

HOW NOT TO ARGUE FOR ORIGINALISM: A REVIEW OF MCGINNIS AND RAPPAPORT'S *ORIGINALISM AND THE GOOD CONSTITUTION*

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Conservative legal scholars John O. McGinnis and Michael B. Rappaport have teamed up to write more than a dozen law reviews articles, most of them in defense of originalism (the view that the Constitution should be interpreted according to its original meaning). In *Originalism and the Good Constitution*,¹ McGinnis and Rappaport draw upon these previous articles to argue for a novel brand of originalism, argued for in a novel way. The central thesis of the book is that originalism leads to better consequences than do alternative approaches because the Constitution was enacted by supermajorities, which made it a good constitution, and originalism preserves the benefits of that good constitution. The book is engaging and exceptionally lucid, but thin at crucial points in the argument. In what follows (in Part I), I will lay out the basic argument of the book, and then (in Part II) explain why I find it unconvincing.

I. THE CENTRAL ARGUMENT OF THE BOOK

Two decades ago, originalism was widely considered to be on life support. Now it is making a vigorous comeback, attracting both liberal and conservative defenders. McGinnis and Rappaport begin by briskly reviewing all the major existing justifications for originalism and arguing that none is fully successful. As an alternative, they offer a consequentialist defense of originalism, claiming that originalist readings of the Constitution tend to produce better net consequences for society over the long run. They note briefly that they subscribe to a particular version of consequentialism—welfare rule-consequentialism. So far as I can see, however, only one important part of their argument (noted below) seems to turn on that widely rejected moral theory.² Somewhat in the spirit of Rawls, they offer a kind

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1. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013).

2. In a recent survey, only 23.6% of philosophers indicated that they embraced a consequentialist approach to ethics. David Bourget and David J. Chalmers, *What Do*

of procedural defense of originalism: our Constitution is good, and should be enforced according to its original meaning, because it was enacted by supermajorities.

McGinnis and Rappaport argue that constitutions enacted by supermajorities are very likely to be good (though there is no absolute guarantee of this) for two major reasons. First, supermajority rules dampen partisanship and mandate a high level of consensus, which leads to greater stability and citizen buy-in over the long run. Second, supermajority rules lead to better and more deliberate constitutional decision-making, because enactors know that any provision they enact will likely be in place for a long time. This creates a kind of limited “veil of ignorance” that helps to protect minorities, because “citizens cannot easily predict whether they and their families will, as political, economic, and social climates change, be in the majority or minority on various issues.”³ Because of the way it was created, we have a good (though not perfect) Constitution that promotes the welfare of the American people. The benefits of our Constitution flow from its original meaning, because it was that meaning that was ratified through supermajority processes. Originalism is the best theory of constitutional adjudication because it, and it alone, preserves the benefits of our good Constitution. The main alternative to originalism, living constitutionalism, allows for judicial updating of the Constitution in ways that produce bad consequences. Living constitutionalism allows for politically unaccountable judges to change the meaning of constitutional texts, thereby creating uncertainty, undermining the objectivity of law, short-circuiting the amendment process, and compelling judges to be dishonest about what they are actually doing (namely, amending the Constitution).⁴ More generally, judicial updates of the Constitution are often bad because they are made in ways that lack the refining procedural virtues of supermajoritarian processes: such decisions may be partisan, may not reflect wide consensus, and are not made under a beneficent veil of ignorance. For these reasons, originalism is the best theory of constitutional interpretation.

Three other features of McGinnis and Rappaport’s central argument should be noted: the particular version of originalism they defend (“original methods originalism”) and their responses to two important objections.

McGinnis and Rappaport embrace what they call “original methods originalism.” On this view, a constitutional provision’s meaning should be

Philosophers Believe? (Nov. 13, 2013), <http://philpapers.org/archive/BOUWDP.pdf>. The number of welfare consequentialists is smaller, and the number of welfare rule-consequentialists still smaller than that. Defending originalism by invoking a welfare rule-consequentialist theory is thus a bit like defending reincarnation by invoking the teachings of Tibetan Buddhism. One is speaking to a very small audience.

