

2010

# The Functions of Ethical Originalism

Richard A. Primus

*University of Michigan Law School*, raprimus@umich.edu

Available at: <https://repository.law.umich.edu/articles/654>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Legal History Commons](#), and the [Supreme Court of the United States Commons](#)

---

## Recommended Citation

Primus, Richard A. "The Functions of Ethical Originalism." *Tex. L. Rev. See Also* 88 (2010): 79-89.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# Texas Law Review

## *See Also*

Response

The Functions of Ethical Originalism

Richard Primus\*

Supreme Court Justices frequently divide on questions of original meaning, and the divisions have a way of mapping what we might suspect are the Justices' leanings about the merits of cases irrespective of originalist considerations. The same is true for law professors and other participants in constitutional discourse: people's views of original constitutional meaning tend to align well with their (nonoriginalist) preferences for how present constitutional controversies should be resolved. To be sure, there are exceptions. Some people are better than others at suspending presentist considerations when examining historical materials, and some people are better than others at recognizing when a historical text taken on its own terms cannot support their own desired perspectives. But within American constitutional discourse, the prevailing tendency runs in the other direction. Despite the common claim that originalism constrains decisionmaking, people who disagree about constitutional issues tend to enact their disagreement in the realm of original meaning, as well as in the other realms of constitutional argument.<sup>1</sup>

One might suspect, then, that different contenders in constitutional cases endorse different views of original meaning precisely so as to support their desired outcomes in those cases.<sup>2</sup> But for reasons that Jamal Greene helps

---

\* Professor of Law, The University of Michigan; John Simon Guggenheim Memorial Foundation Fellow in Constitutional Studies. I thank Jamal Greene for initiating this discussion and Alex Christopher for a cromulent intervention.

1. See Richard Primus, *Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL'Y 159, 171 (2009) (cataloging recent instances in which the Supreme Court has divided in this manner).

2. This view of the matter need not sound in cynical instrumentalism. To be sure, it is possible to imagine a litigant saying to himself, "The historical sources are open textured, and I want to win this case, so I will argue that the original meaning is X, even though the sources could equally well support Y." But for most scholars and judges, and probably for most other participants in the

make visible, that view would understate the stakes of originalist argument.<sup>3</sup> Greene suggests that arguments about original meaning should be understood as a form of what Philip Bobbitt called ethical argument, meaning not “moral argument” but argument about the American constitutional ethos.<sup>4</sup> I share this view. To be sure, much originalist argument is officially presented in the register of legal positivism. The reason why the federal government is limited in its authority to regulate firearms, such an argument might run, is that the founding generation imparted specific content to the Second Amendment through the ratification process, and that content is the law of the Constitution until it is changed through the appropriate process for amendment. But the deeper power of originalist argument sounds in the romance of national identity. Whether originalist arguments have purchase depends less on the accuracy of their historical accounts—or the plausibility of their theories of intertemporal authority—than on whether their audiences recognize themselves, or perhaps their idealized selves, in the portrait of American origins that is on offer. To return to the Second Amendment example, the force of the originalist arguments that the Supreme Court credited in *District of Columbia v. Heller*<sup>5</sup> is not primarily a function of whether historical evidence suggests that the Amendment was originally understood as a federalism measure or a matter of individual rights, and it is largely untouched by the dead-hand problem. But it depends heavily on whether twenty-first-century Americans (and in particular twenty-first-century American officials) are disposed to see the keeping and use of firearms as near the core of what makes them Americans and what connects them to the American past. As a matter of form, the winning argument in *Heller* is originalist. Its substance and its persuasive power are matters of ethos.

Classifying originalist arguments as ethical requires expanding the category of ethos beyond Bobbitt’s own usage, though perhaps not beyond his abstract description of the category. According to Bobbitt’s formulation in *Constitutional Fate*, “ethical argument” is “constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people.”<sup>6</sup> Taken at that level of generality, the

---

system, the fact that originalist interpretations tend to support the interpreters’ own preferred positions is more likely a matter of motivated reasoning than of deliberate manipulation. That is, people with strong preferences about present controversies might be drawn to accept some accounts of original meaning more readily than others, even if they do not experience themselves as cavalier with the history on its own terms. Given that historical sources regularly lend themselves to multiple interpretations, a little bit of motivated reasoning will often be enough to let someone settle on one interpretation rather than another.

