Envisioning Originalism Applied to Bioethics Cases

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Abstract

Originalism is an increasingly prevalent method for interpreting provisions of the US Constitution. It requires strict adherence to the root meanings of constitutional terms, irrespective of drastically different contexts and without regard to consequences. This article offers a brief description of Originalism and summarizes key criticisms of Originalism in principle and in practice. It then examines a mix of past and pending legal cases that implicate bioethical principles and require interpretation of the Constitution, and it envisions an originalist approach to deciding them.

Keywords: Originalism, Bioethics, US Constitution, Law and Ethics, Policy, Case Law

Introduction

Originalism and bioethics are distinct approaches to shaping public policy and private conduct. Originalism, an increasingly prevalent method for interpreting provisions of the US Constitution, requires strict adherence to the meaning of constitutional terms as understood at the time the provision was enacted, irrespective of drastically different contexts and without regard to consequences. Proponents suggest that it removes the policy preferences of judges from decision making and provides neutrality and objectivity. Critics regard it as an unreliable tool, used selectively by conservative justices to reach their desired legal conclusions.

Bioethics emerged in large part as a multidisciplinary effort to examine issues raised by advances in medicine and biotechnology, from late-20th-century developments like the ventilator, in vitro fertilization, and organ transplantation to today's use of ECMO, CRISPR, and artificial intelligence. Bioethicists strive to identify the competing ethical values at stake, weigh them, and propose ethical bedside and policy answers to them.

Originalism matters to bioethicists because courts have and will continue to invoke the theory to resolve constitutional questions concerning such advances, including questions the Framers could not have envisioned.

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This article offers a brief description of originalism and the rationale for it and summarizes key criticisms of originalism in principle and in practice. It then examines a mix of past and pending constitutional law cases relevant to bioethics and envisions an originalist approach to deciding them.

Since there is no single bioethics position on the issues presented in these cases, it is not possible to state whether an originalist approach would align or conflict with a bioethical position. Even so, the exercise is illuminating: it alerts bioethicists, with their diverse views, to the possible impact of originalism in bioethical matters.

Originalism

Originalism claims to offer an objective interpretation of constitutional provisions, free from judicial preference, politics, and policy.[1] Essentially, it calls upon judges to examine historical documents to reveal the original understanding of the provision and adhere to it. Originalism differs from textualism, a related doctrine that calls upon judges not to stray from the text of a constitutional provision or statute. To a strict textualist, the First Amendment, which states that "Congress shall make no law abridging the freedom of speech," has no exceptions. An originalist, however, would point to laws from that period against libel, fraud, obscenity and more, and conclude that the original meaning of the Free Speech clause included such exceptions.

A key recent example of an originalist opinion is *NYS Rifle & Pistol Assn, Inc. v. Bruen*.[2] Plaintiffs claimed that New York's handgun licensing law violated the Second Amendment, which states that "a well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Years earlier, the Supreme Court ruled that the right to bear arms did not depend upon service in a militia, and that the term "arms" is not limited to arms in existence in the 18th century.[3] The sole issue in *Bruen* was whether the handgun licensing law infringed the right "to keep and bear arms."

In an opinion written by Justice Thomas, the majority approached the question as follows: it stated that the plain text of the Second Amendment protects the plaintiff's right to possess arms, which would include a handgun. The Court dismissed as irrelevant New York's argument, based on precedent, that it had a compelling interest in its gun licensing law and had narrowly tailored the law to address that interest. Rather, the Court held that New York must prove that in the era in which the Second Amendment was passed there were similar licensing laws. It regarded the original understanding of the clause as determinative. The Court then reviewed historical sources produced by the litigants and concluded that there was no analogous licensing law in the history of the colonies or the early Republic. As a result, the Court invalidated New York's handgun licensing statute.

The next day, the Court issued an opinion by Justice Alito that employed a similar originalist methodology, this time to strike down the constitutional right to abortion. In *Dobbs v. Jackson Women's Health Organization*,[4] the issue was whether a Mississippi law restricting abortion violated the 14th Amendment due process clause, a result seemingly compelled by the precedent *Roe v. Wade*[5] and its progeny. The Court again started with the text and found that the Constitution "makes no mention of abortion."[6] It acknowledged that its prior decisions accepted the "theory" that the due process clause protects some unspecified substantive liberty interests, but only those "deeply rooted in [our] history and tradition."[7]

