New Approaches to the History of Originalism

Author : Christopher W. Schmidt

Date : September 12, 2019

- Paul Baumgardner, *Originalism and the Academy in Exile*, 37 **Law & Hist. Rev.** 787 (2019).
- Aaron Hall, *"Plant Yourselves on its Primal Granite": Slavery, History and the Antebellum Roots of Originalism*, 37 **Law & Hist. Rev.** 743 (2019).

Law and History Review's recently published symposium, *Originalism and Legal History: Rethinking the Special Relationship*, offers a fascinating collection of articles, some by familiar commentators on constitutional originalism, some by newer voices. In the former category are Bernadette Meyler's powerful critique of the Supreme Court's reading of the history of the Sixth Amendment's Confrontation Clause; Saul Cornell's challenge to originalists to meet the standards of a"genuinely historical approach to reading Founding Era texts that draws on the best interdisciplinary methods available";[1] William Baude and Stephen E. Sachs's defense of originalist analysis as "ordinary lawyer's work," distinct from and more limited than the historian's task of understanding the past;[2] and Logan Sawyer's account of the role that academic historians played in the rise of modern originalism in the 1970s and 1980s.

The symposium also includes a number of contributions from scholars who are newer to the scene. Lindsay M. Chervinsky examines George Washington's understanding of executive authority, as revealed in newly available writings by the first president. Michael Douma explores the history surrounding two early Dutch translations of the United States Constitution. Aaron Hall considers how participants in mid-nineteenth-century debates over slavery turned to the history of the Founding as authority for their positions. And Paul Baumgardner looks to the history of law schools in the 1980s to trace the foundations of modern originalism rise to prominence in the legal academy. The symposium issue also includes Kevin Arlyck's illuminating review of Jonathan Gienapp's important new book, *The Second Creation: Fixing the American Constitution in the Founding Era*.

Although this latest round of contributions on the history and theory of constitutional originalism offers an array of insights and provocations that merit more attention, in this review essay I focus on the fresh perspective on the history of originalism offered in the articles by Aaron Hall and Paul Baumgardner. Building on the work of Robert Post and Reva Siegel,[3] Jamal Greene,[4] and others,[5] they explore the genealogy of originalism as a phenomenon not only of legal theory but of American cultural and political history. Side-stepping the issues that have dominated discussions about originalism in recent decades—debates about the merits of originalism as a theory of constitutional interpretation, about whether originalist analysis and historical inquiry are reconcilable, about the original meaning of particular constitutional provisions—Hall and Baumgardner instead focus on how this particular theory has become such a dominant presence in American life. Central to this line of scholarship is the close attention they give to how developments outside the courts made possible the success of originalism inside the courts.

In *Originalism and the Academy in Exile*, Baumgardner, a Ph.D. candidate in Politics at Princeton University, presents the rise of originalism as a story of legal academic politics. He argues that the early 1980s—a time when "originalist scholars and scholarship held marginal and dubious status in the American legal academy"[6]—was in fact a seminal moment in the emergence of modern originalism. Drawing on interviews he conducted with legal scholars involved in the academic battles of the 1980s, along with archival and published sources, Baumgardner describes legal education in the 1980s as a period of expansion, experimentation, and uncertainty. Faculty at elite law schools were becoming more interested in interdisciplinary scholarship, with Critical Legal Studies riling the waters on the ideological left and law-and-economics gaining stature among more conservative scholars. Within this increasingly dynamic world of the legal academy, there was little space, however, for the early advocates of originalism as a theory of constitutional interpretation. The pioneers of originalism in the 1970s and early 1980s generally worked outside the legal academy or

on its fringes. Among mainstream legal scholars, most of the attention originalism arguments received came in the form of debunking efforts. Whereas Critical Legal Studies and law-and-economics were home-grown products, conceptualized and cultivated within the academy, originalism had to be outsourced.

The key player in Baumgardner's story was the Department of Justice under the leadership of Attorney General Edwin Meese. In a speech before the American Bar Association, Meese declared advancing "a Jurisprudence of Original Intention" the official policy of the Justice Department. (P. 797.) "In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment." (P. 797.) The Justice Department, according to Gary Lawson, who served in the DOJ in the mid-1980s, was an "academy in exile" for originalism in its formative years. (P. 798.) Instead of attending law school workshops, young conservative lawyers were participating in seminars and informal discussions at the Justice Department; instead of publishing law review articles, they were writing memoranda on the history of the framing of the Constitution and its significance for constitutional interpretation. In 1987, Justice Department lawyers produced Original Meaning Jurisprudence: A Sourcebook. The following year they produced *Guidelines on Constitutional Litigation*, which explained that an originalist approach to constitutional analysis "should presumptively be followed." (P. 799.)

With the Justice Department in the Reagan years serving as the essential incubator and promoter of originalism as a viable theory of constitutional interpretation, developments in American politics further bolstered the stature of originalism on the constitutional scene. Justice Antonin Scalia joined the Supreme Court in 1986 and soon became originalism's most effective booster. The following year Reagan nominated another defender of originalism, Robert Bork, to the Court. His defeat in the Senate prompted critics of originalism to once again announce its demise. Bork's originalist views, wrote Ronald Dworkin, "were so thoroughly discredited in the hearings, and proved so generally unpopular, that I doubt that they will any longer be advanced even by lawyers and judges who found them congenial before." (P. 801.) This prediction proved dead wrong of course. If anything, conservative anger at Bork's defeat bolstered support for originalism. The Justice Department continued to promote originalism and it gradually gained a foothold within the federal judiciary. In 1992, Clarence Thomas joined the Court and soon proved himself to the be most committed originalist to ever sit on the Court.

