

Can Originalism Be Moral?

John Yoo

KEY TAKEAWAYS

Originalism can be moral even if some individual provisions, as originally understood, fail to pass universal tests for morality.

What matters is not the morality of the individual rules, but the morality of the system that makes those rules possible.

The lesson of the American experience is

that the Constitution and originalism are moral because they create the Union that makes liberty possible.

JOHN G. MALCOLM. Welcome, everybody, to The Heritage Foundation, and thank you for joining us for the third annual Edwin Meese III Originalism Lecture, which will be delivered tonight by my good friend, Professor John Yoo.

This lecture honors former U. S. Attorney General Ed Meese, who, through a series of speeches in 1985 and 1986, was instrumental in sparking a revolution in the law by reinvigorating what he called a jurisprudence of original intention. This, of course, should not have been revolutionary at all since judges prior to the Progressive Era had long practiced originalism. But times had certainly changed—that is, until Ed Meese came along.

Look how far we have come since then. A solid majority of Justices on the Supreme Court today are self-professed originalists, and during her

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confirmation hearing, Justice Elena Kagan went so far as to say today, “we are all originalists.”¹ I am delighted that the man who sparked this revolution, Ed Meese, is here with us this evening.

Tonight, John Yoo will speak about originalism. John is the Emanuel Heller Professor of Law at the University of California at Berkeley, where he also directs the Public Law and Policy Program and the Korea Law Center. He’s also a visiting scholar at the American Enterprise Institute and a visiting fellow at the Hoover Institution.

John began his legal career by clerking for two legal giants, Judge Laurence Silberman on the D.C. Circuit Court of Appeals and Justice Clarence Thomas on the Supreme Court. He’s written over 100 articles and several books, including his latest one, which he co-authored with Robert Delahunty, *The Politically Incorrect Guide to the Supreme Court*.²

John also served as a Deputy Assistant Attorney General in the Justice Department’s Office of Legal Counsel and as General Counsel to the U. S. Senate Judiciary Committee. Please join me in welcoming John Yoo.

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JOHN YOO. Thanks, John, for that introduction. It’s really great to be here. I’m reminded of the last time I spoke at Heritage in a presidential election year back in 2016. I landed in Washington shortly after the election. I hailed a cab and asked the driver to take me to the Trump transition headquarters. He delivered me here instead. I see that times haven’t changed.

I’m honored to deliver a lecture named after my role model and friend, General Meese. One thing that is sometimes obscured in General Meese’s biography is that he is one of our proudest graduates at Berkeley Law School and a recipient of the school’s Alumni Award, which was given to him by former Dean Chris Edley.

I’m not sure our current Dean Erwin Chemerinsky would have given him the same award, but not for want of trying. Before COVID, Berkeley co-sponsored a conference with Heritage on criminal procedure and invited General Meese to speak. Dean Chemerinsky got up, welcomed everybody, and then proceeded with a 10-minute attack on the Roberts Court for its criminal procedure decisions.

General Meese got up next. Without making any welcoming remarks, General Meese turned to Dean Chemerinsky and said: “Erwin, the Warren Court is over.” He then proceeded with a 10-minute, point-by-point rebuttal,

leaving no doubt that the Court had come to its senses on criminal procedure. It was a wonderful event and not the first time that General Meese had to take a law school dean to school.

The subject of my talk is originalism, a subject that has achieved its high stature in academic discourse thanks to General Meese. I think he was the last of what I would call the “intellectual” Attorneys General. Today, when we think about Attorneys General, we don’t think about their ideas: We instead think about how many people they put in jail. Our Attorneys General today are home secretaries and interior ministers. In contrast, General Meese hearkened back to the original Attorneys General who were advisors to the government about the Constitution and its meaning. His speech on originalism was part of that great effort, along with his unceasing efforts to get constitutionalists appointed to the Supreme Court and the lower courts.

After General Meese delivered his famous speech on originalism,³ citations to *The Federalist Papers* in Supreme Court opinions went up 600 percent. That almost matches the growth of the federal deficit.

A Crisis of Originalism

I intend my remarks to respond to what I call a crisis of originalism. On one hand, originalism is at the height of its acceptance in the bar and on the courts. Perhaps a majority of the Justices of the Supreme Court, or maybe even a super-majority, identify as originalists or at least strive toward originalism.

