Originalism: A Debate
Will Baude and Eric Posner

In Winter Quarter 2014, Eric Posner, Kirkland & Ellis Distinguished Service Professor of Law and Arthur and Esther Kane Research Chair, and William Baude, Neubauer Family Assistant Professor of Law, cotaught a course on originalism, the theory of constitutional interpretation that fixes the meaning of the Constitution at the time of its creation. During the class, they both blogged about the content of the course in dialogue with each other. Professors Baude and Posner allowed The Record to excerpt their conversation here. To maintain the flow and tone of the conversation, the posts included here are reproduced in their original form. The entire conversation, however, includes many more posts than we could include here. Readers are encouraged to read the entire conversation; Professor Baude has posted links to all the posts: www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/09/originalism-and-its-critics-my-dialogue-with-eric/.
The graph on this page shows the number of students who give themselves a 1 (“strongly disagree”) to 5 (“strongly agree”) in response to the statement “I consider myself an originalist.” We also asked them (anonymously) for their political beliefs, and there is a moderate correlation (0.48) between being an originalist and being conservative.

Let’s see whether students change their mind by the end of the course. Meanwhile, a few comments on *Heller*.

It seems to me that the text of the Second Amendment suggests that the right to bear arms is tied to serving in a militia, though not unambiguously, and that the exhaustive historical research discussed by the Court does not resolve the ambiguity one way or the other. A general preference for allowing voters to make up their own mind, the absence of any allegation or evidence of political failure, a relevant precedent if not a strong one, and a very long history of gun control legislation across the country all point to upholding the statute. Both Scalia’s and Stevens’s opinions are horrible messes. Scalia’s parsing of the text is wooden and ludicrous. Both of them select the evidence they like and interpret it tendentiously. Neither shows any feeling for history. The opinions are tedious, pompous anti-models of judicial writing, no advertisement for the method of originalism.

This is a recurring theme in originalism debates. Often what seems like an intractable historical debate is really solved by a legal or interpretive question about what kind of history matters. Consider also the debate between Justices Scalia and Stevens in *Citizens United* about the First Amendment and corporations. Justice Stevens argues that the Framers’ negative views about the role of corporations in society makes it unlikely that corporations have full First Amendment rights. Justice Scalia responds that Founding-era attitudes towards corporations are irrelevant if the text does not incorporate them, or at least that we would need specific evidence that corporations
were thought to be excluded from the freedom of speech. Again, the important dispute is not really a historical one so much as an interpretive one, about what kind of historical evidence is relevant to legal meaning.

All of this is why I think originalism today is best learned in law schools, and practiced by legal scholars, rather than in other academic departments. But that is a much longer discussion for another day.

JANUARY 21, 2014: ERIC POSNER
Originalism Class 3: Precedent

What should originalists do about precedent? If they respect it, then the original meaning will be lost as a result of erroneous or nonoriginalist decisions that must be obeyed. If they disregard it, then Supreme Court doctrine is always up for grabs, subject to the latest historical scholarship or good-faith judicial disagreement (as illustrated by the competing

Partial originalism–originalism-and-precedent–may lead to outcomes that are less respectful to original understandings than nonoriginalist methodologies would.

Heller opinions). One can imagine intermediate approaches: for example, defer only to good originalist precedents, or defer only when a precedent has become really entrenched. But while such approaches may delay the eventual disappearance of original meaning behind the encrustation of subsequent opinions, they cannot stop it, sooner or later. Our readings–Lawson, McGinnis & Rappaport, Nelson–provide no way out that I can see. (Lawson dismisses the problem, while the others propose intermediate approaches.) Originalism has an expiration date.

Another issue is raised by McDonald–the gun control case. In Heller, Scalia disregards precedent in order to implement what he thinks was the original understanding of the Second Amendment. In McDonald, he writes a concurrence that cheerfully combines Heller with the antioriginalist incorporation decisions. Why doesn’t he feel constrained to revisit those decisions? Instead, he joins a holding that generates constitutional doctrine that in practical terms is more remote from the original understanding (gun rights that constrain the states) than he would have if he had gone the other way in Heller (no gun rights at all), given the greater importance for policing of the state governments both at the founding and today. This is akin to the second-best problem in economics: partial originalism–originalism-and-precedent–may lead to outcomes that are less respectful to original understandings than nonoriginalist methodologies would.

