Originalism In American Law And Politics A Constitutional History The Johns Hopkins Series In Constitutional Thought

A constitutional originalist sounds the alarm over the presidency ' s ever-expanding powers, ascribing them unexpectedly to the liberal embrace of a living Constitution. Liberal scholars and politicians routinely denounce the imperial presidency—a self-aggrandizing executive that has progressively sidelined Congress. Yet the same people invariably extol the virtues of a living Constitution, whose meaning adapts with the times. Saikrishna Bangalore Prakash argues that these stances are fundamentally incompatible. A constitution prone to informal amendment systematically favors the executive and ensures that there are no enduring constraints on executive power. In this careful study, Prakash contends that an originalist interpretation of the Constitution can rein in the " living presidency " legitimated by the living Constitution. No one who reads the Constitution would conclude that presidents may declare war, legislate by fiat, and make treaties without the Senate. Yet presidents do all these things. They get away with it, Prakash argues, because Congress, the courts, and the public routinely excuse these violations. With the passage of time, these transgressions are treated as informal constitutional amendments. The result is an executive increasingly liberated from the Constitution. The solution is originalism. Though often associated with conservative goals, originalism in Prakash ' s argument should appeal to Republicans and Democrats alike, as almost all Americans decry the presidency ' s stunning expansion. The Living Presidency proposes a baker ' s dozen of reforms, all of which could be enacted if only Congress asserted its lawful authority.

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The presuppositions of constitutional interpretation -- The principal questions of constitutional interpretation -- The principal features of the American constitutional order : the positive constitutionalism of The federalist -- Approaches to constitutional interpretation -- Textualism and consensualism -- Narrow originalism/intentionalism -- Broad originalism -- Structuralism -- Doctrinalism and minimalism -- The philosophic approach -- Pragmatism -- Epilogue: a fusion of approaches to constitutional interpretation.

Tracing the development of originalism, Eric J. Segall shows how judges often use the theory to reach politically desirable results.

Originalism

Antonin Scalia and American Constitutionalism

A Quarter-Century of Debate

Originalism's Promise

Originalism as Faith

Fixing the American Constitution in the Founding Era

Imperial from the Beginning

In America's Constitution, one of this era's most accomplished constitutional law scholars, Akhil Reed Amar, gives the first comprehensive account of one of the world's great political texts. Incisive, entertaining, and occasionally controversial, this "biography" of America's framing document explains not only what the Constitution says but also why the Constitution says it. We all know this much: the Constitution is neither immutable nor perfect. Amar shows us how the story of this one relatively compact document reflects the story of America more generally. (For example, much of the Constitution, including the glorious-sounding "We the People," was lifted from existing American legal texts, including early state constitutions.) In short, the Constitution was as much a product of its environment as it was a product of its individual creators' inspired genius. Despite the Constitution's flaws, its role in guiding our republic has been nothing short of amazing. Skillfully placing the document in the context of late-eighteenth-century American politics, America's Constitution explains, for instance, whether there is anything in the Constitution that is unamendable; the reason America adopted an electoral college; why a president must be at least thirty-five years old; and why–for now, at least–only those citizens who were born under the American flag can become president. From his unique perspective, Amar also gives us unconventional wisdom about the Constitution and its significance throughout the nation's history. For one thing, we see that the Constitution has been far more democratic than is conventionally understood. Even though the document was drafted by white landholders, a remarkably large number of citizens (by the standards of 1787) were allowed to vote up or down on it, and the document's later amendments eventually extended the vote to virtually all Americans. We also learn that the Founders' Constitution was far more slavocratic than many would acknowledge: the "three fifths" clause gave the South extra political clout for every slave it owned or acquired. As a result, slaveholding Virginians held the presidency all but four of the Republic's first thirty-six years, and proslavery forces eventually came to dominate much of the federal government prior to Lincoln's election. Ambitious, even-handed, eminently accessible, and often surprising, America's Constitution is an indispensable work, bound to become a standard reference for any student of history and all citizens of the United States.

