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What Is Originalism Good For?

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WHAT IS ORIGINALISM GOOD FOR?

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JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013). Pp. 312. Hardcover $ 39.95.

FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM (2013). Pp. 240. Hardcover $ 45.00.

MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM (2013). Pp. 292. Hardcover $ 29.00.

There was a time when the stakes of the debate between originalists and their critics seemed relatively clear. In the wake of the rights revolution of the 1960s and 1970s, early originalists, including Robert Bork and Edwin Meese, argued that binding judges to the mast of original meaning (or original intent) would ensure a more deferential judiciary. Their opponents, who tended to be on the left of the political spectrum, viewed the judiciary as a force for social progress. The chief problem with originalism, from this perspective, was that it required the present generation to submit to the dead hand of the past, with all of the tragic social consequences this entailed. Although these claims were contestable, both sides seemed to agree on the tradeoffs their respective positions entailed. The Constitution could be understood as an impediment to judicial activism or as a tool for achieving social justice; it could not be both things at once.

To the casual observer, it may seem that the battle lines remain more or less where they were in the 1980s. But two new studies – one by John O. McGinnis and Michael B. Rappaport, the other by Frank B. Cross – make clear just how much the debate has changed since the days when Bork and Meese were at the forefront of the originalist movement.[1] McGinnis and Rappaport are originalists who refuse to concede the force of the "dead hand" argument.[2] Originalism, they argue, does not impose insuperable barriers to constitutional change; properly understood, it is the only interpretive theory that empowers the present generation to translate its values into fundamental law.[3] Cross, a critic of originalism, launches a frontal assault on the idea that originalism exerts a constraining effect on

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1. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM (2013).

2. MCGINNIS & RAPPAPORT, *supra* note 1, at 8.

3. *Id.* at 12-13.

the judiciary.[4] Indeed, he makes a strong case that originalism offers only the *appearance* of constraint, while leaving judges relatively free to read their policy preferences and ideological biases into the text of the Constitution.[5]

So where does this leave us? The final book reviewed in this essay, Mark Graber's *A New Introduction to American Constitutionalism*, provides an indispensable guide to the reconfigured landscape of American constitutional theory.[6] Although Graber does not have a horse in the originalism race, he argues persuasively that the debate between originalists and their critics has reached a point of diminishing returns.[7] He urges constitutional theorists to move beyond the study of interpretative methods and judicial review to consider other, arguably more fundamental sources of constitutional legitimacy, including social norms and "constitutional politics" – or the interplay of political institutions that are set in motion by constitutional texts but which often evolve in directions not anticipated by their designers.[8] Americans have always disagreed about the best way of reading their Constitution, he points out.[9] The more urgent question is how such disagreement is processed by the larger constitutional order.

I.

At its core, the argument of McGinnis and Rappaport's *Originalism and the Good Constitution* consists of two interrelated claims.[10] The first is that supermajoritarian decision rules are the most reliable way of arriving at socially beneficial constitutional provisions.[11] The second is that the benefits of supermajoritarian provisions will be lost if constitutional interpreters are permitted to depart from the "original meaning" of said provisions.[12] The first prong of the argument is developed in the book's first three chapters, where the authors explore various theoretical benefits of supermajoritarian decision rules.[13] They conclude that constitutions adopted under supermajoritarian rules are comparatively more likely to protect minority rights and to be viewed as legitimate by the wider public.[14] In addition, because supermajoritarian procedures make it difficult to alter constitutional provisions once they are adopted – and because it is hard to predict how one will be affected by a constitutional provision far into the future – such procedures tend to discourage key actors from seeking short-term advantages at the expense of long-term social welfare.[15] Supermajoritarian procedures, in short, offer the surest route to "a structure of government that preserves democratic decision making [and] individual rights."[16]

But what does supermajoritarianism have to do with originalism? If we accept that

4. CROSS, *supra* note 1, at 1-23.
5. *Id.*
6. MARK GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM (2013).
7. *Id.* at 68.
8. *Id.* at 1-3.
9. *Id.* at 1-10.
10. MCGINNIS & RAPPAPORT, *supra* note 1, at 11-13.
11. *Id.* at 11.
12. *Id.* at 11-13.
13. *Id.* at 1-33.
14. *Id.* at. 42-44.
15. *Id.* at 54.
16. *Id.* at 11.