JANUARY 22, 2014: WILL BAUDE
Precedent Is Not a Threat to Originalism

What should originalists do about precedent? That was the subject of week 3 of the originalism course I am coteaching with Eric Posner. It seems to me that [Eric’s] claim is not obviously true, and also not particularly problematic if it is true.

On the first, it is not clear why all intermediate theories of precedent will lead to 100 percent encrustation or the “disappearance” of original meaning. For example, if the first precedents on a question are consistent with the original meaning, then precedent and originalism point in the same direction and originalism is preserved. Or one could have a theory of precedent that still allows precedents to be overruled some of the time. There is no particular reason for that to lead to encrustation either. Indeed, in many ways the history of constitutional law is the history of eventually overruling precedents. Maybe it is the precedents, not originalism, that have the expiration date.

In any event, suppose that it is true that precedent means that originalism becomes irrelevant over time, at least so long as the constitutional text remains the same. It is not clear why that is a bad thing. Assuming that one is a pro-precedent originalist, one has already reconciled oneself to the fact that originalism permits precedent as a rule of decision. If originalism permits itself to be shingled with precedents, then so be it.

The more interesting question is why precedent is so often put forward as if it were a special problem for originalism. Unless one’s substantive constitutional theory is based directly on precedent (which is true of my colleague David Strauss, but almost nobody else), all theories will face a similar dilemma. The more one adheres to the theory of precedent, the more the substantive theory is lost. The more one ignores precedent, the more one will be accused of placing things “up for grabs.” Indeed, one strength of originalism is that it actually has the resources to answer that question internally (by asking what the original theory of precedent was).

Precedent is an interesting question for originalism, and there is no consensus on the answer, but none of the plausible answers are particularly problematic.
A bequest from Arthur Kane, AB ’37, JD ’39, and his wife, Esther, will support the funding of two positions, a research chair and a teaching chair.

Mr. Kane’s name will be familiar to many in the Law School community: his $3 million gift in 1996 made possible the Arthur Kane Center for Clinical Legal Education, one of the most important buildings in the Law School’s history. His name is also recognized throughout the broader legal community, a legacy of the firm he cofounded and guided for more than 40 years, the multiple precedent-setting cases he argued, legislation he influenced, and professional organizations he led.

Mr. Kane’s father, Henry, immigrated to the United States as a teenager, earned a college degree and a law degree, and became a pioneering workers’ compensation attorney. “He would always tell me,” Mr. Kane says, “If I accomplished what I did, you can do even better—You’re going to go to the University of Chicago and get the best education possible.’ And he was right: The College was great, and the Law School really challenged me and matured me. The faculty included names like Levi, Sharpe, Bigelow, Sears, Moore, and Cleveland—legal giants, every one of them.”

He also recalls his adventures with a future Law School faculty giant, Walter Blum. As fraternity brothers in 1938, they created the first-prize-winning entry in that year’s Homecoming competition, a theatrical production called “The Munich Follies,” in which each line of dialog consisted of the first line from a popular song.

Not long after graduating (at the age of 21), he married his first wife, Bernice, to whom he was wed for 40 years until her passing. He joined the army in 1942 and served for more than three years during the Second World War. When he returned, he joined his father’s law practice, and they worked together until his father’s passing in 1963. He formed the firm that became Kane, Doy & Harrington in 1965, and it became a preeminent workers’ compensation practice, principally on the defense side.

“We tried to keep the firm small,” Mr. Kane recalls, “but I guess we were doing a good job, because cases kept coming in.” He recalls that at one time the firm’s ten attorneys had nearly six thousand active cases, and the firm often was handling as many as ten percent of all of the workers’ compensation cases in Illinois. His legal successes helped burnish the firm’s reputation, as his arguments established important precedents. He became a recognized expert on occupational diseases—for plaintiffs, he won the first asbestosis case in Illinois and also gained a major victory in a myasthenia gravis case. He served as president of the Illinois Workers’ Compensation Lawyers Association and as chair of the Chicago Bar Association’s committee on workers’ compensation, among several other major institutional roles.

