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Why Originalist Courts Need Originalist Classrooms

The Honorable Amul Thapar

KEY TAKEAWAYS

For originalism to work, we must make headway with our nation's law schools, where today's professors are overwhelmingly anti-originalist.

Money talks: Only when taxpayers and donors alike demand it will law schools start to change.

When law schools do change, the price of a law degree might actually be worth it, because lawyers will leave school equipped to practice law in today's courts.

Originalism is the idea that the Constitution has a fixed meaning and that judges should follow that fixed meaning rather than their personal policy preferences. That should not be controversial. Indeed, it seems to be the point of having a Constitution. As Joseph Story put it:

> The constitution is the will, the deliberate will, of the people. They have declared under what circumstances, and in what manner it shall be amended, and altered; and until a change is effected in the manner prescribed, it is declared, that it, shall be the supreme law of the land, to which all persons, rulers, as well as citizens, must bow in obedience. When it is constitutionally altered, then and not until then, are the judges at liberty to disregard its original injunctions.[1]

This paper, in its entirety, can be found at **http://report.heritage.org/hl1343**

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In other words, the people set out the Constitution's original meaning, and judges must honor that meaning when interpreting the Constitution. But in our culture, where too many are willing to bend their views of the law to the politics of the moment, originalism needs defending. It probably always will.

Today, originalism faces challenges on three fronts: in the federal judiciary, in academia, and in legal practice. Against all odds, originalism has begun—slowly but surely—to carry the day in the federal judiciary. As you all well know, originalism has become the ascendant method of constitutional interpretation during the past decade, and rightly so. Any time a case involving constitutional interpretation arrives at the Supreme Court, each justice engages with originalist evidence. Majorities and dissents will disagree on questions of constitutional interpretation, but all justices would probably agree that evidence of the Constitution's original meaning plays an important role. That is not to say the work is done. Our nation's history shows that judges have time and time again been tempted to stray from the Constitution's meaning toward their personal preferences, but the progress we have made since the heydays of Attorney General Edwin Meese and the late, great Justice Antonin Scalia cannot be ignored.

But for originalism to really work, we must make headway on the other two fronts—academia and legal practice. Start with our nation's law schools, where much is amiss. We do not have time to catalogue all the ills of the legal academy. Suffice it to say that today's professors are overwhelmingly anti-originalist, and even setting personal views aside, too many of these professors teach widely accepted originalist methods through a distorted, uncharitable, and often inaccurate lens. This means that most students never engage with originalism in a serious way during their law school careers, much less learn how to *do* originalism in practice. For originalism to get a fair shake and gain adherence in law schools, there must be an environment of free inquiry and debate. As Thomas Jefferson once said, "truth is great and will prevail if left to herself...is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate."[2] More on this later.

The third front of this fight is in the American bar itself. When we think of constitutional interpretation, we often jump to the Supreme Court or the Courts of Appeals, and for understandable reasons. But the main victims of the academy's failure to teach originalism are the trial courts—in both our state and federal judicial systems—and the parties whose cases they adjudicate. It is those courts where the judges and lawyers are the most

overworked and where the academy's failure to teach originalism is most conspicuous. Imagine how many cases would have turned out differently if lawyers had been taught in school how to make originalist arguments in their clients' favor.

In our system of adjudication, which depends on principles of party presentation, this deficit will persist unless and until law schools equip future lawyers and future clerks with the necessary facility in originalism. It is amazing how many times my colleagues and I say, "If they only would have made argument X, their client might have had a chance." Far too many lawyers do not recognize the originalist arguments—that is, arguments about the Constitution's original meaning—that are available. This is a disservice to the American public, and it can be traced back to the training that too many lawyers never receive.

