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State Justices Continue to Challenge Originalism

A lively debate about the value of "history and tradition" in analyzing cases is ongoing in state courts. Some justices are pushing for alternative interpretative methodologies.

By Chihiro Isozaki, Maryjane Johnson | **Published:** August 12, 2025

Iowa North Carolina South Carolina Maryland

Three years ago, the U.S. Supreme Court **expanded gun rights** and **curtailed abortion rights** by invoking originalism, a method of interpreting the Constitution that requires judges to look to "history and tradition" or "original meaning" to assess constitutional rights. Originalism has been a contentious topic in state supreme courts since, sparking debates among justices nationwide. These lively debates have generated trenchant critiques of the method, though some state court justices, including those writing or joining majority opinions, adhere to an originalist analysis.

Below is a sample of recent critiques, drawn from opinions published between March 2024 and June 2025 and building on a **previous summary** of similar criticisms.

Originalism's Backwards Focus Makes It Unfit for Contemporary Issues

A popular refrain among state supreme court justices is that originalism is simply not equipped to handle contemporary issues, either because emerging facts confound old understandings of the law or because those understandings have long been rendered outmoded by changing societal values.

This critique is especially relevant in cases where technology plays a key role. In these cases, justices question originalism's ability to resolve legal controversies involving technologies that didn't exist in the past.

Take, for example, Iowa Supreme Court Chief Justice Susan Christensen's dissent in ***State v. White***. There, a majority of the Iowa Supreme Court ruled that a criminal defendant's right of confrontation was violated when two child witnesses testified to instances of child abuse via a one-way television system while they were physically located outside of the courtroom. The trial court had earlier granted this exception to the standard practice of requiring two-way visibility between defendants and witnesses to protect the wellbeing of the children and minimize additional trauma. The high court's majority rejected this arrangement, however, based on a history-and-tradition analysis of Iowa's Confrontation Clause that it understood to require a face-to-face confrontation between the accused and trial witnesses.

Christensen criticized the majority's originalist approach because it discounted a technological advancement that should have influenced any reasonable interpretation of the constitutional right at stake, here a one-way television system that allowed the traumatized child witnesses to testify adequately. "Originalism has its limits," Christensen wrote. "It cannot account for a technology that didn't exist in 1857 — when the Iowa Constitution was ratified — and a type of case that would not have been brought in 1857."

Furthermore, she noted, the majority's assertion that 19th-century legal understandings should control seemed to have no stopping point and could lead courts to reject any number of changes in modern law. "The majority reaches this

decision based on a mistaken view of originalism," she continued. "There have been numerous developments since 1857 concerning juveniles in the law. Do we now go back to 1857 in all respects?"

A similar line of critique appears in cases where the originalist answer conflicts with contemporary values and norms, a result particularly prominent in cases involving the rights of historically marginalized groups. Even when the legal issues themselves are not entirely new, originalism is inappropriate, critics argue, because it binds judges to apply historical values that have otherwise been rejected — whether as a matter of law or basic reason or human decency.

North Carolina Supreme Court Justice Anita Earls captured this critique in a concurrence to a **decision** reaffirming the constitutionality of a statute of limitations for tort claims by victims of child sexual abuse.

In the case, *McKinney v. Goins*, the majority applied an originalist analysis to determine that a **state constitutional clause** guaranteeing due process did not bar a law reviving expired child sex abuse claims. Earls warned that the majority's application of originalism "freezes the meaning of our Constitution in amber according to narrow circumstances in centuries past" and gives "greater weight to old caselaw over new, contrary to what is taught in law schools and to what common sense compels." The implications of this approach were radical, she explained, and threatened "to bring the law and constitutional protections back to that point in this state's history when slavery was legal and women could not own property or vote."

Justices commonly voice versions of this concern in reproductive rights cases, pointing out that originalism would hinge a woman's rights on constitutional provisions that women had no hand in shaping. What's more, many of these provisions were historically used to perpetuate — rather than protect women from — misogynistic values.

Several justices of the Iowa Supreme Court criticized this feature of the majority's ruling in ***Planned Parenthood of the Heartland v. Reynolds***, which applied an originalist analysis to conclude that the Iowa Constitution contained no fundamental right to abortion. There, the majority determined that the right to an abortion "is not

rooted at all in [Iowa's] state history and tradition," noting the state prohibited abortion from 1857 until the U.S. Supreme Court declared in 1973's ***Roe v. Wade*** that the federal Constitution protected access to the procedure. (*Roe* was overruled in 2022's ***Dobbs v. Jackson Women's Health Organization***.)

