

ORIGINALISM AND ECONOMIC ANALYSIS: TWO CASE STUDIES OF CONSISTENCY AND COHERENCE IN SUPREME COURT DECISION MAKING

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Some eighty years ago, then-Professor and later-Judge Jerome Frank purported to expose what he termed “the basic legal myth”—to wit, that judges decide cases by applying legal rules to the facts before them.¹ Frank reputedly went so far as to say that a court’s decision might turn upon what the judge had eaten for breakfast.²

Fortunately, other judges have looked beyond the breakfast table for methodologies to promote consistency and coherence in judicial decision making. In this Essay, I discuss two such methodologies—one fully achieved and the other still in the making. I refer respectively to the influence of economic analysis in remaking antitrust law and of historical originalism in shaping constitutional law.

I. ECONOMIC ANALYSIS AND THE REMAKING OF ANTITRUST LAW

Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases. The Court had read into the Sherman Act an assortment of vague and, ironically, anti-competitive social and political goals, such as protecting

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1. See JEROME FRANK, *LAW AND THE MODERN MIND* 34 (1930).

2. See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 432 n.9 (2005); Edward Lazarus, *Roper v. Simmons: Insights from the Perspective of Justice Blackmun’s Former Law Clerk*, 82 DENV. U. L. REV. 723, 724 n.5 (2005).

small traders from their larger, impersonal (and more efficient) rivals.³ Judge Learned Hand characterized the goals of antitrust law as minimizing the “helplessness of the individual” and ensuring the “organization of industry in small units” for “its own sake and in spite of possible cost.”⁴

Then, starting in the 1960s, a generation of scholars developed what has aptly been called the “new learning” in antitrust economics.⁵ Phillip Areeda at Harvard Law School, Robert Bork and Ward Bowman at Yale Law School, and Richard Posner and others at The University of Chicago Law School advanced the initially controversial view that the antitrust laws should promote economic efficiency and consumer welfare rather than shield from competitive market forces those whom Justice Peckham had deemed “small dealers and worthy men.”⁶

Starting in the 1970s, the Supreme Court began systematically reworking antitrust doctrine in order to bring it into alignment with the modern economic understanding of competition. In doing so, the Court has made Judge Frank’s “basic legal myth” a reality. Where antitrust jurisprudence was once ad hoc and incoherent, the cases now follow simply stated legal norms. A number of trends in the Court’s antitrust opinions reflect this transformation.

First, as can be seen in Figure 1,⁷ the fate of defendants in antitrust cases has improved substantially with every passing decade over the past forty years:

3. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (“[W]e cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 324 (1897) (“[I]t is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.”).

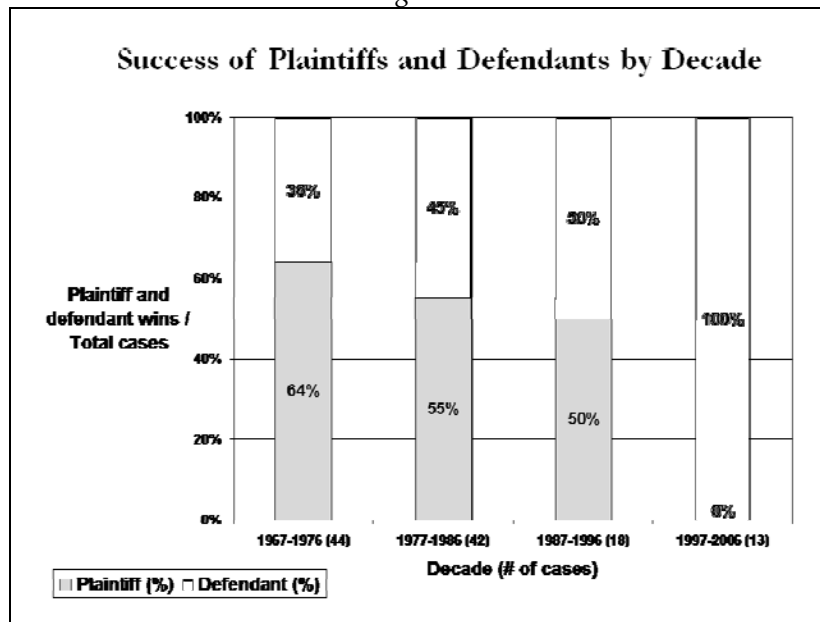
4. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428–29 (2d Cir. 1945).

5. See generally *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* (Harvey J. Goldschmid, H. Michael Mann & J. Fred Weston eds., 1974).

6. *Trans-Missouri*, 166 U.S. at 323.

7. For the data underlying Figures 1–4, see Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, *COMPETITION POL’Y INT’L*, Autumn 2007, at 3, 13–21.