The Court then engaged in an examination of the historical evidence presented by the parties and concluded that abortion rights were not deeply rooted in American history and tradition, nor were they part of the mid-to-late 19th century understanding of the meaning of the due process clause. Accordingly, the Court found that abortion rights are not constitutionally protected. Of interest to bioethicists, the Court noted that its originalist analysis was similar to the analysis it had employed to uphold state laws against "assisted suicide."[8]

Since *Bruen* and *Dobbs*, the Court and lower courts have increasingly used originalism to rule on the constitutionality of other acts of Congress, agency regulations, or state statutes.[9] As one legal author put it, "Originalism is ascendent on the Supreme Court."[10]

Criticisms of Originalism

When applied in good faith, originalism seeks to address the most fundamental challenge in judicial philosophy: how to interpret the law objectively, without regard to personal policy preferences or bias. In theory, originalism promises almost automated decision making: once a judge feeds the relevant clause and the historical record into the analysis, the ruling is inexorable and unassailable. Arguably, the approach avoids the subjectivity of competing judicial philosophies, primarily activism or "living constitutionalism," that invite judges to interpret constitutional provisions in light of the social and political problems of the day. Put differently, originalism is designed to ensure that judges strictly apply the law and not act like legislators. However laudable its purpose, originalism is subject to a long list of formidable criticisms in principle and as practiced.[11]

Criticisms of Originalism Theory

Critics have questioned whether it is appropriate for courts to research and evaluate centuries-old historical records and, indeed, whether they are qualified to do so. One legal scholar and historian wrote that most historians regard the Court's attempts to identify history and tradition "with detached disdain, puzzled wonderment, and even dismissive bemusement – as in: 'Surely, they can't be serious.'"[12]

There is also the question of whether it is desirable or even morally defensible to resolve today's issues based on textual interpretations of the Framers and early legislative bodies, given their composition.[13] Invariably, they consisted exclusively of male, white, wealthy landowners, including slaveholders. Consider this comment by Osagie K. Obasogie:

> [T]he precise historical moments sought to serve as moral and interpretive reference points—a period of slavery, genocidal eradication of Native Americans, conquest and illegitimate land capture, patriarchy and deep gender bias, and other discriminatory attitudes—were so doggedly inequitable that it becomes hard to justify transporting eighteenth-century legal mores into the present as anything other than an attempt to maintain white male privilege."[14]

To be sure, not all Framers shared the same morals or views. But the different perspectives among them further erode the argument for an originalist approach. It is doubtful that all the Framers understood key clauses the same way, so there may be no single original understanding of a clause.[15]

An even more fundamental attack on originalism is that the original understanding of a clause was based on the circumstances of that day, not the circumstances of today. The historical record cannot reliably answer whether the Framers would have supported a right to bear arms if the arms included today's high-powered weapons. Similarly, their views on extending free speech to unlimited corporate election spending are impossible to know. Nor did the Framers claim to be resolving future issues: as the Supreme Court observed, the Founders "knew they were writing a document designed to apply to ever-changing circumstances over centuries."[16]

Next, at least some originalist justices exhibit a striking disregard for *stare decisis* – the legal doctrine of respect for precedent.[17] Both *Bruen and Dobbs* gave scant regard to the longstanding and largely settled caselaw. In fact, it is fair to ask why longstanding precedents such as *Roe v. Wade* do not now demonstrate our history and tradition, entitling them to as much, or greater, deference than historical records from the founding period. As one writer put it, "Does tradition afterward count?"[18]

An especially sharp criticism of originalism is its disregard of justice, of consequences to people. Originalist judges consider this dispassionate adjudication a feature, not a flaw. If the historical record does not support handgun licensing, so be it; the potential for mayhem is not a relevant consideration. (Although, in some cases, the originalist approach would lead to results too intolerable for at least some originalists to bear. For example, in a case in which a violent spouse abuser challenged a court order restricting his access to weapons, all but one of the *Bruen* originalists relaxed their analysis to uphold the restriction.[19] Justice Thomas, dissenting, would have allowed the violent abuser to have his weapons, explaining that "[n]ot a single historical regulation justifies the statute at issue.")

Criticisms of Originalism in Practice

A key criticism of originalism in practice is that it is applied selectively.[20] The conservative majority on the Supreme Court employed originalism in cases where, in its view, the historical record disfavored a right to medical aid-in-dying, disfavored a right to abortion, and favored a right to carry unlicensed firearms. However, the Court chose not to employ an originalist analysis in deciding whether corporations have the right to make unlimited campaign contributions[21] or whether the president of the United States has broad immunity from prosecution for federal criminal laws.[22]

Furthermore, originalists are charged with cherry-picking historical evidence in support of their political or ideological aims. For example, the dissenters in *Dobbs* accused Justice Alito of choosing items from the historical record that supported the decision he favored, while disregarding the contrary historical evidence. Whether true in that case or not, in practice originalism is not structurally guaranteed to be an objective methodology; judges can use history selectively to reach the desired result.

