Originalism and the Living Constitution: Reconciliation

By Kermit Roosevelt

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In modern constitutional theory, originalism (an approach that attempts to enforce the original understanding of the Constitution) sets itself against the interpretive practice known as living constitutionalism, which gives greater priority to contemporary understandings. The debate between originalists and living constitutionalists is generally considered one of the most important current battles over how the Constitution should be interpreted. In what follows, I will briefly set out the debate and then explain why I think its significance is drastically overstated. My conclusion is that with respect to the most interesting and controversial constitutional provisions, the two approaches can be synthesized; that is, they should lead to the same interpretive results. (This argument is drawn from my recent book *The Myth of Judicial Activism* (Yale University Press 2006), which I hope interested readers will consult.)

The standard argument for originalism is relatively straightforward. The Constitution gets its legal effectiveness from the approval of the ratifiers. When the original Constitution was ratified, and when amendments were added to it over the course of years, a particular meaning was enacted, and judges are not given the authority to change that meaning. The role of a judge is to say what the Constitution *does* mean, not what it ought to mean; if change is needed, Article V sets out the procedure by which it can be amended. Allowing judges to have free rein to change the meaning of the Constitution to suit the perceived needs of the day takes sovereignty away from the American people and places it in the hands of an unelected judiciary. Adherence to original understanding, by contrast, prevents judges from imposing their own values. Originalists thus argue that constitutional cases should be decided according to our best guess as to how the ratifiers would have decided them. Judges should protect a right to abortion only if the ratifiers would have agreed that it existed; if the ratifiers believed that racially segregated schools were consistent with the Equal Protection Clause, then judges should not interfere. Anything else, originalists say, is illegitimate (or even "activist").

The standard argument for the living Constitution focuses on the fact that conditions and attitudes have changed greatly since the framers' times. Living constitutionalists argue that the Constitution must be able to adapt to respond to current needs and problems rather than remaining frozen in time. Because the amendment process is so difficult and cumbersome, requiring a two-thirds majority in both the House and the Senate and then ratification by the legislatures of three-quarters of the states, living constitutionalists seem to view judicial modification of the Constitution with equanimity—a necessary evil, at the worst. Without judicial changes, they say, states would still be allowed to segregate schools, ban interracial marriage, and exclude women from the practice of law, to give just a few prominent examples.

When the debate is viewed in these terms, it seems fairly clear that the originalists have the better of it. The Constitution as written may not be perfect, but what is the point of a written Constitution at all if judges have the freedom to modify it as they see fit? And what reason is there to think that judges will write a better Constitution than the one we have? As Justice

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Antonin Scalia is fond of pointing out, judges might as well decide to disregard individual rights provisions as to expand them. That is, although originalists tend to be political conservatives and living constitutionalists tend to be political liberals, there is no reason to think that judges would consistently modify the Constitution in a liberal direction. In speeches, Justice Scalia has gone so far as to say that one would have to be "an idiot" to believe in the living Constitution. And if the descriptions I have given of originalism and the living Constitution are accurate, he might well be right.

But things are not that simple. Originalism is not quite all it claims to be, in part because the precise understandings it seeks to enforce are frequently imaginary. The understanding of the ratifiers, in many cases, probably did not go beyond the vague or general plain meaning; that is, the ratifiers would have disagreed among themselves as to how specific cases should be decided.

Consider, for instance, the question of whether the Necessary and Proper Clause, which allows Congress to pass laws necessary and proper to implement the powers granted to it by Article I, permits the creation of a federal bank. This was one of the big disputes of the framing era, and it divided the framers themselves. Alexander Hamilton argued that the bank was constitutionally allowed, while James Madison asserted that it was not. If Hamilton and Madison—who were both present at the Constitutional Convention and who had collaborated on the Federalist Papers—could not agree, what are the odds that the ratifiers had a clear and uniform understanding on this question?

For a more recent example, consider the Equal Rights Amendment. The ERA was submitted to the states for consideration by Congress in 1972 but never ratified. Section 1 of the ERA provided that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." This is, of course, very much like the Equal Protection Clause, except that it focuses specifically on sex discrimination. (One of the reasons it failed to achieve ratification, ironically, may have been the Supreme Court's contemporaneous use of the Equal Protection Clause itself to forbid sex discrimination.) How clear and consistent were the contemporary understandings of its meaning for specific cases?

Not very. Supporters and opponents clashed over a number of issues—whether sex segregated bathrooms would become unconstitutional, whether the ERA would require that women be drafted into combat, and even whether it would require states to permit same-sex marriage. Harvard law professor Paul Freund, a widely respected constitutional authority, testified to a Senate subcommittee that this last consequence would indeed result: "If the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation."[1]

On the other hand, it seems unlikely that the concern for women's equality that inspired the ERA is necessarily connected to approval of same-sex marriage, so the drafters might have had a different view. The ERA never gained the required thirty-eight state ratifications, so courts never had to grapple with these issues. But the debate over them suggests that the consequences of the ERA were less than entirely clear to the drafters and potential ratifiers.

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[1] CONG. REC. S4578 (1972).