To be sure, there are some within and without our ranks who believe that originalists can never prevail in academia or legal practice. Originalism will never work, these skeptics say, because originalism is difficult. To some extent, they are right. Originalism *is* hard. Making it up *would* be easy. I've lost a lot of sleep (and a lot of hair) trying to do my job correctly. To critics who say originalism is hard, we should ask: "compared to what?" Compared to making it up, sure, but law is not supposed to be easy. It is supposed to get things right, and when we are interpreting our Constitution—the cornerstone of our nation—getting it right for our clients and our countrymen should be the priority.

In my speech today, I'll outline how we can turn the anti-originalist tide in America's law schools and, eventually, in the American bar. First, I'm going to lay out the current failings in the academy that hinder sound constitutional interpretation. I'll focus on how law schools should change their teaching methodology and scholarship to better equip lawyers to do real, originalist law—not the purposivist, ideological mush that law professors too often push on their students. Second, I'll discuss the effects of academia's failures in the trial courts, which I witnessed firsthand as a district judge. Third, I'll discuss the role of appellate courts in helping make originalism work in the trial courts.

But it bears emphasis that while judges can make a difference, making originalism work in the courtroom can be achieved *only* through fundamental changes in the classroom.

The Academy

I start where every lawyer's career begins—the academy. Although most academics will not admit this, law school is in many ways a trade school. The

point of law school is to train lawyers how to practice law, but rather than teaching students how to actually *practice* law as lawyers in a constitutional republic, law schools and their professors have focused on teaching students how to *create* law. They don't try to teach interpretation; instead, they teach legal creativity. For example, they ask how students can minimize certain enumerated rights while effectively creating new ones that aren't even in the Constitution. But legislatures are the ones who *make* law; lawyers and judges just *interpret* law.

By taking the approach that they do, law schools are failing to teach the prevailing method of constitutional interpretation. Such neglect raises a question: What is the goal of law school? Is it to train future lawyers, or is it to train politicians? To ask the question is to answer it, but rather than teaching law students how to be lawyers, too many law schools are teaching their students post-modern philosophy, critical theory, and the need to abolish the so-called carceral state. Professors focus too little on understanding cases on their own terms and too much on what political considerations are supposedly motivating courts' opinions.

So when a court employs originalism, the professors instinctively misconstrue it: Surely, they tell their students, the court's originalist analysis is just a smokescreen for some nefarious political goal. They can't fathom that originalist interpretation is an attempt to get legal interpretation right; they claim it must be a means to achieve bad policy ends. In doing that, professors misrepresent originalism, which creates serious problems with profound consequences for our profession and country. After all, lawyers cannot best represent their clients when the law schools they attended never supplied them with the tools necessary to succeed in today's courts.

Yet that's the sad state of our profession: Many have read Charles Beard's *Economic Interpretation of the Constitution* and post-modern critiques of our law, but few have read Joseph Story's *Commentaries on the Constitution*—much less the Constitution itself. This failure of law schools is undoubtedly creating problems for district courts and litigants across the United States. Lawyers often fail to make the best arguments on behalf of their clients. This is not because of personal incompetence. It is because of poor training by our nation's law schools.

That said, I believe that we can—and must—change the misdirected culture of legal academia for the sake of our country and for the sake of clients who deserve sound representation. I'm an optimist. For originalism to work in our legal system, the academy must step up in two ways: first, in the skills that law schools impart to their students, and second, in the research that professors conduct.

Step one: Law schools must teach originalism to their students. I'm fortunate to have clerks that come from law schools with renowned faculty, but my clerks tell me that they had the opportunity to take one, maybe two, classes that seriously engaged with originalism. More classes ridicule and straw-man originalism than grapple with or teach it. For example, many 1L Constitutional Law professors devote a class or two to studying constitutional methodologies, including originalism, and how do they study it? My clerks tell me that the case that's most often presented as an example of originalism in action is *Dred Scott*. Yes, you heard that correctly, but of course that case shows the opposite—the danger of purposivism and of making it up. In *Dred Scott*, the Supreme Court deviated sharply from the original meaning of the Constitution to hold that black Americans could never be citizens. The ruling stained our Republic. As several originalist scholars point out, *Dred Scott* is where substantive due process came from—not exactly an originalist concept.