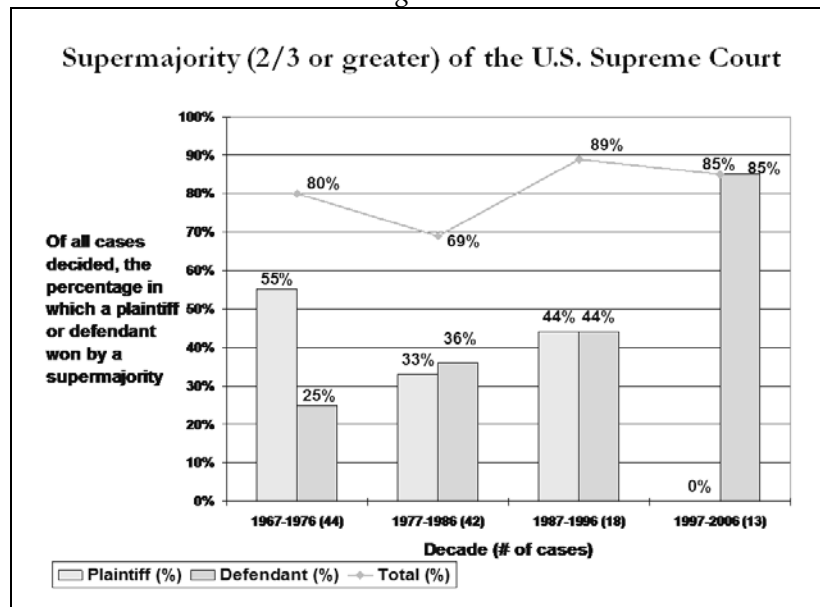
Figure 1



During the decade beginning with the 1967 Term, defendants won thirty-six percent of the antitrust cases decided by the Supreme Court (sixteen of forty-four). In the next decade, defendants won forty-five percent of the antitrust cases (nineteen of forty-two), and in the decade beginning with the 1987 Term, antitrust defendants won fifty percent of their cases (nine of eighteen). During the most recent decade, defendants won all thirteen, that is, one hundred percent of the Court's antitrust cases. These figures reflect the Justices' increasing embrace of the economic approach to antitrust law, which—relative to approaches based upon amorphous sociopolitical goals—limits liability to those relatively few business practices truly inimical to consumers.

The degree of agreement among the Justices in cases won by the defendant has also increased over the past four decades:

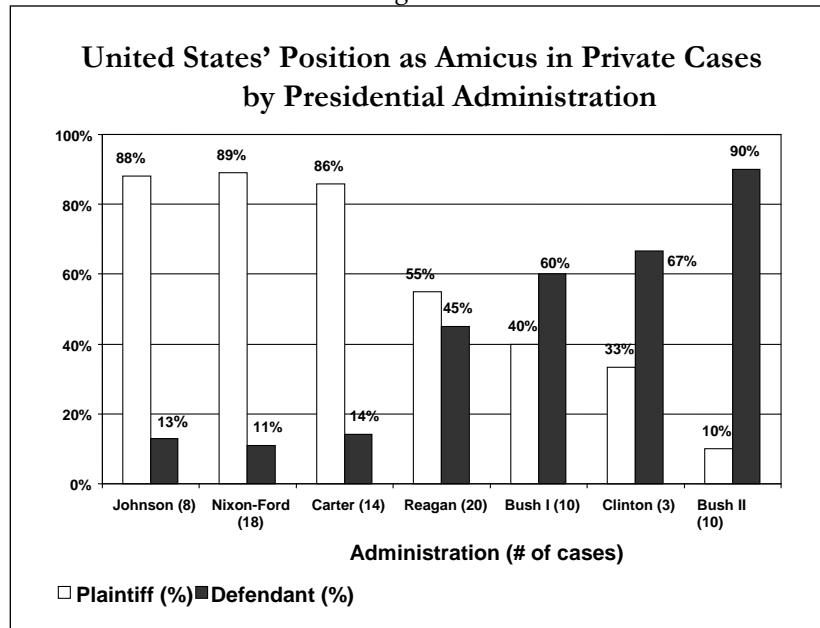
Figure 2



During the decade beginning in 1967, the Court decided only twenty-five percent of all its antitrust cases (eleven of forty-four) by a supermajority of six or more Justices in favor of the defendant. Over the following two decades, that percentage rose to thirty-six percent and forty-four percent, respectively. Finally, in the decade beginning in 1997, when the Court decided all thirteen cases for the defendants, a supermajority obtained in eighty-five percent (eleven of thirteen) of the cases. Over these same four decades, the percentage of all antitrust cases that the Court decided by a supermajority in favor of the *plaintiff* fell from fifty-five percent to zero. As these figures suggest, the economic approach to antitrust has conducted to clear and largely predictable outcomes in favor of defendants.

Third, like the Court itself, the briefs filed by the Solicitor General on behalf of the United States as an amicus in private antitrust cases tended to favor antitrust plaintiffs more frequently forty years ago than they do today. And, as Figure 3 shows, the change does not correlate with changes in the political party of the President:

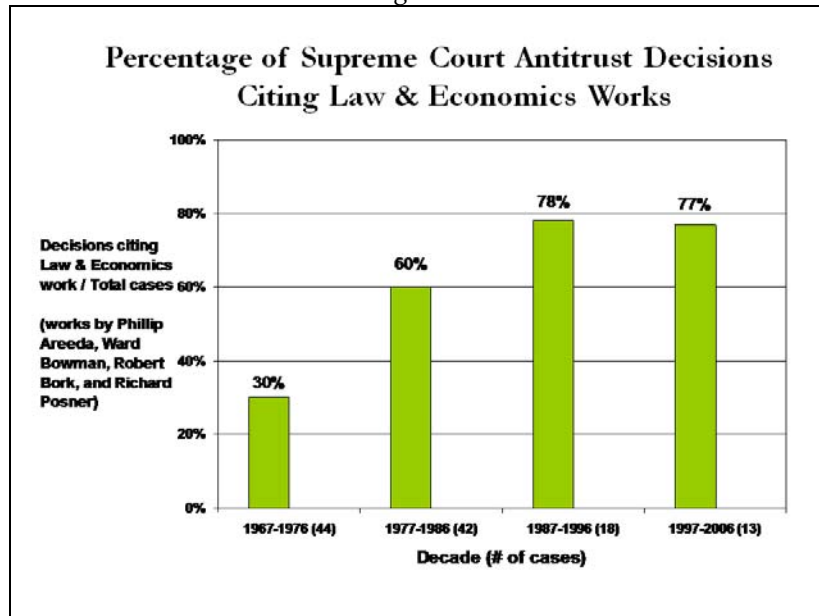
Figure 3



Forty-five percent of the amicus briefs filed by President Reagan's Solicitors General supported the defendant; under President George H.W. Bush, the Solicitor General supported the defendant in sixty percent of his briefs; and under President Clinton that figure rose to sixty-seven percent (although many fewer briefs were filed). Under President George W. Bush the figure was ninety percent. The substantial and increasing support for antitrust defendants across those four administrations contrasts sharply with the consistently rare support for antitrust defendants during the three preceding administrations—fourteen percent under President Carter, eleven percent in the Nixon-Ford years, and thirteen percent under President Johnson. Clearly, what changed was the dominant understanding of antitrust economics, not the party in power.

Finally, the Supreme Court's antitrust opinions have increasingly relied expressly upon the work of leading academic economists:

Figure 4



The percentage of the Court's antitrust opinions that cite the new learning in antitrust law (defined as works by Phillip Areeda, Ward Bowman, Robert Bork, and Richard Posner) increased from thirty percent in the decade beginning in 1967 to sixty percent in the next decade and to more than seventy-five percent in each of the two most recent decades.

The Court's reliance upon modern economic analysis reflects the near consensus among academics on proper antitrust analysis. There is now broad and nonpartisan agreement in academia, the bar, and the courts regarding the importance of sound economic analysis in antitrust decision making. Such analysis has utterly transformed the dialogue within the Supreme Court. Today, it is not uncommon to see briefs on both sides of a case making arguments based upon sophisticated economic literature. In some recent cases groups of independent economists have filed amicus briefs to offer their assistance to the Court. In a few cases, economists have filed amicus briefs taking opposing positions on the questions presented. Even in such cases, where there is no consensus among economists on the application of theory to facts, there is, nevertheless, virtually universal agreement among them—and among the lawyers for the parties—that the Court should answer

questions of antitrust law by promoting consumer welfare and economic efficiency and not by making political judgments about economically irrelevant matters.

Economic analysis does not indicate a single indisputable result in every case, but it does significantly constrain the decision making of the Court and thereby narrow the range of plausible outcomes. Economic analysis thus promotes consistency in antitrust jurisprudence. Armed with the new learning, the Court has revisited and revised many of the significant holdings of earlier eras that rested upon shaky foundations.

The Court's initial embrace of the economic approach to antitrust followed directly from the scholarly work of Judge Robert Bork. In 1966, then-Professor Bork, having examined the legislative history of the Sherman Act, concluded that its authors understood the Act would promote consumer welfare, not the various sociopolitical aims that judges had read into it.⁸

II. HISTORICAL ORIGINALISM AND THE RESHAPING OF CONSTITUTIONAL LAW

Judge Bork's attention to the original understanding of the Sherman Act and the Court's embrace of that view⁹ brought order to antitrust law, and originalists have since applied that method to other areas of law. In his 1977 book, *Government by*

8. See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 10–11 (1966) [hereinafter Bork, *Legislative Intent*]; Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L 225 (2006); see also ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 50–51 (1978) [hereinafter BORK, *ANTITRUST*].

9. See *NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a consumer welfare prescription. A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law." (citation omitted) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)) (internal quotation marks omitted)); *Reiter*, 442 U.S. at 343 (noting legislative history "suggest[s] that Congress designed the Sherman Act as a 'consumer welfare prescription'" (quoting BORK, *ANTITRUST*, *supra* note 8, at 66)); see also *GTE Sylvania Inc. v. Cont'l T.V., Inc.*, 537 F.2d 980, 1003 (9th Cir. 1976) (en banc), *aff'd*, 433 U.S. 36 (1977) ("Since the legislative intent underlying the Sherman Act had as its goal the promotion of consumer welfare, we decline blindly to condemn a business practice as illegal *per se* because it imposes a partial, though perhaps reasonable, limitation on intrabrand competition, when there is a significant possibility that its overall effect is to promote competition between brands." (citing Bork, *Legislative Intent*, *supra* note 8, at 11)).