supermajoritarian procedures are the best way of arriving at beneficial constitutional provisions, McGinnis and Rappaport argue, we should demand that those tasked with interpreting our supermajoritarian Constitution respect the document's "original meaning."[17] After all, a judge who deviates from original meaning is in effect substituting a new rule for one originally adopted by a supermajority. And because the new rule was not adopted through a supermajoritarian procedure, it is unlikely to be better – and may well be worse – than the one it replaces.[18] Even when a particular constitutional provision no longer promotes the common good, therefore, we would be unwise to trust judges with the task of "updating" its meaning. Rather, the logical course of action in such cases is to formally amend the text through one of the supermajoritarian procedures spelled out in Article V.[19] The authors acknowledge that the constitution-making process in the United States has not always conformed to the theoretical ideal of supermajoritarianism.[20] Still, they contend that the U.S. Constitution was produced "in the main under appropriate supermajority rules, and [that] the norms entrenched in the Constitution [therefore] tend to be desirable."[21]

Having sketched a "welfare consequentialist" case for originalism, McGinnis and Rappaport turn from theory to practice.[22] How, exactly, should interpreters discover the "original meaning" of constitutional provisions? Where most originalists focus on the "original intent" or "original public understanding" of particular provisions, McGinnis and Rappaport put forward a new approach, which they label "original methods originalism."[23] The idea, in brief, is that constitutional provisions should be interpreted using the interpretive canons that were in widespread use at the time of their adoption.[24] More controversially—and in contrast to prominent originalists including Keith Whittington, Randy Barnett, and Lawrence Solum—McGinnis and Rappaport reject the view that interpreters may legitimately appeal to extra-textual considerations when confronted with vagueness, ambiguity, or constitutional silence. In other words, they deny the legitimacy of what has come to be known as "constitutional construction."[25] Indeed, they question whether it is ever really the case that original meaning "runs out," or fails to provide sufficient resources for resolving vagueness or ambiguity.[26] Even when there are good arguments on both sides of a constitutional question, they contend, the interpreter can usually resolve the issue by weighing "the relevant originalist evidence . . . and select[ing] the interpretation that [is] supported more strongly by that evidence."[27] The authors' conception of original meaning

17. *Id.*
18. *Id.* at 85-88.
19. *Id.* at 88-94.
20. *Id.* at 11-13.
21. *Id.* at 11.
22. *Id.* at 19.
23. *Id.* at 14, 121.
24. *Id.* at 118, 129. They argue that evidence regarding Founding-era interpretive canons can be derived from three sources: "rules that applied to all legal documents, rules that applied to state constitutions, and rules that applied to statutes." *Id.*
25. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTIONS: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).
26. MCGINNIS & RAPPAPORT, *supra* note 1, at 141.
27. *Id.* at 142.

is further narrowed by their insistence that constitutional provisions are never to be understood as embodying "abstract principles that confer significant discretion on future decision makers."[28] Because constitutions are meant to constrain official authority, they argue, it would make little sense for their framers to include principles so abstract that their future applications cannot be predicted with a reasonable degree of certainty.[29]

As we shall see, McGinnis and Rappaport's unusually narrow conception of "original meaning" is not easily reconciled with their welfare-consequentialism.[30] But first a word on the book's attributes. McGinnis and Rappaport have clearly thought deeply about the central problems of constitutional interpretation, and they have produced an innovative work that deserves to be taken seriously by constitutional theorists of all stripes. The argument that originalism must ultimately stand or fall based on its present-day consequences is both novel and provocative. Consequentialism, after all, has traditionally been a key weapon in the arsenal of originalism's critics (one thinks of FDR imploring the Hughes Court to update a Constitution drafted in the "horse-and-buggy age" so as to meet the economic needs of "present-day civilization," or of Justice Brennan upbraiding Reagan-era originalists for ignoring the social "consequences [that] flow from a justice's interpretation in a direct and immediate way").[31] In contrast, originalists have tended to reject consequentialist reasoning in favor of appeals to abstract principles such as popular sovereignty or the rule of law. But as McGinnis and Rappaport point out, there are serious holes in the existing normative defenses of originalism.[32] The popular sovereignty argument is vulnerable to the charge that the original document was drafted and ratified by a relatively small slice of the Founding-era public. Justifications based on the rule of law are vulnerable to the rebuttal that it is possible to be bound by law – in the form of precedent, for example – without being bound by the original meaning (however defined) of the text. Even if these objections are far from fatal, McGinnis and Rappaport make a strong case that they are sufficiently damaging as to necessitate a course correction. The most convincing justification for originalism, they argue, is not that it advances a particular, contestable principle, but that "it promotes constitutional interpretations that are likely to have better consequences today than those of nonoriginalist theories."[33]

But is this last statement true? Does strict adherence to "original meaning" yield social consequences that are superior to those generated by non-originalist or pluralist approaches to constitutional interpretation? This is the point on which the argument hinges, and here McGinnis and Rappaport are ultimately unpersuasive. The problem, in short, is that the authors' consequentialism, when combined with their unusually strict conception of "original meaning," leads to the untenable assertion that virtually every departure from original meaning (as they define it) has left American society worse off than the alternative of adhering to original meaning.[34] Recall that the interpreter, in McGinnis and Rappaport's

28. *Id.* at 84-85.