Originalism Applied to Bioethics Cases

This section reviews past and pending bioethics-related cases and considers both how originalism would affect the outcome and how bioethicists might view such outcomes.[23]

Past Bioethics-Related Cases

I. The 14th Amendment Due Process Clause and the Right to Refuse Life-Sustaining Treatment

In the 1990 Supreme Court case, *Cruzan v. Director, Missouri Department of Health*,[24] the parents of a permanently unconscious patient sought a court order directing the hospital to discontinue the patient's feeding tube. In a decision authored by Chief Justice Rehnquist, the Court held that (1) a competent person has a liberty interest under the due process clause in refusing unwanted medical treatment, but that (2) in the case of an incompetent patient, Missouri may constitutionally require clear and convincing evidence of the patient's wishes to exercise that right.

An originalist analysis would likely overrule the first part of this precedent. It would first find that the text of the Constitution does not include a right to refuse unwanted medical treatment. The analysis would entail a review of the record from the latter half of the 19th century (the 14th Amendment was passed in 1866 and ratified in 1868) to see whether the original understanding encompassed such rights. In the absence of such evidence, it would reject the first holding in *Cruzan*; it would find that there is no 14th Amendment due process right to refuse unwanted medical treatment.

In fact, Justice Scalia, in a concurring opinion, followed this precise originalist formula in contending that there is no constitutional right to refuse treatment. He wrote:

> It is at least true that no "substantive due process" claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference. . . .[25]

> To raise up a constitutional right here we would have to create [it] out of nothing (for it exists neither in text nor tradition) . . . [26]

Interestingly, an originalist decision overruling the constitutional right to refuse unwanted medical treatment would not appear to have a great practical impact on decisions regarding life-sustaining treatment. Both red and blue states have laws or state court decisions that allow patients to forgo life-sustaining treatment, either directly or through advance directives, most of which predate *Cruzan*. Most states also allow surrogate decision-making. Respect for the right to forgo life-sustaining treatment is a rare area of consensus in a time of culture war.

In fact, overruling *Cruzan*'s constitutional right to refuse unwanted medical treatment may prove a greater barrier to persons claiming a right to refuse vaccination or other pandemic-related treatments. Many of the challenges by vaccination opponents rely upon *Cruzan* as among the constitutional bases for their asserted right.[27]

As noted at the outset, there is no single bioethics position on the ethical issues raised by medicine and biomedical technology. However, a pervasive theme in bioethical literature is respect for autonomy and specifically respect for capable adult patients' decision to accept or decline recommended treatment.[28] The option of declining treatment necessarily follows from the fundamental ethical obligation to secure a patient's informed consent to treatment. The constitutional right to forgo life-sustaining treatment recognized in Cruzan aligns with the mainstream bioethics perspective. An originalist rejection of such a constitutional right would conflict with the predominant bioethical perspective.[29]

As an aside, while there is no Supreme Court decision on point, originalism likely would not support a constitutional right to informed consent, a key bioethical value. The roots of informed consent do not run deep enough to satisfy originalists.[30] Like the right to forgo unwanted treatment, the principle of informed consent more recently became enshrined in common law, statutes, and regulations, and well as in nationwide professional standards.

Cruzan is just one example of how originalism might impact cases that construe the 14th Amendment due process clause in the sphere of bioethics. Over the past 75 years, the clause was invoked as a basis for a constitutional right to contraceptives[31] and abortion.[32] Due process also provides a basis for constitutional protections, procedures, and limitations to protect people from unjustified involuntary mental health commitment.[33] among other rights. The federal right to abortion is already a casualty of originalism;[34] the others would be at risk from a challenge based on the 19th-century legislators' original understanding of due process.[35]

II. The First Amendment Free Speech Clause and Countering Misinformation about Vaccines in a Pandemic

Murthy v. Missouri (2024)[36] addressed an issue highly relevant to bioethics: whether and to what extent the federal or state government can suppress views that it believes endanger public health.

