

# Jack Balkin Is an American

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Jack Balkin's *Living Originalism*<sup>1</sup> is a major contribution to American constitutional theory. But it may be a contribution to American constitutional theory *only* because it is, well, so distinctively *American*. By exploring why Balkin's theory is so American, I hope to show what we might learn from comparative constitutional law in thinking about constitutions, including the American one. In particular, I will explore why Balkin's approach to theory would be a non-starter in the constitutional culture that has become the most influential in the world, the one anchored by the post-World War II German constitution.

In the American debate over constitutional meaning, originalism looms large. Balkin rethinks originalism by starting with the framework that the Constitution created at the time it was drafted and then tracing how successive generations "build out"<sup>2</sup> that framework to fill in the plan. But Balkin's invocation of originalism as an "on the wall"<sup>3</sup> theory is itself very American. Inquiring this closely into a constitution's original meaning is done almost nowhere else in the world, with some lonely holdouts at the High Court of Australia.<sup>4</sup> Instead, *purposive interpretation*—or one of its

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1. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

2. Balkin uses this suggestive metaphor, to "build out" the constitution, at numerous points in his text. For the first usage in the book, see *id.* at 3 ("The method of text and principle . . . requires us to ascertain and be faithful to the principles that underlie the text, and to build out constitutional constructions that best apply the constitutional text and its associated principles in current circumstances.").

3. Balkin has memorably described deviant legal interpretations as being "off the wall," while those interpretations offered within the bounds of acceptability are "on the wall." Given that the wall itself is not stable, constitutional ideas regularly move from being off the wall to being on it—and vice versa. Jack M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1733 (1997).

4. For evidence that the Australian High Court often uses a version of originalism, see Jeremy Kirk, *Constitutional Implications (II): Doctrines of Equality and Democracy*, 25 *MELBOURNE U. L. REV.* 24, 27 (2001). For a defense of originalism in the context of Australian constitutional law, see Jeffrey Goldsworthy, *The Case for Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 42 (Grant Huscroft & Bradley W. Miller eds., 2011); and Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 *FED. L. REV.* 1, 38-39 (1997).

close variants—leaves originalism in the dust in many other advanced constitutional systems.<sup>5</sup> And purposive interpretation is not originalism by another name.

What is purposive interpretation, and how is it different from originalism?<sup>6</sup> Purposive interpretation requires us to ask what the *point* of a particular constitutional order is in order to work out what the constitution demands of us now. Divining the *point* of a constitutional order requires that we look forward to the imagined future of a polity rather than backward to its historical starting point, as originalism asks of us.

The difference between originalism and purposive interpretation parallels the difference between “because” and “in order to.” One

5. Perhaps the most spirited defense of purposive interpretation has been provided by Aharon Barak, former President of the Supreme Court of Israel. See Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 66-84 (2002). For Barak, purposive interpretation requires that “[f]rom among the range of semantic meanings of the constitution, the interpreter must extract the legal meaning that best realizes the purpose of the constitution.” *Id.* at 68.

The Canadian Supreme Court has used the metaphor of a “living tree” to describe its dominant approach to constitutional interpretation, but has also clearly opted for purposive interpretation in general over any sort of originalism. *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, 409 (Can.) (Jacobucci, J., dissenting) (“This Court has never adopted the practice more prevalent in the United States of basing constitutional interpretation on the original intentions of the Framers of the Constitution. Rather, in Canada, constitutional interpretation rests on giving a purposive interpretation to the wording of the sections.”). For more on Canadian constitutional interpretation, see Bradley W. Miller, *Beguiled by Metaphors: The “Living Tree” and Originalist Constitutional Interpretation in Canada*, 22 CAN. J.L. & JURISPRUDENCE 331 (2009).

The South African Constitutional Court has taken its cue from the Canadian courts in using purposive interpretation to guide its reading of the Constitution. See D. J. Brand, *Constitutional Reform—The South African Experience*, 33 CUMB. L. REV. 1, 10 (2002) (“Canadian law influenced the new Bill of Rights, in particular its limitation clause and the purposive interpretation that courts must use when applying the Bill of Rights.”).

The Indian Supreme Court has moved toward a more purposive interpretation of its Bill of Rights as well. See C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 DENV. J. INT’L L. & POL’Y 195, 196-7 (2005) (“Since the 1980s, the Indian judiciary, particularly the Supreme Court of India, has supported these efforts [to strengthen the enforcement of legal rights] through numerous judgments limiting the powers of government—including police and other enforcement machinery—while simultaneously expanding the notions of freedom and liberty. These limitations were justified by invoking a broad and purposive interpretation of Fundamental Rights, which are enshrined in Chapter III of the Constitution of India.”)

For a more detailed treatment, see AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2005).

6. Purposive interpretation is a common method of interpretation of statutes in the United States, so it is not an unfamiliar idea. See Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 93 (2009). (“[P]urposivism’ [will] refer to an interpretive method that is informed by the statute’s, or the legislature’s, goals; ambiguous or vague texts are read in the way that advances what the legislature was trying to accomplish. Thus, one would distinguish three basic sorts of ‘faithful agent’ statutory interpretation: textualism, intentionalism, and purposivism.”) But precisely because purposive interpretation is familiar from the context of statutory interpretation, and it tends to send interpreters to legislative history to see what the legislature intended to accomplish, it is likely to provide a misleading guide to the way that constitutional interpretation is understood in other constitutional systems. I therefore ask American readers familiar with the debate over purposive interpretation in statutory interpretation to put their initial preconceptions on hold and attempt to see with new eyes purposive interpretation as it is used by foreign courts when interpreting their constitutions.

motivates an explanation by reaching backwards to find out how we got to the present, while the other explains the present by understanding it in light of a desirable future state of affairs. Since the future always recedes off into a time not yet experienced, one never actually gets to the end of interpretive time; one moment pulls the interpreter into the next and then the next, and so on—so that the purpose of the activity of constitution-making constantly changes with each new moment. As a result, the starting point of a purposive interpretation is the present, and its referent is the future. By contrast, originalism requires us to start with the past and ask how we in the present should live up to what others imagined for us. Both originalism and purposive interpretation find the meaning of a constitution in a long arc of time, but the two theories place “now” differently in that arc.