3. Jamal Greene, *On the Origins of Originalism*, 88 TEXAS L. REV. 1 (2009).

4. *Id.* at 82–88; *see also* PHILIP BOBBITT, *CONSTITUTIONAL FATE* 93–119 (1982).

5. 128 S. Ct. 2783 (2008).

6. BOBBITT, *supra* note 4, at 94.

category would include any originalist arguments in which the gravamen was a claim about the nature of American institutions and the American people at the founding—and, implicitly, since. That said, Bobbitt himself has pressed a more substantively specific conception of ethical argument. In *Constitutional Fate*, Bobbitt presented ethical arguments as arising not from any claim about American institutions and the American people but from one particular characterization: that ours is a limited government.<sup>7</sup> In subsequent work, Bobbitt has written that the idea of self-government can also give rise to ethical arguments in constitutional law.<sup>8</sup> But even so, Bobbitt's treatments of ethical argument posit or derive a particular substantive ethos—limited government, or self-government—and then regard as ethical arguments from that conception.

Greene approaches the category of ethical argument in a way that does not presume, or argue for, any particular conception of the American constitutional ethos. That seems reasonable. Just as doctrinal argument is argument about the content of constitutional doctrine, ethical argument can be argument about the content of the constitutional ethos. And the American ethos is very much a subject of contest in constitutional law:<sup>9</sup> the content of our ethos is part of what we are arguing about. Bobbitt's claim that the fundamental constitutional ethos is about limited government can be understood as a move within that contest—that is, as an instance of ethical argument—rather than as exhausting the category.

As Greene keenly appreciates, historical narrative is one of the leading ways in which claims about ethos are articulated.<sup>10</sup> To put it Greekily, *ethos* and *mythos* are closely joined. Many historical arguments—specifically, those that aim to persuade their audiences to accept a given sense of the constitutional ethos—can therefore be profitably understood as ethical arguments. “Historical argument” is one of Bobbitt's modalities alongside “ethical argument,”<sup>11</sup> and someone taking a wooden approach to the typology

---

7. See *id.* at 230.

8. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 64–82 (1991); Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEXAS L. REV. 1869, 1937 (1994). That said, Bobbitt may continue to hold the view that the ethos of limited government is more powerful. See Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1284 (1989) (“The fundamental American Constitutional ethos is the idea of limited government.”); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1393 (1994) (book review) (identifying both limited government and self-government as within the constitutional ethos but describing the ethos of limited government as “fundamental”).

9. See, e.g., Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 30 (1990) (explaining that the Court's “embrace of the value of racial equality [in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954),] could have been a misreading of the national ethos” and “came close to failing precisely because that ethos was in fact so divided”).

10. See Greene, *supra* note 3, at 84.

11. BOBBITT, *supra* note 4, at 9–24.

offered in *Constitutional Fate* might classify originalist arguments that do not arise from the idea of limited government (or self-government) as historical rather than ethical. But there is no need to insist on a rigorous separation of historical arguments from ethical ones (and on this point, Bobbitt would surely agree). So Greene's characterization of much originalist argument as ethical is a fair expansion of Bobbitt's category and in some respects an improvement upon it.

If originalist argument is often a form of ethical argument, then the stakes of originalist argument can go well beyond any particular case in which originalist arguments are made. The core question addressed by ethical argument is who Americans are as a people, and the struggle over that issue is a central contest of constitutional law. Moreover, that contest is not pursued only for the sake of establishing a platform from which to decide concrete cases. The content of our national ethos is also contested for something like its own sake, as a source of independent value. Most participants in American constitutional discourse want being American to mean some things and not others. For similar reasons, most participants want American history to be, or to mean, some things rather than others. Just as the character of a person might be revealed by the story of his life, the character of the American people is understood to be revealed by the story of their past. So if originalist argument is ethical argument, the stakes are never just about the case at hand.