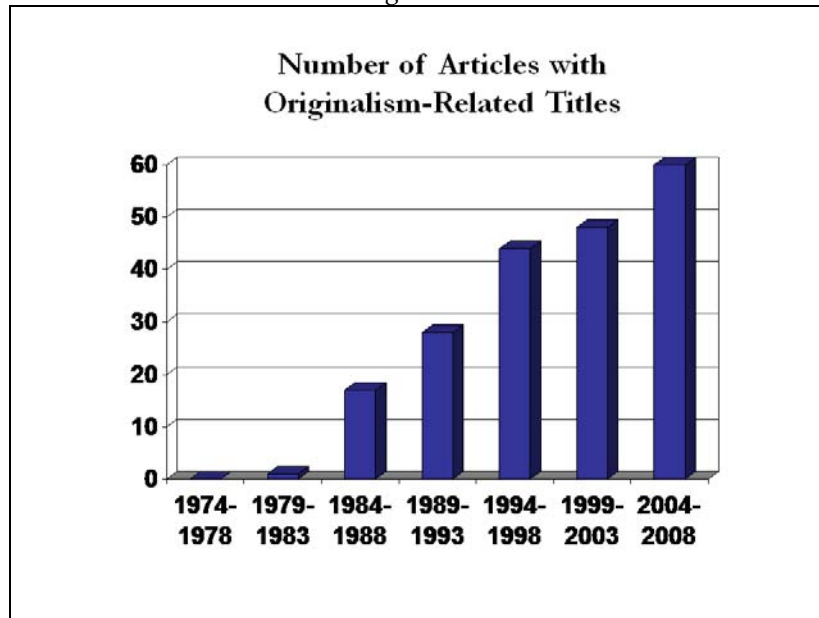
Judiciary: The Transformation of the Fourteenth Amendment, my then-colleague Raoul Berger at Harvard Law School criticized the Warren Court's expansive interpretation of the Fourteenth Amendment as distorting—or simply ignoring—the intentions of the framers of that Amendment, as disclosed by the historical record. Berger argued that the Constitution depends upon judicial fealty to the original intention of the Framers: “A judicial power to revise the Constitution transforms the bulwark of our liberties into a parchment barrier.”¹⁰ And Attorney General Edwin Meese III brought the originalist movement into the world of legal policy in his 1985 address to the American Bar Association, in which he called for “a jurisprudence of original intention.”¹¹ Justice Scalia, in his 1995 Tanner Lecture at Princeton University, later published in book form, clarified the point that the focus should be upon the original public meaning of the terms used in the Constitution and ratified by the states, not literally upon the intentions of its authors.¹²

There is no question that, as it has evolved, originalism has had a profound impact upon American legal culture. In the past few decades, we have seen greater scholarly interest in the original meaning of legal texts in general and of the Constitution in particular. As Figure 5 shows, the number of law review articles adopting or critiquing an originalist perspective has greatly increased, judging from a search of article titles:

10. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 364 (1977).

11. Edwin Meese, III, *The Supreme Court of The United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464 (1986) (emphasis omitted).

12. See ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (1997).

Figure 5¹³

This focus upon original understanding proceeds from the simple insight that, in order to maintain the rule of law, judges must understand the Constitution as real *law* and not as a mere starting point from which to forge a path to their preferred outcomes.

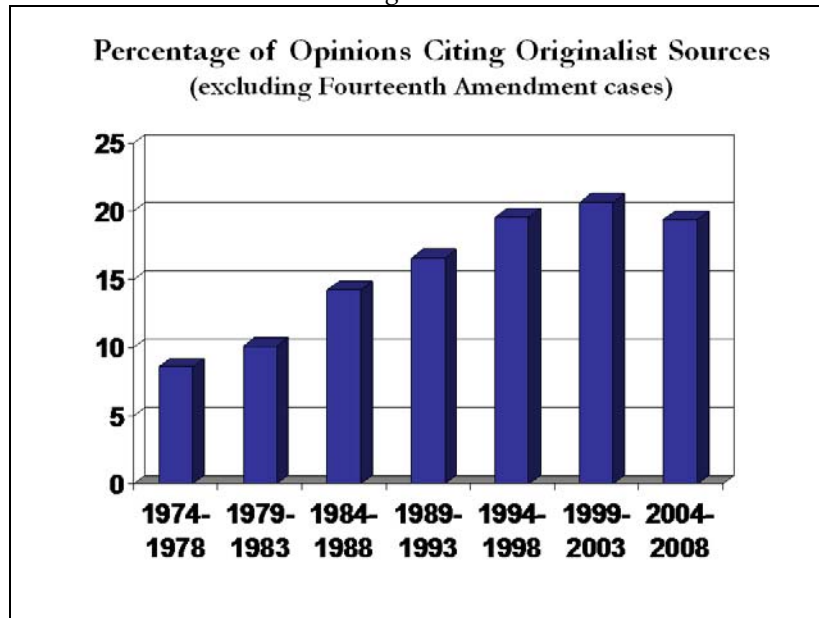
Originalism stands in direct opposition to the idea of a “living Constitution,” the view that once led Justice Brennan to locate “the genius of the Constitution . . . in the adaptability of its great principles to cope with current problems and current needs.”¹⁴ The proposition that the most salient feature of a written constitution is its “adaptability” presents obvious difficulties for the Rule of Law. And so it is that the intuitive and normative weight of the originalist idea is causing originalism gradually to supplant “living constitutionalism” as the default method used by the Supreme Court to address open questions of constitutional meaning (albeit still not including questions

13. Data based on a search of the titles of articles in Westlaw’s U.S. Law Reviews and Journals database using the following search: (original /2 intent) (original /2 understanding) (original /2 meaning) (original!).

14. William J. Brennan, Jr., *Speech to the Text and Teaching Symposium*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55, 61 (Steven G. Calabresi ed., 2007).

arising under the Fourteenth Amendment). In the past three decades, the percentage of such constitutional opinions that cite primary sources from the founding era has doubled:

Figure 6¹⁵



From 1974–83, only nine percent of the Court’s constitutional decisions cited Blackstone, the *Federalist*, the ratification debates, Farrand’s *Records of the Federal Convention of 1787*, or founding-era dictionaries. In the past decade, twenty percent of the Court’s constitutional opinions cited those sources.

