# Rethinking Originalism

## Original intent for liberals (and for conservatives and moderates, too).

*By Akhil Reed Amar*

Posted Wednesday, Sept. 21, 2005, at 12:36 PM ET

Should constitutional interpreters embrace the document's original intent or evade it? Several leading liberal scholars are urging Americans to choose Door No. 2, because the original-intent game is doomed to reach intolerably conservative—indeed, reactionary—results.

But is it? And once we reject that game, what are the proper legal rules to play by?



The present moment is a perfect time to ponder such foundational questions: The Rehnquist Court is now officially history, two new justices will soon be in place, and the Roberts hearings have introduced a new generation of channel-surfers to detailed debates about constitutional philosophy. Closer to home (i.e., the home page of this Web site), several recent ***Slate*** postings by Jack Balkin, Dahlia Lithwick, and Emily Bazelon have made interesting contributions to the original-intent debate.



In late August, Balkin—my Yale colleague and sometime co-author—correctly pointed out that Justices Antonin Scalia and Clarence Thomas, while proclaiming themselves faithful followers of original intent, do not always practice what they preach. For example, these two justices have consistently voted against affirmative action but have never explained how their votes can be squared with historical evidence that the Reconstruction Congress itself engaged in affirmative action.

But without more, this is merely an argument that Scalia and Thomas should be more consistent and less hypocritical: They should respect original intent across the board—at least in the absence of some compelling legal counterargument, such as justifiable reliance on past practice or precedent.

Balkin himself has reached a wholly different conclusion: Modern constitutional interpreters, says he, should simply stop trying to heed the original intent of the men and women who ratified and amended the document. In his opinion, interpreters should focus on the text, not the original intent.

As I see it, text without context is empty. Constitutional interpretation heedless of enactment history becomes a pun-game: The right to "bear arms" could mean no more than an entitlement to possess the stuffed forelimbs of grizzlies and Kodiaks. (And if history no longer constrains, why should spelling? Maybe the Second Amendment is about the right to "bare arms" and other body parts—e.g., nude dancing.)

How about Balkin's argument that originalism generally leads to outrageously conservative results? Another leading liberal light, Cass Sunstein, has said much the same thing of late. I disagree. The framers themselves were, after all, revolutionaries who risked their lives, their fortunes, and their sacred honor to replace an Old World monarchy with a New World Order unprecedented in its commitment to popular self-government. Later generations of reformers repeatedly amended the Constitution so as to extend its liberal foundations, dramatically expanding liberty and equality. The history of these liberal reform movements—19th-century abolitionists, Progressive-era crusaders for women's suffrage, 1960s activists who democratized the document still further—is a history that liberals should celebrate, not sidestep.



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Consider, for example, the landmark 1954 case of *Brown v. Board of Education*. Both Sunstein and Balkin say that *Brown* broke with the history underlying the Civil War amendments, which, they claim, plainly permitted racial segregation. But the 14th Amendment, ratified in 1868, undeniably demanded that government treat blacks and whites with equal respect, equal dignity, and equal protection. All Americans—black and white alike—were proclaimed equal citizens by that amendment. True, some framers of this amendment did say that some segregation laws might be permissible. But in saying this, many of them were envisioning a postwar world in which both races in general might prefer separate spaces (as most men and women today probably prefer sex-segregated bathrooms in public places). In such a world, they believed, segregation would not always be unequal.

But the Reconstructionists never said that segregation would always and automatically be constitutional. The Constitution's text does not say that all citizens are equal "except for segregation laws." Rather, it uncompromisingly demands equality of civil rights—no ifs, ands, or buts. In fact, most Reconstructionists understood that a law whose statutory preamble explicitly proclaimed whites superior to blacks would be plainly unconstitutional. The question in both *Plessy v. Ferguson* (in 1896) and *Brown v. Board* (in 1954) was thus a simple one, and simpler than these constitutional scholars might suggest: Was Jim Crow in fact equal? Or was it instead a law whose obvious purpose, effect, and social meaning proclaimed white supremacy in deed rather than in word? For any honest observer in either 1896 or 1954, the question answered itself: Jim Crow was plainly designed to demean the equal citizenship of blacks—to keep them down and out—and thus violated the core meaning of the 14th Amendment. So, *Brown* is in fact an easy case for those who take text and history seriously. (Note, by the way, that this basic view of *Brown*—embraced by a wide range of scholars from Robert Bork on the right to Charles Black on the left—is somewhat different than the more controversial originalist theory championed by the towering judge/scholar Michael McConnell, whose ideas Emily Bazelon has recently explored.)

Another key originalist point that is often overlooked derives from the 15th Amendment, which was ratified two years after the 14th and reflected a far more robust vision of black rights, including equal-suffrage rules. This amendment was intrinsically integrationist, envisioning a world in which blacks and whites would work side by side at the ballot box, in the jury box, and in legislatures across the country. As the first Justice Harlan understood in *Plessy* (though many modern scholars seemed to have missed the point altogether), the enactment history of the 15th Amendment thus powerfully reinforced various 14th Amendment arguments against Jim Crow.

Yes, it's true that on today's court the two leading originalists are both conservative, but perhaps the court's most influential originalist in history was the great Hugo Black—a liberal lion and indeed the driving force behind the Warren Court. (For more on Black's role in leading the Warren Court to apply the Bill of Rights against states, protect the rights of criminal defendants—especially the indigent—champion the rights of political dissenters, and enforce racial and voting equality principles, click here.) It's also worth remembering that the most towering originalist scholar of the 1970s was also a professed liberal, John Hart Ely.

In short, there are many reasons to question the idea that modern liberals should abandon constitutional history rather than claim it as their own. This short posting is not the place to present all the historical evidence that some modern anti-originalists are overlooking—I've tried to do that elsewhere (in an article in the *Harvard Law Review* published in 2000, and, more comprehensively, in my new book being published this month). But I hope I've said enough here to convince thoughtful anti-originalists to take a second look at the Constitution's first principles.

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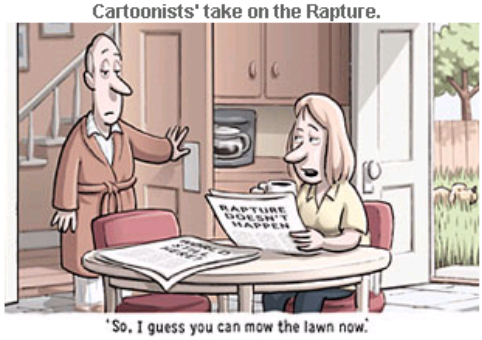


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