In what follows, I identify three functions of ethical-originalist argument that go beyond the realm of deciding particular cases. First, originalist argument can establish the content of American history as a value in itself. Second, it can help to legitimate the constitutional system by creating an affinity between the present generation and the generation of heroic constitution makers. Third, it can establish a particular speaker as the authoritative bearer of the American constitutional tradition, thus empowering him to arbitrate questions in the name of that tradition. These functions of ethical-originalist argument often overlap, and they all overlap with the more quotidian business of using originalist argument to justify particular decisions. But even when a particular speaker aims only at deciding a given case—or establishing a rule of decision that will decide cases of a certain kind—originalist arguments that sound in national ethos can execute the other three functions as well.

### I. Function 1: History as a Value

In American constitutional culture, people struggle over the content of American history as if they derived value from the simple fact of the story's being one thing rather than another. We are invested in the history, so we have preferences about its content irrespective of whether that content bears directly on issues of our own day. Most of us want the founders of the

republic and various other actors in constitutional history to have been honorable and intelligent rather than scoundrels and knaves. We want the story of the Constitution to begin with great promise, and if we recognize that the original Constitution was not perfect, we want the story of American constitutional development to be one of better choices over time, gradually working the Constitution pure and redeeming the initial promise. Again, there are exceptions. But as a general matter, even people critical of existing constitutional arrangements are sufficiently invested in the goodness of the Constitution's history so as to think of themselves as redeemers of an earlier vision rather than as rejecting the Constitution and its tradition.

The preference for an uplifting view of constitutional history is rooted in part in the fact that participants in the constitutional system today are in a sense characters in the Constitution's continuing story and, therefore, the successors in interest of the characters from previous generations. That positioning creates a sense that who they were reflects on us, much as many of us have the sense that our family forebears reflect on us. Most people want their great-grandparents to have been honorable men and women, even if they never met them. Given the choice of which of two stories about our predecessors to accept as true, most of us would prefer the one that casts them in a favorable light.<sup>12</sup> And we want the overall story, in which we are eventually characters, to be a story that we like.

That said, we have different ideas about what kind of story is likable. We have, one might say, differing historical preferences, meaning not preferences *in* the past but preferences *about* the past. Were the founders skeptics or Christians? Was the Civil War a crusade against slavery, or was the slavery gloss peripheral to a struggle for brute sectional power? Many of us care about the answers even apart from whatever might follow for twenty-first-century legal outcomes. We care because some tellings make it easier than others for us to identify with our predecessors, or to think them praiseworthy, or because they make us (rather than our contemporary rivals) into the legitimate bearers of the noble past, or simply because we have heard the story in particular ways since childhood and value what is familiar.

Originalist argument is in part a way of claiming that American constitutional history is the story we want it to be. To be sure, presentist consequences can flow from fixing the story one way rather than another. But the promise of those consequences does not exhaust the appeal of being able to establish the story according to one's liking. We value the story on its own terms, or because of how it makes us feel about ourselves given our

---

12. See, e.g., *The Simpsons: Lisa the Iconoclast* (Fox television broadcast Feb. 18, 1996) (presenting a situation in which Lisa discovers that town founder Jebediah Springfield was actually a vicious pirate rather than a pioneer hero but also realizes that the people of the town derive immense value from their positive image of Jebediah and therefore does not correct the historical record).

relationship to it. And because we have differing preferences about what the story should be, we argue about the content of the history.

## II. Function 2: Constitutional Legitimacy

Investment in the history for something like its own sake is reflected in the following underappreciated feature of originalism: originalism is fun. For most constitutional lawyers—a category in which I mean to include judges and law professors—the process of engaging with America’s constitution writers and imagining what they would have to say about the problems we face today is highly enjoyable. For many, it is downright thrilling. The core framers are heroes and celebrities, and the project of identifying original meanings asks us to stand in their shoes. It is no wonder that so many people like doing it.