The most recent, dramatic, and familiar case is, of course, *District of Columbia v. Heller*,¹⁶ in which all nine Justices agreed

15. Data based upon searches of the Westlaw database—limited to constitutional law key numbers, excluding the key numbers for Fourteenth Amendment due process and equal protection issues—for citations to *The Federalist Papers*, Elliot’s *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Farrand’s *Records of the Federal Convention of 1787*, Blackstone, and prominent founding-era dictionaries. Some search terms were suggested by a research project undertaken for the book *Originalism: A Quarter-Century of Debate* by Steven Calabresi. See Report on the Growth of Originalism in Federal Judicial Opinions and Legal Scholarship (Jan. 8, 2007) (unpublished manuscript, on file with author).

16. 128 S. Ct. 2783 (2008).

that the original meaning of the Second Amendment should determine the outcome of the case.¹⁷ The majority relied upon founding-era laws and dictionaries, and the work of such originalist legal scholars as Randy Barnett of Georgetown University Law Center, Eugene Volokh of the UCLA School of Law, and the historian Joyce Lee Malcolm, now at George Mason University School of Law.¹⁸ Significantly, Justice Stevens's dissent relied upon similar sources.¹⁹ Even before *Heller*, the strength of the evidence uncovered by originalist scholars had convinced Laurence Tribe of Harvard Law School—whom no one has ever accused of being an originalist let alone a gun enthusiast—to revise his treatise to say the Second Amendment does indeed protect an individual right to bear arms.²⁰ Thus, originalist scholarship provided a framework for resolving an open question and replaced the freewheeling approach of the “living Constitution” with a finite set of historical materials from which the outcome was derived.

By contrast, *United States v. Miller*,²¹ decided in 1939, and the Court's only prior look at the Second Amendment, contained—as the Court in *Heller* incredulously observed—“[n]ot a word . . . about the history of the Second Amendment.”²² *Miller*'s ungrounded and opaque reasoning provided little guidance to the lower courts, which, not surprisingly, reached conflicting conclusions about the meaning of the Second Amendment. A clear resolution of the question in *Heller* probably would not have been possible but for the recent scholarship on the original meaning of the Second Amendment, and the amendment itself would have been left to wither away.

17. Compare *id.* at 2788, with *id.* at 2822 (Stevens, J., dissenting).

18. See *id.* at 2791–93 (majority opinion) (citing founding-era laws); *id.* at 2791, 2793 (citing founding-era dictionaries); *id.* at 2793 (citing Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006)); *id.* at 2795 (citing Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 261 (2004) (book review)); *id.* at 2798 (citing JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* 31–53 (1994)).

19. See *id.* at 2824–25, 2830 (Stevens, J., dissenting) (citing founding-era laws); *id.* at 2828 (citing founding-era dictionaries).

20. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 898 n.213, 901 n.221 (3d ed. 2000). Professor Sanford Levinson of the University of Texas School of Law, recognizing how stubborn is the text of the Amendment, wrote *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

21. 307 U.S. 174 (1939).

22. *Heller*, 128 S. Ct. at 2815.

In this way, originalist scholarship has revived constitutional doctrines that Supreme Court precedents, and the legal community generally, had cast aside. The Court's increasing attention to the Tenth Amendment is illustrative. The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,"²³ thereby safeguarding state sovereignty against federal encroachment. In a 1982 case, *Federal Energy Regulatory Commission v. Mississippi*,²⁴ the Court upheld federal legislation requiring state regulatory agencies to act according to specific procedures in considering whether to adopt proposed federal gas and electric utility regulations. Justice O'Connor—joined only by Chief Justice Burger and then-Justice Rehnquist—objected in dissent that the statute violated the Tenth Amendment by conscripting state utility commissions into the national bureaucratic army. "The Court's result," she wrote, "is at odds with our constitutional history, which demonstrates that the Framers consciously rejected a system in which the National Legislature would employ state legislative power to achieve national ends."²⁵

Justice Blackmun, whose best known opinions are testaments to the judicial creativity invited by the "living Constitution," did not even take Justice O'Connor's approach seriously. Writing for the Court, he ridiculed her view of state sovereignty as "almost mystical"²⁶ and doubted whether she meant it "to be taken literally."²⁷ The Court dismissed her "review[of] the constitutional history" as "demonstrably incorrect" and purported to refute the evidence from the founding era not by marshaling similar sources—which would have been impossible—but rather by citing its own anachronistic precedents from the 1930s and later.²⁸

23. U.S. CONST. amend. X.

24. 456 U.S. 742 (1982).

25. *Id.* at 791 (O'Connor, J., concurring in the judgment in part and dissenting in part).

26. *Id.* at 767 n.30 (majority opinion).

27. *Id.* at 761 n.25.

28. *See id.* (citing *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982); *Fry v. United States*, 421 U.S. 542 (1975); *Parden v. Terminal Ry.*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *Case v. Bowles*, 327 U.S. 92 (1946); and *United States v. California*, 297 U.S. 175 (1936)).

In 1992, only ten years later, Justice O'Connor's approach commanded majority support in *New York v. United States*,²⁹ in which she rewrote her prior dissent in *Federal Energy Regulatory Commission v. Mississippi* as the opinion of the Court. "In providing for a stronger central government," the Court now concluded from the historical evidence, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."³⁰ Justice White, who had been part of the majority in the *Mississippi* case, was left to grumble in dissent that in light of "the many Tenth Amendment cases decided over the past two decades in which resort to the kind of historical analysis generated in the majority opinion was not deemed necessary, I do not read the majority's many invocations of history to be anything other than elaborate window dressing."³¹ How wrong he was would soon become apparent.

