

ANALYSIS

A New Playbook for Countering Originalism in Court

Our guide shows lawyers how to defeat shoddy historical arguments.



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The Courts

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John Marshall, the great early chief justice, believed that the Constitution should be a document understood broadly by its principles. He [wrote](#) ^[link-2]: "We must never forget that it is a constitution we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human

affairs." Today, the Supreme Court seems to have chosen to forget.

The conservative supermajority has made clear that it is applying originalism as the central method to interpret the Constitution. It's a radical approach purporting to freeze the charter in time and interpret its words only with their supposed original public meaning in 1787. Litigants seeking to roll back rights and cripple the federal government have

taken the Court's cue and are loading up their opinions with junk history.

We have many critiques — more on that below. But like it or not, this is the current situation for people fighting for rights and justice before the Court.

It's why the Brennan Center has done something new. Last week, we published [a handbook](#) [\[link-3\]](#) detailing how to recognize and respond to originalist arguments — a hands-on manual for lawyers and judges who find themselves in the funhouse of nutty linguistics and historical muck and haven't the foggiest idea of how to pretend to be historians.

My colleague Tom Wolf writes:

Our report distills the insights we've been sharing with our allies in the litigation trenches. It gives attorneys practical advice for spotting, analyzing, and defeating shoddy history in their cases. Our guide is based on the idea that lawyers facing originalist arguments don't have to become historians or default into

“doing originalism.” Lawyers can still *lawyer*, using court decisions and critical thinking to take originalist claims off the table. Our guide shows them how. And — for those situations where lawyers have to get into the historical details — it walks through steps they can take to work better with historians, put forward more accurate history when that's appropriate, avoid mistakes that can weaken their cases, and use history in non-originalist ways.

The lawyers on the front lines protecting our democracy are busy. So, our guide gets right to the point. It offers a battery of bite-size tips, supported with extensive citations to case law, scholarly literature, and court filings that lawyers can quickly adapt for their briefs and oral arguments.

Ironically, there is no “history and tradition” of the Supreme Court working this way. More than most realize, the Supreme Court's embrace of originalism is a recent

phenomenon. It only truly took hold in 2022, with *Dobbs v. Jackson Women's Health Organization* (purporting to rely on the Constitution's original meaning to repeal the right to an abortion) and *New York State Rifle & Pistol Association v. Bruen* (which said, in effect, that current public safety concerns could not constitutionally be a basis for gun regulation).

Before that, the only major originalist decisions were 2008's *DC v. Heller*, which found a right to individual gun ownership under the Second Amendment. Oh, and *Dred Scott* . . . which the originalists don't talk about very much.

Today, the Court is spotty in its application of this newfangled theory. *Trump v. United States*, which granted presidents vast immunity from criminal prosecution, wasn't the tiniest bit originalist. A look at the founding era would have found little support for a monarchical presidency.

Now the Court is considering major questions of presidential power and constitutional rights. Questioning during the argument about Trump's tariffs seemed to

turn on early federal practices. The Trump administration is attempting to eliminate birthright citizenship for the children of certain immigrants, based on a rewriting of the 14th Amendment that recalls the spirit of *Dred Scott*.

In the case that asks whether a president can fire a member of the Federal Trade Commission, questions focused more on issues of the structure of the federal government — perhaps because the Court already settled on a flawed historical account of the president's removal power in [earlier cases](#) [\[link-4\]](#) and seems convinced it can protect the Federal Reserve with a historically [specious carveout](#) [\[link-5\]](#). If the Court lets the firing go forward, it will overrule *Humphrey's Executor*, a 1935 case that affirmed the constitutionality of protections for heads of independent agencies created by Congress. But as we argue on behalf of historian Jane Manners in [a friend-of-the-court brief](#) [\[link-6\]](#), legal limits on firing officials came much earlier, predating even the founding. Well aware of these limits, the

framers expected Congress to be able to set the terms of executive offices.

The country has changed and thrived since the Constitutional Convention. As the United States grew from a few settlements along the East Coast to a continent-spanning nation with 350 million people, we found ways to do all the things a modern government must do. It makes little sense to try to govern in 2025 by trying to enforce the social mores of property-owning white men in the 1700s.

Over time, it seems clear that originalism has been wielded mostly as a tool to cloak conservative policy choices in historical and legal jargon. Yet we engage originalist arguments on their merits, because we must. And we must be able to respond more effectively.

It's good to know the history. I've written three books on constitutional history — and it's fascinating. But what matters most is not what happened in 1787, but what happened after.

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