Perhaps professors could instead use a case reflecting the work of *today's* originalists—like Justice Scalia's or Justice Thomas's many great originalist writings. At the very least, law schools must start teaching originalist methodology—in particular, original public meaning originalism. After all, that is the predominant originalist philosophy in the courts today. It is malpractice for law schools to send their students out into the world without teaching them the prevailing methodology in the federal courts today—and the principal method of constitutional interpretation for most of our country's history.

But theory alone is not enough. Schools must *show* their students how originalism is done. At a minimum, law students should learn about Founding-era sources and which of these sources are most helpful when trying to understand the Constitution's original meaning. A good example is a new course taught at Notre Dame Law School called History and Language in Practice. The course "introduces students to resource sources and methodologies of two areas which have become particularly important with the increased influence of originalism: history and language." The course's goal is to teach students how to research and then use originalist sources in practice. Contrast that with courses that teach students to use legal interpretation as a "tool of resistance" or examine the lessons "bonobo sisterhood" supposedly has for structuring human society. Yes, those are real courses at schools like Yale and Harvard no less. Whom do they benefit? Not your future clients.

Without originalist instruction, young lawyers will lack the toolkit that will enable them to best represent their clients. Before I go further, I want

to be clear about one thing: I am not saying lawyers should only make originalist arguments. They should make all the arguments that benefit their clients. In today's legal world, the problem is that they are not equipped by law school to do so.

To be sure, many scholars are trying to make up for their institutions' deficiencies. Some of these scholars think originalism is the correct approach to interpreting the Constitution; some do not. But all these scholars, no matter their priors, are doing important work. Yet no matter how good these professors are, they can't make up for an institution's deficiencies on their own.

In addition, at some law schools, law students are taking their education into their own hands and trying to make up for the deficiencies. Some form reading groups. These reading groups focus on subjects like originalist theory, the Federalist–Anti-Federalist debates, and the Bill of Rights. Others debate originalist theory in the halls or at lunch talks. But this, although of course admirable, is merely a band-aid on their schools' deficiencies. Another thing students are doing is pushing their schools to form law school clinics that engage more seriously with the original meaning of the Constitution. Several schools have formed religious liberty clinics. Brigham Young University has a corpus linguistics clinic. At least these clinics give students an opportunity to study originalist arguments.

Finally, there are a few law schools that are also striving to be intellectually diverse—Notre Dame and Scalia Law come immediately to mind. These schools not only prepare their students to zealously represent their clients, but also teach students how to work together no matter one's views. You don't hear about students shouting at judges or professors at these institutions. Students—left, right, and in between—enjoy these law schools and learn in a robust and respectful environment. It isn't a coincidence that the students who appear most happy are also the ones attending law schools that foster open debate and discussion. Other law schools should take note.

As Notre Dame's Dean, Marcus Cole, recently commented: "Half the American people could be characterized as conservative. Half the legal profession can be characterized as conservative. In fact, there's nothing wrong with being conservative. It's normal. It's normal everywhere except for in the legal academy." But while other schools see "it is a badge of dishonor" to have any conservatives on the faculty, Dean Cole knows that such one-sidedness does not serve students well. Thus, Notre Dame Law School strives to hire an intellectually diverse faculty, and judges, among others, are noticing. Its clerkship numbers are swelling.[3]

But these lone scholars and institutions are fighting uphill, and they can't prevail alone. Donors to law schools should reconsider their support unless

institutions show genuine commitment to intellectual diversity—including by hiring more originalist scholars and allowing students to learn about the Constitution's original meaning in their curricula. Donors should consider endowing chairs if—but only if—they trust the individuals who will be picking the professors.