By 1997, when the Court revisited the commandeering question, not a single Justice doubted that the original meaning of the Tenth Amendment should govern the result. In *Printz v. United States*, the Court reasoned that "[b]ecause there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."³² The dissenters argued on the same ground, disputing the majority's conclusions based upon the historical sources but expressing no doubt about its originalist approach. Justice Souter went so far as to say that he had reached his view of the case based upon a careful reading of *Federalist* No. 27.³³

A similar pattern appears in the Court's cases concerning state sovereign immunity. In a 1989 case, *Pennsylvania v. Union Gas Co.*,³⁴ the Court decided the Commerce Power could override the limitations of Article III and the Eleventh Amendment, which

29. 505 U.S. 144 (1992).

30. *Id.* at 166.

31. *Id.* at 207 n.3 (White, J., concurring in part and dissenting in part).

32. 521 U.S. 898, 905 (1997).

33. *Id.* at 971 (Souter, J., dissenting) ("In deciding these cases, which I have found closer than I had anticipated, it is *The Federalist* that finally determines my position. I believe that the most straightforward reading of No. 27 is authority for the Government's position here, and that this reading is both supported by No. 44 and consistent with Nos. 36 and 45.").

34. 491 U.S. 1 (1989).

had until then preserved state sovereign immunity from suits by individuals. "It would be difficult to overstate the breadth and depth of the commerce power,"³⁵ announced Justice Brennan, writing for a plurality of the Court and citing cases going back no further than *Jones & Laughlin Steel*³⁶ in 1937. The Court then proceeded in this anachronistic vein to read its expansive view of the Commerce Power back into the founding era:

Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.³⁷

Thus did the Court discover that the States, in ratifying the Commerce Clause, had mutely consented to the abrogation of their sovereign immunity by the Congress.

The Court's Eleventh Amendment cases had already been somewhat opaque, but *Union Gas* further muddied the waters. Here, again, new attention to the original understanding has helped to clarify the Court's position and to recover a constitutional doctrine that was in danger of being lost. In a series of cases culminating in *Alden v. Maine* in 1999, the Court drew upon historical research to establish the coherent position that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."³⁸ Again, as in the Second and Tenth Amendment cases mentioned earlier, even the dissenters based their contrary conclusion upon originalist sources. Justice Souter, dissenting in *Alden* and in *Seminole Tribe v. Florida*, searched the historical record and drew upon a wealth of new scholarship to reach an alternative view.³⁹ Even if the new scholarship has not produced complete agreement among the Justices in this area of

35. *Id.* at 20 (plurality opinion).

36. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

37. *Id.* at 19–20.

38. 527 U.S. 706, 728 (1999).

39. *See id.* at 760–61 (Souter, J., dissenting); *Seminole Tribe v. Florida*, 517 U.S. 44, 100 (1996) (Souter, J., dissenting).

the law, it has kept the debaters on solid ground and out of the quicksand of judicial improvisation.

In other cases, the Court has pulled itself out of the quicksand by revisiting some of its precedents to bring them more in line with the original meaning of the Constitution. For example, the Court has recently disentangled the Confrontation Clause of the Sixth Amendment⁴⁰ from modern judge-made law concerning the hearsay rule and its exceptions. In his concurrence in *Lilly v. Virginia*, Justice Breyer, relying expressly upon “the work of scholars,” pointed out that “[t]he Court’s effort to tie the [Confrontation] Clause so directly to the hearsay rule is of fairly recent vintage, while the Confrontation Clause itself has ancient origins that predate the hearsay rule.”⁴¹ Five years later, in *Crawford v. Washington*—which reformulated the standard for determining when the admission of an out-of-court statement in a criminal case is constitutionally permissible—the Court explained its decision as a response to “[m]embers of this Court and academics [who] have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause.”⁴²

In going back to the historical evidence, the Court recovered the right to confront hostile witnesses as the Framers understood it when they drafted the guarantee in the Sixth Amendment. The Court explained in *Crawford*: “[E]x parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.”⁴³

The Court initiated a similar process with respect to the Sixth Amendment right to a jury trial in *Apprendi v. New Jersey*.⁴⁴ In that case the Court held the modern innovation of “sentencing enhancements” could not constitutionally authorize judges to increase criminal sentences on their own, that is, without a jury having found the relevant facts. “Other than the fact of a prior conviction,” the Court held, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

40. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

41. 527 U.S. 116, 140 (1999) (Breyer, J., concurring) (citation omitted).

42. 541 U.S. 36, 60 (2004).

43. *Id.* at 51.

44. 530 U.S. 466 (2000).

submitted to a jury, and proved beyond a reasonable doubt.”⁴⁵ The decision swept aside many modern developments in sentencing. Yet, as Justice Thomas explained in his concurring opinion, the decision, “far from being a sharp break with the past, marks nothing more than a return to the *status quo ante*—the status quo that reflected the original meaning of the Fifth and Sixth Amendments.”⁴⁶

The Court seems also in recent years to have reconsidered its approach to the religion clauses of the First Amendment. Although it has not formally abandoned the *Lemon* test for evaluating legislation concerning religion, the Court’s view of the Establishment Clause has shifted away from President Jefferson’s post-ratification and seemingly idiosyncratic metaphor—the “wall of separation” between church and state—and toward an understanding of establishment rooted in its original public meaning.