During the Covid-19 pandemic, officials in the Biden administration publicly and privately urged social media platforms like Facebook not to allow misinformation about the pandemic and the Covid-19 vaccine on their websites. Two states and five individual social media users sued, claiming that the Biden administration's actions constituted censorship in violation of the First Amendment's free speech clause. The Biden administration contended that it was merely calling the platforms' attention to harmful misinformation and encouraging them to guard against it. But the District Court found that the government engaged in unconstitutional censorship and issued an injunction. The Fifth Circuit affirmed that decision.[37]

The Supreme Court dismissed the complaint on the grounds that the plaintiffs lacked "standing", i.e., a sufficient personal stake in the lawsuit to meet the requirement that the court may only hear a case or controversy. Justice Alito dissented, declaring that "this is one of the most important free speech cases to reach the court in years."[38] He

contended that the record showed egregious coercion and suppression of disfavored anti-vaccination speech. He argued that the Court should have recognized the plaintiffs' standing and reached the merits.

Assessing the merits under a traditional (not originalist) analysis, a court would first determine whether the government in fact suppressed speech. Having determined that it did so, the court would consider whether the restriction of speech fell within an exception, such as the government's ability to block speech "directed to inciting or producing imminent lawless action and … likely to incite or produce such action."[39] In this case, the Biden administration made no such claim. Accordingly, under a traditional analysis, if not for the standing defect, the Court likely would have found that the government violated the free speech clause.

Now, turning to a hypothetical originalist analysis, the most restrictive view is that espoused by Robert Bork, the conservative legal scholar and a founder of originalism. He contended, based on his reading of the history of the First Amendment, that it protects only "speech that is explicitly political."[40] Under that view, the federal government could suppress disfavored views about vaccines and every other nonpolitical topic.

Most originalists would not go that far. They would engage in a narrower historical inquiry, such as whether the public understood the First Amendment to bar the government from pressuring the media of their day to not publish content that the government believed posed a threat to public health.

There may well be historical evidence that could answer that question. Epidemics and governmental efforts to contain them occurred intermittently throughout US history.[41] Perhaps early lawmakers expected the free speech clause to apply to such measures, perhaps not. But significantly, Justice Alito's lengthy dissent did not address that question. He opted to forgo an originalist analysis of the case.

Government censorship of or opposition to disfavored views has arisen with even greater force during the second Trump administration. The current administration has punished or threatened universities,[42] law firms,[43] and other institutions[44] with the loss of millions of dollars of funding for expressing, or allowing their community members to express, disfavored views about diversity, equity, and inclusion (DEI), the war in Gaza, and other issues. Of direct interest to bioethics, it is punishing hospitals and physicians for supporting gender reassignment procedures.[45] It will be interesting to see if the Court or dissenters condemn censorship here as well, or whether it applies an originalist analysis and perhaps finds historical support for the government's conduct.

III. The 14th Amendment Equal Protection Clause and a State Prohibition of Gender Reassignment Treatments for Minors

This example is based on *United States v. Skrmetti* (2025).[46] Plaintiffs challenged a Tennessee statute that restricted sex transition procedures for minors, claiming it employed sex-based classifications in violation of the equal protection clause. That clause provides that a State shall not "deny to any person within its jurisdiction the equal protection of the laws."

The Court employed a traditional (not originalist) equal protection analysis, which involved querying whether the statute injured either a suspect class or a fundamental right – in which case it would be subject to heightened scrutiny. It found that the statute did neither; rather, it used classifications based on age and medical conditions, which are subject only to rational review. It then found that the state law had a rational relationship to a legitimate government interest, satisfying rational basis review.

An originalist analysis would likely reach the same result, but through a different path. First, originalists like Professor Bork and Justice Alito contended that the equal protection clause was originally understood to protect only the legal

treatment of black citizens post-slavery.[47] Accordingly, in his view, the clause does not guarantee equal protection for women, people with disabilities, LGBTQ people, noncitizens, or other groups.[48]

A less radical originalist approach would be to examine the history to answer the narrower question presented in *Skrmetti*: would mid-19th-century lawmakers or the public have understood the equal protection clause to protect transgender persons? Laws from that period that discriminated against or punished conduct by transgender persons would weigh against the argument that the original understanding of equal protection included protection of this class. It seems doubtful that these plaintiffs could have established their historical right to equal protection.

The *Skrmetti* example illustrates how fundamentally conservative originalism is: the doctrine requires that whatever groups were subjected to injustices and prejudices considered acceptable at the time the Constitutional provision was adopted must remain unprotected by the provision.