The Arthur and Esther Kane Research Chair and the Arthur and Esther Kane Teaching Chair will be faculty members who have demonstrated expertise in constitutional law and/or administrative law. “When I went to the University, it was supposedly a hotbed of communism, but it was in fact a very balanced education,” Mr. Kane says. “At the Law School, I loved studying constitutional law, and I got my highest grade in that course, which was taught by Kenneth Sears from a centrist perspective. In recent years, there has been such a change in the concept of the Constitution and its flexibility. And of course administrative law has become a major forum. I want to be sure that students can learn those subjects in the balanced, mainstream way that I learned them as a law student.”

Mr. and Mrs. Kane celebrated 30 years of marriage in April. Together and separately, they have been generous benefactors to a wide range of causes, including the University of Chicago, the Rehabilitation Institute of Chicago (where Mr. Kane is a life trustee), Northwestern Medical School, and service-dog organizations for veterans and for people who are visually impaired or hearing impaired. They funded the Arthur and Esther Kane Legal Clinic at the Chicago Lighthouse, the only clinic to provide free legal services exclusively to blind and visually impaired people.

“My parents were right,” Mr. Kane says. “Going to the University of Chicago Law School made a huge difference in my life. I think they would be very proud, and that means a lot to me.”
FEBRUARY 12, 2014: WILL BAUDE
Reasons for Being an Originalist

We’re back to originalism class, where we talked yesterday about theoretical justifications for originalism. The topic is set up well by Eric’s recent post, “Originalism means not always getting what you want.” I’m relieved, if a little surprised, to see Eric imply that his own interpretive methodology (which I’m still trying to fully understand) also provides “no guarantee that the interpreter will like the answers.” Eric then says this:

Originalism is itself a choice. Proponents of originalism must make arguments on behalf. And this creates a paradoxical problem for its defenders like Will, who says “if you are intellectually honest, signing on to originalism is signing on to a theory of authority where you can’t be guaranteed in advance that you’ll like what you find.” He’s right that originalism won’t get off the ground if it just advances the political preferences of a small group of people. As I said, the same is true for other methods. The question is what does it get us beyond that? And to answer that question, he must show that it is superior to other methods, presumably by advancing institutional values that everyone or nearly everyone shares. In this respect, originalism is no different from other methods.

So of course it seems right to me that originalism is chosen, not simply inherited, but I am not so sure that Eric and I agree on the correct criteria for choosing an interpretive theory. Eric suggests that the choice should be made on a value-driven basis.

Originalism is sometimes defended that way. Originalism is good, the argument goes, because it constrains judges. OR, originalism is good because it advances a certain form of democratic decision making. OR, originalism is good because, at least under our Constitution, it is faithful to a supermajoritarian process that is systematically likely to produce good results.

I think there is substantial merit to these arguments. But I don’t think they are the only basis on which to choose an interpretive theory and I’m not sure they are the best ones. A different way to justify originalism is conceptual.

The conceptual argument goes: The Constitution is a text, and interpreting that text means trying to discover the meaning those words have in the relevant interpretive community that spoke and received them. Everybody knows this when it comes to the “easy cases,” (two senators, regular elections, federal law trumps state law), and we shouldn’t let the hard cases confuse us. [On this issue we read Gary Lawson’s On Reading Recipes ... and Constitutions and Larry Alexander’s Telepathic Law. So let me say: On Reading Recipes ... was one of the greatest revelations of my 1L year of law school. If the Posner-Baude debates inspire you to read one actual article, make it that one.]

One can criticize these linguistic arguments as incomplete. It’s possible that the Constitutional text is not the law, in which case Lawson and Alexander are just reading the wrong thing. (Sounds crazy, but some law professors seem to think this if you press them.) Alternatively, sometimes the legal system has idiosyncratic rules of interpretation, so it’s possible that the American legal system requires us to treat the constitutional text idiosyncratically. That brings up a third class of justifications for originalism, namely, that originalism is either permitted or required by our legal culture.

In my view, this is where the important work still needs to be done. One important entrant, which we read in class, is a draft paper by Steve Sachs (not yet online) that suggests that we have a widespread legal commitment to legal continuity with the founding and that such continuity is a form of originalism. I think there is more to say, but fundamentally, I think it is true that there is something about contemporary American legal culture that makes originalism a part of our law of constitutional interpretation, even if it is not the way to interpret the Connecticut Constitution or the French Constitution.

