

# The American Constitution AND THE Debate OVER Originalism

Dennis J. Goldford

CAMBRIDGE

# The American Constitution And The Debate Over Originalism

**Jack M. Balkin**



## **The American Constitution And The Debate Over Originalism:**

**The American Constitution and the Debate Over Originalism** Dennis J. Goldford, 2005-04-25 This is a work of constitutional theory that explores the nature of American constitutional interpretation through a reconsideration of the long standing debate between the interpretive theories of originalism and nonoriginalism The book presents the novel argument that a critique of the underlying premises of originalism dissolves not just originalism but nonoriginalism as well which leads to the recognition that constitutional interpretation is already and always structured By their fidelity to the Constitution Americans are a textual people in that they live in and through the terms of a fundamental text On the basis of this central idea the book presents a new understanding of constitutional interpretation and an innovative account of the democratic legitimacy and binding capacity of the Constitution

**Originalism, Federalism, and the American Constitutional Enterprise** Edward A. Purcell, 2007-12-28 In this lively historical examination of American federalism a leading scholar in the field refutes the widely accepted notion that the founding fathers carefully crafted a constitutional balance of power between the states and the federal government Edward A Purcell Jr bases his argument on close analysis of the Constitution s original structure and the ways that structure both induced and accommodated changes over the centuries There was no clear agreement among the founding fathers regarding the true nature of American federalism Purcell contends nor was there a consensus on correct lines dividing state and national authority Furthermore even had there been some true original understanding the elastic and dynamic nature of the constitutional structure would have made it impossible for subsequent generations to maintain any original or permanent balance The author traces the evolution of federalism through the centuries focusing particularly on shifting interpretations founded on political interests He concludes with insights into current issues of federal power and a discussion of the grounds on which legitimate decisions about federal and state power should rest

*Antonin Scalia and American Constitutionalism* Edward A. Purcell, Jr., 2020-05-07 Antonin Scalia and American Constitutionalism is an in depth study of Justice Antonin Scalia s jurisprudence his work on the Supreme Court and his significance in the history of American constitutionalism After tracing Scalia s rise to Associate Justice and his subsequent emergence as a hero of the Republican Party and the political right this book reviews and criticizes his general jurisprudential theory arguing that he failed to produce either the objective method he claimed or the correct constitutional results he promised Focusing on his judicial performance over his thirty years on the Court it examines his decisions and opinions on virtually all of the constitutional issues he addressed from the fundamentals of structure federalism separation of powers and the Article III judicial power to specific interpretations of most major constitutional provisions involving governmental powers and the rights of individuals under the Bill of Rights and the Fourteenth Amendment This book argues that Scalia applied his jurisprudential theories in inconsistent and contradictory ways and often ignored distorted or abandoned the interpretive methods he proclaimed to reach the results he sought results that were aligned with and

supported by the post Reagan Republican coalition Scalia was far more consistent in enforcing such ideologically compatible results than he was in following his proclaimed jurisprudential theories Finally assessing Scalia s historical significance Antonin Scalia and American Constitutionalism argues that his jurisprudence and career are particularly illuminating because they exemplify contrary to his persistent claims three paramount characteristics of American constitutionalism the inherent inadequacy of originalism and other formal interpretive methodologies to produce consistent and correct answers to controverted constitutional questions the close relationship that exists particularly so in Scalia s case between constitutional theories and interpretations on one hand and substantive political goals and values on the other and the unavoidably living nature of American constitutionalism itself All in all Scalia stands as a towering figure of irony because his judicial career deconstructed the central claims of his own jurisprudence

**The Hollow Core of Constitutional Theory** Donald L. Drakeman, 2021-04-08 The Hollow Core of Constitutional Theory is the first major defense of the central role of the Framers intentions in constitutional interpretation to appear in years This book starts with a reminder that for virtually all of Western legal history when judges interpreted legal texts their goal was to identify the lawmaker s will However for the past fifty years constitutional theory has increasingly shifted its focus away from the Framers Contemporary constitutional theorists who often disagree with each other about virtually everything else have come to share the view that the Framers understandings are unknowable and irrelevant This book shows why constitutional interpretation needs to return to its historical core inquiry which is a search for the Framers intentions Doing so is practically feasible theoretically defensible and equally important not only for discovering the original meaning but also for deciding how to apply the Constitution today