But at the same time, originalism is suffering from internal doubt. This doubt originates not from the 1619 Project or from others who regularly vilify our Founding Fathers and denounce originalism, but from the very conservative circles that gave originalism its first home. We stand now at the height of originalism’s victory, the fulfillment of General Meese’s wishes. But amid this apparent victory lies a furious debate among conservatives: Is originalism moral? And if not, is originalism a true victory for conservatives?

My very good friend Adrian Vermeule, who leads the intellectual project known as common good constitutionalism, would say no. To him, originalism is amoral. Vermeule proposes that the Constitution be interpreted not in accordance with its original meaning, but with an eye to policies that benefit the “common good.” Like Ronald Dworkin, Professor Vermeule defends “moral readings of the Constitution.” But unlike Dworkin, Vermeule’s vision for a “moral reading” aligns with conservative principles.

Professor Vermeule is correct that originalism is not a moral theory. It doesn’t promote good or bad morality. And because originalism promises fidelity to the law, whether originalism leads to a “good” or “bad” result

depends on the law. If the law is good, then originalism is good. If the law were bad, then maybe originalism would be bad too. Vermeule concludes, correctly, that originalism should be judged against an external moral theory.

What should that external moral theory be? Professor Randy Barnett, no stranger to Heritage, would say that originalism is justified by a libertarian notion of individual rights. Others, like Professor Hadley Arkes and his fellow travelers from the Claremont School (inspired by Claremont Graduate University Professor Harry Jaffa, the student of University of Chicago philosopher Leo Strauss) would say that natural law should guide our understanding of the Constitution when linguistic and moral gaps arise.

In contrast, Professor Joel Alicea of Catholic University Law School would say that the natural law itself requires that we accept the authoritative decisions of the leaders that the people have chosen within a system of popular sovereignty. Thus, he concludes, obeying the decisions of those leaders itself is moral because popular sovereignty in the U.S. context is consistent with the natural law.

These justifications appeal to various theorists, but they depend on a common assumption, one that is fundamental to any justification of originalism: that our Constitution and our country are different from other constitutions and other countries. Our Constitution is exceptional because our nation is exceptional. Our Constitution is moral, and hence originalism is moral, because the Founding created a nation whose existence and progress has produced good moral outcomes.

This is in contrast to other countries, where the people preceded the establishment of their constitutions or even their nations. Take France, for example. The French people existed long before the modern state of France came into being. The French people saw one constitution after another passed, enacted, thrown out, and replaced again. To them, as with most other countries, the constitution is just an instrument, no different from any other law. In a country like France, it might make sense to reject an understanding of the constitution as moral.

That's why it's no surprise that many critiques of originalism come from people who are enamored with the civil law system and European approaches to the law. The morality of constitutional law in Europe stems from the history and traditions that have existed from the time of the Roman Republic through the Catholic Church to the civil codes of today. That greater political context gives European legal systems their moral justification. Vermeule is surely right in arguing that European constitutional law must abide by the broader notions of the common good provided by that long history and thought.

But Americans are different. The United States is different. We were not a people before the Constitution. In fact, our Constitution created and defined the American nation rather than the other way around. And so if the Constitution itself is what creates our nation-state, which creates us as a nation, then it's possible for the Constitution itself to be morally good (putting aside its outcomes in individual cases).

I'm an American exceptionalist. America is a force for good in the world, and it always has been. America is the best thing that has happened to the modern world.

Think about how different the world would be if we had never had our Revolution and Constitution, if we had remained an appendage of the British Empire. Imagine what the destiny of millions would have been if the United States had not intervened in World Wars I and II, protected Europe and Asia during the Cold War, and established the liberal international order after the disappearance of the Soviet Union.

Giving Effect to America's Goodness

Indeed, the United States is and has been an incredible force for good. And if America is good, then the people and things that built America are good too. Originalism is what gives effect to that goodness. It teaches us to try to understand what the people who gave us the Constitution understood and to apply their wisdom to the circumstances of our times. Truly, it is the goodness of America that makes originalism moral.

This principle is separate from the specific provisions in the Constitution. Not only did the Constitution establish a new nation, but it also united a collection of states and societies with serious regional differences. Originalism is moral because it advances the Constitution's fundamental purpose of creating the Union.