The Court had adopted the “wall of separation” idea in the 1947 case of *Everson v. Board of Education*, in which it read the Establishment Clause to prohibit aid not only to particular religions but to religion in general.⁴⁷ Almost forty years and many confusing precedents later, then-Justice Rehnquist, dissenting in *Wallace v. Jaffree*,⁴⁸ revisited the text and reviewed the history of the First Amendment, which led him to conclude the Establishment Clause was originally understood to prevent only the Government’s establishing a national religion or otherwise privileging a particular sect; it did not prohibit nondiscriminatory aid to religion in general. In light of that history, and because the Court’s extraconstitutional approach had produced inconsistent and incoherent results, Justice Rehnquist called for a reconsideration of the Court’s Establishment Clause cases: “Whether due to its lack of historical support or its practical unworkability, the *Everson* ‘wall’ has proved all but useless as a guide to sound constitutional adjudication,” he wrote.⁴⁹

No one joined Justice Rehnquist’s dissent, but we can now see clearly the Court has moved toward the nonpreferentialist

45. *Id.* at 490.

46. *Id.* at 518 (Thomas, J., concurring).

47. 330 U.S. 1 (1947) (holding New Jersey could constitutionally fund student transportation to and from private sectarian as well as public schools).

48. 472 U.S. 38 (1985).

49. *Id.* at 107 (Rehnquist, J., dissenting).

view that the Government may support religious life as long as it does not discriminate among religions.⁵⁰ Indeed, the Court no longer regards the Establishment Clause as a warrant for pushing religion out of the public square. In *Rosenberger v. University of Virginia*, for example, the Court held a public university could not withhold funds from a student-run religious publication while funding student-run secular publications; funding had to be provided to religious and secular speakers alike, on a nondiscriminatory basis.⁵¹

Justice Souter's dissenting opinion in *Rosenberger* drew heavily upon Madison's 1785 Memorial and Remonstrance Against Religious Assessments to argue that the Establishment Clause was, in fact, originally understood to preclude government funding of religious speakers.⁵² Thus even die-hard adherents to the "wall of separation clause" found only in the "living Constitution" now seek support for their view in originalist sources. As Justice Scalia has noted, the *Lemon* test still "stalks [the Court's] Establishment Clause jurisprudence . . . frightening . . . little children and school attorneys,"⁵³ but its demise is inevitable and imminent. Indeed, five years ago, in *Van Orden v. Perry*, the Court dismissed the *Lemon* factors as "no more than helpful signposts" — and then simply ignored the signposts.⁵⁴

* * *

Originalist scholarship also promises to promote coherence and consistency in nonconstitutional cases. The Alien Tort Statute (ATS),⁵⁵ for example, lay dormant for almost two centuries before courts had to decide what it meant. It was rediscovered by public interest groups seeking to right wrongs committed abroad, regardless of whether their perpetrators had any connection to the United States.

50. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding publicly funded tuition vouchers to parents for use at public or private schools, including religious schools).

51. 515 U.S. 819, 845–46 (1995).

52. *Id.* at 868–69 (Souter, J., dissenting).

53. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

54. 545 U.S. 677, 686 (2005) (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

55. 28 U.S.C. § 1350 (2006).

In the 1980 case of *Filartiga v. Pena-Irala*, the Second Circuit read the ATS as a grant of jurisdiction to U.S. courts over claims brought by aliens for violations of “the law of nations,” no matter where committed.⁵⁶ The plaintiff in *Filartiga* was suing a former Paraguayan police official for violating the Charter of the United Nations, the Universal Declaration of Human Rights, the Declaration of the Rights and Duties of Man of the Organization of American States, and other customary international law.⁵⁷ She won a \$10.4 million judgment for wrongful death,⁵⁸ a precedent that invited human-rights plaintiffs from around the world to bring their cases in the federal courts of the United States.

Amidst all this, no one bothered to look into the history of the ATS. Judge Friendly, in a 1975 case, had called the ATS “a kind of legal Lohengrin; although it has been with us since the first Judiciary Act [of 1789] no one seems to know whence it came.”⁵⁹

In 2004, the Supreme Court undertook to find out whence it came, and thereby brought some coherence, and hence some limitations, to the ATS. In *Sosa v. Alvarez-Machain*, the Court reviewed the history of the ATS and the relevant writings of the founding era, as well as Vattel’s 1758 treatise *The Law of Nations* and, of course, Blackstone’s *Commentaries on the Laws of England*.⁶⁰ The Court’s opinion relied in large part upon scholarship published in recent law reviews and amicus briefs submitted by academic experts on federal jurisdiction and on legal history. Unanimously, the Justices concluded the Congress had enacted the ATS to provide jurisdiction but not to create any new cause of action. Rather, said the Court,

[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time. . . . [.] those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.⁶¹

56. 630 F.2d 876 (2d Cir. 1980).

57. *Id.* at 878–79.

58. *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

59. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (citation omitted).

60. 542 U.S. 692, 714–15 (2004).

61. *Id.* at 724.

The only disagreement on the Court emerged between Justice Souter—who suggested courts should require that any new claim based upon the law of nations “rest on a norm of international character . . . defined with a specificity comparable” to those torts identified by Blackstone⁶²—and Justice Scalia, who said courts should recognize no further actionable torts.⁶³ That debate is more modest and constrained than the one that had previously raged. Once again, the search for original public meaning brought order where chaos had reigned.