29. *See* JACK M. BALKIN, LIVING ORIGINALISM 27-28 (2011) (providing a critique of this argument).

30. MCGINNIS & RAPPAPORT, *supra* note 1, at 24.

31. Transcript of May 31, 1935 Press Conference by President, Franklin D. Roosevelt, *available at* http://newdeal.feri.org/court/fdr5_31_35.htm; JUDGES ON JUDGING 213 (David M. O'Brien ed., 3d ed. 2013) (quoting Brennan, J.).

32. MCGINNIS & RAPPAPORT, *supra* note 1, at 3-7.

33. *Id.* at 2 (emphasis added).

34. *Id.* at 118.

account, has essentially two choices: she may remain faithful to the original meaning of the text, or she may "update" the text in an effort to meet the needs of contemporary society.[35] The problem with "judicial updating," on this view, is that judges are ill suited to the task of amending the nation's fundamental law—or at least not as well suited as Article V actors. But as even casual students of American constitutional development are aware, history is replete with examples of judicial updating that seem to have left American society, on the whole, better off. If judicial updating was at least partly responsible for ending or mitigating such evils as Jim Crow, child labor, gender discrimination, and anti-sodomy laws, shouldn't this count as evidence that judges are, in fact, perfectly capable of altering constitutional meaning in ways that improve the wellbeing of the community? Is it not true that, in each of these cases, strict fidelity to original meaning (narrowly defined) would have produced more human suffering than the alternative?

Faced with apparently beneficial instances of judicial updating, McGinnis and Rappaport have essentially three options. First, they might deny that the "update" in question was, in fact, beneficial to American society. Second, they might argue that all or some of these instances have been wrongly characterized as departures from original meaning. Third, they might argue that, although judicial updating has at times yielded beneficial social consequences, pursuing the constitutional change in question through an Article V amendment would have left society better off in the end. For obvious reasons, they mostly stick to the last two arguments: We are told that apparent instances of "updating" in fact marked a return to first principles, or else that the "update" in question could easily have been obtained via Article V, thus avoiding various negative side effects of "judicial activism."[36] But these claims are for the most part simply asserted. Where one would expect to find serious engagement with historical sources, McGinnis and Rappaport offer little more than sporadic citations to the literature and dubious counterfactuals.

When discussing civil rights, for example, they concede that the Warren Court's landmark decisions, most of which were framed in nonoriginalist terms, helped to bring the Jim Crow era to an end. And yet they contend that decisions such as *Brown v. Board of Education* were necessary only because an earlier generation had departed from the original meaning of the Fourteenth Amendment – an amendment that "encapsulated" the legacy of John Bingham and the Radical Republicans, and thus should have been understood to bar all forms of racial segregation, including segregated schools.[37] This characterization of the Fourteenth Amendment's original meaning is not without prominent defenders, to be sure. But the view that the Amendment was widely understood, at the time of its adoption, to prohibit segregated schools remains a minority position in the scholarly community, and McGinnis and Rappaport offer no new evidence to suggest that the prevailing view is mistaken.[38]

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35. *Id.* at 81-90.

36. *Id.* at 93.

37. *Id.* at 111.

38. *See e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that the Fourteenth Amendment was originally understood to forbid segregated schooling); *but see* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (arguing that the Fourteenth Amendment was originally understood to permit segregated schooling).

As a fallback position, they claim that, even if educational segregation was not among the forms of discrimination originally understood to be proscribed by the Fourteenth Amendment, meaningful federal enforcement efforts on behalf of African American political and economic rights would have rendered decisions such as *Brown* unnecessary. Given a modicum of federal help, African Americans would have used their "greater economic and voting power" to press for integration; and Southern whites, in turn, would have in time realized that the region's racial caste system was "not . . . in their economic and personal interest."[39] But here again, the authors' counterfactual scenario finds little support in the historical literature. As Michael Klarman has pointed out, segregated schooling was universal in the postbellum South, even during the period of vigorous federal enforcement of voting rights.[40] Nor is there much reason to believe that market forces would have seriously dented the South's racial caste system, absent the federal enforcement efforts that followed in the wake of the Warren Court's "updating" of the Fourteenth Amendment. Indeed, as the economic historian Gavin Wright shows in his masterful new study of the civil rights-era Southern economy, economic rationality was perfectly compatible with racism, as most Southern whites were genuinely convinced that racial segregation worked to their economic advantage.[41]