Both purposive interpretation and originalism constrain the interpreter, of course—but they do so differently. With originalism, we are bound to become what our imagined constitutional ancestors wanted. As Balkin’s book shows on nearly every page, however, Americans have substantial wiggle room in construing what our constitutional ancestors wanted us to be. While the “original expected application” version of originalism that Balkin opposes limits the meaning of the constitution to the imaginations of those in the founding generation, Balkin’s alternative originalism, the “method of text and principle,” adjusts the constraints set by the founding generation to vary with the precision of the direction they gave to later generations.<sup>7</sup> This argument applies not only to the text itself, but also to constitutional amendments. For example, the Equal Protection Clause may have been written in an era when the amendment’s drafters distinguished between civil, political, and social equality, but since those words were not fixed in the text, later interpreters—in Balkin’s view—are free to ignore distinctions that the authors of the text would have presupposed.<sup>8</sup> So a later interpreter is not limited to the imagination of those who wrote the text; she may go beyond what the authors of the text thought when the language that the authors used was general. Balkin forcefully argues for a particular understanding of constitutional clauses, but he also makes it abundantly clear that, had history taken different turns in the United

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7. BALKIN, *supra* note 1, at 183-84. The “original expected application” version of originalism, Balkin explains, “asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense.” *Id.* at 7. By contrast, the “method of text and principle,” Balkin’s alternative originalism, requires that “we should pay careful attention to the reasons why constitutional designers choose particular kinds of language” *Id.* at 6. As a result, specific language that appears as a fixed rule should be interpreted narrowly; constitutional language that references abstract principles leaves to future generations how to fill in the specifics. Constitutional drafters constrain the future through their choice of language forms, intending to give future generations room to maneuver in some areas while not in others.

8. *Id.* at 222-29. Balkin notes, “The civil/social distinction is not in the text, and we do not have to accept it today.” *Id.* at 228.

States, those meanings would be different.<sup>9</sup> Balkin starts with the text and then, if permission were given by its authors for later generations to do so, uses later history to leverage a new interpretation.

In short, Balkin's originalism is not an iron cage that traps our collective future inside of it; the "method of text and principle" envisions the constitution as more like a wisteria arbor, which is a structure over which the vines of history grow, always dependent on the structure that supports them but never fully limited to it. Balkin's originalism sees the generally worded parts of a constitutional text as capable of being elaborated over time, with interpretations growing around the spare words of the document. Like wisteria, whose growth depends on weather and soil, constitutional interpretation, in Balkin's view, depends on the issues and problems that arise over the course of a particular constitutional history. Nonetheless, in all originalisms, Balkin's included, the shape of the arbor rather than the plans of the present arborist for the future garden defines what is front and center in our present imaginations.

With purposive interpretation, however, we justify what we do in the present by arguing that a future vision of a specific constitutional order is better than the alternatives in light of the constitution that is interpreted.<sup>10</sup> To continue the gardening metaphor, purposive interpretation sees us as gardeners who need continually to prune and plant in order to properly tend what we have inherited so that we can pass it on. True, a gardener of the law should not (following the metaphor) tear down the wisteria arbor or adopt a scorched-earth policy toward the garden as she found it (and in this sense, constitutional interpretation must not start from scratch either), but if a new vision of the garden makes the wisteria arbor itself less central to the garden's overall architecture, then so be it. Purposive interpretation, too, is flexible, but the debate (in my view) is over the ideal that we should aspire to in light of the constitutional inheritance we have received rather than simply about what others in the past wanted for us. In originalism, we are accountable to a past and to our ancestors; in purposive interpretation, we remember the past, but we are accountable to a future and to each other.

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9. With respect to the Equal Protection Clause, for example, Balkin notes, "Today we live in the wake of two great egalitarian shifts in American politics that have changed basic constitutional understandings about equality and about the practices of ordinary politics—the New Deal and the civil rights revolution." *Id.* at 230.

10. According to former Chief Justice Dickson of the Supreme Court of Canada:  
A constitution . . . is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.  
*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 156 (Can.).

Of course, purposive interpretation of a constitution must be attentive to the actual, concrete text being interpreted, and that text always comes from a past that matters. A gardener, too, must work with what she finds because no garden can be constructed with a day's work. Instead, a constitution, like a garden, must be planted, allowed to grow, and adjusted in light of the conditions the garden faces. Dead plants are replaced with living ones that occupy that space differently; living plants are pruned to show them off to best effect. The debate over what we should aspire to is not a free-floating inquiry, but one rooted in an understanding of a particular constitutional order, created before the interpretive process begins. So, an originalist might object, all purposive interpretation must *start* by referencing a text written in the past and so must confront the past in some way. It can't all be about the future!

Purposive interpretation does have to take a past into account, but it is a past of a different sort than originalism considers relevant. Instead of asking what a particular group of people meant by the words they wrote—or even, as in Balkin's "living originalism," what framework they created and how it was intended to divide responsibilities between the founding and subsequent generations—purposive interpreters often ask what the constitution, when it was written, attempted to *avoid*. Constitutions are rarely written in unproblematic moments of peace; instead they tend to be drafted at a moment of historical rupture. Constitutions are written because history demands a new polity: "A war is lost; an empire is vanquished; an old order is overturned; a dictator dies; an authoritarian government is forced to step aside; a mass public seizes the reins of power from the few who guided the state."<sup>11</sup> As I have argued elsewhere,<sup>12</sup> those who write constitutions are in general focused even more on how to avoid the past that gave rise to the need to write a new constitution than they are on how to constrain a country's future. At moments of constitutional drafting, those writing the new text have fresh in their minds what went wrong and aim to avoid those specific horrors again. Uncovering this past-to-be-avoided may be relevant to the purposive interpretation of a constitution in the interpretive present because it can lead to the discovery of a central point of the enterprise. But it does not fully settle the question. The point of the constitution may shift as understanding of the history the constitution was designed to avoid shifts as well, and this leaves the subjectivities of the constitutional drafters behind. There is no reason to privilege the specific understandings of history most prevalent in people's minds in the moment that the new constitution was written; instead, new

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11. Kim Lane Scheppelle, *A Constitution Between Past and Future*, 49 WM. & MARY L. REV. 1375, 1375-76 (2008). For specific examples of the historical events that have given rise to new constitutions, see *id.* notes 1-6 and accompanying text.

12. *Id.*; see also Kim Lane Scheppelle, *Constitutional Interpretation After Regimes of Horror*, in LEGAL INSTITUTIONS AND COLLECTIVE MEMORIES 233 (Susanne Karstedt ed., 2009).

reasons growing out of new understandings of that historical moment may easily supplant the earlier versions. Most crucially, purposivist debate over the meaning of a constitution occurs not over answers to the question “what did they mean?” or “what did they intend to leave for us?” but instead over the question “what happened that caused a new constitution to be written?” The former is tied to understandings from the moment of creation and exists within minds at the time; the latter responds to historical research and may evolve with new interpretations of that history.

Still, a Balkinian might at this point say: “Gotcha! Once purposive interpreters in the present have to reach back into the past to discover the evils that the constitution *was designed to avoid*, one must be talking about the *intent* of the framing generation.” The purposive interpreter would respond that, no, there is an important difference between looking to the past to see how the framing generation intended to bind future generations to their vision of government (as originalism requires) and looking to the past in order to understand what its point was (as purposive interpretation requires). Originalism requires that we pass through the minds of the framing generation on the way to understanding what they would want from us.<sup>13</sup> It requires that we see the constitution as a set of deliberate choices with aims attributable to those doing the choosing.<sup>14</sup> Purposive interpretation requires that we understand the historical

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13. Balkin denies that originalism requires understanding what was in the minds of the Framers with regard to the specific content of specific clauses: “Constitutional interpretations are not limited to applications specifically intended or expected by the Framers and adopters of the constitutional text.” *See* BALKIN, *supra* note 1, at 6. Nonetheless, he wants us to be guided by the “reasons why designers choose particular kinds of language”—for example, that “they want to limit discretion” or “they want to channel politics through certain key concepts but want to delegate the details to future generations.” *Id.* at 6-7. In making this move, Balkin shifts from pinning subjectivity on the specific content of those intentions (what he calls “original expected application”) to pinning subjectivity on form (the “method of text and principle,” which emphasizes the level of generality with which particular provisions are written). *Id.* at 7, 6. By contrast, purposive interpretation as I am describing it rejects (and indeed finds inappropriate) an appeal to subjectivity of a framing generation as such.