So it is totally true and fair to say that the best defense of originalism has not yet been written, even after all these years. But the important point, I think, is to realize that there are different kinds of reasons one can have for believing (or rejecting) originalism. Originalism does not have to be justified entirely on the basis of its consequences. Consequentialist arguments might be part of an overlapping set of reasons for originalism, but they aren’t the whole story. This can be frustrating to originalism’s critics, who sometimes feel as if originalists are playing a shell game; but I think it’s really just that there are a lot of good arguments in favor of originalism that reinforce one another.

[Eric also has a post about the issue of “safety valves,” which I think is interesting but even more academic, and potentially confusing, so I will cover it separately.]

FEBRUARY 12, 2014: ERIC POSNER
Class 6: Reasons for Being an Originalist

Will’s position on the role of normative arguments in the debate is unclear. He seems to think that they play some role, but what exactly? If the “conceptual” argument for
originalism is strong, are the normative issues irrelevant? Are they some kind of tiebreaker? I would like to know more.

Let us turn to the conceptual argument. Will likes Alexander’s and Lawson’s argument that courts are supposed to enforce the Constitution, and so they need to interpret the Constitution so that they know what they are trying to enforce, and interpreting the Constitution means figuring out what the original understanding was. But this is merely a semantic argument. Alexander, Lawson, and Will just define “Constitution” to mean “the text” rather than the set of norms that structure and restrict the government. That’s like saying that antitrust law is the Sherman Act rather than the body of norms that courts have created under the authority of that act. This statement is either plainly wrong or based on idiosyncratic definitions.

Steve Sachs’s argument is more sophisticated. Sachs is a positivist and he believes that, as a purely empirical matter, we Americans believe that our constitutional law consists of the original understanding, and any legal norms that appear to deviate it are invalid unless they can be derived from continuity rules that existed at the founding. If that’s what we believe, that’s the law, and if the justices have a duty to obey the law, then they should be originalists. Sachs does not actually cite any evidence about Americans’ beliefs, and for this reason stops short of claiming that originalism is right. Will does think that such evidence exists. Yet Americans seem to think that they have constitutional rights that protect all sorts of things that are not part of the original understanding. Will thinks that if forced to confront these inconsistencies, people would choose the original understanding over their favorite rights, just as people accept legal judgments about statutes and common law that turn out to violate strongly held moral intuitions about what the law is or should be. My view is that people continue to accept the authority of the Constitution and the Supreme Court precisely because the Court has recognized popular rights. In Sachs’s terms, our “continuity rule” recognizes the power of the Supreme Court to effectuate “amendments” to the text under certain conditions. I would add that it recognizes the authority of the other branches to do so as well.

If Will’s position has any force, it derives from the fact that the public does seem to venerate the 1789 text and the founding generation; and, moreover, that Supreme Court justices do not openly acknowledge that they have the power to amend the text on their own. I have two responses:

First, there is an important ceremonial aspect to our political and legal culture. Common law judges also say that they “find” law rather than “make” law, even though all sophisticated observers know that the opposite is true. Justice Roberts says that he calls balls and strikes, and again no sophisticated person believes him. When Justice Breyer says that he enforces the “spirit” of the 1789 text rather than that he makes pragmatic judgments or enforces precedents (though he says that also), he is giving a ceremonial bow to the founders, and not committing himself to the original understanding. (The ceremony is a strong, persistent, but strange part of our political culture, and is temporarily suspended when we remember that many founders were slave owners but otherwise remains in full force.)

Second, I think Will gets our legal culture wrong. Originalism is a minority position supported by only two justices on the Supreme Court who practice it inconsistently, and hardly any others throughout our entire history. Continuity-to-the-last-generally-accepted-change-in-constitutional-norms is not the same as continuity-to-the-founding. Numerous justices and judges—Breyer is just one—have criticized originalism in the clearest of terms and have suffered no adverse consequences, no blast of public outrage of the sort that would occur if a justice said (to use Sachs’s examples) that we are bound by the French constitution or Klingon law or the Articles of Confederation. When President Obama said that he wanted an “empathetic” Supreme Court justice, everyone understood what he meant, and while plenty of people criticized him, his two choices have been confirmed.