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.
This third volume about legal interpretation focuses on the interpretation of a constitution, most specifically that of the United States of America. In what may be unique, it combines a generalized account of various claims and possibilities with an examination of major domains of American constitutional law. This demonstrates convincingly that the book's major themes not only can be supported by individual examples, but are undeniably in accord with the continuing practice of the United States Supreme Court over time, and cannot be dismissed as misguided. The book's central thesis is that strategies of constitutional interpretation cannot be simple, that judges must take account of multiple factors not systematically reducible to any clear ordering. For any constitution that lasts over centuries and is hard to amend, original understanding cannot be completely determinative. To discern what that is, both how informed readers grasped a provision and what were the enactors' aims matter. Indeed, distinguishing these is usually extremely difficult, and often neither is really discernible. As time passes what modern citizens understand becomes important, diminishing the significance of original understanding. Simple versions of textualist originalism neither reflect what has taken place nor is really supportable. The focus on specific provisions shows, among other things, the obstacles to discerning original understanding, and why the original sense of proper interpretation should itself carry importance. For applying the Bill of Rights to states, conceptions conceived when the Fourteenth Amendment was adopted should take priority over those in 1791. But practically, for courts, to interpret provisions differently for the federal and state governments would be highly unwise. The scope of various provisions, such as those regarding free speech and cruel and unusual punishment, have expanded hugely since both 1791 and 1865. And questions such as how much deference judges should accord the political branches depend greatly on what provisions and issues are involved. Even with respect to single provisions, such as the Free Speech Clause, interpretive approaches have sensibly varied, greatly depending on the more particular subjects involved. How much deference judges should accord political actors also depends critically on the kind of issue involved.
Why originalism is a flawed, incoherent, and dangerously ideological method of constitutional interpretation Originalism, the view that the meaning of a constitutional provision is fixed when it is adopted, was once the fringe theory of a few extremely conservative legal scholars but is now a well-accepted mode of constitutional interpretation. Three of the Supreme Court’s nine justices explicitly embrace the originalist approach, as do increasing numbers of judges in the lower courts. Noted legal scholar Erwin Chemerinsky gives a comprehensive analysis of the problems that make originalism unworkable as a method of constitutional interpretation. He argues that the framers themselves never intended constitutional interpretation to be an inflexible and shows how it is often impossible to know what the “original intent” of any particular provision was. Perhaps worst of all, though its supporters tout it as a politically neutral and objective method, originalist interpretation tends to disappear when its results fail to conform to modern conservative ideology.
The Challenge of Originalism
The Dangerous Fallacy of Originalism
The Living Presidency
Originalism, Interventionism, and the Politics of Judicial Review
Living Originalism
Common Good Constitutionalism
The Second Creation
What did the Constitution mean at the time it was adopted? How should we interpret today the words used by the Founding Fathers? In ORIGINALISM: A QUARTER-CENTURY OF DEBATE, these questions are explained and dissected by the very people who continue to shape the legal structure of our country. Inside you'll find: *A foreword by Justice Antonin Scalia and

speeches by former attorney general Edwin Meese III, Justice William Brennan, Judge Robert H. Bork, and President Ronald Reagan *Transcripts from panel discussions and debates engaging some of the brightest legal minds of our time in frank, open discussions about the original meaning of the Constitution of the United States and its impact on the rule of law in our country *A debate on the original meaning of the Commerce, Spending, and Necessary and Proper Clauses *Concluding thoughts by Theodore Olson, forty-second solicitor general of the United States and a fellow at both the American College of Trial Lawyers and the American Academy of Appellate Lawyers. ORIGINALISM: A QUARTER-CENTURY OF DEBATE is a lively and fascinating discussion of an issue that has occupied the greatest legal minds in America, and one that continues to elicit strong reactions from both those who support and those who oppose the rule of law. Steven G. Calabresi, co-founder of the Federalist Society and professor of law at Northwestern University School of Law, has compiled an impressive collection of speeches, panel discussions, and debates from some of the greatest and most prominent legal experts of the last twenty-five years.