14. Even though Balkin seems to deny a subjectivist view of original meaning, he still sees constitutional language as a set of choices made for reasons discernible in the motivations of the choosers. Perhaps the most crucial choice is between a closed constitution and an open one, or what Balkin calls the skyscraper model and the framework model. *See id.* at 21-23. In the skyscraper (closed) mode, the constitution is seen as having created the finished product of a constitutional government which closes off opportunities for further development. In the framework (open) model, the constitution is seen as the starting point of an open and multi-generational project. Balkin’s “method of text and principle” requires “that interpreters must be faithful to the original meaning of the constitutional text and to the principles that underlie the text.” *Id.* at 23. But this “does not require fidelity to original expected application,” meaning the range of concrete problems to which the text might be applied. *Id.* In short, Balkin opts for framework originalism, or the open model of the constitutional project. But this involves entering the realm of subjectivities of the Framers, at least with regards to their choices of generality in language: “Constitutional drafters use rules because *they want* to limit discretion; they use standards or principles because *they want* to channel politics but delegate the details to future generations.” *Id.* at 24 (emphasis added). Even though Balkin takes pains to note that his theory does not require “obedience to particular *persons* who lived in the past,” he understands the texts that bind us as having been the product of choices that we must respect. *Id.* at 39. That is why focusing on the meaningful actions of a particular set of people turns out to be something that cannot be avoided in Balkin’s scheme.

developments leading up to a new constitution without having to infer anything about the subjectivity of people in that time. We could take into account what the founding generation thought of the history that they were embedded in at the time, but we could also take other readings of that history as helpful just as well. Because purposive interpretation does not require—indeed, does not encourage—a tour through the minds of those who wrote the constitution or who lived in those times, the point of the history giving rise to the need for a new constitution can change over time as that history is seen in a new light.

A concrete example will make the difference between various modes of originalism (even “living originalism”) and purposive interpretation clearer. Many comparative constitutional law experts, including generations of judges at the Federal Constitutional Court of Germany, take for granted that the German Basic Law, and particularly its rights provisions, must be interpreted as saying “never again” to the signature evils of National Socialism, in particular the Holocaust. For example, in the *Aviation Security Case* of 2006, the Federal Constitutional Court rejected as unconstitutional the law that would have permitted the government to shoot down a hijacked airplane, thus killing all of its passengers in order to save people on the ground. Recoiling in horror from the thought that the state would take the lives of some to spare the lives of others, the Court categorically rejected this weighing of lives:

Taking as a starting point the idea of the constitution-creating legislature that it is part of the nature of human beings to exercise self-determination in freedom and to freely develop themselves, and that the individual can claim, in principle, to be recognised in society as a member with equal rights and with a value of his or her own, the obligation to respect and protect human dignity generally precludes making a human being a mere object of the state. What is thus absolutely prohibited is any treatment of a human being by public authority which fundamentally calls into question his or her quality of a subject, his or her status as a legal entity by its lack of the respect of the value which is due to every human being for his or her own sake, by virtue of his or her being a person . . . .<sup>15</sup>

Focusing on the strategies of the constitutional interpretation in this excerpt, one can see that the Court both references the framers (“the constitution-creating legislature”) and also explains what the *purpose* of the constitutional enterprise is (upholding “the obligation to respect and protect human dignity”). But what can only be seen upon further

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15. *Aviation Security Case*, Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] Feb. 15, 2006, 115 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 118 (Ger.) (citations omitted), available at [http://www.bverfg.de/entscheidungen/rs20060215\\_1bvr035705en.html](http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html) (English translation provided by the Court).

investigation is that the purpose the Court references might not have been obvious in precisely this way to the framers, a point that I will argue further below. As a result, the Court both acknowledges the moment the constitution was written but also takes the core meaning of the constitution to be an understanding that became as canonical only later. Now, however, all are agreed that the protection of human dignity is the central purpose of the constitutional order and that this is a reaction against Germany's twentieth-century history.

Some knowledgeable commentators have tried to explain the Court's decision in the *Aviation Security Case* precisely through invoking the unquestioned centrality of the principle of human dignity in the Court's understanding of what the Basic Law means: "[S]ince the principle of human dignity performs the function of the anchor in, or serves as the core of, the German constitutional system, any dilution of it raises the specter of losing the Archimedean point."<sup>16</sup> And why is dignity the Archimedean point of the current German constitution? Another commentator explains this in the context of exploring why the Federal Constitutional Court has been so especially insistent that measures to fight terrorism remain within clear constitutionally defined principles:

During the Third Reich, many legal and institutional boundaries that had been erected under the Weimar Republic as guarantees for the effectiveness of the rule of law/*Rechtsstaat* principle were overthrown. Step by step, legally defined divisions between the state and the Nazi party, between the police and intelligence agencies, and between the military sector and the police were dissolved or systematically blurred . . . . Many provisions in the *Grundgesetz* [Basic Law] can be traced back to the idea that the erection of legal and institutional boundaries is fundamental for the functioning of the rule of law/*Rechtsstaat*. If these principles are eroded, that erosion is just a small step en route to a perpetual state of emergency.<sup>17</sup>

The reaction of the Court in the *Aviation Security Case*, recoiling in horror when confronted with any action that even hinted at the callousness and brutality of the National Socialist State, reflects the view that ensuring "never again" is the dominant point of the constitutional enterprise in Germany.

In what follows, however, I will attempt to show that this "never again" purpose became the dominant point of the constitution only after the initial drafting of the Basic Law. It was then projected backwards into the history

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16. Nina Naske & Georg Nolte, "Aerial Security Law." *Case No. 1 BvR 357/05. 115 BVerfGE 118*, 101 AM. J. INT'L L. 466, 470 (2007).

17. Rainer Nickel, *Data Mining and "Renegade" Aircrafts: The States as Agents of a Global Militant Security Governance Network—The German Example*, 24 EMORY INT'L L. REV. 619, 624-25 (2010).

of the text as its core purpose, reflecting a changing social view of that history. This sort of later creation of an original purpose is completely consistent with the idea of purposive interpretation, but is more uncomfortable for originalists. In fact, originalists may well see this sort of reconstruction of the purpose of the constitutional enterprise as rewriting history in the most appallingly unconstrained way.

