from the “living constitutionalism” that old-style originalism had emerged to contest. This charge is one that constitutionalists should take seriously. To the extent that it

is true, originalism is revealed to be no more judge-proof than any other method of interpretation: any method can be insincerely manipulated. But if originalism, the one approach claiming fidelity to the actual Constitution, is used as mere cover for favored results, then the hypocrisy of its traducers is beyond even the normal lawyerly sins.

originalism has mistakenly proceeded on “faith” in the chimeras of objective judicial review and the rule of law.

To his credit, Segall recognizes that his view raises a momentous question: why should citizens obey courts? Why obey what is said in the name of the law and the Constitution once we know that judges are really just doing what they think is right?

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But is Segall a constitutionalist? He is sympathetic to the “strong deference” shown by first-wave originalists toward legislatures: in the absence of overwhelmingly clear original meaning, he urges, majorities should govern and courts should stay out of the way. Nevertheless, he accepts that such a return to the separation of powers and a more soundly democratic constitutionalism is well-nigh impossible because the cat of modern judicial power has been out of the bag for over a century. At a deeper level, Segall professes himself a “legal realist.” Within American constitutional discourse, this term signifies the view that law is politics all the way down. Judges do not decide cases based on legal rules or doctrines, but on their own views of what outcome is right or just. Judicial opinions are post-hoc rationalizations. For legal realists the rule of law is a fantasy – it does not exist. On this account, originalism is a particularly egregious ruse and/or self-delusion. Originalists should stop pretending and recognize that, despite what they say, they are simply pursuing their own ideological ends just like everybody else. Instead,

With the bygone days of judicial deference seemingly irretrievable, Segall offers a new kind of faith—a hope that Americans will carry on as before even though the old justifications for doing so are gone. “The people will abide by and respect the Court’s decisions simply because of the role the justices play in our system of checks and balances.” We can safely and confidently leave the “broad and imprecise aspirational goals” of our constitutionalism to the care of judges if only we “trust the justices to act in good faith to apply those indeterminate concepts to new events and circumstances, without pretending that answers to hard constitutional issues flow naturally or logically from those precommitments.” Faith indeed. It is not clear that judges are best suited for the philosophical cum political task of ruling in this way, nor that the Constitution, as opposed to some other text, need be retained as a palimpsest for their decrees.

Pushing in a similar direction, Jonathan Gienapp’s *The Second Creation* argues that the Constitution did not have a settled meaning until gradually it was “fixed” over the course of debates in the first few

Congresses of the 1790s. As members of Congress organized various aspects of the new government, they encountered questions of constitutional interpretation that needed answers. Gienapp recounts the debates surrounding the removal of executive branch officials, the amendments constituting the Bill of Rights, the chartering of the first Bank of the United States, and the implementation of the Jay Treaty in 1796. In each instance, he argues, it was only through debate, and not beforehand, that meaning was fixed (settled). And crucially, he insists that it was only as part of this process that people came to conceptualize the written Constitution as having a fixed meaning, whereas previously they had been tentative or unsure about what kind of thing it was in its essence. The book shows convincingly that, despite the laborious months of drafting and the protracted debates over ratification, not all parts of the Constitution had a precisely agreed meaning that was readily accepted by members of Congress in the 1790s. This thesis is supported with ample documentation in primary sources and advanced in clear and direct writing. Gienapp successfully adds nuance and complexity to our understanding of the past—one of the professional obligations of the historian.

This book does not intervene directly in the debate about originalism, though its author has done so at length with several interlocutors in a variety of on-line forums and in law reviews. But the book's final page emphasizes its emancipatory potential in this context. Once we grasp that the idea of a fixed Constitution emerged from a "contingent set of practices" and an "entirely optional set of norms," the fact of its invention "should encourage us to imagine anew, in our own way, what the Constitution ought to be."

One possible implication of these claims for originalism is a fundamental dismissal

of its attempt to discern and apply the original meaning of the Constitution. After the fashion of Gertrude Stein's lament for the disappearance of her childhood home in Oakland, California, "there is no there there." On this view, the return to the founding brings an encounter with only confusion and uncertainty, terms Gienapp uses frequently to describe the debates he studies. Another, opposite, implication is also possible. The original meaning that originalists posit and search for does exist, but it was particularized and settled through debate and practice, and over a longer period of time, than merely at the completion of the text on September 17, 1787, or during the ratification process. After all, each of the controversies Gienapp relates did ultimately conclude with formal action based on a particular interpretation of the text or an addition to it. These and other possible implications of this important book are already being discussed by noted scholars in the disciplines of history, law, and political science. This conversation surely will continue for some time, though the book's effect on originalist theory remains to be seen. Gienapp is successful, and properly so, in complicating originalist invocations of a pristine or universally agreed-upon constitutional meaning, but originalism is too integral to American constitutionalism to be effaced any time soon.