NEW YORK TIMES BESTSELLER • Justice Neil Gorsuch reflects on his journey to the Supreme Court, the role of the judge under our Constitution, and the vital responsibility of each American to keep our republic strong. As Benjamin Franklin left the Constitutional Convention, he was reportedly asked what kind of government the founders would propose. He replied, “ A republic, if you can keep it. ” In this book, Justice Neil Gorsuch shares personal reflections, speeches, and essays that focus on the remarkable gift the framers left us in the Constitution. Justice Gorsuch draws on his thirty-year career as a lawyer, teacher, judge, and justice to explore essential aspects our Constitution, its separation of powers, and the liberties it is designed to protect. He discusses the role of the judge in our constitutional order, and why he believes that originalism and textualism are the surest guides to interpreting our nation ’ s founding documents and protecting our freedoms. He explains, too, the importance of affordable access to the courts in realizing the promise of equal justice under law—while highlighting some of the challenges we face on this front today. Along the way, Justice Gorsuch reveals some of the events that have shaped his life and outlook, from his upbringing in Colorado to his Supreme Court confirmation process. And he emphasizes the pivotal roles of civic education, civil discourse, and mutual respect in maintaining a healthy republic. A Republic, If You Can Keep It offers compelling insights into Justice Gorsuch ’ s faith in America and its founding documents, his thoughts on our Constitution ’ s design and the judge ’ s place within it, and his beliefs about the responsibility each of us shares to sustain our distinctive republic of, by, and for “ We the People. ”

Originalism is a force to be reckoned with in constitutional interpretation. At one time a monolithic theory of constitutional interpretation, contemporary originalism has developed into a sophisticated family of theories about how to interpret and reason with a constitution. Contemporary originalists harness the resources of linguistic, moral, and political philosophy to propose methodologies for the interpretation of constitutional texts and provide reasons for fidelity to those texts. The essays in this volume, which includes contributions from the flag bearers of several competing schools of constitutional interpretation, provides an introduction to the development of originalist thought, showcases the great range of contemporary originalist constitutional scholarship, and situates competing schools of thought in dialogue with each other. They also make new contributions to the methodological and normative disputes between originalists and non-originalists, and among originalists themselves.

Americans widely believe that the U.S. Constitution was almost wholly created when it was drafted in 1787 and ratified in 1788. Jonathan Gienapp recovers the unknown story of the Constitution ’ s second creation in the decade after its adoption—a story with explosive implications for current debates over constitutional originalism and interpretation.

A Debate

The Yale Law School Guide to Research in American Legal History

Originalism and the Good Constitution

The Rise of Constitutional Originalism as a Response to Rapid Social Change in the US

51 Imperfect Solutions

Originalism in American Law and Politics

The Originalist Reaction

This book explains how the debate over originalism emerged from the interaction of constitutional theory, U.S. Supreme Court decisions, and American political development. Refuting the contention that originalism is a recent concoction of political conservatives like Robert Bork, Johnathan O'Neill asserts that recent appeals to the origin of the Constitution in Supreme Court decisions and commentary, especially by Justices Antonin Scalia and Clarence Thomas, continue an established pattern in American history. Originalism in American Law and Politics is distinguished by its historical approach to the topic. Drawing on constitutional commentary and treatises, Supreme Court and lower federal court opinions, congressional hearings, and scholarly monographs, O'Neill's work will be valuable to historians, academic lawyers, and political scientists.

The idea of the separation of powers is still popular in much political and constitutional discourse, though its meaning for the modern state remains unclear and contested. This book develops a new, comprehensive, and systematic account of the principle. It then applies this new concept to legal problems of different national constitutional orders, the law of the European Union, and international institutional law. It connects an argument from normative political theory with phenomena taken from comparative constitutional law. The book argues that the conflict between individual liberty and democratic self-determination that is characteristic of modern constitutionalism is proceduralized through the establishment of different governmental branches. A close analysis of the relation between individual and collective autonomy on the one hand and the ways lawmaking through public institutions can be established on the other hand helps us identify criteria for determining how legislative, administrative, and judicial lawmaking can be distinguished and should be organized. These criteria define a common ground in the confusing variety of western constitutional traditions and their diverse use of the notion of separated powers. They also enable us to establish a normative framework that throws a fresh perspective on problems of

constitutional law in different constitutional systems: constitutional judicial review of legislation, limits of legislative delegation, parliamentary control of the executive, and standing. Linking arguments from comparative constitutional law and international law, the book then uses this framework to offer a new perspective on the debate on constitutionalism beyond the state. The concept permits certain institutional insights of the constitutional experiences within states to be applied at the international level without falling into any form of methodological nationalism.