3. MCGINNIS & RAPPAPORT, *supra* note 1, at 42.

4. MCGINNIS & RAPPAPORT, *supra* note 1, at 204.

interpreted based on the applicable interpretive rules that were generally accepted at the time the provision was enacted. This is different from standard forms of originalism. Most originalists deny that original interpretive methods are binding, partly because such methods would seem to be part of an “unwritten Constitution” (which they reject) and partly because it would open the door to liberal arguments that the enactors often used open-textured language “capable of growth.”⁵ McGinnis and Rappaport reject such concerns. They argue that originalists must accept original interpretive methods because they are built into the original meaning of constitutional texts. The enactors (most of whom were not lawyers) understood that the Constitution was a legal document and that there were established rules for interpreting such documents. Moreover, they understood that the original meaning (and therefore benefits) of constitutional texts could not be reliably preserved if judges were empowered to apply non-original interpretive methodologies. Therefore the enactors wisely built original interpretive methods into the very meaning of the Constitution’s words. What were those methods? McGinnis and Rappaport are surprisingly noncommittal on this issue, saying they believe it was some form of textualism,⁶ but conceding that it might have been some version of intentionalism. They seem to think it does not matter a great deal so long as some coherent originalist method was intended.

McGinnis and Rappaport are unfazed by the common liberal retort that the enactors deliberately used elastic language capable of growth. If that were true, then original methods originalists would have to accept that dynamic methods of interpretation should be employed.⁷ Though they do not say it, this might force consequentialists like McGinnis and Rappaport to reject original methods originalism.⁸ But fortunately, they say, the evidence is solid that the enactors favored originalist methods and were too “risk-averse”⁹ to use constitutional language abstractly or open-endedly, so as to effectively delegate questions of application to future interpreters.

5. JACK M. BALKIN, *LIVING ORIGINALISM* 26 (2011).

6. MCGINNIS & RAPPAPORT, *supra* note 1, at 135.

7. *Id.* at 134.

8. Curiously, McGinnis and Rappaport admit that the Constitution itself sometimes authorizes departures from its original meaning. They cite precedent as one example. Another is the President’s duty to enforce court orders, even when it is clear that the orders are inconsistent with original meaning (*id.* at 172). They say there is “nothing strange” about the Constitution authorizing departures from its original meaning. Maybe not, but there is something strange about an *originalist* who accepts certain kinds of deviations from original meaning. Suppose a constitution includes a provision that specifically requires judges to employ dynamic methods of interpretation rather than originalist ones in the interpretation of certain clauses. This would make originalism self-referentially incoherent. Applying original meaning would require abandoning original meaning.

9. *Id.* at 149.

Original methods originalism has another advantage over other methods of constitutional interpretation, McGinnis and Rappaport claim. It promotes judicial restraint and makes the law clearer and more predictable. Because original methods originalism builds the original interpretive methods into the very meaning of constitutional language, it makes it easier to find determinate “right answers” to constitutional questions. It does this by largely eliminating problems of vagueness and ambiguity from constitutional language. The original interpretive methods include rules that authorize interpreters to resolve issues of vagueness and ambiguity by adopting whatever originalist readings are supported by a preponderance of evidence. Thus, constitutional language is truly vague or ambiguous only in those rare cases of exact equipoise where no reading is more probable than any other.¹⁰ This is an advantage of original methods originalism, because it promotes greater clarity and predictability in constitutional adjudication and reduces judicial activism.

After defending their preferred mode of originalism, McGinnis and Rappaport respond to two important objections. One is that most of the Constitution was enacted without the participation of women and African Americans, and therefore was not enacted by true supermajorities, thereby subverting their consequentialist argument for originalism. The other is that any defensible theory of constitutional interpretation must recognize the importance of precedent, and that originalism is incompatible with precedent.

McGinnis and Rappaport respond to the point about women and African Americans (and other excluded groups, which they strangely ignore) by arguing that the most obvious and worst consequences of excluding these groups have been corrected by later amendments (notably, the Civil War Amendments and the Nineteenth Amendment). They admit that there might be defects in the Constitution that resulted from the exclusion of these groups, but they argue that there is no normatively attractive way to fix those problems now, so judges should still stick with the original meaning, warts and all.¹¹

The problem of precedent also raises serious concerns for originalists. Most originalists admit some role for precedent, but as McGinnis and Rappaport note, this is not easy to square with originalist premises. As Gary

10. *Id.* at 142. Note that this is an exceedingly odd way of treating vagueness and ambiguity. Suppose I'm a high school principal and issue a one-sentence dress code: “No inappropriate clothing may be worn in school.” It would be bizarre to argue that this rule is not vague because there are interpretive rules that resolve all cases of putative application except in cases of exact ties. The rule is vague because parents and students would have only the foggiest ideas what sorts of clothing I would consider inappropriate, and even if they could assign rough probabilities (“Vampirella t-shirt? I'd say there's a 60-80% chance he'd send you home”) it still would be vague.

11. *Id.* at 16.