The German Basic Law of 1949 was written while Germany was newly divided, living under occupation and reeling from the effects and horrors of World War II, perhaps—most vividly to them—the effects and horrors that affected Germans themselves.<sup>18</sup> Before the drafting process started, the German local authorities refused to engage in a constitutional drafting process as long as Germany was under occupation and divided—and therefore as long as the constitution could not be a constitution for all of Germany.<sup>19</sup> In the end, a compromise was reached: the committee that drafted the constitution used the term “Parliamentary Council” and called their handiwork the “Basic Law” because a “constitution” produced by a “constituent assembly” would have symbolized a permanent governing document for Germany—which would in turn have meant accepting the occupation and division of Germany as a permanent state of affairs.<sup>20</sup> The preamble of the Basic Law that resulted from this process made explicit that this was to be a provisional constitution until Germany could be reunited and fully self-determining.<sup>21</sup>

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18. Throughout this section of the Article, I primarily use sources from the late 1940s through the early 1960s precisely to avoid the version of the history that we now take to be canonical, in which accounts of the purpose of the German Basic Law take as central the horrors of fascism and an embrace of a particularly expansive conception of rights as the antidote to the evils of the Holocaust.

19. The local ministers-president, convening in Koblenz in 1948, rejected the idea of a constituent assembly and a new constitution until an all-German government could be constituted along with the restoration of sovereignty over the whole territory in one polity. Eventually they accepted the proposals of the Allied occupying powers to create a constitutional government to which power could be restored, but they rejected the terminology which would have meant that they were creating a permanent constitution for a permanently divided Germany. JOHN FORD GOLAY, *THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY* 14-17 (1958). In the actual drafting process, rights were not at the center of attention in the debates over the German Basic Law. *Id.* at 175-98. Social and economic rights were more contentious than first-generation rights, but even then the rights provisions of the constitution took hardly any time at all to agree upon. *Id.* at 187-91. Rights of relevance to the Catholic Church, having to do with marriage, the family, the role of women and rights of children (particularly the rights of illegitimate children and the rights of parents to give their children a religious education) were resolved in favor of the Christian Democratic position because the Christian Democratic parties simply had more votes in the Parliamentary Council. *Id.* at 194-98.

20. PETER MERKL, *THE ORIGIN OF THE WEST GERMAN REPUBLIC* 53-54 (1963); see also Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1308-14 (2008).

21. The original preamble of the Basic Law read:

Conscious of its responsibility before God and men, animated by the will to maintain its national and political unity and to serve the peace of the world as an equal member of a united Europe, the German people in the[se] Länder . . . have, by virtue of their constituent power, adopted this Basic Law of the Federal Republic of Germany so as to give a new order to the political life for a transitional period. They have acted also on behalf of those Germans to whom participation was denied. The entire German people remains called upon to

The German public at that time was deeply apolitical, perhaps still in shock from the politics that it had just experienced. As one chronicler of German postwar reconstruction noted, “The vast majority of the people was stunned by the magnitude of the collapse of Nazi totalitarianism and relatively unconcerned about political reconstruction.”<sup>22</sup> Far from uniting “the people” in a moment of “national rebirth,”<sup>23</sup> the new constitution was drafted with little publicity or public engagement. A poll taken in West Germany in 1949 found that only 21% of the public was “very interested” in the constitutional drafting process then underway, while 40% were not interested at all.<sup>24</sup>

The first draft of the new constitution—a draft whose particulars were still very much evident in the final version—was largely agreed upon by a small committee of experts meeting for two weeks in August 1948.<sup>25</sup> When the Parliamentary Council—the official drafting committee—picked up the drafting process, civil society was largely silent as the constitution came together, and only the political parties, civil service, major churches, and trade unions had much input into the process.<sup>26</sup> The only issue that engaged the public as the constitution was being drafted was the issue of “parents’ rights” over the education of their children, and in particular whether a “totalitarian state monopoly on education” would deprive parents of the ability to send their children to religious schools.<sup>27</sup> Otherwise, the drafting of the Basic Law was limited to a small circle and it went into effect without popular ratification.

The politically active minority that participated in the drafting of the new constitution had strong views that fell along party lines, divided more or less evenly between the Christian Democrats and Social Democrats as the largest two factions in the Council, a space they shared with a few smaller parties.<sup>28</sup> The key points of contention in the Parliamentary Council were not the meaning of core values or how to atone for the sins of the war, but the composition of the upper house of parliament, a division of power between a central government and the regional governments, and the complications of fiscal federalism.<sup>29</sup> In short, the

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complete the unity and freedom of Germany in free self-determination.

Carl J. Friedrich, *Rebuilding the German Constitution II*, 43 AM. POL. SCI. REV. 704, 705-06 (1949) (quoting GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at pmb. (Ger.)). An inconsequentially different translation can be found in GOLAY, *supra* note 19, at 217-18.

22. MERKL, *supra* note 20, at 20.

23. Because the Nazis had promised “national rebirth,” the very idea was greeted with suspicion. *Id.*

24. *Id.* at 129.

25. GOLAY, *supra* note 19, at 18.

26. MERKL, *supra* note 20, at 132-35.

27. *Id.* at 140.

28. GOLAY, *supra* note 19, at 19.

29. *Id.* at 44-92; MERKL, *supra* note 20, at 92-103.

division of powers between the regions and the central government were more hotly debated than anything else; the basic rights provisions and the centrality of human dignity, now thought key to understanding German constitutional values, received very little overt attention in the debates.<sup>30</sup>

If one takes the intent of that framing generation as evidenced from the things they got most excited about and spent most of their time debating, then the reunification of Germany, the vertical and horizontal separation of powers, and the role of religion in public life should have been the dominant preoccupations of later originalism. “Building out” the structure would have meant preparing for unification, policing federalism with great rigor, and ensuring that religious education was preserved. But while those principles have been honored, the core spirit of the German constitution has been “built out” even more importantly elsewhere. In fact, later constitutional interpretation has moved quite a long way from the issues that preoccupied the Parliamentary Council in 1949 and even from the structures they built in what has come to be known as the Bonn Constitution. The key animating ideas central to constitutional interpretation have changed as the understanding of the purpose of the constitutional order has been elaborated over time.

In particular, as new histories of World War II came to be accepted in the later 1950s, through the 1960s and beyond, the apparent point of the constitution was modified to match the new interpretations of history. The new narrative about the war emphasized the signature horrors that Germany had inflicted on targeted populations, rather than the indignities of occupation and division of Germany itself by foreign forces that had been even more visible to the constitutional Framers.<sup>31</sup> The Holocaust

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30. The debates have been reprinted in a multi-volume set entitled DER PARLAMENTARISCHE RAT, 1948-1949: AKTEN UND PROTOKOLLE (Kurt G. Wernicke & Hans Booms eds.). While they were made available soon after the actual events, they were edited and reprinted again in the 1970s in a more user-friendly style. For example, Volume I was republished as I DER PARLAMENTARISCHE RAT 1948-1949: AKTEN UND PROTOKOLLE, ED. KURT G. WERNICKE (FOR THE GERMAN BUNDESTAG) AND HANS BOOMS (FOR THE BUNDESARCHIV), VORGESCHICHTE (Volker Wagner ed., 1975). Still, the debates have only rarely been used as sources of constitutional interpretation by the Federal Constitutional Court. See DONALD KOMMERS & RUSSELL MILLER, CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 71-72 (3d ed., 2012).