The way that Americans understand their Constitution and wider legal tradition has been dominated in recent decades by two exhausted approaches: the originalism of conservatives and the "living constitutionalism" of progressives. Is it time to look for an alternative? Adrian Vermeule argues that the alternative has been there, buried in the American legal tradition, all along. He shows that US law was, from the founding, subsumed within the broad framework of the classical legal tradition, which conceives law as "a reasoned ordering to the common good." In this view, law's purpose is to promote the goods a flourishing political community requires: justice, peace, prosperity, and morality. He shows how this legacy has been lost, despite still being implicit within American public law, and convincingly argues for its recovery in the form of "common good constitutionalism." This erudite and brilliantly original book is a vital intervention in America's most significant contemporary legal debate while also being an enduring account of the true nature of law that will resonate for decades with scholars and students.

Engaging but caustic and openly ideological, Antonin Scalia was among the most influential justices ever to serve on the United States Supreme Court. In this fascinating new book, legal scholar Richard L. Hasen assesses Scalia's complex legacy as a conservative legal thinker and disruptive public intellectual. The left saw Scalia as an unscrupulous foe who amplified his judicial role with scathing dissents and outrageous public comments. The right viewed him as a rare principled justice committed to neutral tools of constitutional and statutory interpretation. Hasen provides a more nuanced perspective, demonstrating how Scalia was crucial to reshaping jurisprudence on issues from abortion to gun rights to separation of powers. A jumble of contradictions, Scalia promised neutral tools to legitimize the Supreme Court, but his jurisprudence and confrontational style moved the Court to the right, alienated potential allies, and helped to delegitimize the institution he was trying to save.

Democracy and Equality

Ourselves and Our Posterity

The Presumption of Liberty - Updated Edition

The Living Constitution

Constitutional Originalism

The Basic Questions

The Failed Promise of Originalism

Constitutional interpretation -- The dilemmas of contemporary constitutional theory -- The authority of originalism and the nature of the written Constitution -- A defense of originalism and the written Constitution -- Popular sovereignty and originalism -- The nature and limits of originalist jurisprudence.

Problems of constitutional interpretation have many faces, but much of the contemporary discussion has focused on what has come to be called "originalism." The core of originalism is the belief that fidelity to the original understanding of the Constitution should constrain contemporary judges. As originalist thinking has evolved, it has become clear that there is a family of originalist theories, some emphasizing the intent of the framers, while others focus on the original public meaning of the constitutional text. This idea has enjoyed a modern resurgence, in good part in reaction to the assumption of more sweeping power by the judiciary, operating in the name of constitutional interpretation. Those arguing for a "living Constitution" that keeps up with a changing world and changing values have resisted originalism. This difference in legal philosophy and jurisprudence has, since the 1970s, spilled over into party politics and the partisan wrangling over court appointments from appellate courts to the Supreme Court. In Constitutional Originalism, Robert W. Bennett and Lawrence B. Solum elucidate the two sides of this debate and mediate between them in order to separate differences that are real from those that are only apparent. In a thorough exploration of the range of contemporary views on originalism, the authors articulate and defend sharply contrasting positions. Solum brings learning from the philosophy of language to his argument in favor of originalism, and Bennett highlights interpretational problems in the dispute-resolution context, describing instances in which a living Constitution is a more feasible and productive position. The book explores those contrasting positions, to be sure, but also uncovers important points of agreement for the interpretational enterprise. This provocative and absorbing book ends with a bibliographic essay that points to landmark works in the field and helps lay readers and students orient themselves within the literature of the debate.

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.

