

Symposium

FOREWORD: ORIGINAL IDEAS ON ORIGINALISM

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Since Chief Justice John Marshall's declaration in *Marbury v. Madison*¹ that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"² judges and Justices have interpreted the meaning of various constitutional provisions when exercising the power of judicial review. While scholars and jurists have always considered the original understanding of the Constitution,³ originalist scholarship has become increasingly prominent and subject to renewed debate since the Warren Court.⁴ Indeed, many argue that originalism "reemerged" as a reaction to the Warren and Burger Courts.⁵ And since this reemergence, originalism has taken center stage in modern constitutional law. The impact of originalism is significant, and originalism now represents a dominant—perhaps *the* dominant—method of constitutional interpretation.

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¹ 5 U.S. (1 Cranch.) 137 (1803).

² *Id.* at 177.

³ See, e.g., Edwin Borchard, *The Supreme Court and Private Rights*, 47 YALE L.J. 1051, 1063 (1938) (discussing "original meaning" and the Privileges and Immunities and Due Process Clauses); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) (using the phrase "original understanding"); Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment: 2*, 48 YALE L.J. 171, 189–90 (1938) (using the phrase "original intentions").

⁴ See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 886 (1985).

⁵ See, e.g., James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1347 (1997); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 601 (2004) ("[O]riginalism was a reactive theory motivated by substantive disagreement with the recent and then-current Warren and Burger Courts; originalism was largely developed as a mode of criticism of those actions.").

But the impact of originalism is not confined to the Judiciary. Indeed, the debate over the meaning of the Constitution's text is at the forefront of modern politics. How judges choose to interpret the seemingly ambiguous words of the constitutional text—what is a “cruel and unusual punishment”?—affects our lives in many ways. What is the extent of the President's power to interrogate and detain those suspected of terrorism? Is there a constitutional right to an abortion? These questions matter because judicial decisions have a profound effect on the policies adopted and the actions taken by the President and Executive Branch, Congress, and state and local governments. And in turn, these policies can have a significant effect on our daily lives. Determining the correct method of constitutional interpretation, and the manner in which that method of interpretation is implemented, is a critical endeavor that has generated much scholarship and controversy.

Take, for example, the Supreme Court's recent decision in *District of Columbia v. Heller*,⁶ in which the Court held that the Second Amendment grants an individual right to bear arms⁷ and struck down the District of Columbia's handgun ban.⁸ The result in *Heller* has already been—and will continue to be—subject to a great deal of analysis and critique,⁹ including a piece by Professor Lawrence Solum in this Symposium. But equally as interesting as the Court's holding is the shared analytical approach of Justice Scalia's majority opinion and Justice Stevens's dissenting opinion: both opinions ground their reasoning in originalist arguments.

Justices Scalia and Stevens reached radically different results, however, demonstrating how the strand of originalism one chooses can profoundly affect the interpretive outcome. In Justice Scalia's view, the original public meaning of the text controls the interpretation of the Second Amendment. He analyzed the amendment as follows:

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.¹⁰

⁶ 128 S. Ct. 2783 (2008).

⁷ *Id.* at 2801.

⁸ *Id.* at 2821–22.

⁹ See, e.g., Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

¹⁰ *Heller*, 128 S. Ct. at 2788 (citation omitted).

But Justice Stevens's dissent looked not to the public meaning of the text but to the original intention of the Framers and to the Amendment's drafting history.¹¹ Rather than focusing on the public meaning of the Amendment's words, Justice Stevens focused on James Madison's original draft of the Second Amendment to reveal the Framers' original intention:

Madison's decision to model the Second Amendment on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. When Madison prepared his first draft, and when that draft was debated and modified, it is reasonable to assume that all participants in the drafting process were fully aware of the other formulations that would have protected civilian use and possession of weapons and that their choice to craft the Amendment as they did represented a rejection of those alternative formulations.¹²

Heller is thus significant for two reasons other than its landmark holding: it establishes the primacy of originalism as a form of constitutional interpretation, and it illuminates the debate about the proper method of originalist interpretation.

The clash over the Second Amendment's meaning in *Heller* is merely a microcosm of the larger debate surrounding originalist approaches to constitutional law.¹³ In April 2008, leading constitutional scholars from across the nation—many of them champions of originalism, some of them critics—gathered at the Northwestern University School of Law for a symposium. The Symposium was a call for original ideas on originalism, and the articles in this special issue are the result.

The articles in this issue address originalism in its many forms. Some authors argue in favor of original intentions originalism, others offer spirited defenses of original public meaning originalism, and one article proposes a new method of originalist thought—original legal meaning originalism, whereby the text is interpreted like any other legal document. (James Madison was a lawyer, after all.) Among other things, these articles address ground rules that should control constitutional interpretation within various strains of originalist thought. They also explore the implications of originalism—or alternative approaches—for constitutional systems of government.

What is a “cruel and unusual punishment”? We posed this question at the beginning of this Foreword. This important constitutional query—and many others like it—has profound implications for American society. We

¹¹ *Id.* at 2827–38 (Stevens, J., dissenting).

¹² *Id.* at 2835.

¹³ Two other prominent recent cases, among many, that feature originalist reasoning are *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Crawford v. Washington*, 541 U.S. 36 (2004). For a recent discussion on the rise of originalism in American law, see Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

hope the articles in this Symposium will provide a blueprint of how various modes of originalist thought might answer the question. This issue of criminal punishment—like the important inquiry in *Heller*—demonstrates that while originalism is dominant in constitutional scholarship, it does not speak with a single voice. Instead, originalism will provide a host of varying answers to these and other constitutional questions. The articles that follow offer cutting insights from leading scholars in the field and make for a stimulating and compelling read.