When confronted with patently non-originalist decisions that seem to have benefited American society, McGinnis and Rappaport consistently take the position that the constitutional change in question could have been achieved via Article V, if only shortsighted judges and politicians had not short-circuited the amendment process. In the case of the New Deal Court's expansion of the federal commerce power – which, among other things, facilitated the abolition of child labor – they argue that the Roosevelt Administration could have won ratification of the Child Labor Amendment, and perhaps of a broader amendment expanding Congress's commerce power, if only FDR had made the effort. Instead, FDR, who was "unwilling to compromise" on the substance of potential amendments, pressured the Supreme Court to rewrite the Commerce Clause, with the result that the constitutional changes of the New Deal period were deprived of a firm foundation in the text.[42]

A similar argument is used to dismiss the Burger Court's landmark decisions on gender discrimination. Although McGinnis and Rappaport concede that the original meaning of the Fourteenth Amendment did not prohibit gender discrimination, they insist that this problem, too, could easily have been remedied via a constitutional amendment. The Equal Rights Amendment came within three states of ratification, after all, and McGinnis and Rappaport argue that the Burger Court's efforts on behalf of gender equality caused

39. MCGINNIS & RAPPAPORT, *supra* note 1, at 109-11, 239 n.15.

40. Klarman, *supra* note 38, at 1891-92 (1995) ("[S]chool segregation was essentially universal in the postbellum period," even in states where black voting majorities existed and where state constitutions "explicitly barred the practice.").

41. GAVIN WRIGHT, SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION IN THE AMERICAN SOUTH 65 (2013). As Wright explains, "[t]he vast majority of [early-twentieth-century] white southerners had a vision of economic progress in which blacks had no more than a subordinate role, if any." *Id.* In fairness to McGinnis and Rappaport, they may not have had access to Wright's recently published study.

42. MCGINNIS & RAPPAPORT, *supra* note 1, at 90-91.

many state legislators to "conclude that a formal amendment was unnecessary."[43] Moreover, they contend that the Court's non-originalist reading of the Fourteenth Amendment lent credibility to the arguments of the ERA's foes, who claimed that activist judges would use the amendment to effect sweeping social change – for example, by mandating same-sex bathrooms and forcing women into combat.[44] In sum, although the non-originalist decisions of the Hughes and Burger Courts were well intentioned, their most important consequences were negative: they sapped public enthusiasm for the Article V process and deprived arguably necessary constitutional "updates" of the popular legitimacy that would have accompanied a formal amendment. Theorists who justify "judicial updating" on the grounds that Article V sets an impossible bar to ratification thus "have the matter backward."[45] "It is not that the constitutional amendment process operates poorly and therefore nonoriginalism is required. Rather, it is that nonoriginalism prevents the constitutional amendment process from operating effectively."[46]

The problem, as in their discussion of civil rights, is that the argument depends on a series of complex counterfactuals for which McGinnis and Rappaport provide almost no evidence. Could FDR have secured a constitutional amendment overturning the Court's narrow, pre-1937 understanding of the interstate commerce power? Despite McGinnis and Rappaport's claims to the contrary, scholars are divided on the question of whether "the requisite supermajorities were in place" for an amendment expanding Congress's commerce power.[47] It is important to recall that the Child Labor Amendment had been languishing in the states since 1924, and aside from Arkansas, not a single Southern state had ratified it. In light of the South's monolithic opposition to this single-issue amendment, it seems undeniable that a broader amendment expanding federal power over the economy would have faced even greater obstacles.[48] And the notion that the Burger Court single-handedly killed the Equal Rights Amendment is similarly implausible. Even if decisions such as *Reed v. Reed* and *Frontiero v. Richardson* did, in fact, lower the stakes of the ERA fight, it does not follow that the amendment would have been ratified in their absence.[49] For starters, it is important to note that opposition to the ERA was centered in the South and a handful of religiously conservative Western states. Was it judicial "activism" that drove legislators in these states to oppose the amendment? This seems unlikely. Prominent opponents of the ERA, including Senator Sam Ervin and the activist Phillis Schlafly, were stoking fears of same-sex bathrooms and women in combat even before the Court entered

43. *Id.* at 93.

44. *Id.*

45 *Id.* at 94.

