

Historical Interpretation of Originalism and Non-originalism under the System of American Constitutional Precedent

Long Qian

Law School of China University of Political Science and Law, Beijing, 100088, China

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Abstract: The constitutional interpretation methods of originalism and non-originalism play an important role in the American precedent system. In the history of more than 200 years since the founding of the United States, the two are different, unified, and dialectical exist in the constitutional precedent system of the United States. This paper will sort out the historical context of the two from several important periods in American history. How did they develop in the founding era of United States, after the Civil War, during the New deal period, after World War II and into the stage of the 21st century. Judging from the history of American constitutional interpretation for more than 200 years, the position of originalism and non-originalism of various schools in the theory of constitutional interpretation can be seen as equal. Throughout the history of the United States, it can be said that originalism dominated in the first hundred years, and that non-originalism developed rapidly in the last hundred years, while the status of originalism gradually wavered, but it did not completely lose its influence.

1. Introduction

Originalism and non-originalism are two basic camps in the interpretation of the American Constitution. Under the American precedent system, the constitutional interpretation methods of originalism and non-originalism play an important role. Originalism regards exploring the intention of the constitute or the original meaning of the text as its own standard of constitutional interpretation, aiming at upholding the traditional constitutional values such as constitutional authority, people's sovereignty, majority democracy and judicial restraint. Non-originalism is opposed to the ancient laws adopted in the constitution-making era, and holds that the reasonable meaning of the text of the constitution should be sought in order to pursue a living constitution. In the more than 200 years of history since the founding of the United States, the two are distinct and United. The rise and fall dialectical exist in the constitutional precedent system of the United States. In the vast American constitutional jurisprudence, they explain the main body of the constitution, the amendment of the constitution, put forward their own theory, and explain the basis of their legitimacy.

On the historical context of the two doctrines, many works have also combed the historical changes and processes of originalism, but the historical context of the development of non-originalism is seldom mentioned. By integrating and clarifying the relevant theoretical studies, we can not only perfect the theories of originalism and non-originalism, but also make people look at the objectivity of dialectical existence of these two theories more reasonably in comparison. This paper will sort out the historical context of the two from several important periods in American history. In the founding era of United States, after the Civil War, during the New deal period, after World War II and into the stage of the 21st century, how did they develop. Through The excavation of the social background reveals the rise and fall between the two and where the variables are. Why does one prevails in the certain era and so as to the other, interpreting originalism and non-originalism from a historical point of view.

2. The Dominant Position of Originalism in the Founding Era of United States

2.1 The influence of the Scholar Blackstone Theory

In the founding era of United States, the constitutional interpretation was mainly based on originalism. Before the founding of the United States, as a British colony, the British authorities ruled for more than 200 years. Therefore, the American legal system is naturally influenced by the English legal system and inherits the English common law system.

Professor Blackstone in the 18 th century was the first professor of common law in English history and “declared the coming of a new era of English law”¹. The influence of his theory on American law is omnidirectional, and his main book, the interpretation of English Law, was praised as the “Bible of Law” in the United States at that time. ²Black stone's theory of legal interpretation with the intention of legislator as the legal authority also influences the legal practice of American constitutional interpretation.

In the age of Blackstone, parliamentary sovereignty was established. So he believes that putting the judiciary above legislative power would undermine the entire system of government. Seeking the intention or will of the legislator is the correct means to achieve the goal of ruling by law, which is also the correct method of constitutional interpretation. Black stone's profound influence on American fundamentalist theory actually stems from his theoretical summary of precedent principle, which has a long history of judicial tradition. The precedent principle, he said, was instrumental in ensuring consistency, certainty and predictability of the law. The characteristics of retroactive following the principle of precedent and the appeal of originalism to legislators The nature of the intention is very similar: they all look backwards and try to find the true meaning of the law from the material of the past, while the material borrowed by the fundamentalist in seeking the constitute intent includes precedents. Precedent principle and originalism both represent the desire to restrict the judicial discretion and further respect the legislator³.

2.2 Marshall Court period

"Interpreting the law is the proper and peculiar duty of the courts," Hamilton said in the Federalist papers. In fact, the Constitution should be regarded as the fundamental law by judges. Therefore, the power of interpretation of the Constitution and any laws enacted by the legislature should be vested in the courts. In the event of irreconcilable differences between the two, the law with greater force and effect shall prevail. That is: the Constitution and the law, the Constitution shall prevail; the people and their representatives, according to the will of the people. And assume that the people's power is above the judicial and legislative powers. " ⁴From this point of view, it can be seen that in the early days of the founding of the people, the Constitution must be interpreted with the will of the people, that is, The original intent of the Constitution shall prevail.