From 1953 to 1969, the Supreme Court under Chief Justice Earl Warren brought about many of the proudest achievements of American constitutional law. The Warren

declared racial segregation and laws forbidding interracial marriage to be unconstitutional; it expanded the right of citizens to criticize public officials; it held school prayer unconstitutional; and it ruled that people accused of a crime must be given a lawyer even if they can't afford one. Yet, despite those and other achievements, conservative critics have fiercely accused the justices of the Warren Court of abusing their authority by supposedly imposing their own opinions on the nation. As the eminent legal scholars Geoffrey R. Stone and David A. Strauss demonstrate in Democracy and Equality, the Warren Court's approach to the Constitution was consistent with the most basic values of our Constitution and with the most fundamental responsibilities of our judiciary. Stone and Strauss describe the Warren Court's extraordinary achievements by reviewing its jurisprudence across a range of issues addressing our nation's commitment to the values of democracy and equality. In each chapter, they tell the story of a critical decision, exploring the historical and legal context of each case, the Court's reasoning, and how the justices of the Warren Court fulfilled the Court's most important responsibilities. This powerfully argued evaluation of the Warren Court's legacy, in commemoration of the 50th anniversary of the end of the Warren Court, both celebrates and defends the Warren Court's achievements against almost sixty-five years of unrelenting and unwarranted attacks by conservatives. It demonstrates not only why the Warren Court's approach to constitutional interpretation was correct and admirable, but also why the approach of the Warren Court was far superior to that of the increasingly conservative justices who have dominated the Supreme Court over the past half-century.

The American Constitution and the Debate Over Originalism

The Use and Abuse of the Past in American Jurisprudence

A Debt Against the Living

A Natural Law Account of the American Constitution

Worse Than Nothing

The Three Branches

A Republic, If You Can Keep It

Prominent constitutional scholar Christopher Wolfe challenges popular opinions by presenting an insightful and well-supported defense of originalist interpretations of the Constitution. He describes the traditional approach to constitutional interpretation and judicial review and then focuses his analysis on the due process clause, which has become the source of most modern constitutional law. Wolfe challenges the most influential defenders of judicial activism, including Laurence Tribe, Michael Dorf, Harry Wellington, and Mark Tushnet, and he persuasively explains the dire political consequences of taking the Constitution out of constitutional law.

Originalism holds that the U.S. Constitution should be interpreted according to its meaning at the time it was enacted. In their innovative defense of originalism, John McGinnis and Michael Rappaport maintain that the text of the Constitution should be adhered to by the Supreme Court because it was enacted by supermajorities--both its original enactment under Article VII and subsequent Amendments under Article V. A text approved by supermajorities has special value in a democracy because it has unusually wide support and thus tends to maximize the welfare of the greatest number. The authors recognize and respond to many possible objections. Does originalism perpetuate the dead hand of the past? How can originalism be justified, given the exclusion of African Americans and women from the Constitution and many of its subsequent Amendments? What is originalism's place in interpretation, after two hundred years of non-originalist precedent? A fascinating counterfactual they pose is this: had the Supreme Court not interpreted the Constitution so freely, perhaps the nation would have resorted to the Article V amendment process more often and with greater effect. Their book will be an important contribution to the literature on originalism, now the most prominent theory of constitutional interpretation.

It is commonly understood by the American populous that the Constitution is the law of the land, we base our understanding of many of our state laws in regard to whether or not they are "constitutional." What the general American populous may not know, is how the actual document of the Constitution is applied to cases or legal holdings. Especially in today's political climateit is increasingly clear that there are sections of the Constitution and the Bill of Rights that need to be reexamined. There are major debates surrounding the cases, which argue controversial issues such as god, guns, and gays. It is clear that the current social morality is influencing many court decisions. This cultural shift, known as originalism, causes an issue with the legal jurisprudence that revolves around the Constitution. This is a relatively recent term that describes the way of interpreting the Constitution as the framers would have intended. It is the intent of this paper to help inform those who are interested in viewing the Constitution through an originalist perspective. This will be done by first defining the term originalism, then explaining the historical context from which this definition emerged, and finally describing the translation of the definition into the modern context in order to help inform the reader on how to better understand the legal debates today.--

Nine essays which examine constitutional issues at different points in American political history to explain how the constitutional issues resulting in the Civil War were central to politics for a long time before and after the actual conflict. Treats the period from the 1780s through the 1920s.