A primary reason for its endurance is that originalism expresses central components of America's experiment in written constitutionalism: the Constitution is a text and stands as a fundamental law based on the consent of the people as the sovereign authority. Although this view was long the accepted one, Gienapp insists that the founding generation was unsure what it had created. The "ontological" status of the Constitution was confused, he says repeatedly, and it became clearer only during the debates of the 1790s. This claim is overstated, if not conceptually overwrought.

Abjuring ontological verification, and perhaps tautologically, the Preamble confidently announces that the people of the United States “do ordain and establish this Constitution.” The document refers to itself as a constitution in several other places. In a society with a long history of covenantal self-governance by reference to written texts, including the Fundamental Orders of Connecticut (1639), and arguably the Mayflower Compact (1620), against the background of the common law, along with the recent waves of post-independence state constitution making, plus the pervasive influence of John Locke’s social contract theory, and the recent failure of the Articles of Confederation, it seems safer to accept that the founding generation knew what a constitution was. Moreover, the “supremacy” clause of Article VI states that the Constitution and the laws made pursuant to it “shall be the supreme law of the land.” This too is a clear statement of what kind of thing the Constitution was held to be, even if the meaning and reach of its terms when applied in future circumstances remained unsettled.

Accordingly, the debates Gienapp traces occurred within a deeper agreement about the nature and purpose of the Constitution as fundamental law. We must pause to ask why the debaters of the 1790s, amid their disagreements, recognized the Constitution as an authority over them. Why did they feel bound by it and seek to justify themselves within its terms? The attempt to cohere and defend a course of action under the Constitution was predicated on the recognition of it as a legal authority. At this level, the founding generation was neither confused about the Constitution nor engaged in creating it a second time.

Here we can recur to James Madison, though his tergiversations in the 1790s (endlessly dissected by scholars, including Gienapp) have confounded any agreement about whether he was profoundly prudent,

or altered his views to suit conditions, or was merely feckless. A potential solution to the Madison problem is in *Federalist* 37. There, amid the larger project of defending the new written Constitution, Madison cautioned that its necessarily general terms would attain more specific meaning over time—and more or less in the fashion Gienapp recounts. Madison observed that the movement from ideas to words, especially in the realm of law, was never wholly complete. “And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined.” Consequently, “all new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.” Time, deliberation, and practice would settle the meaning (“liquidate”) the doubtful portions of the Constitution.

Even deeper philosophically than this meditation on the limits of legal language, *Federalist* 37 counsels moderation about what can be expected from politics – and this again amid the overall defense of the written Constitution. “It is a misfortune, inseparable from human affairs, that public measures are rarely investigated with that spirit of moderation which is essential to a just estimate of their real tendency to advance or obstruct the public good; and that this spirit is more apt to be diminished than promoted, by those occasions which require an unusual exercise of it.” Moderation in advancing a just estimate of the public good—now there are some old things made new again! And likewise, the acceptance that politics always happens in circumstances both unchosen and chancy. Given the many conflicting agendas and crosscutting imperatives at the Philadelphia convention, Madison concluded that “the

real wonder is that so many difficulties should have been surmounted, and surmounted with a unanimity almost as unprecedented as it must have been unexpected.” Well, not quite unanimity, nor indeed entire theoretical consistency (as Madison averred). But prudence counseled that politics should proceed on the basis of the text that had been produced.

The *Federalist* made additional appeals to moderation and prudence when recognizing the inevitable imperfection and incompleteness of the Constitution, often while highlighting the associated capacity to amend it. Taken together, such expressions should remind us that while constitutionalism does indeed set limits on government by taking some political choices permanently “off the table,” it was never thought capable of resolving all political conflict. Rather, its institutions, and too its ambiguities, were designed to structure that conflict so that governance could be as reasonable and moderate as circumstances allowed.

For far too long we and the Supreme Court have made our Constitution bear more meaning than it can hold. Originalism re-emerged at the end of the last century as a response to this problem. But both Segall’s and Gienapp’s books should compel originalists to see that they too err if they think the founding can always provide airtight constitutional clarity that resolves today’s disputes. Neither recourse to illusory historical specificity, nor ex cathedra decrees from five of nine Justices, can in the long run substitute for self-governing citizens and legislators who accept the responsibility of deliberating and compromising with one another. Indeed, as in the 1790s, it would be great once again to see Congress debating the Constitution and the legitimate extent of its own power. This would be far healthier for the republic than its contemporary self-assurance, by and with the Court’s endorsement, that it can legislate on any topic whatsoever merely by invoking the commerce clause or the equal protection clause. ▸