Thinking of originalist argument as an activity in which twenty-first-century Americans get to imagine themselves in the role of the founders might seem trivializing. It suggests that arguing about the original meaning of Article II is like playing Guitar Hero—and in some ways it is. But something deeper is also going on. Enabling citizens and officials to identify with the major figures of their national political traditions serves important civic functions. It encourages them to relate to the governing regime as their own, rather than as something alien or imposed. That attitude toward government is an important element of legitimacy.

Two central features of American government make discursive opportunities to identify with the makers of the system especially important. The first, which is mostly a function of the sheer size of the polity even at the state level,<sup>13</sup> is that few citizens have the opportunity to feel ownership of the regime through actual proximate impact on policymaking. The second is that the Constitution is very old. As is well understood, an inherited Constitution that is extremely difficult to amend is a form of government that people now living do not really have the opportunity to accept or reject. This is the familiar dead-hand problem in constitutional law.<sup>14</sup> Without some way of

---

13. According to the 2000 census, more than 85% of Americans live in states whose populations are larger than the entire United States population was at the time of the ratification of the Constitution. U.S. CENSUS BUREAU, STATES RANKED BY POPULATION (2001), available at <http://www.census.gov/population/www/cen2000/briefs/phc-t2/tables/tab01.pdf>. The proportion of modern Americans who live in states whose *electorates* are larger than the entire United States electorate was at the time of ratification is, of course, even larger. Compare FED. ELECTION COMM’N, DISTRIBUTION OF ELECTORAL VOTES, <http://www.fec.gov/pages/elevote.htm>, with FIRST CENSUS OF THE UNITED STATES 8 (1790), available at <http://www2.census.gov/prod2/decennial/documents/1790b-02.pdf> (summarizing the population of individual states and territories).

14. The dead-hand problem defeats any claim that the Constitution is legitimately binding today on the basis of its democratic enactment, but it does not defeat the Constitution’s claim to legitimacy overall, because constitutional legitimacy is not founded on democratic enactment alone.

bridging the gap between the twenty-first century and times long before, the gap in time between the constitution makers and the people who are governed could foster a sense of alienation.

Arguing constitutional questions in originalist terms helps to allay some of the anxieties that the dead-hand problem might otherwise raise because it seems to collapse the distance between Americans today and the generations that wrote and revised the Constitution. From a practical perspective, it is often hard to understand why the best way to approach the problems of twenty-first-century governance would be through the ideas of James Madison or John Bingham. Capable as they were, neither Madison nor Bingham could think concretely about the issue presented in, say, *Citizens United v. FEC*,<sup>15</sup> because neither of them had knowledge of twenty-first-century political campaigns, corporate governance, and mass-market advertising. But if we argue our most pressing issues as if their ideas were relevant, we can seem to elide the difference between their world and ours. We create in ourselves a sense of intertemporal community: in every generation, constitutional lawyers see themselves as if they had been at Philadelphia.

This is not an unequivocally good thing. For starters, imagining ourselves as engaged in the founders' own conversation does nothing to make their ideas any more helpful for the instrumental task of finding the best regime for, say, the regulation of corporate money in politics under the conditions of 2010. In the worst-case scenario, our analysis of the question would be substantively distorted by the introduction of inapposite ideas. Nor does the fact that arguing in originalist terms might help us worry less about the dead-hand problem mean that it offers to *solve* that problem. Talking as if the founders were less removed from us than they actually are does not alter the fact that the written Constitution is an artifact of times now gone. But if engaging in originalist argument does not solve that problem, it may nonetheless alleviate some of the anxieties that focusing on that problem might otherwise raise. So for better or for worse, the activity has an enduring attraction.

If one of the functions of originalist argument is to foster identification with the constitutional regime, it matters whether the content of original constitutional meanings resonates with people today. If we engaged the ideas of Madison and Bingham and found them alien, or worse yet repulsive, then trafficking in original meanings would be a poor strategy for making us feel that the Constitution they wrote is authentically ours as well. In the actual practice of constitutional argument, this problem rarely arises: lawyers, judges, and professors have a way of finding that originalist sources

---

See Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 192–202 (2008).