CONCLUSION

To be sure, the Court has a long way to go before it can be said to have restored the Constitution to its originally understood meaning, but even now its approach to constitutional interpretation seems ever less susceptible to the charge that the opinions of the Justices reflect not their best thinking but rather how well their breakfasts agreed with them. It is no small achievement that on a question of first impression, such as the meaning of the Second Amendment, all the Justices would join in the search for the original meaning of the text. From the system of federalism rooted in the Tenth and Eleventh Amendments to the rights of criminal defendants under the Fifth and Sixth Amendments, original meaning increasingly appears to be the default mode for addressing constitutional questions. This change speaks also to the increasing role of originalism within the overall legal culture. The Supreme Court’s originalist opinions guide the lower courts in resolving constitutional disputes and thereby amplify the Court’s originalist voice. More important, in the long run, those opinions help shape the thinking of law students as they are first exposed to constitutional law. On the other hand, originalism has yet to penetrate some parts of the Constitution, where, as a result, judicial policymaking remains unconstrained by positive law. The Fourteenth Amendment guarantees of Equal Protection and of Due Process of

62. *Id.* at 725.

63. *Id.* at 739 (Scalia, J., concurring in part and concurring in the judgment) (“There is not much that I would add to the Court’s detailed opinion, and only one thing that I would subtract: its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms.”).

Law come foremost to mind. Those clauses have been subjected to so much abuse (think of *Baker v. Carr* and *Roe v. Wade*) that recovering their original meanings poses a special challenge. Nevertheless, there is no denying that originalism has fostered throughout the legal profession a new respect for enacted law—particularly for the Constitution *as* law—and for fidelity to texts of all sorts. The role of judges in the making of legal policy has been concomitantly limited as a result.

Some observers have suggested, nonetheless, based mostly upon the *Heller* decision itself, that originalism is a sham. The Justices, after all, were sharply divided notwithstanding that each side couched its opinion in originalist terms. Moreover, as Stuart Taylor has observed, “even though all nine justices claimed to be following original meaning, they split angrily along liberal-conservative lines perfectly matching their apparent policy preferences, with the four conservatives . . . voting for gun rights and the four liberals against.”⁶⁴ According to this view, the search for the original public meaning of the Constitution does not constrain judges; it merely provides a new set of materials from which they may pick and choose, as they used to scavenge through legislative history, in order to reach a personally preferred conclusion.

This cynicism is unwarranted. To be sure, policy preferences may lurk behind a judge’s decision about whether to adopt an originalist or a nonoriginalist approach to interpretation in a particular case. Notably, originalism has had its most dramatic effect, with the Justices unanimously revising earlier precedents, in cases concerning the rights of defendants. This is an area where originalist research and liberal political preferences happen to coincide. It may be that some Justices are committed to originalism as a normative theory while others resort to it only when they like its implications. But this suggests that originalism actually *is* constraining. Otherwise, the Justices not committed to originalism would fashion original-meaning arguments to bolster their position in every case and thereby preclude the charge that in some cases they are departing opportunistically from the original meaning of the Constitution.

They cannot do that precisely because, like the new learning in antitrust, the search for original public meaning limits and

64. Stuart Taylor Jr., *Is Judicial Review Obsolete?*, NAT’L J., July 5, 2008, at 10, 10.

thereby alters the dialogue within the Court. By restricting the acceptable bases of a decision, originalism limits the range of plausible outcomes.

Indeed, originalism has become more constraining as originalist methodology has become more objective over time. Early originalist scholars encountered the legitimate criticism that their search for an elusive “original intent” was bootless because the subjectivity of “intent” made it malleable, like the search for “congressional intent” in the entrails of legislative history. As a result, the historical search has been refined and objectified to seek not the original intent of the Framers but the original public meaning of the words in the Constitution. As the depth and breadth of this scholarship increases, the search through historical materials will become ever less discretionary for the Justices.

Ultimately, originalism promises to constrain constitutional interpretation just as the new learning constrains the Court’s understanding of the Sherman Act, but the constitutional project is more complicated and more ambitious. It requires scholarly convergence not only upon method but also upon historical research into many discrete areas of law. Lawyers and judges have for twenty years or more bemoaned the disconnect between the legal profession and academic scholarship,⁶⁵ but with the new learning in antitrust and original public meaning in constitutional law, we have two significant areas where academic research has been, and continues to be, of the utmost importance. The judges would not—indeed, could not—have undertaken this important research on their own.

The new learning in antitrust and originalism in constitutional law provide anchors where courts were previously adrift. By constraining judicial decision making, they promote consistency in court decisions. Originalism also narrows and often blocks the self-directed path of the courts and thereby preserves the individual rights protected by the Constitution while leaving the legislature appropriately greater scope for making policy in other areas. Preserving individual rights against majoritarian preferences and bowing to the legislative majority in other respects restores the Court to its rightful place in the system of government the Framers bequeathed to us.

65. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

Although the past thirty years of originalist scholarship have produced remarkable gains in certain areas of law—especially federalism, the Commerce Clause, criminal procedure, and the Establishment Clause—much of the Constitution remains to be recovered. That recovery depends upon continuing the transformation of the legal culture, which in turn requires a continuing partnership between academic researchers and public interest litigators. Only the Supreme Court, however, can hold that partnership together by rewarding its efforts. If it does that, then what Jerome Frank called the basic legal myth—what we call the Rule of Law—is not, as he thought, a fiction to be exposed, but rather a goal to be achieved.