In fact, *intent-based* interpretation in the American sense is rejected by the Federal Constitutional Court not just for the Basic Law, but for statutes as well. This is in part because the Court distinguishes between objective and subjective intent. Objective intent is expressed clearly in language, and one does not have to go behind it to figure out what those who wrote it meant. Subjective intent, requiring more than the language itself to work out what a speaker or author meant to say, has no place in legal interpretation:

The interpretation of a legislative provision is determined by the objectified intent expressed by the legislator, as manifested in the wording of the provision itself and its semantic context. The subjective intentions of the legislative organs on the other hand are not authoritative with regard to a provision's meaning.

Holger Fleischer, *Comparative Approaches to the Use of Legislative History in Statutory Interpretation*, 60 AM. J. COMP. L. 401, 409 (2012) (quoting 1 BVERFG 301, 312).

31. The narrative of the war changed over time, not just in Germany but across the world. As Samuel Moyn points out, in the immediate aftermath of the war, the Holocaust as such was not a

emerged as the defining evil of World War II rather later than people now realize, and the particular narrative of the Holocaust as the core teleology of the war refigured the position of the German Basic Law itself, so that its moral core came to be shaped by the public acknowledgement of Germany's role in the brutal elimination of Jews in Europe.<sup>32</sup> With

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concept that was part of the international reckoning with what had just happened:

In real time, across weeks of debate around the Universal Declaration in the UN General Assembly [in 1948], the genocide of the Jews went unmentioned, in spite of the frequent invocation of other dimensions of Nazi barbarity to justify specific items for protection, or to describe the consequences of leaving human dignity without defense. It was far more recent Holocaust memory that encouraged a mystified understanding, too, of the Nuremberg Trials, which in reality had contributed to ignorance of the specific plight of the Jews rather than establishing a morally familiar tradition of responding to mass atrocity. More important, it is not at all obvious that, at the time, Nuremberg and related legal innovations like the genocide convention were conceived as part of the same enterprise as the itemization of human rights, let alone falling under their umbrella—though they are often treated now as if they were a single if multifaceted achievement.

SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 82 (2010).

In Germany itself, “[i]n the decade after the war a national consensus emerged in the West that was time and again reconfirmed in elections and public opinion surveys: West Germans emphasized their own suffering and largely ignored the suffering they had inflicted on others.” Wulf Kansteiner, *Losing the War, Winning the Memory Battle: The Legacy of Nazism, World War II, and the Holocaust in the Federal Republic of Germany*, in *THE POLITICS OF MEMORY IN POSTWAR EUROPE* 102, 111 (Richard Ned Lebow, Wulf Kansteiner & Caludio Fogu eds., 2006).

For evidence that the constitutional drafters were preoccupied with the occupation and division of Germany, rather than with the Holocaust, one can point to the fact that, at first, the local authorities refused to participate in drafting a constitution as long as the country was under occupation. See GOLAY, *supra* note 19, at 14-15. Once the process started, the Social Democrats at first wanted only to write a short document creating a provisional government. *Id.* at 22. As the constitutional drafting process moved on anyway (pushed along by the Allied powers who said that occupation could not end without it), a distrust of the German people permeated the proceedings, a distrust that showed that even the Parliamentary Council wondered whether the country was really up to the task of self-government. The members of the constitutional drafting committee

considered it their mission to set up and maintain a constitutional democracy without the participation of the masses and, if need be, against their will. To this end, they used the time-honored devices of checks and balances and added some new weapons against excessive democracy to the armory.

MERKL, *supra* note 20, at 81. In the end, the preamble of the new constitution indicated its temporary character by announcing that it was to last only for a “transitional period” and that it was written “also on behalf of those Germans to whom participation was denied” because the country was divided. (For the whole preamble, see *supra* note 21.) While the commitment to human dignity is front and center in the text, many other signals in the process and in the text that resulted from it indicated that the unification of Germany and the ending of the occupation were even more crucial to the constitutional framers when the text was written.

32. While overwhelming evidence of the Holocaust was on display as soon as the first of the Nuremberg Trials began in 1946, genocide was not defined there as one of the signature crimes of the war. Instead, the killing of six million European Jews was portrayed as part of a huge and indiscriminate mass killing of civilians more generally. This portrayal remains puzzling to some observers who have adopted the view that emerged later, that the Holocaust was the signature and most shocking evil Germany performed during the war. See the recent film by Christian Delage, *NUREMBERG: THE NAZIS FACING THEIR CRIMES* (Arte 2006).

For West Germans at the time of constitutional drafting, and even for a decade after that,

the contemporaries of Nazism settled on a number of widely shared, mostly self-defensive and apologetic strategies to deal with Nazism . . . . The former citizens of the Third Reich were culturally and psychologically ill-prepared to work through trauma, guilt and shame. Therefore, for the most part, they avoided any rigorous inquiries into their own responsibility for the Nazi catastrophe. But they also adopted a self-centered victim identity for very

recognition that the targeted destruction of peoples—along with the camps, the killing sites, and the rest—was the *central* evil committed by the German state, the point of the German Basic Law shifted its center of gravity, and constitutional interpretation followed. As this process happened, the point of the constitutional order became the respect for human dignity, the protection of the core elements of rights from any political restriction, and the binding of all public authority to a constitution of values.<sup>33</sup> In short, as the Holocaust moved to the center of understandings of what World War II was about,<sup>34</sup> the meaning of the German Basic Law shifted to emphasize the “never again” message of human dignity, the rights provisions, and their protection by the Constitutional Court as the central animating spirit of the text.<sup>35</sup>

The growing centrality of the Holocaust to the evolving understanding of the German Basic Law can be seen in a string of decisions, starting with the famous *Lüth* case in 1958.<sup>36</sup> Veit Harlan, a famous Nazi film director who had been exonerated after the war, released a new film. The Hamburg Senate leader Erich Lüth, who had been outraged by the exoneration, organized a boycott of the film to protest Harlan’s politics. Suing Lüth for the economic harm caused by the boycott, Harlan won in an ordinary civil court under a general provision of the Civil Code that required those who intentionally caused harm to another, contrary to “good morals,” to compensate those whom they had harmed. The Federal Constitutional Court, however, held that the ordinary court had given insufficient weight in its interpretation of the Civil Code to the idea of free speech in the Basic Law, finding that the objective values of the Basic Law infused the whole legal order and must be considered in interpreting even the general clauses of the Civil Code. Constitutional values were too important to be left to public law alone; even private law had to take constitutional values into account. The revolutionary character of this decision was perhaps made less shocking by the fact that this crucial case played out on facts

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pragmatic reasons: it helped them to come to terms with Germany’s division, large-scale destruction, and foreign occupation.