In addition, many law school faculties are funded by taxpayer dollars, whether directly or indirectly. As a result, law professors are public servants who should be serving the common good rather than pursuing their own political agendas. Producing something of practical value—namely, excellent lawyers—is in their interest if they want taxpayers to continue footing the bill. If that is not their priority, then taxpayers should take note and demand change.

Of course, until law schools come around, civic institutions, judges, and lawyers in private practice must pick up the slack. The Heritage Clerkship Academy, for example, comes to mind as a place where students can go to sharpen or hone their understanding of the Constitution's original meaning. Seminars like the one Randy Barnett operates help too, as do the Federalist Society's debates and events, which take originalist arguments about the Constitution seriously.

The second change academia must embrace to make originalism work is for scholars to devote time and resources to refining the original meaning of constitutional provisions. I don't know many judges that wouldn't welcome a comprehensive historical account of each provision of the Constitution. Scholars are best equipped to produce this account, but no single scholar can do this on his own. Even Joseph Story had his limits. He didn't get to the Eleventh and Twelfth Amendments in his great *Commentaries on the Constitution*. Instead, like any intellectual enterprise, originalism develops and reaches the truth only through the exchange of ideas. This body of work requires the collaboration and synthesis of professors, judges, and the bar. Indeed, if this were to happen, the *Heritage Guide to the Constitution* would have to be a multi-volume set! Maybe the next version should be.

As the courts have started to take the original meaning of the Constitution seriously once again, people are realizing that many provisions have not been definitively interpreted. This provides scholars and lawyers alike a unique opportunity. The best scholars will point us to the primary sources and legal principles that we can use to understand these provisions. Such principles and precepts will help us determine the meaning of often difficult-to-understand provisions. The same is true of originalist resources that allow legal professionals to access Founding-era sources. BYU, for example, has the world's leading corpus linguistics database, which digitized

and made text-searchable thousands and thousands of hard-to-read originalist sources.

Scholars should have a strong incentive to do originalist work: It is relevant. At a time when the academy is navel-gazing and disconnected from the practice of law, originalism is where a scholar can generate a real, meaningful impact. Look at how the brightest scholars being cited by the Court today are almost all originalists, or at least take the original meaning of the Constitution seriously. Even before Justices Gorsuch, Kavanaugh, and Barrett were appointed to the Supreme Court, nearly all of the most frequently cited scholars conducted originalist research, and that certainly has not changed.

By the same token, the purposivism of the American legal academy is becoming increasingly irrelevant to everyday judging. In 2011, Chief Justice Roberts poked fun at academic work, describing its attention to obscure topics like "the influence of Immanuel Kant on evidentiary approaches in eighteenth century Bulgaria or something." Things have not improved much since then. In fact, one study found that 82 percent of law review articles have zero citations within the first five years after publication, and another study found that 43 percent of law review articles are never even cited—not once.

With such favorable pressures, I believe that the conditions are ideal to create change in legal academia.

District Courts

We've established that academia is failing in the skills it teaches and the scholarship it produces. Now, how does this affect the district courts?

Everyone here knows that doing originalism is no easy task, and leaving district court judges to do it alone would be impossible. It isn't as simple as picking the best policy or outcome. Rather, to be originalist, judges must probe the meaning of a provision of the Constitution at the time of the Founding. This raises a host of questions:

- Where to start researching?
- What sources are most probative?
- What years are most relevant?
- What happens when historical sources have divergent meanings?

- When can we be confident that we have approximated the original meaning?

Scholars devote years to writing books and law review articles to answer these questions in the context of specific constitutional provisions, and the Supreme Court has the benefit of dozens of amicus briefs when the historical meaning of a constitutional provision is at issue. For example, in *Bruen*,[4] the Court had the benefit of 84 amici, and in the *Rahimi* Court,[5] 60. But district judges have neither the luxury of time nor the volume of research to conduct that analysis in the first instance.

I know this from firsthand experience. I served as a judge on the Eastern District of Kentucky for 10 years. Driving from my duty station in Covington, Kentucky, to try cases in Pikeville and London, Kentucky, left me precious little time for Founding-era research.