Marshall explained Hamilton's view in Marbury v. Madison in 1803. During his time in power, many times to explore the original intention of the constitute to provide the basis for his claim. But in the view of non-fundamentalists, the Supreme Court's unconstitutional review power, established by Justice Marshall in 1803, actually follows the conclusion of non-fundamentalist constitutional interpretation.

3. The Rise of Non-originalism After the Civil War

In 1857, the Supreme Court, in Drayd Scott v. Sanford⁵, followed a fundamentalist interpretation of the Constitution and overturned the law known as the Missouri compromise. So that blacks can

¹ Cited from Q.H.He, Blackstone and the Modernization of British and American legal Culture, in Law Science, No. 4, 1996.

² Cited in Kenneth W. Thompson, ed. Political Theory of the Constitution, trans. Z.M.Zhang, Triple Bookstore, 85 (1997).

³ Y.F.Zhang, A study on the interpretation of the Constitution of originalism-centered on American Judicial Review. Ph. D. thesis, Renmin University of China, 2010.

⁴ Hamilton, Jay, Madison, et al. Translated by F.G. Cheng.

⁵ DredScott v. Sandford (1857).

still be the legitimate property of others, not free citizens protected by the Constitution. That is, if a black man is in a free state where slavery has been abolished, he still has no citizenship and his fate cannot be changed. The case defended the existence of slavery, and President Lincoln angrily attacked: "the house collapses in half. I believe that in a country that is half a slave and a half a free man, the government will last for a long time. No. " Shortly after the end of the Civil War, the verdict was overturned by the 14th Amendment. After the 14th Amendment overturned the judgment, non-originalism began to rise. Because the rights of blacks cannot be protected if they follow the fundamentalist interpretation of the Constitution.

In the judgment of 1870 in *Hepburn v. Griswood*⁶, the Supreme Court sought the basis of its decision in the Constitutional "purpose," Spirit ":" We believe that, The fathers who built and adopted the Constitution also hoped that the spirit of the prohibition would spread throughout the legislative system. The fairness established and upheld by the Constitution should not be undermined by legislation of another opposite trend. We believe that these views are fully supported by the letter and spirit of the Constitution. " The words "purpose" and "spirit" are obviously inconsistent with the constitutional interpretation of originalism.

Although non-originalism began to rise at that time, the constitutional interpretation method of originalism still prevailed, because the idea that "constitutional interpretation based on the original intention is the most effective safeguard for limited government" was still upheld by the Supreme Court at that time.

4. The Rise of Non-originalism in The New Deal Period

In the 1930s, modern judicial review rose, originalism declined, and non-originalism came into being. At that time, with the development of modern capitalist industry, the national economic scale came into being, and it was imperative to control the national economy macroscopic. After the Great American economic crisis in 1929, the federal government began to intervene aggressively in the economy. The New deal period is an important period in the history of the Supreme Court exercising the power of unconstitutional review. At that time, the classical liberalism still had a great influence in the United States, so in the early New deal, the Supreme Court in the classical liberalism Still convinced that the government should intervene at least and that individual property rights are sacrosanct, he insisted on a fundamentalist interpretation of the constitution to limit the government's behavior. Later, the Supreme Court moved from conservatism to openness, with conservatism and liberalism gaining the upper hand in the debate. The status of the original constitutional interpretation method began to decline, and the non-fundamentalist constitutional interpretation method was greatly respected.

In the case of *Panamanian Refinery Corporation v. Ryan* (1935) at the beginning of the New deal, ⁷the Supreme Court, by a vote of 8 to 1, ruled that paragraph 9⁸ of the National Industrial Renewal Act enacted by President Roosevelt in 1933 was null and void. The Supreme Court adheres to the principle of separation of powers established by the Constitution. In the view of the justices, Congress's regulations on oil regulation in the National Industrial Renewal Act, because there are no specific standards to follow, result in Congress delegating legislative power to the President. The exercise of discretionary power by the President makes the executive power too broad and goes against the idea of limited government, which checks and balances power in the Constitution of the United States. Theoretical institutional design poses a major threat. And the economic due process established in *Lockna v. New York* in 1905, as a branch of substantive due process, meant that the court was based on traditional economic theories such as laissez-faire,

⁶ *Hepburn v. Griswold*(1870).

⁷ *Panama Rafining Co. v. Ryan* (1935).

⁸ The main content of this paragraph is that all the industries of all states, large and small, are free to compete, and that the quantities and units of production shall be allocated according to the production quotas of the states, and the total production shall not exceed the quotas expected of the states. The same should be said for transporting oil. In violation of this provision, the President may order a ban under paragraph 9, paragraph 3, of the Act. The President has the power to impose penalties if he does not obey the order from this prohibition.

freedom of contract, and so on. Economic rights may be presumed to be "free" or "property" protected in special terms by the 5th and 14th amendments and may prohibit federal or state agencies from interfering in the economic sphere. In *Scott Poultry Company v. the United States* in 1935, the Supreme Court also held that the National Industrial Renewal Act had declared that it went beyond interstate trade provisions and the lack of criteria for the appointment of powers. It is unconstitutional. The case clearly reflects the tension between the reasons for the court decision and the needs of society.