The existence of this sort of disagreement suggests that originalism will not deliver clearly correct answers in many cases. This is not simply a practical problem. Originalists like to claim that adherence to original meaning prevents judges from imposing their own values, while living constitutionalism does not. But if the ratifiers would not have agreed on how specific cases should be decided, the supposed constraint is illusory. That is, a judge following an originalist methodology could still reach whatever results he wanted by highlighting some historical evidence and downplaying the rest. So originalism, as a methodology, does not in fact prevent judges from imposing their preferences on society. Historical evidence does not do much more than offer "plain meaning," as far as deciding difficult cases goes.

Still, if the choice is between plain meaning plus history and judicial whim alone, originalism may be the better option. My broader claim here is that the conventional way of framing the debate is deeply misleading. It is misleading because the argument I gave for originalism makes a fundamental error. It assumes that if constitutional *meaning* remains the same, then the outcomes of cases must remain the same, even as surrounding facts and circumstances change.

Living constitutionalists and originalists share this assumption, but it is easy to demonstrate that they are both wrong. Imagine for a moment that the Constitution had a clause it does not—a clause providing that senators, while engaged in debate, "shall wear the latest Fashions." This clause would, quite clearly, direct one thing in 1789 and another now. Conduct that the ratifiers deemed consistent with the clause—dressing in knee breeches and a powdered wig—would be inconsistent with today's understanding of the language. Should an originalist judge, exercising fidelity to the ratifiers' understanding, hold that senators must dress according to the fashions of the eighteenth century?

The answer is obviously no. The ratifiers of a clause requiring "the latest Fashions" plainly expected the set of activities permitted by that clause to change over time. The word "latest" is a dead giveaway. Still, even if the clause just required "fashionable Attire," it would be reasonable to think that the ratifiers intended its requirements to change. A provision that required senators to adhere to the ratifiers' understanding of what was fashionable would be a rather foolish one. It would be easy to see, at the time of ratification, that such a provision would quickly lose its fit and fail to serve the intended purpose. Requiring twenty-first-century senators to dress in eighteenth-century costumes would make them look not fashionable but ridiculous.

In adjusting the outcome of cases to follow the evolution of fashion, a judge would not be engaged in modifying constitutional meaning. She would be following the original understanding—an understanding that clothes that seemed fashionable in 1789 would appear anachronistic and silly centuries later, and that the purpose of ensuring fashionable senators requires reference to future notions of fashion.

So it is clearly possible to write constitutional provisions that direct different outcomes as times change. To put the point in the terminology I shall use for the rest of this discussion, it is possible for the *meaning* of a constitutional provision to remain constant while its *applications* change. Most originalists ignore this possibility; they are what we could call "application

originalists" rather than "meaning originalists." But the possibility does exist. The question, once we have established this initial point, is which, if any, of the provisions in our actual Constitution fit that description.

One way to decide this would be simply to look at the language. Some words, like "latest," clearly announce that their range of application is to be flexible. Others, like "thirty-five," suggest that their applications are meant to be fixed. If we look through the Constitution, we will certainly find some words that suggest flexibility. "Unreasonable" searches and seizures are prohibited by the Fourth Amendment, "speedy" trial guaranteed by the Sixth, and "excessive bail" and "cruel and unusual punishment" forbidden by the Eighth.

The possibility of concealing a lethal handgun in a pocket might make reasonable searches that would have been considered unreasonable by the framers. The available means of transportation for judge, jury, and accused might bear on what counts as a "speedy" trial. An inquiry into "excessive" bail might take inflation into account, and whether a punishment is "unusual" might depend on whether it is common now, not whether it was in 1791 when the Eighth Amendment was ratified.

We should not, however, focus solely on the words of the Constitution, for it is semantically possible that these terms incorporate by reference not current circumstances but those of the ratifiers' times. The appropriate inquiry looks to the words and also to the purpose of the relevant constitutional provision, asking whether that purpose is better served by a static or a flexible range of applications.

Each of the provisions I have mentioned probably better serves the purpose the ratifiers intended if its range of applications is flexible. A Fourth Amendment that banned police from patting down suspects would expose them to serious danger; it would no longer strike a sensible balance between individual privacy and public safety. A Sixth Amendment speedy trial guarantee that was keyed to travel by horseback would make little sense in the modern world; it would allow authorities to impose arbitrary delays. A prohibition on excessive bail expressed in 1791 dollars would set an absurdly low threshold in the twenty-first century; it would make bail requirements meaningless. And defining "cruel and unusual punishments" by reference to 1791 understandings and practices would allow punishments that have now become rare or nonexistent because they were deemed barbaric and inhumane.

Those examples are relatively minor, though the proper interpretation of the Cruel and Unusual Punishment Clause has been a matter of some dispute in cases I will discuss later. The Equal Protection Clause is an issue of greater significance, in part because the changes that judges might take into account include changes in values as well as facts. Changes in values are relevant because a prohibition on unjustified discrimination is value-laden. There is no objective and timeless standard by which to determine whether discrimination is justified, not even cost-benefit analysis, for costs and benefits depend on attitudes as well as material facts. And even those who accept the idea of a reasonableness standard that takes changing facts into account in evaluating Fourth Amendment searches and seizures might argue that changes in societal values should not be allowed to change the outcome of constitutional cases.