One lead I'm glad we pursued arose in a case called *Sergent v. McKinstry*.[6] The plaintiff in that case was seeking to withdraw the case from bankruptcy court to the federal district court. The crux of the issue was whether the plaintiff had a right to a jury trial on her breach of fiduciary duty and gross negligence claims in federal court. Figuring out whether these claims were legal (entitling her to a jury trial) or equitable (which meant no jury trial) required comparing the nature of the plaintiff's claims to 18th-century actions in English courts before the merger of law and equity. It also required reading sources ranging from a 1742 opinion in the English courts of equity to an 1830 Justice Story opinion to a multitude of treatises and law journal articles.

This was not easy, especially with trials and sentencings going on, but I had two advantages most district judges don't have: clerks well versed in originalism, who were committed to working night and day to figuring it out, and excellent lawyers who were willing to chip in and do the necessary research. And yes—for those interested—we ultimately concluded the plaintiff was entitled to a jury trial. I never promised that originalism would be gripping, but it is important to get things right.

From my current position on the Sixth Circuit, I can say with certainty that being a district judge is not easy. They have fewer clerks, less time, and not as much help from attorneys—most of whom are not trained in originalism and don't even know certain arguments exist on behalf of their clients. This, along with a busy docket, means many arguments are never raised or even recognized.

Originalism is now the predominant judicial philosophy for good reason: It is the best way to ensure that judges reach fair and reliable results for the litigants before them. But many arguments are still left unmade or undeveloped, and we can't expect the busy district courts to do it alone.

It is hard to fault the district courts for this. There are, however, a few things judges could consider doing when the arguments are flagged but not effectively briefed. They don't have to go it alone. In those cases, district courts should consider asking for supplemental briefing with specific questions; asking for amicus briefs, especially from law school clinics; or even issuing a general order encouraging amicus briefs from anyone interested.

Appellate Courts

Until the broader legal profession catches up, appellate judges need to spend more time trying to make life easier for the district courts. How? By distilling doctrines and rules for district judges to follow within the constraints of Supreme Court precedent and the Constitution's original meaning. This approach holds true both for substantive law and for methodological questions like how to apply originalism in adjudicating cases. Here, the task of an appellate judge is to make the originalist inquiry clear and easily transportable into the context of everyday litigation.

An area where we have already sought to do this is the Second Amendment. Since the Supreme Court's decision in *Bruen*, hundreds of criminal defendants have challenged their convictions for being a felon-in-possession under Section 922(g)(1)[7] as unconstitutional. These challenges have left district courts scrambling. They have wielded vastly different methodologies in evaluating the constitutionality of Section 922(g)(1), and predictably disparate outcomes have emerged across the country.

This past summer, one such case arrived on our docket: *United States v. Williams*.[8] It involved a defendant, Erick Williams, who argued that his indictment for being a felon-in-possession under 922(g)(1) should be dismissed because the statute violated the Second Amendment. Our task was to determine whether Section 922(g)(1) is consistent with our nation's history and tradition of firearm regulations as the Supreme Court's precedents in *Bruen* and *Rahimi* dictate. So we took a deep dive into the Anglo–American history of firearm regulation of so-called dangerous persons. After diving into the Founding-era sources, the constitutionality of the felon-in-possession statute became clear: Anglo–American legislatures have long barred classes of people considered "dangerous" from possessing firearms.

How do we apply that general principle to offenders like Mr. Williams? To figure that out, we had to look at the way crimes were classified at the time of the Founding and throughout American history. We found roughly three categories. First, crimes against the person, such as robbery and attempted murder. Convictions for such crimes were and are strong evidence a person

was dangerous. The second category was crimes posing a significant threat of danger, such as drug trafficking. And third, crimes causing no physical harm to another person or the community. Such crimes would include mail fraud; forgery; or, if you're in New Jersey, pumping your own gas or opening a ketchup bottle in a grocery store. This last category of crimes could sometimes result in a finding that a person is not dangerous—even if he lacks proper New Jersey etiquette.

