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Is Originalism Libertarian?

by [Mikolaj Barczentewicz](#)



When one hears Supreme Court nominee Elena Kagan confessing "We are all originalists" during her [Senate hearing](#), one might think that originalism is really in. But even if it is, what does it mean for libertarians? Ilya Shapiro [recently suggested](#) that originalism is "necessarily



libertarian." Is it really so? And what is originalism anyway? Some think that it is about judges abandoning "judicial activism" and accepting the original, libertarian understanding of the Constitution, the meaning the Framers intended to be preserved. It is not that easy though, and if libertarians want to engage in what promises to be a revival of the revolutionary doctrine (particularly [disliked by zombies](#)), they should understand both the advantages and limitations of the originalist interpretation of the Constitution.

What is originalism?

Originalism is a method of interpreting the Constitution, apart from that there is no simple answer to the question "what is originalism?" The main reason is that there really is a variety of "originalisms." Historically, the first version of originalism was "original intent" originalism and it was based on an assumption that "constitutional

interpretation should be guided by the original intentions of the framers." Of course, many questions arise as to what the "intentions" are, whose intentions we should be concerned with and so on. Overwhelming and arguably conclusive criticism rendered original intent originalism dead and buried in the eyes of academics.

However, this critique did not bury originalism for good. In 1986 Antonin Scalia called for changing the label "from the Doctrine of Original Intent to the Doctrine of Original Meaning." This event marks the advent of "New Originalism" or "original public meaning" originalism. New Originalism is not concerned with intentions or expectation of the Framers. Instead, it tries to establish original public meaning of the Constitution (as amended). What does it mean in practice? Usually, it means a tedious research in 18th-century dictionaries, newspapers and legal treatises in search of the meaning that was shared by users of English at the time of ratification.

Judicial activism and restraint

Originalism, which is a formalist method of interpretation, constrains the judicial discretion. And this is a good thing, because it is reasonable to expect that the original meaning of the Constitution expresses more libertarian views than that of most of the judges. There are some judges who would widen the area of personal freedom compared to the original meaning, but most of them would not. Thus, it is prudent to accept originalism.

Originalism also provides us with an alternative standard of judicial activism. What is judicial activism after all? Some say that a judge is an activist when he strikes down a law, or a precedent, thus failing to give deference to the political branch of the government. According to this understanding both the Warren Court and Rehnquist Court were activist (and the latter much more so), although their activism was directed towards very different goals. Originalists could say that a judge is an activist when he fails to strike down a law, or a precedent, that does not conform with original public meaning (or original intent, if anyone knows what that is) of the Constitution.

It is now easy to see, that for example, striking down *Roe v Wade* or the Federal Reserve Act, would be considered judicial activism under the first view, but it would not be considered as such when we accept originalist standard (assuming that *Roe* was wrongly decided on constitutional basis).

Undesirable results

From the libertarian point of view, showing the unconstitutionality of the Federal Reserve Act or the Social Security Act is obviously a desirable

result of accepting originalism. Similarly with the original meaning of the Ninth and Tenth Amendments. But libertarians should remember that the framers of the Constitution and the Amendments were not necessarily libertarian. Of course, New Originalism is not concerned directly with the authors, but nevertheless we have to concede that the Constitution is not a pure libertarian manifesto.

The original meaning of the First Amendment might not be as radically libertarian as we would like it to be. J. H. Huebert makes a similar case in respect to the Fourteenth Amendment. Accepting originalism is a strategy, and for this strategy to succeed, libertarians should not follow the example of Justice Scalia, who [forgets about](#) his originalism when it could contravene his extralegal beliefs.

Should libertarians endorse originalism?

Libertarians are not a majority, and presumably will not become one in the foreseeable future. If they want to achieve greater liberty in this political system, they should be able to use arguments that may appeal to judges. That being said, libertarians may consider originalism as "the most appealing way" to interpret a written constitution, as there is great evidence that this method of constitutional interpretation yields the most libertarian results.

If one does not believe in the intrinsic legitimacy of the Constitution (and some libertarians do believe in it, take Randy Barnett for example), then there is nothing in this method that would make it "necessarily libertarian." The acceptance of originalism requires a consequentialist approach: we expect better outcomes with originalism than without, given all the constraints of our political system.

It is a bundled deal nevertheless, and it might happen that originalism will give us some undesirable results. To reject originalism only when it does not suit us (following the example of Antonin Scalia) undermines the originalist argument in other cases. Originalism comes at a cost, but I believe that it is a cost worth paying.

Of course, there is a risk of idealization and romanticization of originalism, and that should be avoided. Originalism is not a panacea or a complete answer to the problem of big government. Arguably there are better ways to promote the agenda of personal freedom: nullification may be one, grassroots political action might be another. Accepting originalism does not mean abandoning more principled, rights-based approaches. Libertarians should still criticize the state and even the Constitution. It means only that they should accept the rules of the judicial game and play along to win as much as possible.

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