The North was industrial; the South was agrarian. The North was built on freedom; the South, unfortunately, on slavery. But they came together in the Revolution and the Constitution to found our nation. Although the North and South deeply distrusted each other, they foresaw the enormous public benefits of national unity.

Consider the free-market economy which the Constitution created. Consider the national defense against hostile invaders, the potential for westward expansion, and the ability to accept millions of hard-working immigrants longing for a better life. How did these brilliant features come together? They came together because of the Constitution: not because the Constitution provided a detailed answer to every question, but because it

struck a careful balance of power between the North and the South so that they could both trust each other enough to join a single Union.

Today, we take their trust for granted, but their cooperation was miraculous. Before the North and South worked out a system, there was no Supreme Court. Nor was there any other enforcement authority. After independence was won, the North and the South lived in regional anarchy. They needed to come together to become one nation. And how did they do it? By writing a Constitution. The Founders understood that a written Constitution would promote trust: trust that people would keep their bargains and fulfill their promises about the sharing of power.

A similar problem arises in international relations. How do two countries make a treaty? How do they ever make an agreement with each other when there's no international court with any real authority to enforce the terms?

International relations theory provides an answer: credible commitments. Each state must send signals to each other that it is trustworthy and that it's not going to break its word, even if one side becomes much more powerful later. The best way for a party to prove that it will keep its word is to contribute to expensive institutions that will safeguard its obligations and protect against subversion of the agreement, and the most credible signal that the North and the South could have sent was to devise a written constitution with a Supreme Court that would enforce its terms.

Although there's no way to test this theory perfectly, one way to understand it is to consider *Dred Scott* and the advent of the Civil War.

Chief Justice Roger Taney wrote for the Court in *Dred Scott*. His opinion seriously misconstrues the original understanding of the Constitution. It concludes that Congress cannot regulate slavery in the territories. The crux of his opinion was that slaves were property. Thus, their ownership and their movement could not be restricted by the federal government without violating the Takings Clause and the Due Process Clause. The natural consequence of this reasoning, as Lincoln understood, was that either all of America would tolerate slavery or none of it would. And *Dred Scott's* logic suggested that all of it would.

This interpretation contradicted the original meaning of the Constitution. But more fundamentally, it subverted the careful constitutional bargain crafted by the North and South. The two regions could no longer trust each other to obey the Constitution because the expensive safeguard the parties had established—the Supreme Court—surrendered its legitimacy with its erroneous decision. *Dred Scott*, by failing to honor and enforce the original terms of the deal embodied in the Constitution, left the North and South with no recourse but civil war.

Can Originalism Be Moral?

So, can originalism be moral? *Dred Scott* shows that it can. When a constitution is as fundamental as ours is, a deviation from the Constitution amounts to a change in the basic rules of the game. When that change adversely affects a party who helped to form the agreement, the change subverts the entire purpose of the agreement and, in turn, the country that the agreement was made to establish.

This means that originalism can be moral even if some individual provisions, as originally understood, fail to pass everyone's test for morality. What matters is not the morality of the individual rules, but the morality of the system that makes those rules possible. While I am in full agreement that our Constitution exists to protect the natural rights of the Declaration of Independence, that lofty purpose is not possible without the creation of the United States, which will then protect those natural rights.

Even if the common good is the metric, natural law thinkers understood that there must be an effective, viable government to protect the common good, and that's not possible without a constitution.

Daniel Webster, one of our greatest Senators, captured this relationship between individual rights, natural rights, and freedom. In his famous speech on the Senate floor, Webster said: "Liberty and Union, now and forever, one and inseparable!" That's the lesson of the American experience and why the Constitution and originalism are moral: because they create the Union that makes liberty possible.

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Endnotes

1. Testimony of Elena Kagan in hearing, *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States*, Committee on the Judiciary, U.S. Senate, 111th Congress, 2nd Session, June 28–30 and July 1, 2010, p. 62, <https://www.congress.gov/111/chrq/CHRG-111shrg67622/CHRG-111shrg67622.pdf> (accessed May 10, 2024).
2. John Yoo and Robert Delahunty, *The Politically Incorrect Guide to the Supreme Court* (Washington: Regnery, 2023).
3. Edwin Meese III, "Speech to the American Bar Association," July 9, 1985, <https://teachingamericanhistory.org/document/speech-to-the-american-bar-association/> (accessed May 10, 2024).