15. 130 S. Ct. 876 (2010).

underwrite constitutional meanings that they find attractive. There are exceptions, of course. Trashing the founders is a known academic genre. But it is rare in public discourse, virtually unknown in litigation, and a niche pursuit even in the academy. In the main, constitutional lawyers who argue from original meanings tend to conclude that the founders were just like us, at least to the extent of valuing what the speaker thinks we value, or should value. Originalist argument thus helps legitimize the constitutional regime by creating a sense of national ethos that is continuous from the founders to our own time.

### III. Function 3: Authority and Authenticity

Finally, originalist argument can help establish a particular speaker as an authoritative arbiter of the constitutional tradition. The authority to speak in the name of the tradition is not simply something that attaches to offices. Occupying certain offices helps, and the office of Supreme Court Justice helps more than most. But there is no uniform quantum of authority to speak in the name of the tradition that is allocated to all justices equally. Who has more and who has less is partly a matter of the different ways in which different justices enact their relationships to constitutional history and, in turn, how the audience of constitutional lawyers processes those different ways of enacting the relationship.

One effective way for a justice to position himself as an authoritative arbiter of the American constitutional tradition is to speak confidently about the values of the founders. A justice who systematically presents his work product as the fulfillment of the founders' vision bids to establish his own role as apostolic. Indeed, a justice who successfully persuades his audience that the spirit of constitutional history moves within him is likely to enhance his own authority to decide issues in accordance with his own vision even when he cannot adduce direct support from statements of the founding generation. And the most successful forms of originalist argument for this purpose are broad claims that sound clearly in national ethos, rather than measured historical reconstructions that are limited to the technical particulars of positive authority.

Chief Justice John Marshall's opinion in *McCulloch v. Maryland*,<sup>16</sup> for example, was a masterpiece of ethical argument. Broadly and confidently, it spun out the meaning of what the founding generation did in creating the Constitution.<sup>17</sup> Chief Justice Marshall was a member of that generation, of course, and he participated personally in the Virginia Ratifying Convention.

---

16. 17 U.S. (4 Wheat.) 316 (1819).

17. See Gerard N. Magliocca, *A New Approach to Congressional Power*, 95 GEO. L.J. 119, 125 (2006) (opining that "Marshall cast such a powerful spell that *M'ulloch* has displaced the views of the Framers as the authoritative source on the scope of Congress's power").

But his authority to speak for the whole generation is less a product of that participation than it is of his telling the story later on. After all, his participation in the founding generation does not differentiate him from a host of other people, many of whom had different views from his about the Bank of the United States and a large number of related constitutional questions.<sup>18</sup>

Consider also the example of Justice Brandeis describing the founders' attitudes toward free speech. "Those who won our independence by revolution were not cowards," Justice Brandeis declared in his famous *Whitney*<sup>19</sup> concurrence, but rather "courageous, self-reliant men, with confidence in the power of free and fearless reasoning."<sup>20</sup> The tone is broad and confident, and the picture is general. A careful historian might cringe at the lack of nuance, but there is a reason why Justice Brandeis did not write, "Those who won our independence by revolution were, mostly, not cowards, though of course there are a few cowards in any large group. Most of them most of the time were confident in the power of free reasoning, even though many of them were less so, and some would have been willing, in certain circumstances, to impose restrictions."

At one level, Justice Brandeis was making an argument about the First Amendment. But he was also instructing his audience in a general vision of the founders and, simultaneously, a vision of Justice Brandeis as someone who knew, easily and intuitively, what the founders were all about. Note that Justice Brandeis named no particular founders and adduced no particular historical evidence for his claim about their character and worldview. None was needed. Part of the point, after all, was that he, Justice Brandeis, had sufficient access to what was important about the relevant historical story.