Kansteiner, *supra* note 31, at 135.

Nor was there a comprehensive understanding of the Holocaust as such outside Germany either. In fact, the appearance of Raul Hilberg’s book *The Destruction of European Jewry* (1961) marked the first comprehensive documentation of the Holocaust as a separable and uniquely horrific identification of particular civilians for death on grounds of their ethnicity.

33. The new “point” of the Basic Law gives pride of place to Article 1, which protects human dignity as “inviolable” and binds all state authority to its protection. GRUNDGESETZ art. 1. Article 19 requires that “in no case, may a basic right be infringed upon in its essential content.” *Id.* art. 19. Of course, that language was there from the beginning, and the unamendability provision of Article 79 reveals that those elements were to be specially protected. *Id.* art. 79. But the unamendability clause also protects federalism and the basic democratic order as well as dignity and rights. *Id.*

34. See generally LUCY DAVIDOWITZ, *THE HOLOCAUST AND THE HISTORIANS* (1983). Of particular note is Chapter 3, “The German Historians.”

35. See Scheppelle, *Constitutional Interpretation After Regimes of Horror*, *supra* note 12.

36. For an English summary, see KOMMERS & MILLER, *supra* note 30, at 60-61.

that brought the Nazi past into sharp relief and required its denunciation. The beneficiary of the narrow application of the Civil Code had been a Nazi film director; the Court's decision limiting his rights under the Civil Code in favor of an expansive reading of the constitutional free speech rights of his critics clearly indicated that criticism of former Nazis would receive constitutional protection.<sup>37</sup>

*Lüth* is considered a cornerstone of constitutional jurisprudence of Germany, as important as *Marbury* or *McCulloch* in the American constitutional order. It arose on facts that inescapably recalled Germany's National Socialist past, and so signaled a turn away from the preoccupation of the framers with occupation and division of the country and towards an understanding of the Basic Law as the moral backbone of the new political order determined not to repeat mass human rights violations. Later signature decisions of the German Federal Constitutional Court tacked the other way on free speech, *limiting* free expression where it gave vent to extremist views. As a result, the Constitutional Court permitted not only the criminalization of incitement to racial hatred<sup>38</sup> and the criminalization of the "Auschwitz lie" (Holocaust denial)<sup>39</sup> but also, more recently, the banning of demonstrations on days of particular significance to National Socialists.<sup>40</sup> These decisions grow out of this same sense that the point of the constitutional order is to avoid the signature horrors of the Nazi past, so that free speech is expansively interpreted where it emboldens critics of the Nazi regime and narrowly interpreted when speech might be used to bolster fascism.

Even the famous 1975 German abortion case did not escape the resonant

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37. In his discussion of decisions in the early years of the Federal Constitutional Court, up to and including the *Lüth* case, Peter Quint noted how the Court swung back and forth between two positions: (1) the Restorationist approach, which attempted to highlight the many rule of law elements that survived from the National Socialist period into the postwar one; and (2) the Reconstructionist approach, in which the new constitution constituted a complete rejection of that past. The decisions that took the sharp-break Reconstructionist view tended to be cases where Nazi atrocities were visible on the surface of the case. For example, the 1952 decision of the Federal Constitutional Court banning the Nazi party from public life partook of Reconstructionism. See Socialist Reich Party Case, 2 BVERFGE 1 (1952). By contrast, the decisions finding continuity with the past tended to be about something else. See, e.g., Concordat Case, 6 BVERFGE 309 (1957) (upholding the continuing legal validity of Hitler's concordat with the Vatican). Yes, it was about Hitler, but it was also about Germany's continuing relations with the Vatican. In cases like that, the Court was more Restorationist. Quint notes: "In the 1950s the Restorationist view probably remained the majority position in German politics and society. If so, the Constitutional Court, with its mixture of Restorationist and Reconstructionist opinions, can be seen as a generally progressive force of that period." Peter Quint, *A Return to Lüth*, 16 ROGER WILLIAMS U. L. REV. 73, 82 (2011).

38. For a good review of the Federal Constitutional Court's approach to hate speech, see Winfried Brügger, *The Treatment of Hate Speech in German Constitutional Law I*, 4 GERMAN L.J. 1 (2002); and Winfried Brügger, *The Treatment of Hate Speech in German Constitutional Law II*, 4 GERMAN L.J. 1 (2003).

39. Holocaust Denial Case, 90 BVERFGE 241 (1994), available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=621](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=621) (English translation).

40. Mehrdad Payandeh, *The Limits of Freedom of Expression in the Wunsiedel Decision of the German Federal Constitutional Court*, 11 GERMAN L.J. 929 (2010).

frequency connection with this anti-Nazi understanding of the core purpose of the constitution. The Court again showed that the moral underpinning of the postwar German constitution was dignity anchored in a rejection of Nazi practices:

Unlike the case of the Weimar Constitution, the categorical inclusion of the inherently self-evident right to life in the Basic Law may be explained principally as a reaction to the “destruction of life unworthy to live,” the “final solution,” and the “liquidations” that the National Socialist regime carried out as governmental measures. Article 2(2)[1] of the Basic Law implies, as does the repeal of the death penalty by Article 102 of the Basic Law, “an affirmation of the fundamental value of human life and of a state concept that is emphatically opposed to the views of a political regime for which the individual life had little significance and that therefore practiced unlimited abuse in the name of the arrogated right over life and death of the citizen.”<sup>41</sup>

Had state toleration of abortion not called up memories of the eugenic practices of fascism in the view of the Constitutional Court, it is tempting to think that the case might have tilted more sharply toward a woman’s right to choose, as was true in virtually all of the other cases arising at high courts around the world in the 1970s.<sup>42</sup>

In contemporary German constitutional law, it is absolutely commonplace to refer to the core moral idea of the German constitution as human dignity, a principle that underpins both the rights of citizens and the obligations of the state to honor and advance these rights. For example, the Aviation Security Case, in which the Federal Constitutional Court refused to allow the state to make the deliberate decision to take some lives even to save others, produced a Kantian judgment refusing the state the power to treat any person as a means to an end.<sup>43</sup> The constitution’s moral compass now points precisely opposite the National Socialist past.

This was not the dominant spirit in the Parliamentary Council at the time that the Basic Law was drafted. There, as we have seen, the framers were centrally concerned with the division of Germany, the allocation of powers between regional and national institutions, and the role of religion in the new public life.<sup>44</sup> Discussion of the horrors of the war in general and

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41. *Abortion I Case*, 39 BVERFGE 1 (1975), translated in *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PRO. 605 (Robert E. Jonas & John D. Gorby trans., 1976).

42. Kim Lane Scheppele, *Constitutionalizing Abortion*, in *ABORTION POLITICS: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE* 29 (Dorothy McBride Stetson & Marianne Githens eds., 1996).