**A Storm over This Court** Jeffrey D. Hockett, 2013-05-24 On the way to offering a new analysis of the basis of the Supreme Court s iconic decision in Brown v Board of Education Jeffrey Hockett critiques an array of theories that have arisen to explain it and Supreme Court decision making generally Drawing upon justices books articles correspondence memoranda and draft opinions A Storm over This Court demonstrates that the puzzle of Brown s basis cannot be explained by any one theory Borrowing insights from numerous approaches to analyzing Supreme Court decision making this study reveals the inaccuracy of the popular perception that most of the justices merely acted upon a shared liberal preference for an egalitarian society when they held that racial segregation in public education violates the equal protection clause of the Fourteenth Amendment A majority of the justices were motivated instead by institutional considerations including a recognition of the need to present a united front in such a controversial case a sense that the Court had a significant role to play in international affairs during the Cold War and a belief that the Court had an important mission to counter racial injustice in American politics A Storm over This Court demonstrates that the infusion of justices personal policy preferences into the abstract language of the Constitution is not the only alternative to an originalist approach to constitutional interpretation Ultimately Hockett concludes that the justices decisions in Brown resist any single elegant explanation To fully

explain this watershed decision and by implication others it is necessary to employ a range of approaches dictated by the case in question      *The ^AFounding Fathers Reconsidered* R. B. Bernstein,2009-05-05 This concise and elegant book reintroduces us to the history that shaped the founding fathers the history that they made and what history has made of them It gives the reader a context within which to explore the world of the founding fathers and their complex and still

controversial achievements and legacies      The Failed Promise of Originalism Frank Cross,2013-01-09 Originalism is an enormously popular and equally criticized theory of constitutional interpretation As Elena Kagan stated at her confirmation hearing We are all originalists Scores of articles have been written on whether the Court should use originalism and some have examined how the Court employed originalism in particular cases but no one has studied the overall practice of originalism The primary point of this book is an examination of the degree to which originalism influences the Court s decisions Frank B Cross tests this by examining whether originalism appears to constrain the ideological preferences of the justices which are a demonstrable predictor of their decisions Ultimately he finds that however theoretically appealing originalism may seem the changed circumstances over time and lack of reliable evidence means that its use is indeterminate and meaningless Originalism can be selectively deployed or manipulated to support and legitimize any decision desired by a justice

**Universal Rights and the Constitution** Stephen A. Simon,2014-04-01 Innovative examination of the tensions between universal and more uniquely American definitions of cherished rights Are constitutional rights based exclusively in uniquely American considerations or are they based at least in part on principles that transcend the boundaries of any particular country such as the requirements of freedom or dignity By viewing constitutional law through the prism of this fundamental question Universal Rights and the Constitution exposes an overlooked difficulty with opinions rendered by the Supreme Court namely an inherent ambiguity about the kinds of arguments that count in constitutional interpretation which weakens the foundations of our most cherished rights Rejecting current debates over constitutional interpretation as flawed Stephen A Simon offers an innovative framework designed to provide clearer foundations for rights interpretations while preserving a meaningful but limited role for universal arguments He reveals the vital connections among contemporary debates over such matters as the right to privacy the constitutionality of the death penalty and the role of foreign law in constitutional interpretation

**Static and Evolutive Treaty Interpretation** Christian Djeffal,2016 How should international treaties be interpreted over time This book addresses what evolutive interpretation looks like in reality

**Gunfight: The Battle over the Right to Bear Arms in America** Adam Winkler,2011-09-19 A provocative history that reveals how guns not abortion race or religion are at the heart of America s cultural divide Gunfight is a timely work examining America s four centuries long political battle over gun control and the right to bear arms In this definitive and provocative history Adam Winkler reveals how guns not abortion race or religion are at the heart of America s cultural divide Using the landmark 2008 case District of Columbia v Heller which invalidated a law banning handguns in the nation s capital

as a springboard Winkler brilliantly weaves together the dramatic stories of gun rights advocates and gun control lobbyists providing often unexpected insights into the venomous debate that now cleaves our nation

**Living Originalism** Jack M. Balkin, 2011-11-29 Originalism and living constitutionalism often seen as opposing views are not in conflict So argues Jack Balkin a leading constitutional scholar in this long awaited book Step by step Balkin shows how both liberals and conservatives play important roles in constitutional construction and offers a way past the angry polemics of our era

The Language of Law and the Foundations of American Constitutionalism Gary L. McDowell, 2010-06-28 Argues that the Founders intended the Constitution to be interpreted according to the text s meaning and its framers original intentions