Lawson has argued, the Supremacy Clause makes the Constitution, federal statutes, and federal treaties the supreme law of the land. There is no mention of federal judicial opinions. Thus, originalism seems to require judges to follow the Constitution, not precedent, whenever the precedent conflicts with original meaning.¹²

McGinnis and Rappaport respond by arguing for a limited role for precedent. They claim that the Constitution incorporates a minimal notion of precedent as an aspect of the “judicial power” that is conferred on federal courts by Article III. They also argue that the principle of *stare decisis* is something judges created and is thus part of the common-law. As common-law, it is subject to regulation by Congress. This raises obvious separation-of-powers concerns, but McGinnis and Rappaport argue that there are constitutional limitations on what Congress can do to try to control court opinions.¹³

Since Congress has the power to legislate rules of precedent, McGinnis and Rappaport take a crack at formulating good rules. They argue for two rules. The first requires non-originalist precedent to be followed whenever a return to original meaning would cause “enormous costs.” They cite as examples originalist court rulings striking down paper money, Social Security, or the vast regulatory structures created under expansive New Deal interpretations of the Commerce Clause. The second rule of precedent would require courts to adhere to non-originalist precedents whenever those precedents are “entrenched” in the sense that the judicial decisions enjoy such strong popular support that any court ruling overturning them would likely be quickly reversed by constitutional amendment. They argue that *Griswold v. Connecticut* (recognizing a right of married couples to use contraceptives) falls into this category, as do decisions in the 1970s recognizing that gender discrimination is prohibited by the Equal Protection Clause. Other than these two limited exceptions, however, judges must stick to original meaning come hell or high-water.¹⁴ They call this an “intermediate position”¹⁵ between originalists who have no truck whatever with non-originalist precedent and those who (as they see it) have thrown in the towel to the liberal take-over of constitutional doctrine and are originalists in name only.

In sum, McGinnis and Rappaport argue that courts should (with relatively rare exceptions) stick to the original meaning of the Constitution because doing so would have good consequences for the American people.

12. See Gary Lawson, *Mostly Unconstitutional: The Case against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 6 (2007).

13. MCGINNIS & RAPPAPORT, *supra* note 1, at 172.

14. Oddly, they float a four-pronged third possible precedent rule, but say they are “not yet ready to endorse it fully.” *Id.* at 187.

15. *Id.* at 192.

They concede that originalism is not perfect; all approaches to constitutional interpretation have pros and cons. But as they see it, the downsides of living constitutionalism are so severe that originalism comes out the clear winner.

II. WHY THE ARGUMENT FAILS

The argument McGinnis and Rappaport make is bold. They reject all current justifications for originalism and rest their entire case on a single consequentialist argument. Moreover, it is striking that they choose to fight it out with living constitutionalists on consequentialist grounds, because this is widely considered a point on which originalists are vulnerable. A standard objection to originalism is that it has bad consequences for society, because it binds current generations to the “dead hand” of the past. Many living constitutionalists have argued that originalism is too inflexible and would often compel judges to impose outdated and sometimes downright retrograde values on the American people. Living constitutionalist David Strauss offers a typical expression of this argument. He writes:

Originalists’ America—in which states can segregate schools, the federal government can discriminate against anybody, any government can discriminate against women, state legislatures can be malapportioned, states needn’t comply with most of the Bill of Rights, and Social Security is unconstitutional—doesn’t look much like the country we inhabit. . . . [A]n unchanging Constitution would fit our society very badly. Either it would be ignored or, worse, it would be a hindrance, a relic that keeps us from making progress and prevents our society from working in the way it should.¹⁶

McGinnis and Rappaport try to counter these sorts of “parade-of-horribles-type” arguments mostly by claiming that respect for precedent would block the most egregious of the horribles. But as we have seen, they claim that the role of *stare decisis* is quite limited in constitutional law. For the most part, they believe, judges should refrain from any judicial updating and compel the American people to drink whatever brew (however disagreeable) the long-dead enactors concocted. If the American people get fed up enough with this treatment, they can amend the Constitution, as the founders intended. Whatever one thinks of this argumentative strategy, it highlights the risks McGinnis and Rappaport take by eschewing arguments from principle and resting their case entirely on consequentialist grounds.

In thinking about the merits of McGinnis and Rappaport’s consequentialist defense of originalism, we should first note the high level of gener

16. David A. Strauss, *A Living Constitution*, THE RECORD ONLINE (Fall 2010), <http://www.law.uchicago.edu/alumni/magazine/fall10/strauss>.

ality at which they frame their argument. In essence they argue: the Constitution as a whole (construed according to its original meaning) is good, therefore each individual provision of the Constitution (construed according to its original meaning) is good. On the face of it, this appears to be an obvious fallacy of division. Why do we have to treat the Constitution as an uncuttable whole tamale? Why cannot we consider it piecemeal, enforcing some provisions in their original meaning, when that appears to make good consequentialist sense, while judicially updating others, when it does not?