In creating these categories, our court was not setting out a categorical approach to determine whether a defendant is dangerous. We were making the historically rooted, commonsense point that certain categories of offenses will more strongly suggest an individual is dangerous. In this way, district courts can more easily adjudicate as-applied challenges to the felon-in-possession statute under *Bruen*'s history-and-tradition framework. The idea was to produce an opinion that was faithful to the Constitution's original meaning and Supreme Court precedent while also being straightforward for district courts to apply. In *Williams*, we then applied that framework ourselves and concluded that Williams could be banned from possessing a firearm since his violent past put him in Category I.

Zooming out, my hope is that this framework for analyzing post-*Bruen* challenges to the felon-in-possession statute will translate what history and tradition dictate into a feasible inquiry for district courts. District judges won't be tasked with asking whether James Madison contemplated disarming someone who was convicted of second-degree burglary. Instead, the district judge will already have the relevant analytical background to work from: that the Second Amendment allows legislatures to disarm "dangerous persons," and certain crimes are indicators that someone is dangerous. Such fact-bound questions are ones that district judges are well-equipped to answer, especially when aided by other important doctrines—like the party-presentation principle—that channel the exercise of judicial power.

I have just described how appellate courts can synthesize history and precedent and make them more straightforward for district courts to apply. This process underscores a more fundamental point about the role of appellate judges in making originalism work. Appellate courts act as the middlemen between the Supreme Court and district courts. They synthesize the precedent from above and distill it for the courts below.

Originalist opinions are no different. Appellate judges must take the principles set forth in Supreme Court opinions and produce clear, historically accurate opinions so that lower courts may more easily apply those opinions to novel facts. Unlike the district courts, appellate courts have the time and resources to do this well—as long as they remain faithful to

the Constitution's original public meaning. But even so, appellate judges need clerks and lawyers that are equipped to undertake this inquiry and understand it. That's where law schools come in once again.

Conclusion

Before I wrap up, I want to thank Heritage and other such groups and schools for teaching originalism, textualism, and the history of our great nation. Ultimately, this problem can be solved only by schools, but groups like Heritage are doing an admirable job filling the gap. Law schools would benefit from studying what they are doing to equip some of our nation's finest lawyers, and we all might want to think twice before sending money to law schools. Every one of us, including the taxpayers, should be demanding that law schools hire professors who are committed to educating people about what the Constitution means, not what the professors might wish it meant. Taxpayers and their representatives should be revisiting the way faculty are hired and tenured.

But getting taxpayers engaged is no small task. Today, the public greatly misunderstands what courts are doing. Many would rather vilify the courts than explain in good faith what they are actually doing. The task of clearing this up falls on those of us in this room and beyond. Justice Scalia made great strides in bringing the Constitution's original meaning back to the fore. Today, it is not novel to start with the text of a statute or the Constitution. I think the public would be surprised to learn that this wasn't the standard practice in the courts when Justice Scalia came onto the scene.

We need to take the next step and educate the public about originalism. My book, *The People's Justice*,[9] was an attempt to do that. The reaction I received showed me that most members of the public agree that originalism is what the courts should be doing. We are a constitutional republic, and most Americans think we should follow the Constitution. We should not shy away from defending that principle.

But one book or one speech will not do the task. It is the duty of each lawyer, judge, public servant, and citizen—everyone in this room—to do their part. Write, speak, educate. And make no mistake: Money talks. Only when taxpayers and donors alike demand it will law schools start to change. When law schools do change, the hefty price paid for a law degree might actually be worth it, because lawyers will leave school equipped to practice law in today's courts.

The Honorable Amul Thapar is Circuit Judge on the U.S. Court of Appeals for the Sixth Circuit.

Endnotes

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