But the line between facts and values is not as clear or as sharp as it might seem, for value judgments about the justifiability of discrimination may depend on background factual beliefs and assumptions. We can see this by considering a few examples of practices that the ratifiers believed were acceptable, but that modern Americans do not. The historical evidence strongly suggests that the ratifiers of the Equal Protection Clause did not believe that it would stop states from segregating schools, or banning interracial marriage, or excluding women from the practice of law.

Why would anyone think these things—some of which seem obviously unjustified to modern sensibilities—were constitutionally unproblematic? Until relatively recently, many "facts" justified these forms of discrimination. Interracial marriage was considered likely either to produce monsters or at the least to compromise the purity of the white gene pool. Educating black and white children together probably seemed simply impossible; as Abraham Lincoln put it in 1858, "[t]here is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality."[2] And as for women lawyers, as Justice Joseph Bradley wrote in *Bradwell v. Illinois,* five years after the ratification of the Fourteenth Amendment, "the natural . . . timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[3]

Additionally, discrimination was considered justified as a reflection of the natural order of things, a conclusion often couched in religious terms. Justice Bradley rested his assertion that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother" on the simple ground that "[t]his is the law of the Creator."[4] And the trial court judge who enforced Virginia's ban on interracial marriages against Mildred Jeter and Richard Loving observed that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."[5] These rationales may once have been sufficiently widely accepted to count as adequate justification for discrimination; they may once have seemed like common sense. But they no longer appear that way. A modern legislature would be unlikely to rely on them in enacting a law, and a modern judge would be less likely still to accept them as justification.

If the ratifiers' beliefs about the likely applications of the Equal Protection Clause depend on facts that are now deemed false and on beliefs about the nature of the world that are no longer shared, working in concert to produce attitudes that now seem reprehensible, what is a court to do? It could attempt to enforce those attitudes despite the fact that they command results now clearly at odds with an ordinary understanding of the constitutional language. That is what application originalism would require. But a sensible originalism—what I call *meaning originalism*—does not require such results, and their perversity is itself a suggestion that application originalism is not the right way to proceed.

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[2] ABRAHAM LINCOLN, *Fourth Debate with Stephen A. Douglas at Charleston, Illinois, in* THE COLLECTED WORKS OF ABRAHAM LINCOLN, 3145-46 (Roy P. Basler ed., 1953).
[3] Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).
[4] *See id.*
[5] Loving v. Virginia, 388 U.S. 1, 3 (1967).

Living constitutionalists sometimes argue that originalism should be rejected because it would allow practices we now think are unjust. That is a result-oriented argument, and it is not very convincing. It boils down to the proposition that we should read the Constitution to mean what we want it to mean. What I am suggesting here is somewhat different. It is that reading the Equal Protection Clause to contain a fixed set of applications will predictably lead to results that future generations will find outrageous. And because fixed applications lead to those results, it is more sensible to suppose that the ratifiers understood and intended the applications to be flexible. It is more sensible to suppose that the Equal Protection Clause is one of those provisions whose applications change while its meaning remains constant.

This approach is consistent with the words of the Constitution. The Equal Protection Clause cannot be read as setting out a clear rule that all forms of discrimination are prohibited. It must allow state universities to favor students with higher grades and test scores; it must allow states to impose age and vision restrictions on drivers. What it prohibits is unjustified discrimination, and justification can certainly be assessed by modern standards as easily—perhaps more easily—as by those of 1868. (It may be, as originalists frequently claim, that judges are not especially good at figuring out what modern societal values are, but why then should they be considered good at figuring out what those values were over a hundred years ago?)

It also, I believe, does a better job of fulfilling the purpose that the ratifiers had in mind for the Equal Protection Clause. The clause was adopted in the wake of the Civil War, and it was clearly intended to stop states from discriminating against the newly freed slaves. But it was intended to do more than that. The drafters considered and rejected language that would have prohibited only discrimination based on race, and they considered and rejected language that would have prohibited only discrimination with respect to particular rights. Their purpose seems to have been more general; it seems to have been to stop states from discriminating in ways that a national majority found unjustified.

So the key question is whether this purpose is better served by a fixed or flexible range of applications. The answer is that only a flexible one can ensure the continued priority of national values. A ban on only those forms of discrimination that the ratifiers thought were unjustified will soon lose fit. The discriminatory practices the ratifiers focused on will lose their practical significance, and new ones will take their place. If equal protection is to continue to protect, it must be able to meet the challenge of new discrimination.

Employing current standards to assess justification does just that. It allows an emerging national consensus to override discrimination that was accepted in the past. By so doing, it ensures that vulnerable minorities will continue to be protected against treatment that local majorities find acceptable but national majorities do not. Since the words of the Equal Protection Clause do not limit its application to particular issues or forms of discrimination, it makes sense to assume that this form of protection was what the drafters and ratifiers intended. In this case, then, there is no conflict between originalism and the living Constitution.