This is where McGinnis and Rappaport's rule-consequentialism comes in. According to rule-consequentialism it is a mistake to evaluate acts entirely on their own consequences (as act-consequentialists do). That makes ethics too atomistic and would permit obviously immoral actions (like framing an innocent man to prevent a deadly riot) whenever such acts appear to have optimistic consequences. A better approach, rule-consequentialists claim, is to recognize the importance of general rules in the moral life and say that acts are morally right if they accord with a rule whose general observance would maximize good consequences. McGinnis and Rappaport appear to be operating with similar intuitions when they reject any piecemeal examination of the Constitution. It would be too risky to allow judges to decide on their own which parts of the Constitution need updating. We need a general rule, and the best rule, in consequentialist terms, is (roughly): "No judicial updating is permitted."

This is a point at which fruitful debate could be joined. Is rule-consequentialism an acceptable normative theory? More specifically, is it the right theory to apply in constitutional interpretation? If it is, is it true that a more or less rigid rule of "no judicial updating" would produce the best consequences? Might not a more nuanced rule of the form "no judicial updating except in cases X, Y, and Z" produce better consequences? What factors contribute to a "good constitution" other than passage by supermajorities, and to what extent may those factors be considered in constitutional adjudication? These are important questions that McGinnis and Rappaport leave untouched. My own sense is that very few readers will buy McGinnis and Rappaport's argument, either because they disagree with its consequentialist foundations, or because they doubt that a "no judicial updating" rule would have the best consequences, or both. I fall into the "both" camp, and have argued elsewhere at length that a restrained living constitutionalist approach makes sense and has served our nation well.¹⁷

Another point on which McGinnis and Rappaport might be challenged is their defense of original methods originalism. They claim that present-day judges must use the interpretive rules that were deemed applicable to

17. See GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 91-127 (1992).

the Constitution by the enactors. Doing so reduces problems of vagueness and ambiguity, cabins judicial discretion, reflects the risk-averse cautiousness of the enactors, and ensures that the benefits that flow from a super-majoritarian enactment process are passed on to the future.¹⁸

This argument is weak for several reasons. First, it far from clear that the enactors would have agreed on the correct way to interpret the Constitution. At the time of the founding, there appears to have been widespread confusion and debate about how legal texts should be interpreted. There were intentionalists, textualists, supporters of traditional “equitable interpretation,” and some who apparently favored mix-and-match theories that included elements of various approaches.¹⁹ It is highly unlikely that super-majorities would have agreed on a single preferred approach. Second, the enactors never voted on any proposed method of interpreting the Constitution and the Constitution is silent on the matter. It is unclear, then, why present-day interpreters are bound by the enactors’ unexpressed and unratified interpretive intentions or expectations. Third, as Jack Balkin has argued, it is unlikely that the enactors were as risk-averse as McGinnis and Rappaport claim. Contrary to Justice Scalia’s oft-quoted claim, it is implausible to suppose that the “whole purpose [of a constitution] is to prevent change.”²⁰ As John Marshall famously stated, constitutions are “intended to endure for ages to come,”²¹ and for this reason often include broad principles and abstract guarantees that allow for change and flexibility. Fourth, if the enactors had intended their own preferred interpretive methods to be binding on later generations it seems likely that they would have stated that clearly and provided some reliable way for subsequent generations to discover what those methods were. Finally, it is a *non sequitur* to argue that the consequentialist benefits of constitutional language can be passed on *only if that language is packaged together* with the enactors’ preferred interpretive methods. Compare: Would the benefits of Jesus’s Sermon on the Mount have been better, worse, or unchanged if the Sermon had been accompanied by an interpretive guide, written by Jesus himself, explaining exactly what he meant? If you think the answer is obvious, I suggest you think again. The point is that the following questions must be kept distinct:

Q1: “What are the benefits of this enactment?”

Q2: “What would the benefits of this enactment be if it were interpreted according to its original meaning?”

18. MCGINNIS & RAPPAPORT, *supra* note 1, at 150.

19. See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1515-22 (1998).

20. Quoted in BALKIN, *supra* note 5, at 28.

21. *McCulloch v. Maryland*, 4 Wheaton 316, 415 (1819).