Baumgardner explains how these developments outside the legal academy had the effect of advancing the stature of originalism in the law schools. Justice Department lawyers became law professors, some of them rising to the ranks of nation's leading constitutional scholars. Among conservative legal scholars, originalism became the dominant theory of constitutional interpretation. It was the focus of countless articles, symposia, and debates. In the academy, the Justice Department's more practical, results-oriented approach to originalism gained more analytical rigor. Although accounts of the historical trajectory of political and legal concepts often focus on their translation from the world of ideas to the world of practice, Baumgardner makes a persuasive case for giving attention to the flow of ideas in the other direction. His history of originalism shows how an idea that gained substance and stature outside the academy then shaped debates and careers within the academy.

Aaron Hall's *Plant Yourselves on its Primal Granite: Slavery, History and the Antebellum Roots of Originalism* is a compellingly argued and elegantly expressed account of constitutional contestation in the first half of the nineteenth century. Hall examines how lawyers and judges in antebellum American called upon the history of the framing of the Constitution to legitimate their constitutional arguments about slavery. The authority of the Founding in American constitutional culture was never a given; it had to be constructed, and that construction, Hall argues, was in large part the product of antebellum debates over slavery.

Drawing on material in his recently completely history Ph.D. dissertation, Hall argues that it was in debates over slavery, more than any other subject of constitutional contestation in the nineteenth century, that jurists turned to the Founding for authority. Cases involving slavery, "inspired an effort to produce settled authoritative answers through stories about original promises, expectations, and intentions, an approach that recruited popular history and faith in a fathers' Constitution."[7] This turn to cultural authority to bolster formal legal claims Hall terms "vernacular constitutionalism."[8]

The text of the Constitution could only provide so much. But crafting stories about the Founding that resonated with the anxieties and desires of Americans in the antebellum period could do much more, expanding the possibilities of constitutionalism to provide seemingly definitive answers to the issues that were tearing the nation apart. These projects of "narrative world building," as Hall terms it, resonated with speakers and audiences at an emotional level. (P. 749.) References to the Founding were gilded with mysticism or religion—the framers were "inspired," the Constitution touched by the "finger of God." (P. 754.) Actively cultivated by lawyers, vernacular constitutionalism became an accepted register of argumentation for judges as well. "As courts leaned upon its legitimating authority, public constitutional history became a kind of constitutional law" in the decades leading up to the Civil War. (P. 752.) "[P]opular historical authority and formal legal justification would move together." (P. 752.) Hall shows how this dynamic played out in the 1842 Supreme Court case *Prigg v. Pennsylvania*, in which the "justices constituted themselves as a court of history to govern slavery." (P. 755.)

Hall argues that this nineteenth-century history helps to explain the "deep roots of originalism's appeal." (P. 747.) More than just a theory of constitutional interpretation, originalism, Hall explains, "can be understood as a form of constitutional engagement both in court and out of doors that integrates public memory culture and legal reasoning." (P. 747.) Understanding originalism in this way "directs attention toward the formation of the constitutional culture that sustains originalism." (P. 748.) Hall describes the entwinement of "public memory culture and legal reasoning" as the "taproot of originalism." (P. 760.)

While Baumgardner remains agnostic on what his historical account says about the value of originalism as a method of constitutional engagement, Hall, in his conclusion, directs his history analysis in a critical direction. Originalism then, like originalism today, "dispossess[es] living generations of interpretive and policy-making authority" and "obscures the act of choosing meaning and making policy." (P. 761.)

One of the puzzles of the history of originalism is why a theory of constitutional interpretation that legal scholars and historians alike have so regularly and thoroughly critiqued, denounced, and dismissed remains such a vital force in American constitutional discourse. In these important new articles, Hall and Baumgardner help to answer this puzzle.

1. Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 **Law & Hist. Rev.** 821, 822 (2019).
2. William Baude and Stephen E. Sachs, *Originalism and the Law of the Past*, 37 **Law & Hist. Rev.** 809, 811 (2019).
3. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 **Fordham L. Rev.** 545 (2006).
4. Jamal Greene, *Selling Originalism*, 97 **Geo. L.J.** 657 (2009).
5. *See, e.g.,* Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 **American Journal of Legal History** 198 (2017); Mary Ziegler, *Originalism Talk: A Legal History*, **BYU L. Rev.** 869 (2015).
6. Paul Baumgardner, *Originalism and the Academy in Exile*, 37 **Law & Hist. Rev.** 787, 792 (2019).
7. Aaron Hall, *"Plant Yourselves on its Primal Granite": Slavery, History and the Antebellum Roots of Originalism*, 37 **Law & Hist. Rev.** 743, 746 (2019).
8. *Id.*

Cite as: Christopher W. Schmidt, *New Approaches to the History of Originalism*, JOTWELL (Sept. 13, 2019) (reviewing Paul Baumgardner, *Originalism and the Academy in Exile*, 37 **Law & Hist. Rev.** 787 (2019); Aaron Hall, *"Plant Yourselves on its Primal Granite": Slavery, History and the Antebellum Roots of Originalism*, 37 **Law & Hist. Rev.** 743 (2019)), https://legalhist.jotwellcom/new-approaches-to-the-history-of-originalism.