In *Obergefell v. Hodges*, which held that the due process and equal protection clauses require states to recognize same sex marriage, Justice Kennedy wrote:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[49]

Originalism emphatically rejects that view. It would require judges to continue historical injustices because they are historical. To the originalist, the equal protection clause should not have been construed to prohibit laws against same-sex marriage because such laws were publicly accepted at the time the clause was adopted.

In any event, this is another instance in which the Court inexplicably chose not to follow originalist methodology in favor of a traditional, less controversial equal protection analysis that was sufficient to reach the same result.

Pending Bioethics-Related Cases

I. The 1st Amendment Free Exercise Clause and the Right to a Religious Exemption from Mandatory School Immunizations

This example is based on a pending lawsuit, *Miller v. McDonald.*[50] The plaintiffs in *Miller* claim that New York's mandatory vaccination law for school children infringes their free exercise rights under the First Amendment by failing to allow religious exemptions. The federal Court of Appeals upheld the statute as a law of general applicability that the legislature deemed necessary to protect child health. However, the Supreme Court remanded the case to the Court of Appeals to reconsider its decision in light of *Mahmoud v. Taylor*, its most recent free exercise ruling.

In *Mahmoud,* the Court held that a school must allow parents to excuse their children from having to read LGBTQ+ related stories that they found objectionable on religious grounds. The Court found that the mandate imposed an undue burden on the parents' free exercise rights. For present purposes, what is notable about *Mahmoud* and other recent pro-religious exemption decisions[51] or dissents[52] is that they do not employ originalist analyses. Indeed, the cases mentioned do not address the historical understanding of the free exercise clause at all.

An originalist analysis of the religious exemption claim would review the historical record regarding exemptions to mandatory vaccination. The Supreme Court addressed that record in its 1905 decision, *Jacobson v. Massachusetts.*[53] In response to a smallpox outbreak, the city of Cambridge, Massachusetts, passed a regulation requiring its inhabitants to be vaccinated. A resident objected to the regulation on constitutional (though not specifically religious) grounds. The Court per Justice Harlan essentially applied an originalist analysis: it provided extensive historical support for

authority of a state to enact quarantine laws and "health laws of every description."[54] It also noted the practice of compelling persons to be drafted in war time, "without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions."[55]

Arguably, Jacobson's originalist approach supports mandatory vaccination without exemption only in the case of a public health emergency, as opposed to mandatory routine preventive vaccinations. And there might well be historical support from the constitutional era for religious exemptions. But significantly, the Miller Court chose not to raise the historical question at all. That failure illustrates the key criticism mentioned earlier: the subjective choice to employ the originalist approach only when it will lead to politically desired outcomes undermines the claim that originalism ensures neutrality and objectivity. Put differently, the Court could have, but chose not to, review or remand the case in light of *Bruen* and *Dobbs.*

Bioethicists disagree among themselves about the ethics of offering a religious exemption to a vaccination mandate. Some focus on the fundamental importance of individual autonomy, including respect for religious belief; others focus on the principle of justice, including obligations to the community. But the point here is that the bioethical debate would turn on competing ethical values, not on whether there was an original understanding that religious objectors would be exempt from mandatory vaccinations.

II. The Article II Vesting Clause and the Prohibition of Gender Reassignment Treatment for Minors

At least three major lawsuits[56] are challenging an executive order of President Trump that aims to eliminate gender reassignment treatment to persons under age nineteen by directing the US Department of Health and Human Services (HHS) and other agencies to eliminate research and educational grants and taking other regulatory action against providers and institution that offer such treatment.[57] A key claim in the legal challenges is that the executive order in question is beyond the constitutional authority of the president under Article II of the Constitution and usurps the legislative function. In legal jargon, the executive order is *ultra vires*.

An originalist analysis would start with the text of the Article II vesting clause, which states that "The Executive Power shall be vested in a President of the United States of America." It must be read in conjunction with Article I, which states that "All legislative powers granted by the Constitution are given to Congress...." In short, the Constitution gives Congress the exclusive power to legislate and the executive branch the exclusive power to execute the laws.

The originalist analysis would then research the historical record to discern whether the Framers and the public at the time would have regarded an executive order restricting a disfavored medical procedure as more akin to legislating or to executing federal law. It would be an interesting analysis: on one hand, a core purpose of the American Revolution was to achieve independence from a tyrannical king; yet the early experiment of the Articles of Confederation demonstrated the need for an executive with significant authority, albeit within the bounds of law.