Essays in Constitutional Originalism

The Enduring Constitutional Vision of the Warren Court

An Originalist Argument against Its Ever-Expanding Powers

The Constitution of the Original Executive

States and the Making of American Constitutional Law
The Historical Significance of a Judicial Icon
Theories of Constitutional Interpretation

"In this fine book, Gary McDowell shows that the Constitution is our fundamental law---not our master, but our guide and mentor. Only at our peril do we try to make it our servant."---Harvey Mansfield, Harvard University "Erudite and lucid: McDowell's book is a must-read for those who wish to understand the philosophical and linguistic roots of the originalist tradition of constitutional interpretation."-R. Kent Newmyer, University of Connecticut School of Law "This book adds a major dimension of depth to the case for guiding judicial interpretation of the Constitution by the original intent of the framers. McDowell articulates a deeply thought-provoking meditation, informed by a fertile understanding of key foundations for originalism articulated by major figures in political philosophy, in the common law, and among the Founders themselves who shaped the theorizing that informs our constitutional order."---Thomas Pangle, University of Texas at Austin "For several decades, Gary McDowell has been one of our most brilliant and learned students of law and political philosophy. This book is his summa, a profound defense of originalism as a moral Constitutional philosophy, a brilliant discourse on the framers and their philosophical forbears and successors, and a powerful handbook of strategy in what McDowell calls `the contemporary war for the Constitution.'This work is essential reading for anyone who cares about the Supreme Court and the Constitution, but it is more. It is, simply stated, one of this generation's most important contributions toward preserving the rule of law itself."---Stephen Presser, Northwestern University School of Law "In this timely book, the case against the so-called `living' constitution is so powerfully argued and so clearly presented that it cannot be ignored."---Gordon S. Wood, Brown University

"Antonin Scalia and American Constitutionalism is a critical study of Justice Antonin Scalia's jurisprudence, his work on the U.S. Supreme Court, and his significance for an understanding of American constitutionalism. After tracing Scalia's emergence as a hero of the political right and his opposition to many of the decisions of the Warren Court, this book examines his general jurisprudential theory of originalism and textualism, 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, the book examines his opinions on virtually all of the constitutional issues he addressed, from fundamentals of structure to most major constitutional provisions. The book argues that Scalia applied his jurisprudential theories in inconsistent ways and often ignored, twisted, or abandoned the interpretive methods he proclaimed, in most cases reaching results that were consistent with "conservative" politics and the ideology of the post-Reagan Republican Party. Most broadly, it argues that Scalia's jurisprudence and career are particularly significant because they exemplify-contrary to his own persistent claims-three paramount characteristics of American constitutionalism: the inherent inadequacy of "originalism" and other formal interpretive methodologies to produce "correct" answers to controverted constitutional questions; the relationship-particularly close in Scalia's case-between constitutional interpretations on one hand and substantive personal and political goals on the other; and the truly and unavoidably "living" nature of American constitutionalism itself. As a historical matter, the book concludes, Scalia stands as a towering figure of irony because his judicial career disproved the central claims of his own jurisprudence"--

This book is an introduction to and defense of originalism and the Founding intended for a more general audience. No similar book exists. It is aimed at law students, advanced college students, policymakers, and the politically interested reader seeking a general introduction to originalism and its implications for today.

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.

A Constitutional History
Textual Meaning, Original Intent, and Judicial Review
Constitutionalism in the Approach and Aftermath of the Civil War
The Justice of Contradictions
Constitutional Interpretation
Historicism, Originalism and the Constitution
How to Read the Constitution

Provides the first natural law justification for an originalist interpretation of the American Constitution.