46. *Id.*

47. *See generally* Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMMENT. 1, 3-4 (2013); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 154-57 (2010); Gerald N. Magliocca, *Court-Packing and the Child Labor Amendment*, 27 CONST. COMMENT. 455, 476-77 (2011) (speculating that FDR may have hoped to benefit from the failure of the Child Labor Amendment, as this would strengthen his hand in the Court-packing fight). Even if we accept this point, however, it also seems clear, based on Roosevelt's private correspondence, that FDR sincerely believed that securing a formal amendment was politically impossible due to Southern opposition.

48. Cushman, *supra* note 47, at 3. Cushman notes that Roosevelt abandoned the amendment idea only after "[t]wo years of effort by Justice Department lawyers . . . failed to yield an [amendment] proposal[]" that seemed likely to win ratification. *Id.*

49. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973).

the gender discrimination fray.[50] Jane Mansbridge, who in 1980 interviewed dozens of state legislators on the subject of the ERA, reports that only a single lawmaker mentioned the Supreme Court as influencing his or her position.[51] Would lawmakers in conservative states have been under significantly greater pressure to ratify the ERA, absent the Burger Court's updating of the Equal Protection Clause? This assumes that voters in the Deep South and conservative Western states viewed gender discrimination as a serious policy problem requiring a federal response—and it is far from clear that this was the case. Indeed, at least in the South, opposition to the ERA was clearly rooted in resentment of the federal government's recent efforts on behalf of African American civil rights. With the memory of forced racial integration still fresh in white Southern minds, there was, to put it mildly, little enthusiasm for inviting federal intervention on behalf of gender equality.[52]

As these examples suggest, *Originalism and the Good Constitution* suffers from the authors' reluctance to deal seriously with the sorts of tragic choices that a narrow conception of "original meaning" necessarily entails. Indeed, some inconvenient cases, such as the Court's landmark 2003 decision in *Lawrence v. Texas*, are ignored altogether.[53] Recall that the *Lawrence* Court read the Fourteenth Amendment to bar states from criminalizing sodomy between consenting adults—an interpretation that is almost certainly at odds with McGinnis and Rappaport's understanding of original meaning. Presumably, they would condemn the decision on the grounds that it is better to live with injustice, and wait for democratic decision makers to realize the error of their ways, than to risk the collapse of our supermajoritarian constitutional order. But are the effects of "judicial updating" really so severe as to outweigh the suffering of those Americans who were reduced to second-class citizenship by the criminal statutes that *Lawrence* invalidated? What is the consequentialist-minded interpreter to do when confronted with entrenched injustice that is unlikely ever to be remedied by constitutional amendment? McGinnis and Rappaport offer few clues as to how this sort of moral calculus might play out; indeed, they do not seem to acknowledge that it is even necessary.

II.

If there is one point on which virtually all originalists agree, it is that originalism constrains judicial behavior. Compared to rival interpretive approaches, that is, originalism purportedly leaves little room for the interpreter to read his or her policy preferences or ideological biases into the Constitution. For many well-known originalists, including Justice Scalia, this attribute alone effectively settles the interpretive debate in favor of original meaning.[54] But is there any empirical evidence of originalism's constraining power?

Frank B. Cross sets out to answer this question in his new study, *The Failed Promise*

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50. David E. Kyvig, *Historical Misunderstandings and the Defeat of the Equal Rights Amendment*, 18 THE PUB. HISTORIAN 51 (1996).

51. JANE J. MANSBRIDGE, WHY WE LOST THE ERA 47, 245 n.7 (1986).

52. Kyvig, *supra* note 50, at 53-54. Kyvig notes that Southern opponents of racial integration, including Erwin, "raised the specter of mixed-gender public restrooms [as] a not-so-subtle reminder . . . of other recent reforms, for which segregated public restrooms had been an important symbol." *Id.* at 51.

53. *See generally* CROSS, *supra* note 1; Lawrence v. Texas, 539 U.S. 558 (2003).

54. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

of Originalism.[55] The first challenge that Cross—or anyone attempting a study of originalism's effect on judicial behavior—must confront is that there is no universally accepted way of "doing" originalism. Originalists differ among themselves, not only on the question of why originalism is normatively superior to its rivals, but also on such critical questions as whether the interpreter should be guided by "original intent" or "original public understanding" and whether non-originalist precedents should be given any weight in the interpretive process. Given the internecine divisions within the originalist camp, it is reasonable to wonder whether it is even possible to specify something called "originalism" that can be studied empirically.

