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Constitutional Interpretation for the Twenty-first Century

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Constitutional Interpretation for the Twenty-first Century

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The goal is to develop an understanding of the Constitution for the 21st century. It makes no sense to find this by looking to the 18th century. Throughout American history, the Supreme Court has decided the meaning of the Constitution by looking to its text, its goals, its structure, precedent, historical practice, and contemporary needs and values. This is what constitutional law always has been about and always should be about. It is misguided and undesirable to search for a theory of constitutional interpretation that will yield determinate results, right and wrong answers, to most constitutional questions. No such theory exists or ever will exist.

Only a few Justices in American history have professed to follow an originalist philosophy and they are originalists only some of the time. For example, Justices Scalia and Thomas, the self-professed originalists on the Court, believe that the meaning of the Constitution was fixed when it was adopted and that constitutional interpretation is the process of finding and following this original meaning. But these Justices did not apply originalism in their Tenth and Eleventh Amendment decisions of the last decade. The Court's decisions prohibiting Congress from commandeering state governments and forcing them to adopt laws or regulations cannot be derived from the text of the Tenth Amendment or its intent or its historical meaning.¹ Nor can originalism explain the Court's expansion of sovereign immunity to bar suits against states by their own citizens in federal courts or in state courts.² Perhaps even more profoundly, these Justices pay no attention to originalism in condemning all affirmative action programs despite strong evidence that the original intent of the Fourteenth Amendment was very much to allow such efforts.³

Moreover, it must be remembered that on many occasions, the Supreme Court has expressly rejected originalism. In *Home Building & Loan Ass'n v. Blaisdell*, the Court declared:

If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.⁴

Most famously, in *Brown v. Board of Education*, Chief Justice Earl Warren, writing for the Court,

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¹ See, e.g., *Printz v. United States*, 521 U.S. 898, 919-22 (1997); *New York v. United States*, 505 U.S. 144, 155-58 (1992).

² See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (state governments cannot be sued in state courts without their consent).

³ See Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998) (arguing that the framers of the Fourteenth Amendment intended to allow affirmative action efforts).

⁴ 290 U.S. 398, 442-43 (1934).

stated: “In approaching the problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”⁵

For decades, prominent constitutional scholars have advanced devastating critiques of originalism.⁶ Yet, over the last few decades, originalism as a philosophy of constitutional interpretation seems to have gained legitimacy and even acceptance.

In this essay, I want to explore why this has happened. My thesis is that the appeal of originalism is that it offers a false promise of constraining judges and of limiting, if not eliminating, value choices by judges. Getting past originalism requires demonstrating that this truly is a false hope; no theory of constitutional interpretation can significantly reduce or eliminate judicial discretion. Progressives need to defend constitutional decision-making as it always has been practiced, by both liberals and conservatives: it is a product of judges considering a myriad of sources, including the Constitution’s text, its goals, its structure, precedent, historical practice, and contemporary needs and values. No theory can offer determinacy in constitutional decision-making or avoid the reality that results depend on value choices made by judges in determining the meaning of the Constitution. A John Paul Stevens and an Antonin Scalia will disagree in most important constitutional cases, not because one is smarter or has a better approach to constitutional interpretation. They will come to different results because they have vastly different ideologies and values.

First, there is no doubt that the appeal of originalism is its promise of constraining judges. It is the allure of formalism, of decisions derived deductively from sources external to the judges. Originalists claim that decisions in constitutional cases would be based on seemingly objective sources and not on the ideology of the judges. Justice Scalia, for example, has advanced exactly this defense for his originalist philosophy and declared: “Originalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”⁷ There is an understandable appeal to an approach to constitutional law which provides for decisions that have nothing to do with the identity or values of the individual judges.

Second, it is crucial to recognize and to expose this as a false promise. Originalism, no less than any theory of constitutional interpretation, still involves tremendous judicial discretion and decisions that are very much the result of value choices by the judges. There are many reasons for this. Balancing of competing interests is an inevitable part of constitutional law and inescapably involves judicial discretion, just as much for originalists as for non-originalists. Balancing competing interests is a persistent feature of constitutional decision-making. How should the President’s interest in executive privilege and secrecy be balanced against the need for evidence at a criminal trial?⁸ How should a defendant’s right to a fair trial be balanced against the freedom of the

⁵ 347 U.S. 483, 492 (1954).

⁶ See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469 (1981).

⁷ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989).

⁸ See *United States v. Nixon*, 418 U.S. 683, 713 (1974) (holding that the President has executive privilege, but that such privilege is not absolute and must yield to overriding interests, including a “demonstrated, specific need for

press?⁹ How should legitimate, important, and compelling government interests be determined in individual rights and equal protection cases? Levels of scrutiny are, after all, just a tool for arranging the weights in constitutional balancing. Moreover, constitutional law constantly asks, as does so much of law, what is reasonable. Under the Fourth Amendment, courts routinely focus on whether the actions of police officers are reasonable.¹⁰ Under the Takings Clause, courts determine whether there is a public purpose by examining whether the government acted out of a reasonable belief that its action would benefit the public.¹¹ Such balancing is not an exclusively liberal exercise. In a recent case, Justice Scalia, writing for the Court, stressed that the application of the exclusionary rule depends on a weighing of its costs and benefits.¹²

Moreover, originalism allows tremendous judicial discretion because the intent behind any constitutional provision can be stated at many different levels of abstraction.¹³ For example, who was the equal protection clause intended to protect? The intent could have been solely to protect African Americans; to protect all racial minorities; to shelter all groups that have been historically discriminated against; or to defend all individuals from arbitrary treatment by the government. Each of these potential answers is a reasonable way of describing the drafters' intent for the Fourteenth Amendment. Yet a judge must eventually choose among these answers, and a great deal depends on that choice. Whether sex discrimination or affirmative action violates equal protection depends entirely on the choice among levels of abstraction. Here, too, neither formalism nor originalism can provide a discretion-free answer.