Since then, a number of New deal laws aimed at saving the economic crisis have been declared null and void in the early years of the New deal, which has had a negative impact. No longer subject to government interference, businessmen can do whatever they want and restore many immoral practices in business. As vice rises one foot, virtue rises ten, when they encounter more ways of unethical competition, but can no longer be protected by the government. Stocks jumped instantly, but when investors thought of a possible contraction in currency, they immediately sold off their shares in large quantities, causing the market to falter again.

Faced with the fact that the Supreme Court had annulled a number of New deal laws, making it difficult to implement them, President Roosevelt was furious and accused the Supreme Court justices of interpreting the Constitution with outdated principles. So he reshuffled the Supreme Court and put the judges who supported his New deal law in the Supreme Court. The case of *National Bureau of Labor Relations v. Johnslaw Steel Company*¹⁰, which occurred in 1937, was a typical case in Roosevelt's New deal period, reflecting the Supreme Court's transition from conservative to open. In this case, several employees of the Jones Laurin Steel Company were dismissed by the company for participating in trade union activities. The Labor Relations Bureau found that the company had violated labor relations laws, ordered the reinstatement of several sacked employees and stopped such discriminatory practices. But the company refused, arguing that its business was manufacturing, not business, and that it was not subject to the federal Constitution's "business clause", under which the government could not interfere.¹¹ In this case, the Supreme Court changed its attitude and did not distinguish between the two concepts of trade and manufacturing: first, as to the power to regulate interstate trade, the court held that federal powers could not be restricted. Because the operation of this power can "promote, protect and promote" state trade. Easy. Second, while the actions of companies in this case are consistent with state regulations, Congress has the power to exercise such control if their actions and interstate trade are closely and substantively related. Finally, as the participation of workers in trade union negotiations with employers is one of the basic conditions to ensure industrial stability, it can avoid the disruption of business caused by workers' strikes and thus affect interstate commerce. As a result, the federal government not only governs interstate commerce, but also governs activities that affect interstate commerce. The present case provides a broad interpretation of the "direct" and "indirect" effects of interstate trade in similar cases in the past: As long as Congress finds a "rational basis" for the link between regulatory issues and interstate trade, the courts affirm the constitutionality of the law. The decision in this case shows that the position of originalism and non-originalism in the Supreme Court has begun to change, changing the old tradition, conservative constitutional interpretation of originalism, and adapting to the social trend. Non-fundamentalist constitutional interpretation, in line with the purpose of the New deal, greatly expanded the rights of the federal government. Then, in other cases, the Supreme Court upheld the New deal law, paving the way for a smooth New deal that eventually weathered the country's economic crisis.

A series of actions made by the Supreme Court during the New deal period showed that the latter had the upper hand in the great contest between laissez-faire constitutionalism and the national constitutionalism with the central government as the center. Since then, American society has

⁹ *Schechter Poultry Corp v. United States* (1935).

¹⁰ *National Labor Relations Board v. Jones and Laughlin Steel Corporation* (1937).

¹¹ Note: before this case, one of the means by which the court had bound the government was to give a narrow interpretation of the scope of "interstate trade". The concept of distinguishing between trade, production, and manufacturing: state trade is limited to matters directly related to state trade, including the sale and transport of goods directly attached to them, and does not include the process of converting materials into finished products.

entered a new era of federal and state economic and commercial adjustment, comprehensive management and regulation. Originalism began to decline, rather than fundamentalist constitutional interpretation to the golden age.

5. Protection of Civil Rights After World War II

In the early 1940s, with the end of World War II, the status of national security declined, and the national mood stabilized. At the same time, President Roosevelt advocated upholding the basic human rights of citizens. During this period, the Supreme Court did much to protect the rights of citizens. In 1943 the *West Virginia State Department of Education v. Barnett*¹², the second case of the National Flag, the Supreme Court reversed its attitude in the National Flag first case and, in turn, protected citizens' freedom of expression and religious belief. In the 1951 *Dennis* case, in which citizens' freedom of speech was guaranteed, a majority of the judges said: "neither Holmes nor Brandeis has set up too materialization the dangerous standards of freedom of expression that are clear and realistic, to form a rigid rule that can be applied to every case without regard to the actual circumstances of the case. " This means that, depending on the circumstances of the case, clear and realistic risk standards can be changed.¹³ Non-originalism plays an important role in safeguarding civil rights.