“The past too easily becomes a political football, a pawn in contemporary political debates about law and history. Charles is keenly aware of the abuse of history by lawyers, but also the abuse of law by historians. History’s ‘dead hand,’ Charles argues, should be invoked carefully and judiciously. To his credit, Charles’s goal in this book is to improve the fraught dialogue between history and law.”—Robert J. Spitzer, SUNY Cortland, author of Saving the Constitution from Lawyers and The Politics of Gun Control “A rich and searching account of how the past should shape the present that sheds new light on many of our generation’s most challenging constitutional problems.”—Gerard Magliocca, Samuel R. Rosen Professor of Law, Indiana University Robert H. McKinney School of Law “In this thoughtful and ambitious book,

Patrick Charles addresses some of the central questions in all of constitutional interpretation. Charles 'historical guideposts' approach simultaneously supports and challenges the positions of self-identified originalists and living constitutionalists alike. It represents a useful intervention in the ongoing debate between those camps."—Joseph Blocher, Associate Professor of Law, Duke University. The use of history in law is a time honored tradition. Over the years the practice has assumed many forms, including historicism, intentionalism, interpretivist history, law office history, historical narrative, originalism, etc. This book picks up where past commentators have left off. The different historically based approaches to adjudicating constitutional questions are weighed and considered, particularly originalism, and asserts that history in law is legitimate only if it leads to accurate results. The book then purposes an approach to accomplish the objectives of historical accuracy and objectivity, and therefore legitimacy.
The first guide to legal research intended for the many nonspecialists who need to enter this arcane and often tricky area
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.
A Biography
Rethinking Constitutional Law

Restoring the Lost Constitution
America's Constitution
A Comparative Model of Separation of Powers
A Historical Inquiry
Elucidates the debate between constitutional originalism and the "living constitution" approach.
The U.S. Constitution found in school textbooks and under glass in Washington is not the one enforced today by the Supreme Court. In Restoring the Lost Constitution, Randy Barnett argues that since the nation's founding, but especially since the 1930s, the courts have been cutting holes in the original Constitution and its amendments to eliminate the parts that protect liberty from the power of government. From the Commerce Clause, to the Necessary and Proper Clause, to the Ninth and Tenth Amendments, to the Privileges or Immunities Clause of the Fourteenth Amendment, the Supreme Court has rendered each of these provisions toothless. In the process, the written Constitution has been lost. Barnett establishes the original meaning of these lost clauses and offers a practical way to restore them to their central role in constraining government: adopting a "presumption of liberty" to give the benefit of the doubt to citizens when laws restrict their rightful exercises of liberty. He also provides a new, realistic and philosophically rigorous theory of constitutional legitimacy that justifies both interpreting the Constitution according to its original meaning and, where that meaning is vague or open-ended, construing it so as to better protect the rights retained by the people. As clearly argued as it is insightful and provocative, Restoring the Lost Constitution forcefully disputes the conventional wisdom, posing a powerful challenge to which others must now respond. This updated edition features an afterword with further reflections on individual popular sovereignty, originalist interpretation, judicial engagement, and the gravitational force that original meaning has exerted on the Supreme Court in several recent cases.
When we think of constitutional law, we invariably think of the United States Supreme Court and the federal court system. Yet much of our constitutional law is not made at the federal level. In 51 Imperfect Solutions, U.S. Court of Appeals Judge Jeffrey S. Sutton argues that American Constitutional Law should account for the role of the state courts and state constitutions, together with the federal courts and the federal constitution, in protecting individual liberties. The book tells four stories that arise in four different areas of constitutional law: equal protection; criminal procedure; privacy; and free speech and free exercise of religion. Traditional accounts of these bedrock debates about the relationship of the individual to the state focus on decisions of the United States Supreme Court. But these explanations tell just part of the story. The book corrects this omission by looking at each issue-and some others as well-through the lens of many constitutions, not one constitution; of many courts, not one court; and of all American judges, not federal or state judges.