Ultimately, a historical analysis would likely show that the Framers viewed the president's authority as far narrower than the view prevalent today. Turning then to an executive order against gender reassignment treatments, an originalist analysis would likely view this as a legislative action, rather than an execution of existing laws.

This raises a broader point: an originalist approach to interpreting the Article II vesting clause would likely restrict presidential authority to a degree far greater than that which recent presidents routinely exercise. If applied uniformly, it would restrain presidential initiatives that many bioethicists might support, as well as others that many would oppose.

Conclusion

This exercise offers only a few examples of how originalism might be applied to cases in bioethics. Originalism is extremely conservative in the literal sense – it compels the resolution of today's novel legal issues by mining the views of lawmakers from long ago. Advances in medicine and biotechnology have often "outpaced" the law.[58] When that happens, originalism stands guard in the doorway, defiantly barring constitutional law from catching up. It is an especially firm bulwark against the recognition of rights that are not specified in the Constitution, including those highly relevant to bioethics, such as privacy, contraception, abortion, and medical-aid-in dying.

While originalism is inherently conservative, the examples studied in this article reveal some surprises: in some cases, it yields results that would not be regarded as conservative by today's standards. For example, an originalist analysis would likely support a law mandating vaccination without a religious exemption. And it might disfavor an executive order, issued without legislative support, that restricts gender reassignment treatments. Or the denial of funding to suppress speech.

Accordingly, originalism can be politically fickle; it might in some cases point to an arguably progressive result.[59] Perhaps for that reason, the doctrine seems to be used selectively by the Court. But that selectivity undermines its rationale as an objective judicial philosophy, in contrast to judicial legislating.

In constitutional cases involving modern bioethical issues, while originalism can lead to outcomes across the political spectrum, ultimately, the public is ill-served by the Supreme Court's demand for evidence of the inapposite views of our ancestors.

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[1] Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849. https://teachingamericanhistory.org/document/originalism-the-lesser-evil/

[2] 597 U.S. 1 (2022). https://www.oyez.org/cases/2021/20-843

[3] *District of Columbia v. Heller*, 554 U.S. 570 (2008). https://supreme.justia.com/cases/federal/us/554/570/

[4] 597 U.S. 215 (2022). https://supreme.justia.com/cases/federal/us/597/19-1392/

[5] 410 U.S. 113 (1973). https://supreme.justia.com/cases/federal/us/410/113/

[6] *Dobbs*, 597 U.S. at 225. https://supreme.justia.com/cases/federal/us/597/19-1392/

[7] Ibid., 597 U.S. at 231.

[8] Ibid., 597 U.S. at 239, referring to *Washington v. Glucksberg*, 521 U.S. 702 (1997).

[9] E.g., *Moore v. Harper*, 143 S.Ct. 2065(2023). https://supreme.justia.com/cases/federal/us/600/21-1271/#tab-opinion-4757256 (federal court review of state election laws); *Trump v. Anderson*, 144 S.Ct. 662 (2024). https://supreme.justia.com/cases/federal/us/601/23-719/ (meaning of insurrection clause); *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407 (2022). https://supreme.justia.com/cases/federal/us/597/21-418/ (prayer on school football field does not violate establishment clause).

[10] Ian Bartrum, "Structural Originalism: A Second Amendment Case Study," *University of Pennsylvania Journal of Constitutional Law* 27 (2025): 846. https://doi.org/10.58112/jcl.27-4.3

[11] *Bruen,* 83 - 133 (Breyer, dissenting). See also, Erwin Chemerinsky, *Worse than Nothing* (Yale University Press, 2022); Thomas Wolf, Seth Breidbart, and Chika Isozaki, *Countering Originalism: A Guide for Litigators* (New York: Brennan Center for Justice at New York University, December 2025), https://www.brennancenter.org/media/14809/download/bcj-166-countering-Originalism.pdf.

[12] William J. Novak, "Some Realism about Originalism," *Michigan Law Review* 123 (2025): 1185–1190. https://doi.org/10.36644/mlr.123.6.some; Saul Cornell, "Learning to Read Like an Eighteenth-Century Lawyer: The Historical Critique of Originalism Revisited," *William & Mary Bill of Rights Journal* 33 (2024): 439. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2104&context=wmborj

[13] Chemerinsky. The Abhorrence Problem. In Erwin Chemerinsky, *Worse Than Nothing: The Dangerous Fallacy of Originalism* (Yale University Press, 2022),

[14] Osagie K. Obasogie, "Can Originalism Save Bioethics?" in *Critical Approaches to Science and Religion*, chap. 4 (New York: Columbia University Press, 2023), 97.