McGinnis and Rappaport clearly assume that the enactors were smart people (way smarter than the folks running around today), that they enacted wise constitutional provisions, and that they attached meanings to those provisions that were wise and far-seeing. We could try to attach better interpretations to those provisions, but we, being much less sapient than them, would very likely fail. That is why we need to accept not only the majestic words the enactors handed down to us, but also the specific understandings they had of those words. Otherwise we cannot get the extraordinary benefits of their wisdom.

This is a version of what Jack Balkin labels a “narrative of decline.”²² Like all myths, it is at best a half-truth. Its illogic can be exposed by thinking about some of the standard criticisms of originalism that McGinnis and Rappaport sedulously ignore. Consider the Eighth Amendment. Most would agree that the amendment’s ban on “cruel and unusual punishments” has produced good effects. Thanks largely to nonoriginalist judges, we no longer flog people, or cut off their noses or ears, or brand them, or execute horse-thieves, the mentally impaired, or children. Would the same benefits (or even greater ones) have flowed from an originalist reading of the Eighth Amendment? It seems highly unlikely. It is well-known that the founding generation saw nothing wrong with whipping criminals or cutting off their noses.²³

My point, again, is that discussing the comparative benefits of originalist vs. non-originalist interpretive approaches is a good conversation to have. But it is vital that it not be conducted at such a high level of generality that we lose sight of important granular details.

There is one other major point on which McGinnis and Rappaport might be challenged. As Frederic Bloom and Nelson Tebbe have recently noted,²⁴ there is an inherent structural weakness in McGinnis and Rappaport’s argument. McGinnis and Rappaport claim that the Constitution is good because it passed by supermajorities. But was it? Consider the founding. African Americans, women, and Native Americans, of course, were almost totally excluded from the ratification process. Owing to property restrictions, so too were 25-35 percent of adult white males.²⁵ As a result of voting qualifications and widespread public apathy, only about five percent of the population actually participated in the ratification process.²⁶ Of those

22. BALKIN, *supra* note 5, at 29.

23. See Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1031 (1978).

24. Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 MICH. L. REV. 809, 820 (2015).

25. Donald S. Lutz, *Political Participation in Eighteenth-Century America*, 53 ALB. L. REV. 327, 335 (1989).

26. ERWIN CHEREMINSKY, *INTERPRETING THE CONSTITUTION* 19 (1987).

who did participate, it is doubtful that a majority favored ratification. As Gordon Wood notes, “the Federalist victory was actually more of an Anti-federalist default.”²⁷ For these reasons, McGinnis and Rappaport’s claim that the original Constitution was approved by supermajorities seems to be more form than substance. On their view, good constitutions are created when lots of people with widely divergent backgrounds and beliefs participate in an enactment process that is constrained by strict supermajoritarian rules. It seems that these conditions were not met with the original Constitution. There was no true supermajority.

As Bloom and Tebbe also note,²⁸ a similar problem arises with the Civil War Amendments. These were strongly opposed by a majority of Southerners. In late 1865, the Reconstruction Congress refused to seat any representatives from the defeated South. The Fourteenth Amendment would never have been passed by the necessary two-thirds votes in the House and Senate if the Southern representatives had been present. By early 1867, every Southern state that considered the proposed Amendment had rejected it by overwhelming majorities.²⁹ In 1867, Congress declared that no rebel state could be readmitted to the Union unless it ratified the Fourteenth Amendment. In the South, Union military commanders purged voter rolls and created a new electorate. As a result, African American voters outnumbered white voters in five Southern states.³⁰ Large numbers of white voters either boycotted elections or were disqualified as former rebels. Under these conditions, constitutional conventions were called in ten Southern states and new state constitutions were written. The reconstructed governments created under these new constitutions duly ratified the Fourteenth Amendment. Despite the fact that Ohio and New Jersey had rescinded their previous ratifications, Secretary of State William Seward declared on July 28, 1868 that the Amendment had been approved by the required three-fourths of the states and the Amendment became part of the supreme law of the land.

Constitutional historians debate whether the process by which the Fourteenth Amendment became part of the Constitution was constitutionally legitimate.³¹ My concern is whether the process can be squared with McGinnis and Rappaport’s claim that the Constitution was passed by true

27. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 486 (1969).

28. Bloom & Tebbe, *supra* note 24, at 820-21.

29. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION* 269 (1988).

30. SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 717 (1965).

31. *See, e.g.*, AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 364-80 (2005) (arguing that it was).

supermajorities. So far as the Civil War Amendments are concerned, this seems highly dubious.

McGinnis and Rappaport are correct that the Civil War Amendments did much to correct some of the worst flaws of the original Constitution. But this fact does nothing to correct the structural flaws in their defense of originalism. Their argument requires genuine supermajorities, and clearly these did not always exist.