"Do originalists really believe that a woman has the same constitutional right of autonomy over her body today as in 1857? Really?" Justice Edward Mansfield asked in a dissent. And in a separate dissent, Christensen raised additional concerns about originalism in this case as well, noting that the majority's ruling "perpetuates the gendered hierarchies of old when women were second-class citizens." It is not surprising Iowa lacks a tradition of supporting abortion, she wrote, considering women's "utter absence in decision-making roles" in Iowa historically.

Originalism is Uniquely Inappropriate in State Courts

Justices have also raised concerns about the use of originalism in state courts specifically. At the heart of this critique is the observation that the methodology was primarily developed to interpret the federal Constitution, a document that differs from state constitutions in many critical ways.

Justices have pointed out, for example, that state constitutions are more frequently amended than their federal counterpart, making it difficult to determine which version of a constitutional provision should be authoritative when determining its original meaning. In North Carolina, Earls **explored** this problem in a case concerning whether life sentences without opportunity for parole for juvenile defendants violated the a state clause prohibiting cruel and unusual punishment. In *State v. Tirado,* the majority anchored its analysis to the clause's original intent when drafted in 1776.

In her concurrence, Earls faulted the majority for "fix[ing] its gaze" on the 1776 version without "explain[ing] why that moment should control." She offered a series of considerations challenging the majority's conclusion, including that "the 1776 Constitution [was] the only version never directly voted on and approved by the electorate." The majority's decision, Earls argued, had the perverse effect of "look[ing] to the most exclusive, least democratic version of our Constitution as its guiding star."

Then-South Carolina Chief Justice Donald Beatty echoed these concerns in a partial dissent in ***Owens v. Stirling***, ruling that execution by electrocution and firing squad did not constitute "cruel or unusual" punishment under the state constitution. Beatty pointed to the difficulty of determining the original meaning of a constitutional clause that has been amended multiple times: "Even using the concept of originalism, the Court would need to decide whether the ban on 'cruel' punishment should be based on our collective judgment today of its meaning in 1790, 1865, 1868, 1895, or perhaps 1971."

Other critics have called attention to the oft-scant evidence available to decipher the original meaning of state constitutional provisions. For instance, in ***Rutgers Law Review***, Judge Dan Friedman of the Appellate Court of Maryland described the "dearth and unsuitability" of his home state's convention records, making a broader point about the variability of the quality and quantity of state convention records across the 50 states. Originalism as applied to the federal Constitution is simply "not a perfect fit for state constitutions," Friedman wrote.

Scholars have echoed these views. Harvard law professor Maureen Brady, for example, has called out courts for habitually using state constitutional convention records with "reckless abandon." In the ***Wisconsin Law Review***, she detailed many problems associated with state constitutional convention records, including poor documentation, delayed and secret proceedings, inaccuracies introduced in records published decades after the fact, and politicized accounts of the conventions.

Judging is a Purposefully Subjective Endeavor

Supporters of originalism argue that it removes subjectivity from judging — a claim that critics challenge, pointing to the selective and results-oriented way that judges often apply the method. Critics stress that, even when applied in good faith, originalism is no different from other approaches to judicial decision-making because all judging requires some level of subjective judgment.

Beatty emphasized this point in his partial dissent in ***Owens***, referenced above: "From a practical standpoint," he wrote, "the use of originalism does not remove the element of judicial interpretation (or, as the majority fears, potential bias) present in answering the question."

What's more, state justices have pointed out that subjectivity is a necessary and important part of judging that should be acknowledged and embraced, not hidden away or rejected. South Carolina Supreme Court Justice D. Garrison Hill made a case for subjectivity in a separate opinion in *Owens*, noting that judicial analysis relies on the sound judgment of judges. Hill warned against originalism as "a mindless methodology," calling on the justices to actively "consider the principle underlying the constitutional right to help determine the contours of the right and to then use common sense to apply it to the facts."

He continued by expounding his vision for a pluralistic approach to judging, which he contended better accounts for the deliberate open-endedness of constitutional provisions: "When the framers left us with vague terms, they intentionally left interpretation of those terms to the only true power courts have in our republic: our judgment." Quoting former U.S. Supreme Court Justice Oliver Wendell Holmes and former President Thomas Jefferson, he concluded: "The law is not, some 'brooding omnipresence in the sky' that always provides clear answers. . . . We should recognize this reality, and appreciate that judging is not capable of being done by a 'mere machine.'"

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As these recent state supreme court opinions illustrate, state judges continue to offer critiques of originalism and push for alternative interpretative methodologies. These critiques often echo those raised by federal judges, but they also introduce state-specific considerations. By fostering this lively debate, justices are affirming their commitment to states as laboratories of independent constitutional thought, and are helping to articulate an affirmative, non-originalist vision of the role of judging.

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