*Smith v. Aulet*¹⁴ in 1944 quashed claims of white superiority and restricted the actual participation of the majority of Southern blacks in politics. Subsequently, the constitutional principle of equal protection extended to the elimination of racial discrimination in property. In a 1948 ruling, the Supreme Court declared the judicial enforcement of racial restraints null and void in violation of the constitutional principle of equal protection.¹⁵ Because of the great victory of the black American movement in the 1950s, the American feminist movement, inspired by it, made great progress in the 1960s and made a breakthrough victory in the 1970s. Benefit In addition, in the 1960s, the Supreme Court gradually relaxed the review of the economic legislation, and strengthened the interference of the review legislation on the non-economic rights, mainly to give special protection to the individual "right of privacy". To a large extent, the protection of citizens' individual rights depends on the non-fundamentalist method of constitutional interpretation.

During the Burger Court period from 1960 to 1980's, the balanced interpretation model of non-originalism was widely used in the constitutional interpretation, with geometric growth. Some scholars have counted out the 473 cases heard by the Supreme Court from 1984 to 1986, of which 214 cases all involved the balanced interpretation model. Some people believe that judicial review has entered a "balanced era".¹⁶ By the end of the 1980 s, however, the utilization rate of the balanced interpretation model had gradually declined. This can be attributed in large part to the restructuring of the Supreme Court's justices, following the originalism that the justices have begun to occupy most of the world: after Reagan became President, Mr Rehnquist, the "conservative" man, was named Chief Justice, and then nominated fundamentalist Scalia, Kennedy and others to the Supreme Court. The conservative Rehnquist Court came into being. Rehnquist Court has effectively restricted federal intervention in state rights through a series of cases such as *U.S. v. Lopez*.¹⁷ In fact, as early as 1973, *Roe v. Wade* had a great influence on the theory of constitutional interpretation, the originalism began to revive, followed by a criticism of the living concept of the Constitution. Borg, a professor at Harvard University, has made great efforts to revive the original idea. Borg always believed that originalism The method of constitutional interpretation is the fundamental to maintain the rule of law and constitutional order established by the founding fathers. Constitutional interpretation is the activity of exploring and applying the intention of the constitute. His book

¹² *West Virginia State Board of Educational v. Barnette* (1943).

¹³ Z.C.Jiang, Ren Donglai: a brief Analysis of the balanced interpretation Model in the Constitutional decision of the Supreme Court of the United States-from the *Heller* case. In the *Law Review of Nanjing University* (fall 2010).

¹⁴ *Smith v. Allwright* (1944).

¹⁵ J.M.Hu, ed. *Foreign Constitutions: cases and comments*. Peking University Press, first Edition, 2004, p. 160.

¹⁶ Quoted from T Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, Yale Law Journal, vol. 96, 1987, p. 972.

¹⁷ F.He. *The country of the Lord Chancellor*. Law Press, 1 st ed. 2010, p. 3.

Judicial Rule: the Evolution of the Fourteenth Amendment gave a powerful impetus to the revival and development of the fundamentalist theory. During this period, originalism steadily developed into a set of systematic, distinctive legal ideas and developed towards refinement. Meese, then attorney general, also launched a public campaign to defend originalism.

6. The Present Situation of The Two in The 21st Century

The year of 2005 was a turning point for the Supreme Court, when Rehnquist died of illness. Roberts succeeded Rehnquist as Chief Justice and the Federal Supreme Court entered Roberts's time. Roberts appreciated what Marshall Court had done, because the Marshall Court in the early 19th century had contributed so much to the constitutional history of the United States. Roberts also wants Supreme Court justices to be as consistent as possible, to avoid big disagreements and to advocate "judicial minimalism." And combined with other conservative justices, gradually set aside many liberal precedents. In the discussion on the second Amendment, whether a citizen has a gun or not In the case of power, it is clear through judgment that the right of holding a gun owned by citizens is an important constitutional right, which highlights the dominant position of the constitutional interpretation method of originalism in this period in the Supreme Court.

7. Conclusion

Judging from the history of American constitutional interpretation for more than two hundred years, the position of originalism and non-originalism of various schools in the theory of constitutional interpretation can be said to be equal. When conservatism prevails in a certain era, adherence to fundamentalist constitutional interpretation will become the mainstream of that era. If, with the development of society, people's ideas and ideas change, the liberal school of thought has more influence in society, then the theory of constitutional interpretation leading the Supreme Court to make a constitutional judgment is non-fundamentalist. Originalism has dominated the judicial practice of the Supreme Court for a period of time, but it has also been replaced by non-originalism. The time of the Throughout the history of the United States, it can be said that originalism dominated in the first hundred years, while non-originalism developed rapidly in the last 100 years, but its position gradually wavered, but it did not lose its influence completely.

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