Cross deals with the problem by defining originalism broadly: any constitutional interpreter who "grants relatively greater importance to originalist materials and lesser importance to precedent" is considered an originalist for the purposes of his study.[56] This raises the question of which historical sources should count as "originalist materials." In the end, Cross settles on a list of Founding-era sources consisting of *The Federalist*, *Eliot's Debates*, James Madison's notes on the Constitutional Convention, early dictionaries, and the Declaration of Independence.[57] He does not claim that these sources do, in fact, reveal the original meaning (however defined) of particular textual provisions. Indeed, he contends that these sources are both "incomplete in their coverage" and "of uncertain reliability, with records compromised by incompetence or purposeful bias."[58] But originalists must derive original meaning from somewhere, and Cross concludes, reasonably enough, that extensive reliance on Founding-era sources should be regarded as evidence of originalism in action.

Having arrived at a workable definition, Cross uses a dataset of Supreme Court opinions containing citations to Founding-era sources to quantify originalism's impact (or lack thereof) on the justices' decisions.[59] He is not the first scholar to attempt this sort of analysis, and his quantitative chapters lack the methodological sophistication of some previous efforts. Still, *The Failed Promise of Originalism* is more comprehensive than prior studies, and Cross presents his findings with admirable clarity and candor.[60] He is at his best when using quantitative evidence to demolish popular myths concerning originalism's origins. Among other things, his analysis makes clear that originalism is a relative newcomer to the Court.[61] Although the Justices occasionally invoked Founding-era sources in the nineteenth and early twentieth centuries, they did not begin to do so with regularity until relatively late in the last century. Moreover, he notes that the first signs of an ascendant originalism can be detected in Court opinions from the 1950s and 1960s—a discovery that

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55. *See generally* CROSS, *supra* note 1.

56. *Id.* at 43.

57. Other potential sources, including the records of the early Congresses and Joseph Story's Commentaries, are dismissed because they appeared too late to accurately reflect the original meaning of the text. *Id.* at 66-67.

58. *Id.* at 67.

59. *See id.* at 141-49; *see also id.* at 185.

60. For previous attempts to quantify the impact of originalist reasoning on judicial decision-making, *see* Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113 (2002); Pamela C. Corley, Robert M. Howard, & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329 (2005); Matthew J. Festa, *Dueling Federalists: Supreme Court Decisions with Multiple Opinions Citing The Federalist, 1986-2007*, 31 SEATTLE U. L. REV. 75 (2007).

61. CROSS, *supra* note 1, at 73.

calls into question the widespread belief that modern originalism was born in a reaction against the Warren Court's alleged disregard for original meaning.[62] Finally, by examining how often individual justices joined or authored opinions citing originalist materials, Cross discredits the notion that originalism is a polarizing force on the modern Court. Since the beginning of the Warren Court era, he finds no significant "difference among the justices in [their use of] originalist sources."[63] Indeed, justices normally identified as foes of originalism, including Justice Brennan, seem to have cited Founding-era sources at roughly the same rate as self-proclaimed originalists, including Justices Scalia and Thomas.[64]

Following this descriptive overview of the Court's use of "originalist materials," Cross proceeds to test two specific hypotheses concerning originalism's impact on decision making.[65] First, he asks, "whether originalism is intrinsically conservative in ideological effect."[66] In other words, are opinions that rely on Founding-era sources more likely to reach ideologically conservative results? Relying on Segal and Spaeth's U.S. Supreme Court database to measure opinion ideology, Cross finds little evidence to support this hypothesis.[67] Citations to Founding-era sources, it turns out, are about as common in ideologically liberal opinions as in conservative ones.[68] His second hypothesis weighs the relative influence of originalism and ideology on judicial decision-making. More specifically, do "justices [who] rely on originalist sources . . . tend to reach results consistent with their ideological preferences, or are they frequently driven away from such results?"[69] Here again, he finds no evidence that use of originalist sources has significantly impacted the justices' voting behavior. "The ideological results in justices' opinions using originalism," he concludes, "trace fairly closely the ideological results in opinions not using originalism."[70] Justice Scalia, for example, reaches conservative decisions in 75.9% of the cases in which he joins an opinion that cites originalist materials—a percentage that is almost identical to his overall conservative voting rate of 75.7%.[71] Justice Ginsburg, in turn, reaches liberal decisions in about 69% of all cases, and in about 74% of cases in which she joins an opinion citing Founding-era evidence.[72]