*The Invisible Constitution in Comparative Perspective* Rosalind Dixon, Adrienne Stone, 2018-11-08 Constitutions worldwide inevitably have invisible features they have silences and lacunae unwritten or conventional underpinnings and social and political dimensions not apparent to certain observers This contributed volume will help its wide audience including scholars students and practitioners understand the dimensions to contemporary constitutions and their role in the interpretation legitimacy and stability of different constitutional systems

**Judges as Guardians of Constitutionalism and Human Rights** Martin Scheinin, Helle Krunke, Marina Aksenova, 2016-04-29 There are many challenges that national and supranational judges have to face when fulfilling their roles as guardians of constitutionalism and human rights This book brings together academics and judges from different jurisdictions in an endeavour to uncover the intricacies of the judicial function The contributors discuss several points that each represent contemporary challenges to judging analysis of judicial balancing of conflicting considerations the nature of courts legitimacy and its alleged dependence on public support the role of judges in upholding constitutional values in the times of transition to democracy surveillance and the fight against terrorism and the role of international judges in guaranteeing globally recognized fundamental rights and freedoms This book will be of interest to human rights scholars focusing on the issues of judicial oversight as well as constitutional law scholars interested in comparative perspectives on the role of judges in different contexts It will also be useful to national constitutional court judges and law clerks aiming to familiarise themselves with judicial practices within other jurisdictions

*The Future of Gay Rights in America* H.N. Hirsch, 2020-03-25 Sandra Day O Connor has called the gay rights movement the first important civil rights struggle of the twenty first century Recent court decisions to overturn sodomy laws and to recognize gay marriage have emboldened activists but have also resulted in a tremendous backlash not the least of which has been a call for a constitutional amendment defining marriage as only between members of the opposite sex Through its historical and legal contextualization of these decisions *The Future of Gay Rights in America* is essential for understanding an epochal moment in the history of gay rights

**Referendums as Representative Democracy** Leah Trueblood, 2024-04-18 In referendums on fundamental constitutional issues do the people come together to make decisions instead of representatives This book argues no It offers an alternative theory of referendums whereby they are one of many ordinary

ways that voters give direction to their representatives In this way the book argues that referendums are better understood as exercises in representative democracy The book challenges the current treatment of referendums in processes of constitutional change both in the UK and around the world It argues that referendums have been used under the banner of popular sovereignty in a way that undermines representative institutions This book makes the case for the use of referendums stronger by showing how they can support rather than undermine institutions of representative democracy Understanding referendums as exercises in representative democracy has broader implications for constitutional democracy as well Rather than see the power to constitute constitutions as something that happens occasionally in exceptional moments through referendums this book argues instead that voters constantly have the power to constitute and reconstitute their constitutions

**Human Dignity** Aharon Barak, 2015-01-26 Human dignity is now a central feature of many modern constitutions and international documents As a constitutional value human dignity involves a person's free will autonomy and ability to write a life story within the framework of society As a constitutional right it gives full expression to the value of human dignity subject to the specific demands of constitutional architecture This analytical study of human dignity as both a constitutional value and a constitutional right adopts a legal interpretive perspective It explores the sources of human dignity as a legal concept its role in constitutional documents its content and its scope The analysis is augmented by examples from comparative legal experience including chapters devoted to the role of human dignity in American Canadian German South African and Israeli constitutional law

Constitutional Rights in Two Worlds Mark S. Kende, 2009-03-02 This book examines the South African Constitutional Court to determine how it has functioned during the nation's transition

*Constitutional Politics in a Conservative Era* Austin Sarat, 2008-05-05 Aims to bring together the work of leading scholars of Constitutionalism Constitutional law and politics in the United States to take stock of the field to chart its progress and point the way for its future development

**The State as a Work of Art** Eric Slauter, 2009-05 The founding of the United States after the American Revolution was so deliberate and monumental in scope that the key actors considered this new government to be a work of art framed from natural rights Recognizing the artificial nature of the state these early politicians believed the culture of a people should inform the development of their governing rules and bodies The author explores these central ideas in this account of the origins and meanings of the U S Constitution He reveals the cultural histories upon which the document rests highlights the voices of ordinary people and considers how the artifice of the state was challenged in its effort to sustain inalienable natural rights alongside slavery and to achieve political secularization at a moment of growing religious expression

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