My last point is if we really think that the case for originalism is empirical (I have my doubts, but for another time), then there must be an empirical way to test it. There are all kinds of confounding problems—who is the relevant audience, for example, and how much do they need to know, and how large does a consensus have to be. But a simple starting point is a survey question that forced the respondent to choose between an originalist outcome and a popular one. Here’s one:

In the course of searching a person’s home pursuant to a valid warrant, the police discover that the person owns birth control pills. The legislature of the state in which the search took place has recently passed a law making it a criminal offense to own birth control pills. This statute conflicts with Supreme Court precedent; however, the precedent itself is inconsistent with the original understanding of the Constitution in 1789, which does not mention contraception. Should the police arrest the owner of the birth control pills based on probable cause that she violated the statute? Should she be tried and convicted?
I realize that some originalists believe that precedent matters. But under the continuity version of originalism described by Sachs, this seems like a straightforward test case. Or if not, I’d be pleased to hear a better one.

**FEBRUARY 14, 2014: WILL BAUDE**

**Originalism in Our Legal Culture: The Case of the Ground Zero Mosque**

Eric has (of course) a response to my post from earlier this week on the reasons for being an originalist—especially my claim that originalism is part of American legal practice, part of our law, even if it isn’t necessarily a part of everyone’s. This paragraph from Eric’s post comes very close to passing the methodological Turing test (i.e., describing my position in the way I would describe it):

If Will’s position has any force, it derives from the fact that the public does seem to venerate the 1789 text and the founding generation; and, moreover, that Supreme Court justices do not openly acknowledge that they have the power to amend the text on their own.

Eric responds that we have a lot of false ceremonial aspects to our legal culture, such as the notion that judges “find” law rather than ‘make’ law, or the Chief Justice’s invocation of an umpire calling balls and strikes. You will not be surprised to learn that I disagree with Eric about the importance of those aspects of our culture too. It’s terribly important that judges pretend to find law rather than making it (what else could justify its retroactive application to the parties?) and that judges acknowledge the umpire ideal. Those ideals may well be exaggerations and imperfectly realized, but they are key to judicial legitimacy.

Eric also disagrees with me at a more empirical level, and proposes a test question to find out where people’s commitments truly lie—the goal is to come up with a question that pits originalism against something popular. But his example, which uses a birth control prosecution in the trial court, doesn’t work, because most versions of originalism (including Sachs’s) tolerate precedent (especially for lower courts), so there is no clear conflict.

In any event, as we’ve seen, precedent is an area where we can’t even agree what counts as originalism, so a good test question ought to abstract from precedent entirely. Same-sex marriage might be a better area for Eric, but Mike Rappaport and Mike Ramsey—who are core originalists if anybody is—both think it is quite plausible that the original meaning of the Fourteenth Amendment protects a right to gay marriage.

Maybe a better question would be about building a mosque near Ground Zero:

A Muslim landowner wishes to build a mosque a few blocks away from the former site of the World Trade Center, in New York City. The city’s zoning authority has voted to forbid the mosque on religious grounds. But the city’s vote is inconsistent with the original understanding of the amended Constitution, which prohibits states from discriminating against peaceful religious activity. Should the city nonetheless punish the landowner? Should a court allow the city to do so?

(If you’re wondering, 2010 opinion polls from Fox, Quinnipiac, and CBS reported that building the mosque was unpopular [61–71 percent against, 22–32 percent for], but also that most people thought the owner had a right to build it [61–73 percent vs. 25–34 percent].)

Perhaps both of us can do better, but defining the appropriate questions may prove somewhat difficult. *Putting aside things permitted by precedent*, it’s actually hard to think of things that are both widely popular today and clearly inconsistent with the Constitution’s original meaning. (I spent this morning scrolling through Polling Report until I finally found the Ground Zero example.) If you have better suggestions, please leave them in the comments!

Anyway, the fact that it’s hard to think of clear cases of conflict, apart from precedent, was my original point. And maybe it means that the important disagreement between me and Eric is really about precedent after all.