What should we make of the fact that reliance on Founding-era sources seems to have little impact on the justices' voting behavior? Does this mean that the justices are deliberately manipulating the evidence in order to reach ideologically favorable outcomes? Cross is agnostic on this point, but appears to lean toward the view that unconscious "motivated reasoning," rather than conscious manipulation of sources, is responsible for the lack of consensus in decisions employing originalist evidence.[73] The larger point, however,

62. *Id.* at 90.
63. *Id.* at 151.
64. *Id.* at 150-51.
65. *Id.* at 176.
66. *Id.*
67. The United States Supreme Court database is available at http://scdb.wustl.edu/index.php.
68. CROSS, *supra* note 1, at 177.
69. *Id.* at 184.
70. *Id.* at 187.
71. *Id.* at 185.
72. *Id.*
73. *Id.* at 165-70.

is "that originalism, at least as measured by use of originalist sources, has failed to constrain the justices . . . ."[74] This is "not because justices ignore [the theory] but instead because the originalist sources can be employed for either a liberal or a conservative result in the closely contested cases before the Court."[75]

Originalists will no doubt find fault with certain aspects of Cross's methodology, including his expansive definition of originalism. The decision to label any opinion in which a Founding-era source is cited an "originalist" opinion may obscure important differences between, say, the straightforward textualism of Hugo Black and the more historically grounded originalism of Justice Scalia. Others may attribute the lack of consensus in originalist opinions to judicial incompetence, or else to a rudimentary grasp of originalist theory. As originalism becomes more sophisticated, and as justices become more familiar with the latest scholarship, perhaps we can expect a greater degree of convergence in originalist opinions. Still others will point out that justices who employ originalist modes of reasoning do not always do so sincerely. Perhaps the lack of consensus in originalist opinions does not stem from any flaw in the theory itself, but rather from deliberate obfuscation on the part of justices who find the true "original meaning" of particular provisions distasteful.

But despite its at times cursory treatment of potential objections, *The Failed Promise of Originalism* largely succeeds in debunking the notion that originalism is comparatively more effective than its rivals at limiting judicial discretion.[76] As Cross points out, even if one grants the debatable proposition that divergent interpretations of originalist evidence should be chalked up to judicial obfuscation—that is, to justices who refuse to accept what they know to be the true original meaning of the Constitution—it is not clear how this problem can be remedied.[77] Consider *District of Columbia v. Heller*, the controversial 2008 decision in which a bare majority of the Court ruled that the Second Amendment protects an individual right to own a handgun, irrespective of involvement with a state militia.[78] The sharply conflicting interpretations of the Second Amendment's "original meaning" put forward in Scalia's majority opinion and Stevens' dissent cannot both be correct. But both are coherently reasoned and well stocked with citations to Founding-era sources. If one side or the other was manipulating the evidence—whether consciously or unconsciously—it is not clear how this could be conclusively established. Who would arbitrate such a dispute? Cross does not rule out the possibility that "future hypothetical justices [may] coalesce[] around one particular theory of originalism and . . . devote[] [themselves] to it above all else, [thus] overcom[ing] their [innate] ideological biases."[79] But the impressive array of evidence marshaled in this study suggests that we would be unwise to pin our hopes on such an unlikely development.

III.

Cross's study raises a number of important questions about the larger enterprise of

74. *Id.* at 186.
75. *Id.*
76. *Id.* at 185-86.
77. *Id.* at 186-87.
78. District of Columbia v. Heller, 554 U.S. 570 (2008).
79. CROSS, *supra* note 1, at 194.

constitutional theory. If originalism is incapable of constraining judicial behavior, is there an alternative theory that can do better? And if not, what is the point of our incessant theorizing about the true meaning of the First Amendment or the Equal Protection Clause? Is constitutional theory little more than politics by other means?

These are big questions that Cross, understandably, does not attempt to answer. Fortunately, such big questions are the central concern of Mark Graber's latest book, *A New Introduction to American Constitutionalism*. Graber's book is a sort of textbook, albeit an unconventional one that "aim[s] to teach the teachers of American constitutionalism as well as their pupils."[80] In particular, he hopes to broaden the study of constitutionalism to cover more than "limits on government action enforced by the Supreme Court."[81] Reducing the study of constitutionalism to the study of the *U.S. Reports*, he argues, leaves students without the analytical tools to understand vast swaths of the American constitutional order. Armed with nothing more than a handful of memorable Supreme Court precedents, he asks, how are students to make sense of constitutional questions, such as the debate over the extent of the President's war powers, which are unlikely ever to be considered—let alone resolved—by the courts? Or, for that matter, how can students who have not been trained to think systematically about the relationship between law and politics ever hope to make sense of radical shifts in constitutional doctrine?