43. For a discussion of this case, see *supra* note 15 and accompanying text.

44. In making this point, I am not trying to argue that the German constitutional framers were engaged in Holocaust denial or any such thing. I am making the simpler point that they were more self-centeredly focused on the ruins of a divided Germany and what this meant for their own lives than on the destruction that Germany had caused to others who were, after all, not present to represent themselves in these debates.

the Holocaust in particular were rare in these years.<sup>45</sup>

As Fritz Stern recalls the immediate postwar period: “To begin with there was the Germans’ collective amnesia, which has also been called a ‘negative memory.’ A few leaders, such as Mayor Reuter [of West Berlin] and on rare occasions [Chancellor] Adenauer himself, recalled the Germans’ crimes, but there seemed little psychic openness to confronting the past.”<sup>46</sup> Adenauer, as the chair of the Parliamentary Council, could hardly bring himself even as the first chancellor of the rebuilt Germany, to look backwards very often. And Adenauer, whose fourteen years as chancellor dominates his biography more than his few months as chair of the Parliamentary Council, never adopted the mantle of the framer-in-chief.<sup>47</sup> (In fact, those who participated in the Parliamentary Council are rarely referred to by name at all.<sup>48</sup>)

I linger on this point not to further blame Germans for failing to cope with their past or to cast aspersions on the members of the Parliamentary Council. Both the German state and the German people did eventually take responsibility for the Nazis’ actions, and in a fashion that has become a model for other countries that have had to live in the shadows of regimes of horror. I emphasize this point because the moment of German constitutional framing was a moment of self-preoccupation in a divided and demoralized state. Had German constitutional advocates taken that as the zero point for constitutional interpretation, the German constitution would have been a less grand constitution than it became. Instead, by taking a purposive view of the constitution—asking what the point of the constitutional enterprise is—Germany and, more particularly, the German Federal Constitutional Court could revise the purpose of this particular historical constitution in light of a fuller understanding of the historical moment than was available to the framers at the time. The German Basic Law grew into a constitution that rejected National Socialism and all of its entailments; it was born as a document that resented occupation and pined for a unified Germany.

Purposive interpretation is in fact the dominant form of interpretive strategy in comparative jurisprudence these days. It may be for this reason that the courts that practice it are more influential in comparative perspective than is the United States Supreme Court, whose originalism makes its interpretations—and therefore the United States Constitution

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45. See Kansteiner, *supra* note 31. For an account of the disputes that emerged among historians about how to understand the reworked histories of the period, see CHARLES S. MAIER, *THE UNMASTERABLE PAST: HISTORY, HOLOCAUST AND GERMAN NATIONAL IDENTITY* (1988).

46. FRITZ STERN, *FIVE GERMANY'S I HAVE KNOWN* 197 (2006).

47. For one prominent example, see the official Biography of Konrad Adenauer on the website of the foundation named after him, available at <http://www.kas.de/wf/en/71.3717>.

48. Much more common in discussions of the constitutional framing are references to the political parties represented around the table, rather than the specific individuals involved. See GOLAY, *supra* note 19; MERKL, *supra* note 20.

itself—more distinctly parochial.<sup>49</sup> This may seem an odd conclusion, given that I have just shown that German constitutional law rests on an interpretation of the country's unique past. But the shadow of the Holocaust, while having a special relationship to Germany, is also a shadow over the world. Holocaust memorials have been created in places that the Holocaust did not literally touch in the moments when it was happening; Holocaust history is world history in a way that later generations, regardless of their national location, cannot ignore.<sup>50</sup> The Holocaust has become *global* history which, while Germany has a special place in that history, is not limited to Germany. In fact, the “never again” reaction of the German Federal Constitutional Court has been shared by other courts interpreting constitutions that did not grow out of a distinctly German past.<sup>51</sup>

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49. David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012) (showing that the use of the United States constitution as a model for either rights or structural features of government has declined sharply over the last several decades, and arguing “that the U.S. Constitution is increasingly far from the global mainstream”); Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WIS. L. REV. 597, 599 (“Even in those cases where the United States exercised a great deal of influence in the constitution-making process, the turn to alternative forms means that in many ways the United States Constitution and the jurisprudence that has flowed from it has, more recently, been providing the anti-model.”).

50. Peter Novick points out for the United States:

By the 1970s and 1980s the Holocaust had become a shocking, massive, and distinctive *thing*: clearly marked off, qualitatively and quantitatively, from other Nazi atrocities and from previous Jewish persecutions, singular in its scope, its symbolism, and its world-historical significance. This way of looking at it is nowadays regarded as both proper and natural, the “normal human response.” But this was not the response of most Americans, even of American Jews, while the Holocaust was being carried out. Not only did the Holocaust have nowhere near the centrality in consciousness that it had from the 1970s on, but for the overwhelming majority of Americans—and, once again, this included a great many Jews as well—it barely existed as a singular event in its own right. The murderous actions of the Nazi regime, which killed between five and six million European Jews, were all too real. But “the Holocaust,” as we speak of it today, was largely a retrospective construction, something that would not have been recognizable to most people at the time. To speak of “the Holocaust” as a distinct entity, which Americans responded to (or failed to respond to) in various ways, is to introduce an anachronism that stands in the way of understanding contemporary responses.

PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* 19-20 (1999).

51. For example, in *R. v. Zundel*, [1992] 2 S.C.R. 731, the Supreme Court of Canada had to confront the free speech rights of a Holocaust denier and had no trouble taking on the history of the Holocaust as the history of Canada as well:

Holocaust denial has pernicious effects upon Canadians who suffered, fought and died as a result of the Nazi's campaign of racial bigotry and upon Canadian society as a whole. For Holocaust survivors, it is a deep and grievous denial of the significance of the harm done to them and thus belittles their enormous pain and loss. It deprives others of the opportunity to learn from the lessons of history. To deliberately lie about the indescribable suffering and death inflicted upon the Jews by Hitler is the foulest of falsehoods and the essence of cruelty. Throughout their tragic history, the circulation of malicious false reports about the Jewish people has resulted in attacks, killings, pogroms and expulsions. They have indeed suffered cruelly from the publication of falsehoods concerning their culture. . . .