Originalism also provides enormous discretion to judges in deciding the original intent. The theory focuses on the Framers, but so many people were involved in drafting and ratifying the Constitution and its amendments that it is possible to find historical quotations supporting either side of almost any argument. The debate over the Second Amendment powerfully illustrates this, as both sides make strong arguments based on the original understanding of the provision.¹⁴

These critiques of originalism, of course, are familiar. Yet, their significance cannot be overstated in formulating an approach to constitutional law for the 21st century. No theory of

evidence in a pending criminal trial”).

⁹ See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) (“It is unnecessary, after . . . two centuries, to establish a priority [as between the First and Sixth Amendments] applicable in all circumstances.”).

¹⁰ See *Samson v. California*, 126 S. Ct. 2193, 2197 (2006) (“‘[U]nder our general Fourth Amendment approach’ we ‘examin[e] the totality of the circumstances’ to determine whether a search is reasonable within the meaning of the Fourth Amendment.” (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001))).

¹¹ See *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (explaining that in takings cases there is “a presumption that the government’s actions were reasonable and intended to serve a public purpose”).

¹² *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006).

¹³ See Dworkin, *supra* note 6, at 488-91.

¹⁴ Compare *Silveira v. Lockyer*, 312 F.3d 1052, 1060-61 (9th Cir. 2002) (determining that the original meaning of the Second Amendment was not to create an individual right to own or possess weapons, but to keep Congress from regulating firearms in a manner that would prevent states from protecting themselves through militias), with *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (determining that the original meaning of the Second Amendment was to protect the right of individuals to possess and bear firearms).

constitutional interpretation can provide formalism or significantly reduce judicial discretion. Inevitably, judges in interpreting the Constitution must make choices as to the meaning of open-textured constitutional language and in balancing competing interests.

Antonin Scalia purports to have a more objective approach to constitutional law and repeatedly asserts a moral high ground compared to his colleagues.¹⁵ He finds in the Constitution no protection for reproductive choice, a prohibition of affirmative action, permission for prayer in public schools and government aid to religious schools, and no exclusionary rule. His views seem far more similar to the 2004 Republican platform than to anything in the original meaning of the Constitution.

Third, progressives must defend their alternative vision of constitutional law. Originalists try to put progressives on the defensive by asserting that originalists have a theory of constitutional law, but that others don't. But this is based on their claim of a theory which reduces judicial discretion and offers a seemingly objective method of decision-making. Once this is exposed as false it becomes clear that all judges are engaged in the same enterprise and that none have an objective methodology that permits decisions removed from their own values.

Progressives must offer a more complex and realistic description of judging in constitutional cases. Supporters of originalism present the debate as if there are only two choices: discretion-free judging or judging by whim and caprice. Of course, the reality is neither. Judges always have discretion, but the exercise of that discretion is not about what the judge ate for breakfast. Rather, discretion is about how judges look at multiple sources and decide the meaning of the Constitution. An accurate description of judicial review's reality is needed to compete with the value-neutral models and the rhetoric supporting them.

What, then, is the role for fidelity in constitutional interpretation for the 21st century? It all depends on "fidelity" to what. Constitutional interpretation always must show fidelity to the document's text. But all Justices throughout history have done this and have based their decisions on giving meaning to the text of the Constitution. Surely, too, fidelity must be to the goals of the constitutional provision. But the goals are inevitably abstract, not the specific intent of the framers. In deciding what is "cruel and unusual punishment," judges must be guided by the goal of ending degrading and inhumane punishments, not the specific views of the framers as to which punishments are unacceptable. In deciding that segregation violates equal protection, the Court rightly followed the general goal of equal protection, not the specific views of the Congress that both ratified the Fourteenth Amendment and segregated the District of Columbia public schools. Courts also need to consider all that has occurred since the ratification of a constitutional provision, including judicial precedents. Contemporary needs should be taken into account as well; there is no other way to balance.

¹⁵ See, e.g., Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); Scalia, *supra* note 7.

This, of course, means that judges will have discretion in interpreting the Constitution. But that is how it always has been. *Marbury v. Madison*,¹⁶ establishing the institution of judicial review, was an exercise of judicial discretion because the Constitution is silent about the authority of courts to invalidate statutes or executive actions.

As progressives articulate a vision of constitutional law for the 21st century, it must be one based on the Constitution's commitments to freedom and equality. It must be based on the Constitution's respect for the dignity of each individual. It must be based on the Constitution's mandate for separation of powers and checks and balances.

Progressives must explain in judicial decisions, law review articles, and op-ed pieces why the Constitution includes protection for reproductive choice, why it allows affirmative action to achieve racial equality, why it requires a separation of church and state, why it does not permit indefinite detentions of human beings without judicial review. This is the challenge of a Constitution for the new century.

¹⁶ 5 U.S. (1 Cranch) 137 (1803).