Twitter Thread by Mark Joseph Stern



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This article—which points out mistakes in conservative scholarship promoting the "unitary executive" theory—illustrates a major problem with originalism. No one likes to admit error, especially not judges. And there's no incentive for acknowledging that you read history wrong.

> A new paper: \u201cRemoval of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism,\u201d Yale J. Law & Humanities, 2022.
>
> I found many errors in unitary executive amicus & scholarship on Blackstone & other historical sources. Thread:https://t.co/kUMAwfFY5K
>
> — Jed Shugerman (@jedshug) November 30, 2021

Once the Supreme Court locks into a particular reading of history, that interpretation gains precedential force. It becomes entrenched in the law. By the time new evidence emerges that suggests history was misinterpreted, it might be too late. Bad history now binds the judiciary.

This is one potential solution but I don't think the self-professed originalists on the Supreme Court will ever admit error. A ton of evidence has piled up refuting key claims in Scalia's Heller opinion and the Republican-appointed justices just ignore it. https://t.co/PSTuOC6qRB

> Isn't it illustrative of why originalism MUST be coupled with a weak form of stare decisis? Originalism claims to be falsifiable, and a strong view of SD entrenches rules based on bad history, when it is precisely originalist opinions' historic accuracy that gives them authoriry.
>
> — Jimmy Buffett Fan, Esq. (@jimmy_esq) December 6, 2021