[15] Chemerinsky. The Epistemological Problem. In Erwin Chemerinsky, *Worse Than Nothing: The Dangerous Fallacy of Originalism* (Yale University Press, 2022).

[16] *NLRB v. Noel Canning*, 573 U.S. 513, 533–34 (2014). https://supreme.justia.com/cases/federal/us/573/513/

[17] J. Bernstein, "Originalism's Precedent Problem," 45 *Northern Illinois University Law Review* 172. https://huskiecommons.lib.niu.edu/niulr/vol45/iss2/6/

[18] "Conservative Caution v. Progressive Originalism: How Justices Barrett and Jackson Are Paving Their Own Paths on the Court," symposium, 31 *Cardozo Journal of Equal Rights and Social Justice* 607 (2025) at 636. https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1029&context=cardozoersj

[19] *United States v. Rahimi*, 602 U.S. 680 (2024). https://supreme.justia.com/cases/federal/us/602/22-915/

[20] Chemerinsky. The Hypocrisy Problem. In Erwin Chemerinsky, *Worse Than Nothing: The Dangerous Fallacy of Originalism* (Yale University Press, 2022).

[21] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). https://supreme.justia.com/cases/federal/us/558/310/

[22] *Trump v. United States*, 603 U.S. 593 (2024). https://supreme.justia.com/cases/federal/us/603/23-939/

[23] Obasogie, "*Can Originalism Save Bioethics*"," 97. Obasogie, addressing a related but separate topic, observes that "Germline engineering, embryo screening, and similar techniques give rise to the ability of science and medicine to enhance or eliminate populations in ways that would make nineteenth-century eugenicists utterly giddy." He then calls for bioethicists to employ Originalism, to "reorient itself away from principalism and back toward its original founding value: anti-eugenics."

[24] 497 U.S. 261 (1990). https://supreme.justia.com/cases/federal/us/497/261/

[25] Ibid. At 294.

[26] Ibid. at 300.

[27] E.g., *Health Freedom Defense Fund, Inc. v. Carvalho*, 148 F.4th 1020 (9th Cir. 2025). https://cdn.ca9.uscourts.gov/datastore/opinions/2025/07/30/22-55908.pdf; *Johnson v. Kotek*, NO. 22-35624, 2024 WL 747022 (9th Cir. 2024). https://www.supremecourt.gov/DocketPDF/24/24-173/322395/20240813193006226_Johnson%20v%20Kotek%20Petition.pdf; *Children's Health Defense, Inc. v. Rutgers, the State University of New Jersey*, 93 F.4th 66 (3rd Cir. 2024). https://law.justia.com/cases/federal/appellate-courts/ca3/22-2970/22-2970-2024-02-15.html; *We The Patriots USA, Inc. v. Connecticut Office of Early Childhood Development* 76 F.4th 130 (2nd Cir. 2023). https://law.justia.com/cases/federal/appellate-courts/ca2/22-249/22-249-2023-08-04.html

[28] Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 8th ed. (New York: Oxford University Press, 2019).

[29] A bioethicist might respect a patient's decision to forgo treatment as an ethical matter but not support it as constitutional right. While principled arguments could be made for holding those separate positions, the positions are not "aligned" in whether they support the patient's decision.

[30] Ruth R. Faden and Tom L. Beauchamp, *A History and Theory of Informed Consent* (New York: Oxford University Press, 1986).

[31] *Carey v. Population Services International*, 431 U.S. 678 (1977). https://supreme.justia.com/cases/federal/us/431/678/ (An earlier right-to-contraceptives decision. *Griswold v. Connecticut*, 381 U.S.479 (1965), relied upon a combination of constitutional provisions, but principally the First Amendment).

[32] *Roe v. Wade*, 410 U.S. 113 (1973). https://supreme.justia.com/cases/federal/us/410/113/

[33] *O'Connor v. Donaldson*, 422 U.S. 563 (1975); Parham v. J.R., 442 U.S. 584 (1979). https://supreme.justia.com/cases/federal/us/422/563/

[34] *Dobbs v. Jackson Women's Health Organization* (2022).

[35] See e.g. Erwin Chemerinsky, "The Future of Substantive Due Process: What are the Stakes?," 76 *SMU Law Review* 427 Summer 2023); Parker Wilkson, "The Danger of Dobbs: Substantive Due Process, Fundamental Rights, And a Critique of the Theory of Historical Tradition." 35 U. *Fla. J.L. & Pub. Pol'y* 197 (Spring 2025).