Taken together, the stories reveal a remarkably complex, nuanced, ever-changing federalist system, one that ought to make lawyers and litigants pause before reflexively assuming that the United States Supreme Court alone has all of the answers to the most vexing constitutional questions. If there is a central conviction of the book, it's that an underappreciation of state constitutional law has hurt state and federal law and has undermined the appropriate balance between state and federal courts in protecting individual liberty. In trying to correct this imbalance, the book also offers several ideas for reform.
Supreme Court Justice Antonin Scalia once remarked that the theory of an evolving, "living" Constitution effectively "rendered the Constitution useless." He wanted a "dead Constitution," he joked, arguing it must be interpreted as the framers originally understood it. In The Living Constitution, leading constitutional scholar David Strauss forcefully argues against the claims of Scalia, Clarence Thomas, Robert Bork, and other "originalists," explaining in clear, jargon-free English how the Constitution can sensibly evolve, without falling into the anything-goes flexibility caricatured by opponents. The living Constitution is not an out-of-touch liberal theory, Strauss further shows, but a mainstream tradition of American jurisprudence--a common-law approach to the Constitution, rooted in the written document but also based on precedent. Each generation has contributed precedents that guide and confine judicial rulings, yet allow us to meet the demands of today, not force us to follow the commands of the long-dead Founders. Strauss explores how judicial decisions adapted the Constitution's text (and contradicted original intent) to produce some of our most profound accomplishments: the end of racial segregation, the expansion of women's rights, and the freedom of speech. By contrast, originalism suffers from fatal flaws: the impossibility of truly divining original intent, the difficulty of adapting eighteenth-century understandings to the modern world, and the pointlessness of chaining ourselves to decisions made centuries ago. David Strauss is one of our leading authorities on Constitutional law--one with practical knowledge as well, having served as Assistant Solicitor General of the United States and argued eighteen cases before the United States Supreme Court. Now he offers a profound new understanding of how the Constitution can remain vital to life in the twenty-first century.

Interpreting the Constitution

The Language of Law and the Foundations of American Constitutionalism

Originalism, Constitutional Interpretation, and Judicial Power

Antonin Scalia and the Politics of Disruption

Originalism, Federalism, and the American Constitutional Enterprise

Eminent scholar Saikrishna Prakash offers the first truly comprehensive study of the original American presidency. Drawing from a vast range of sources both well known and obscure, this volume reconstructs the powers and duties of the nation's chief executive at the Constitution's founding. Among other subjects, Prakash examines the term and structure of the office of the president, as well as the president's power as constitutional executor of the law, authority in foreign policy, role as commander in chief, level of control during emergencies, and relationship with the Congress, the courts, and the states. This ambitious and even-handed analysis counters numerous misconceptions about the presidency and fairly demonstrates that the office was seen as monarchical from its inception.

Maltz reformulates the justification for originalist review and refines originalist theory itself; he argues that a pure originalist approach mandates excessive judicial intervention under the Constitution; and he shows that most nonoriginalist theorists have failed to provide a sufficient functional justification for nonoriginalist intervention.

Arguments over constitutional interpretation increasingly highlight the full range of political, moral, and cultural fault lines in American society. Yet all the contending parties claim fealty to the Constitution. This volume brings together some of America's leading scholars of constitutional originalism to reflect on the nature and significance of various approaches to constitutional interpretation and controversies. Throughout the book, the contributors highlight the moral and political dimensions of constitutional interpretation. In doing so, they bring constitutional interpretation and its attendant disputes down from the clouds, showing their relationship to the concerns of the citizen. In addition to matters of interpretation, the book deals with the proper role of the judiciary in a free society, the relationship of law to politics, and the relationship of constitutional originalism to the deepest concerns of political thought and philosophy.

Originalism and living constitutionalism, so often understood to be diametrically opposing views of our nation□s founding document, are not in conflict□they are compatible. So argues Jack Balkin, one of the leading constitutional scholars of our time, in this long-awaited book. Step by step, Balkin gracefully outlines a constitutional theory that demonstrates why modern conceptions of civil rights and civil liberties, and the modern state□s protection of national security, health, safety, and the environment, are fully consistent with the Constitution□s original meaning. And he shows how both liberals and conservatives, working through political parties and social movements, play important roles in the ongoing project of constitutional construction. By making firm rules but also deliberately incorporating flexible standards and abstract principles, the Constitution□s authors constructed a framework for politics on which later generations could build. Americans have taken up this task, producing institutions and doctrines that flesh out the Constitution□s text and principles. Balkin□s analysis offers a way past the angry polemics of our era, a deepened understanding of the Constitution that is at once originalist and living constitutionalist, and a vision that allows all Americans to reclaim the Constitution as their own.