He has a point. Most teachers of constitutional law (the present writer included) do a poor job of conveying the extent to which constitutional meaning is shaped by forces—from social movements, to elections, to unwritten norms—that have little to do with case law or jurisprudence in the traditional sense. And few casebooks or undergraduate textbooks even attempt to provide a systematic framework for thinking about the relationship between constitutional doctrine and the various extra-judicial forces that drive constitutional development. Graber's book goes a long way towards filing this void. He opens with a discussion of constitutional purposes, proceeds through chapters on constitutional interpretation, constitutional authority, and constitutional change, and finally concludes with a comparative examination of American constitutionalism. Along the way, he manages to synthesize a vast amount of normative and empirical material, and he displays a rare talent for simplifying complex arguments without sacrificing nuance. He also has a knack for using historical episodes to illustrate the practical stakes of debates that might otherwise strike students as hopelessly abstract.

Graber's theoretical perspective, as he makes clear at the outset, is best described as "historical-institutionalitst."[82] He describes constitutional meaning as emerging from complex interactions among judges, political actors, and ordinary citizens, all of whom operate within a political universe structured by inherited norms and institutions.[83] If he is quick to find fault with scholars who present an idealized portrait of an apolitical judiciary, he is equally quick to insist that text, precedent, and other legal considerations set limits to what political actors, and the judges they place on the bench, can hope to accomplish. It would be naïve, he points out, to pretend that political ideology played no role in the Supreme

80. MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM xii (2013).
81. *Id.* at ix.
82. *Id.* at xi.
83. *Id.* at 13.

Court's 5-4 decision in *Bush v. Gore*.[84] But it would be equally naïve to suggest that a Republican legal challenge to the results of the 1996 presidential election could have placed Bob Dole in the White House.[85] "[P]ersonal values or interests" almost certainly influence judicial decision making, he concludes, but only to the extent that they "can be incorporated by legal means."[86]

The chapter on constitutional interpretation is a particular highlight. Here, Graber pulls off the remarkable feat of summarizing the major theoretical approaches in a style that is both concise and accessible. The discussion is admirably evenhanded, and effectively highlights the strengths and weaknesses of originalist, aspirational, structural, pragmatic (or prudential) and doctrinal approaches. Although originalism is not singled out for special criticism, one senses that more rigid forms of originalism are difficult to reconcile with historical-institutionalism. Simply put, the notion that the true meaning of a constitutional provision is frozen at the time of ratification sits uneasily beside the historical-institutionalist's awareness that constitutional principles have historically evolved in tandem with underlying structures of political authority. For example, Graber rightly notes that "judicial decisions, federal laws, presidential proclamations, and underlying political movements" have effected far more constitutional change than Article V amendments over the course of American history.[87] He points out, moreover, that "whenever partisan coalitions have acquired relatively durable control over all national institutions"—as occurred in the 1830s, the 1860s, and the 1930s—"their constitutional vision has become the law of the land."[88] This is not to suggest that this type of "semiformal" constitutional change must necessarily be viewed as legitimate. But Graber is no doubt correct to claim that such change is hardwired in the structure of our constitutional order. Normative theorists who ignore this basic fact of American constitutional development, he suggests, do so at their peril.

Ultimately, however, Graber is less interested in pointing out flaws in particular interpretive theories than in critiquing the broader enterprise of constitutional theory. He urges theorists to examine not only the ways in which constitutions constrain political actors through the mechanism of judicial review, but also the ways in which they construct politics and constitute citizens. When a constitutional order flourishes, he points out, it is typically not because judges or political actors have managed to constrain official power by reasoning their way to a single, normatively best way of reading the constitutional text. Rather, it is because the constitution has facilitated the internalization of broadly shared norms and fostered a constitutional politics that "aggregate[es] existing interests, values, and policy preferences in ways that privilege constitutionally desirable outcomes."[89] Conversely, when a constitutional order disintegrates, it is typically not because of interpretive disagreement alone, but rather because the norms and political mechanisms that once facilitated peaceful dispute resolution have broken down – as in the slavery crisis of the

84. Bush v. Gore, 531 U.S. 98 (2000).
85. *Id.*
86. *Id.* at 218.
87. *Id.* at 161.
88. *Id.* at 153.
89. *Id.* at 219; *see id.* at 231.

1850s. Viewed from this perspective, it seems clear that the stakes of interpretive disagreement are somewhat lower than originalists (and their critics) want to claim. For all its flaws, originalism is not the root cause of dysfunction in our constitutional order; but neither should we look to it—or any interpretive theory—for salvation.