Among the sitting Justices, Justice Kennedy seems to have a particularly strong sense of confidence in himself as a bearer of the American constitutional tradition. He is comfortable making broad pronouncements about the meaning of America and the arc of its history, and he generally does so without the sense of ambiguity and contingency that a more disciplinary approach to history might involve. His recent invocation of the founders' views of free speech in *Citizens United v. FEC* was more compact than Justice Brandeis's in *Whitney*, but it was no less general, no less robust, and no more a matter of having to struggle with historical nuance. "At the founding," Justice Kennedy wrote, "speech was open, comprehensive, and

---

18. This is not to say that Marshall's argument does its work by its own force alone. As is true of argumentative texts generally, success requires not just something about the text but also something about the audience, and there have been periods in history when the orientation of the dominant audience denied the *McCulloch* opinion the revered place that it now holds. See Magliocca, *supra* note 19, at 124–34.

19. *Whitney v. California*, 274 U.S. 357 (1927).

20. *Id.* at 377 (Brandeis, J., concurring).

vital to society's definition of itself; there were no limits on the sources of speech and knowledge.<sup>21</sup> That is a picture of an ethos. And if there were any doubt that Justice Kennedy's opinion offered an image of the ethos of America not just at the founding but through time, one might note that the opinion invokes not just a general image of wide-open-eighteenth-century speech but also the Jimmy Stewart movie *Mr. Smith Goes to Washington*.<sup>22</sup>

At one level, Justice Kennedy's view of founding-era speech was offered to justify the decision that Congress may not ban corporations and unions from making political expenditures. But more is at stake in Justice Kennedy's relationship to the founders than either the outcome of *Citizens United* or the more general question of the limits of the First Amendment. If some constitutional actors regularly and confidently advance broad ethical arguments about the founding and others do not, the latter group risks ceding the role of Vicars of the Constitution. The power to speak in the name of the founding is a tool that belongs to those who use it.

#### IV. Conclusion: The Limits of Ethos

Greene's suggestion that originalist argument is largely ethical can be broadened. Perhaps much textual argument, too, is best understood in the register of ethos. This may be so in two different ways. First, textual argument is in part a way in which constitutional actors advance and defend claims about ethos, just as originalist argument is. That much is simply a result, once again, of the fact that ethos is a large part of what constitutional argument is substantively about. But also like originalist argument, textual argument is a practice through which Americans enact an important piece of the constitutional ethos. Making originalist arguments is a way in which we enact our sense of connection to the founding; making textualist arguments is a way in which we enact our sense of ourselves as governed by a written document. Very few Supreme Court cases are actually decided by reference to the words of the text, but our enacted attitude toward textual argument both reflects and embodies a central part of our constitutional ethos.

At least two of our most hallowed forms of constitutional argument—text and history—are thus not just vehicles for advancing claims about ethos. They are also discursive practices through which the constitutional ethos is enacted. Once we notice that fact, it is instructive to think further about which forms of constitutional argument are *not* practices through which Americans enact their constitutional ethos. Doctrinal argument may or may not be, depending on the case and the context; prudential argument is almost certainly not; neither, I think, are more hard-headed arguments about the practical functioning of governance. Those modes of reasoning might have a

---

21. *Id.* at 906.

22. *Id.* at 916.

greater tendency to yield pragmatically helpful answers about how to govern a complex society in the twenty-first century—if only we were good at them, of course. To be sure, those modes of reasoning cannot answer many questions of value. But questions of value are only part of what constitutional law must resolve.

To some extent, therefore, the prominent place of ethical-originalist argument in constitutional law is regrettable. Officials might make better decisions about consequential issues of governance if they were not simultaneously engaged in a gauzier contest about national identity. But as a matter of practice, constitutional discourse is partly that gauzier contest. To the extent that it is, originalist arguments are doing more than using history to settle twenty-first-century questions of law. We may capture the phenomenon better by saying that twenty-first-century questions provide opportunities for articulating rival visions of the past. And once we adopt that perspective, it should be no surprise that people with different constitutional values find different meanings in originalist history, rather than being able to refer to historical sources to settle contested questions. The history, after all, is what they are contesting.