The tragedy of the Holocaust and the enactment of the Charter have served to emphasize the laudable s. 181 aim of preventing the harmful effects of false speech and thereby promoting racial and social tolerance. In fact, it was in part the publication of the evil and

By contrast, the U.S. founding has remained a national event rather than a world event, despite the efforts by some to hold up the United States as a model for the world.<sup>52</sup> And the rest of the world has confined the American Constitution to its facts, so to speak. Statues of James Madison are not found frequently outside the United States, nor are paintings of the Philadelphia Convention reproduced in special exhibits all over the world. The U.S. Constitution has not offered a generalizable model.<sup>53</sup>

What if the Supreme Court had engaged in the same enterprise of reconceiving the purpose of the Constitution as understandings of history evolved over time? One can only guess what might have happened if the Constitution had been interpreted as an *anti-colonial constitution*, which would have tied the specific U.S. developments to a more generalizable history, or if the Supreme Court had joined the international movement to take on the distinctive harms of the Holocaust as an event in world history that could be interpreted as a call to constitutional action in the United States.<sup>54</sup> Instead, the approach of the U.S. Supreme Court to its own Constitution, shored up with originalism, reflects what Karl Llewellyn said about law in an age before the wildfire of judicial review spread: “Law, as against other disciplines, is like a tree. In its own soil it roots, and shades one spot alone.”<sup>55</sup>

Originalism may be a symptom that Americans are proud of their constitution and eager to tout it as the best constitution in the world.<sup>56</sup> Not surprisingly, in this context, where even *knowing about* the decisions of foreign courts is considered only slightly short of treason,<sup>57</sup> originalism

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invidious statements that were known to be false by those that made them regarding the Jewish people that lead the way to the inferno of the Holocaust. The realities of Canada’s multicultural society emphasize the vital need to protect minorities and preserve Canada’s mosaic of cultures.

*Id.*

52. The Republican Party’s national platform for the 2012 election asserts it as a fact: American “[c]onstitutional ideals have been emulated around the world, and with them has come unprecedented prosperity for billions of people.” REPUBLICAN PLATFORM 2012, WE BELIEVE IN AMERICA, available at [http://www.gop.com/2012-republican-platform\\_we](http://www.gop.com/2012-republican-platform_we).

53. See *supra* note 49.

54. Instead, the U.S. Supreme Court has steadily refused to make exceptions to its rigid First Amendment absolutism by taking on board the special injuries caused by speech to communities that have historically had the most to fear. See Claudia E. Haupt, *Regulating Hate Speech—Damned if You Do and Damned If You Don’t: Lessons Learned from Comparing the German and U.S. Approaches*, 23 B.U. INT’L L.J. 299 (2006).

55. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 41 (Oxford Univ. Press 2008) (1930).

56. The Republican Party’s national platform in 2012 called the United States Constitution “[p]erhaps the greatest political document ever written.” REPUBLICAN PLATFORM 2012, *supra* note 52.

57. The critic-in-chief of using foreign law to understand the American Constitution has been Justice Scalia, who is also not surprisingly the most vocal advocate of originalism. For Justice Scalia, taking into account constitutional developments over the borders is anti-democratic, while originalism preserves democratic self-determination:

Increasingly, nowadays, foreign courts cite our opinions, and we theirs, because (I fear) judges in all countries believe they are engaged in the very same enterprise: not in

has become America's way of saying that it wants to go it constitutionally alone.

The originalism of Justice Scalia, however, is precisely *not* the originalism of Balkin. Balkin has rescued originalism from framer worship and the associated attention to the minute details of the late eighteenth century. It is a valiant attempt. But Balkin's book is also a very American book because he still seeks to understand the highest and best meaning of what the Framers wanted from us. The touchstone of his understanding is still "fidelity to original meaning."<sup>58</sup> The Framers may not have wanted us to stay in the eighteenth century, but they wanted us to respect when they put us on a short leash and when they let us run the field. In some parts of the Constitution, according to Balkin, the Framers gave us specific direction (in the form of rules) and in other parts of the text, they allow us to adjust our views over time (when they bequeathed us principles). But even Balkin's originalism presumes that the basic point of a constitutional order cannot shift over time. Balkin's originalism demonstrates that he, too, will be shocked—*shocked!*—when the purpose of the American constitution is found to change over time.

Yes, of course, Balkin's originalism is precisely an originalism that allows—even requires—change.<sup>59</sup> For Balkin, the Constitution establishes a democratic space in which "[s]ocial movements, political parties and interest groups vie with each other to influence popular and elite views about the Constitution."<sup>60</sup> But Balkin sees later generations as "building out" from an originating vision. The constant reference back to that originating vision is what makes Balkin an originalist.

Purposive interpretation of the sort I have described here does not proceed from an originating vision that comes down through the ages. In fact, the specific designs of the specific framers are not relevant. Instead, constitutional interpretation proceeds from an "objective" (which is to say,

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determining the original meaning of the unalienable rights approved by the American people or the Canadian people or by the European nations that signed the Convention on Human Rights; nor even in determining what present-day Americans or Canadians or Europeans believe the human rights provisions *ought* to mean; but in determining *for themselves* the *true* content of human rights, much as judges in common-law jurisdictions once believed they were all pursuing the same "brooding omnipresence" of The Common Law. One might expect this international development to strengthen the conviction of our domestic evolutionary judges that they are on the right track (can we be wrong in pronouncing this new human right when the vast majority of the world's judges agree with us?). It may be, however, that the sheer spectacle of our judges' determining the meaning of the American Constitution by falling into step with the judges of foreign courts will bring home to the American people the profoundly undemocratic nature of the evolutionary enterprise.

Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL'Y 871, 873 (2008).

58. BALKIN, *supra* note 1, at 277

59. *See id.* at 282 ("Framework originalism leaves space for future generations to build out and construct the Constitution-in-practice. Living constitutionalism occupies this space. It explains and justifies the practice of building on and building out.")

60. *Id.* at 294.

evidence-based rather than subjectively-in-the-moment) understanding of what particular historical moments mean. As Frank Kermode argued persuasively in *The Sense of an Ending*,<sup>61</sup> it is precisely what happens later that allows us to understand what was happening at the start. In Germany, as I have tried to show, the later understanding of the “zero point”<sup>62</sup> of German political life as the determination never to repeat the Holocaust supplanted the sense that was widespread in the moment when the Basic Law was written that Germans were the primary victims of the war. And, with this switch in what World War II meant for subsequent generations, a wholly different constitutional law followed.

From this demonstration, one can see that purposive interpretation enables a transformation of what later interpreters take the starting point to be and does not just adjust the implications of a fixed constitution as new situations emerge. In fact, to put it in a shocking way, under purposive interpretation a zebra can become an aardvark upon the discovery of historical evidence that the zebra was misidentified at the start.

As Jeffrey Rosen<sup>63</sup> has put it, however, “We are all originalists now.”<sup>64</sup> But that is strikingly true only of Americans. Most of the other influential constitutional cultures<sup>65</sup> have understood that a vibrant constitutional order remakes itself over time as it comes to understand its own past in new ways.

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61. FRANK KERMODE, *THE SENSE OF AN ENDING* (1967) (explaining how, by fixing the ending, the narrative can be organized in such a way that it leads to this ending).

62. MERKL, *supra* note 20, at 1.

63. See Jeffrey Rosen, *How New Is the New Textualism?*, 25 *YALE J.L. & HUMAN.* 43 (2013).

64. Jeffrey Rosen, *Originalist Sin: The Achievement of Antonin Scalia, and Its Intellectual Incoherence*, *NEW REPUBLIC*, May 5, 1997, at 26.

65. The German story occupies most of this essay. For a discussion of Israel, Canada, South Africa and India, see *supra* note 5.