[36] *Murthy v. Missouri*, 603 U.S. 43 (2024). https://supreme.justia.com/cases/federal/us/603/23-411/

[37] *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023). https://law.justia.com/cases/federal/appellate-courts/ca5/23-30445/23-30445-2023-09-08.html

[38] Murthy v. Missouri, 603 U.S. at 77 (Alito,J., dissenting).

[39] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). https://supreme.justia.com/cases/federal/us/395/444/

[40] Robert Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Review (1971):1, 20. https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2720&context=ilj

[41] See Polly Price, *Plagues in the Nation: How Epidemics Shaped America* (Beacon)(2022).

[42] E.g., "Columbia Agrees to Trump's Demand After Federal Funds Are Stripped," *New York Times*, March 21, 2025. https://www.nytimes.com/2025/03/21/nyregion/columbia-response-trump-demands.html

[43] "Trump Expands Attacks on Law Firms, Singling Out Paul, Weiss," *New York Times*, March 28, 2025. https://www.nytimes.com/2025/03/14/us/politics/trump-law-firm.html

[44] "When It Comes to D.E.I. and ICE, Trump Is Using Federal Grants as Leverage," *New York Times*, April 7, 2025. https://www.nytimes.com/2025/04/07/us/politics/trump-homeland-security-ice-dei-grants.html

[45] President Donald J. Trump, Exec. Order No. 14,187, "Protecting Children from Chemical and Surgical Mutilation," n.33 supra. https://www.federalregister.gov/documents/2025/02/03/2025-02194/protecting-children-from-chemical-and-surgical-mutilation

[46] *United States v. Skrmetti*, 605 U.S. 495 (2025). https://www.justice.gov/crt/media/1404486/dl?inline

[47] *United States v. Virginia*, 518 U.S. 515, 568-69 (1996)(Scalia, J. dissenting). https://supreme.justia.com/cases/federal/us/518/515/

[48] Chereminsky, ibid., Chapters 4 and 5.

[49] *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015). https://supreme.justia.com/cases/federal/us/576/644/

[50] Order 25-133 (December 8, 2025) https://www.supremecourt.gov/orders/courtorders/120825zor_i4ek.pdf

[51] *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522 (2021). https://supreme.justia.com/cases/federal/us/593/19-123/; *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020). https://www.oyez.org/cases/2020/20A87

[52] *Dr. A. v. Hochul*, 142 S.Ct. 552 (2021). https://www.supremecourt.gov/opinions/21pdf/21a145_gfbi.pdf (Gorsuch, dissenting)

[53] Jacobson v. Massachusetts, 197 U.S. 11 (1905). https://supreme.justia.com/cases/federal/us/197/11/

[54] Id. at 25.

[55] Id. at 29.

[56] *PFLAG, Inc. v. Trump*, 8:25-cv-00337 https://storage.courtlistener.com/recap/gov.uscourts.mdd.575616/gov.uscourts.mdd.575616.1.0_3.pdf; Commonwealth of Massachusetts v. Trump, 25 CV- 12162, at p 2. https://storage.courtlistener.com/recap/gov.uscourts.mad.287522/gov.uscourts.mad.287522.1.0.pdf; *San Francisco Aids Foundation v. Trump*, 3:25-cv-1824 https://storage.courtlistener.com/recap/gov.uscourts.cand.444946/gov.uscourts.cand.444946.1.0.pdf (challenging several executive orders)

[57] President Donald J. Trump, Exec. Order No. 14,187, "Protecting Children from Chemical and Surgical Mutilation," January 28, 2025, https://www.govinfo.gov/content/pkg/DCPD-202500192/pdf/DCPD-202500192.pdf.

[58] E.g., Susan M. Wolf et al., "Anticipating Biopreservation Technologies That Pause Biological Time: Building Governance & Coordination Across Applications," *Journal of Law, Medicine & Ethics* 52 (2024): 534–552. https://doi.org/10.1017/jme.2024.129; Susan L. Crockin, Alta L. Charo, and M. Edmonds, "The History and Future Trends of Art, Medicine and Law," *Family Court Review* 59, no. 1 (January 2021): 22–45, https://doi.org/10.1111/fcre.12550.

[59] Novak at 1190 (discussing "Dreams of a Progressive Originalism"). https://repository.law.umich.edu/cgi/viewcontent.cgi?params=/context/mlr/article/14175/&path_info=