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# Originalism is Bunk

Mitchell N. Berman
University of Texas School of Law

As originalism comes much closer to "working itself pure," we are better positioned to assess its progress. And that progress, I believe, must be counted a disappointment. Notwithstanding their enviable energy and remarkable commitment to the cause, the advocates of originalism have been unable thus far to make good on its core claim. Moreover, a dispassionate analysis suggests that the prospects for any greater success are slim indeed. Or so I will argue.

That argument unfolds in three parts. Part I lays the groundwork by specifying what I take to be originalism's core claim and by situating that claim within a network of possibilities. Because "[t]he originalist debate has progressed without a clear statement of the doctrine itself or an adequate account of the different versions in which it can manifest itself," this Part starts by revealing several of the distinct dimensions on which versions of originalism can and do vary. While acknowledging that, given this diversity of originalist theses, the assignment of any particularistic content to originalism *simpliciter* is bound to be contestable, I proceed to argue that the core originalist contention–the contention that can most fairly lay claim to what people mean by "originalism" when they use the term without modification–is a strong thesis. As a first rough pass, originalism is the view that courts ought to interpret constitutional provisions *solely* in accordance with some feature of those provisions' original character.

To better appreciate this claim, it might be helpful to reflect on the not uncommon description of originalism as the theory that judges "should be guided by" the Constitution's original meaning (or the original intent of its framers, or the like). A critical claim of Part I is that this prescription faithfully captures contemporary originalism if but only if it's taken to mean that a judicial interpretation of the Constitution *must follow*, or is *bound by*, the original meaning (or intent, etc.). Insofar as the notion of guidance at work is looser and more advisory – directing, for example, that judicial constitutional interpretation need only take the Constitution's original meaning "seriously"– then this characterization is an inaccurate rendering of the form of originalism that is most commonly espoused by self-described originalists and most vigorously contested by their self-described opponents.

As is well known, and as I have already remarked in passing, the feature of the original character that is said to demand this strong judicial solicitude varies across originalist theories. That is, self-professed originalists might variously focus on, for example, framers' intent, ratifiers' intent, the dominant understanding of framers and ratifiers

combined, or the prevailing public meaning of the documentary text. However, for purposes of evaluating originalism as I have defined it, this particular dimension of variability–variability, that is, with respect to the *object* of originalist concern–is of decidedly secondary, even tertiary, importance. More illuminating is to distinguish varieties of originalism based on the character or status of the arguments advanced in originalism's support. I will distinguish two such varieties, what I will call "hard originalism" and "soft originalism."

Briefly, originalism is "hard" when justified by reference to reasons that purport to render it (in some sense) necessarily true; it is soft when predicated on a contingent and contestable weighing of the costs and benefits of originalism relative to other interpretive approaches. Think of the difference this way: Once we define originalism with sufficient precision to give us confidence that it is, in fact, a subject of live controversy, we can consider what resources originalists might employ to convert opponents and skeptics. Hard arguments seek to show that originalism follows logically or conceptually from premises that the interlocutor can be expected already to accept; soft arguments aim to persuade their audience to revise their judgments of value or their empirical or predictive assessments. Theorists who contend, for example, that interpreters "have no choice but to respect the original meaning of [the Constitution's text]"10 are hard originalists.

The arguments for hard originalism most commonly advanced today depend upon particular views either about what it means to interpret a text or about what it means to treat a constitution as authoritative. They are canvassed and rejected in Part II. Virtually all remaining arguments – those sounding in democracy, the rule of law, the cabining of judicial discretion, and the like – are better understood, I suggest, as soft. That is not to say that these arguments are not *presented* as hard. Frequently, they are. My point will be that if we treat such argument as hard their implausibility becomes evident on little reflection. It is therefore more charitable to their proponents, as well as more fruitful, to reimagine them as soft. They are critically assessed in Part III. Together, these parts conclude that the arguments for hard originalism are based on faulty logic or erroneous premises; while the same cannot quite be said of all arguments for soft originalism, even the best case for soft originalism is extremely implausible.