**MARCH 6, 2014 ERIC POSNER**

**Originalism Class 9: Between Phony and Naive**

In our last class, we discussed Jack Balkin’s paper, “Why Are Americans Originalist?” which I interpret as a sly debunking exercise. Balkin’s most interesting argument is that the turn to originalism in the 1980s was akin to Martin Luther’s repudiation of the Catholic Church’s monopoly over Biblical interpretation, with the Supreme Court playing the role of the Church. (You might think of the habit among libertarians of carrying around a pocket-sized constitution as the modern version of biblical translation into the common language.) Originalism is a political strategy that became attractive because the founding-era meaning of the text coincided (very roughly) with the political goals of conservatives while at the same time appealing more broadly because of the patriotic, antielitist message that the Constitution contains the wisdom of the founders and we can all read the Constitution for ourselves. The students were pretty skeptical.
But I do sympathize with conservatives of the 1970s and 1980s who saw the Warren Court as an ideological apparatus and were contemptuous of the law professors at the time who sought to rationalize its liberal holdings with phony constitutional theories. The problem was that the alternative they came up with rests on a mythical self-image, or at least encourages people to treat mythology as fact, with all kinds of weird consequences for constitutional law. It’s as if the Germans repudiated their Basic Law and decided to derive constitutional norms from the myths of the Nibelungen. Or—to be fairer—from whatever archaeological research might reveal about the customs of Germanic tribes at the time of Tacitus.

We polled students again—they polarized, which makes sense since they are more informed about what originalism means now than they were at the start of the course. But it bodes ill for the project of originalism itself since originalism can prevail only if that is what the people want.

MARCH 7, 2014 WILL BAUDE

Originalism: The Theory and the Politics

The questions of whether originalism is true and where originalism comes from are both interesting. But they are different questions. Either question might interest people, but it’s important not to confuse the two. For example, some of the enthusiastic devotees of the scientific theory of evolution were “Social Darwinists” or promoters of eugenics. But it would be pretty silly to think that that fact tells us much about the scientific validity of evolution.

Theories of law are a little more complicated, because there is less consensus about the method for establishing legal truth than there is about the method for establishing scientific truth. And that might be because law is really a human construct in a way that science is not (although I’m sure that claim will be controversial in some quarters too)! But the basic point remains.

Even if it is true, as Eric Posner writes, that “originalism is a political strategy that became attractive because the founding-era meaning of the text coincided (very roughly) with the political goals of conservatives,” at this point it is also a real theory, and it is part of American legal practice. There are some interesting tensions raised sometimes by the difference between academic originalism and practical originalism (which I call “impure originalism”) but they’re ultimately not fatal to originalism, they’re just inevitable tensions in constitutional theory.

That brings us to this assessment:

I do sympathize with conservatives of the 1970s and 1980s who saw the Warren Court as an ideological apparatus, and were contemptuous of the law professors at the time who sought to rationalize its liberal holdings with phony constitutional theories. The problem was that the alternative they came up with rests on a mythical self-image, or at least encourages people to treat mythology as fact, with all kinds of weird consequences for constitutional law. It’s as if the Germans repudiated their Basic Law and decided to derive constitutional norms from the myths of the Nibelungen. Or—to be fairer—from whatever archaeological research might reveal about the customs of Germanic tribes at the time of Tacitus.

First, this passage once again reveals that the world looks very different to an internalist and an externalist. Posner seems to look at constitutional law from outside the system, and it looks silly and made up, as lots of systems do from the outside. I look at it from inside, and while originalism is “working itself pure,” it seems like one of the most viable competitors in current constitutional theory.

But let me try, briefly, to play an externalist. Suppose that I am a 70s/80s political operative whose goal is to dismantle the Warren Court (actually the Burger Court, by this time). I could try to simply eliminate the court or its power, but there is too much demand for such an institution. I could put forward a vision of precedent, but that will let the activists “vote twice” because liberals will disregard conservative precedents but conservatives will adhere to liberal precedents. I could put forward a vision of barely concealed conservative policy making, but that comes pretty close to eliminating the court too, because if it really is engaged in nothing but politics, how can it justify its existence? So maybe originalism really is the most politically acceptable antidote to unconstrained judging—not because it is perfect, but because it is better than the other ones allowed in our legal culture.

Now I don’t know if any of that is right. But if we are going to try to draw lessons from the alleged political practice of originalism, I see two natural choices:

(1) originalism is the best available alternative to unconstrained judging or

(2) originalism has been on the rise because people really believe it.

Take your pick. ■