Originalism Within the Living Constitution

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The argument that original meaning should guide constitutional interpretation is nearly as old as the Constitution itself. Before there were strict constructionists, before there were judicial activists, there were originalists. In those early days, few seriously objected to the notion that the Constitution should be read in accord with its original meaning, though there were plenty of debates over how best to ascertain that original meaning and what exactly was required to be faithful to the Constitution of the founding.

The modern originalism debates are different. The authority of the original meaning of the Constitution has been routinely challenged in basic ways. The claim that the Constitution should be understood differently—that it is a "living Constitution" that means something different today than it meant when it was adopted, for example—is now itself quite old. It is now thought that adherence to original meaning is one alternative among many, a choice that might be made or that might not. If originalism is not exactly on the defensive, it at least has to be defended.

For judges who wish to exercise the power of judicial review, adherence to the original meaning of the Constitution is the only choice that is justifiable. We might make use of the language of the Constitution to help make sense of and to express our highest political ideals and aspirations. We might borrow from the constitutional text to help remind us of our past political struggles or inspire us to take on new national projects. When judges attempt to set aside the policy decisions of our elected representatives, when they claim that their own constitutional judgments trump those of others, then they cannot rest such claims on mere political idealism couched in a loose constitutional rhetoric. Judges are only entitled to respect when asserting that a law is null and void when they can back up such assertions with a persuasive explanation of how the law violates the meaning of the Constitution as it was framed and ratified.

I. Why Originalism?

There are several interrelated justifications for jurisprudence of originalism. Originalism is implicit in the design of a written constitution. The adoption of a written constitution is justified by the desire to fix certain principles and raise them over others as having special weight. The writing of a constitution allows the people to assemble and, in a moment of reflection and deliberation, adopt those specified principles. Originalism makes sense of the fact that it was *this* text and no other that was adopted and ratified, and it channels the judicial inquiry into discovering what was meant by those who adopted this text. A jurisprudence of originalism recognizes and emphasizes that the Constitution is a communication, an instruction,

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from an authorized lawgiver, the sovereign people, and that the task of the faithful interpreter is to discover what that instruction was and to apply it as the situation demands.

At heart, all of these justifications are concerned with explaining the basis on which judges can claim the authority to ignore the policies made by elected legislators. Government officials in the United States do not exercise force and power by divine right. Their authority for making legitimate laws that average citizens are expected to obey ultimately comes from their constitutional office. Government officials are chosen to make policy within the limited scope of their predefined legal authority. Legislators are elected to make laws that are intended to serve the public good and operate within constitutional limits. The president is elected to secure the national interest and to insure that those laws are implemented effectively. Judges are not elected for the general purpose of making good policy. Judges are selected to interpret and apply the law in the cases and controversies that arise before them.

The claim to exercise the power of judicial review, the claim to the authority to ignore an otherwise valid law, can only be inferred from the Constitution. The Constitution does not in so many words simply give judges the power to veto laws. The power of judicial review in a particular case is merely an inference from the judicial duty to apply the law—all the law—correctly and appropriately to the case at hand. As Chief Justice John Marshall explained over two centuries ago, if Congress were to instruct the judges that a citizen be convicted of treason on the testimony of only one witness when the Constitution requires two or that a citizen be held criminally liable for actions that were legal when they were committed, then judges would have no choice but to recognize that the superior law of the Constitution would have to govern the case, regardless of the instructions of Congress.[1] A jurisprudence of originalism makes better sense of why John Marshall was correct than does any alternative. Once judges depart from originalism, once they are no longer guided by the original meaning of the Constitution in resolving the cases that come before them, then their very claim to the power of judicial review becomes open to question.

The point of issuing an instruction is to convey the meaning of those authorized to issue them to those obliged to obey them. As James Madison noted, the faithful interpreter must recur to "the sense in which the Constitution was accepted and ratified. In that sense alone it is the legitimate Constitution."[2] It is only by recurring to the original meaning intended by those who created the Constitution that we can make sense of and maintain the notion that we seek to establish, in the words of the *Federalist*, "good government from reflection and choice."[3] It is only by "carry[ing] ourselves back to the time when the constitution was adopted, recollect[ing] the spirit manifested in the debates," seeking the most "probable [meaning] in which it was passed," rather than by seeing what meaning "may be squeezed out of the text, or invented against it," that we can avoid rendering the Constitution a "blank paper by construction."[4]

[1] Marbury v. Madison, 5 U.S. 137, 179 (1803).
[2] JAMES MADISON, THE WRITINGS OF JAMES MADISON 191 (Gaillard Hunt ed., vol. 9, 1910).
[3] THE FEDERALIST NO. 1, at 33 (Alexander Hamilton), (Clinton Rossiter ed., 1961).
[4] THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 296 (H.A. Washington ed., vol. 7, 1859); THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON, 247 (Paul Leicester Ford ed., vol. 8, 1899).

For some this may seem to be begging the question: Must even a faithful constitutional interpreter be committed to the language and intent of the founders? The short answer is yes. The implicit link between "language" and "intent" indicates the direction of the interpretive imperative. We readily recognize that we cannot be said to be interpreting the text if we disregard its language. But the language of the text does not emerge from the sea or drop from the sky; it was intentionally written by the authors of the text in order to communicate a message, to convey their thoughts to others. At a minimum, the choice of constitutional language reflects the intentions of the framers that a faithful interpreter is bound to respect. But language is a means, not an end in itself. We use language to convey meaning. We interpret language in order to understand that meaning. If we are free to ignore the meaning that the founders sought to convey in the text, then why are we not equally free to ignore the text itself? Why be bound by the words that they happened to write down if we are not bound by what they meant to say with those words? Why should the language of the Constitution, disassociated from any intended meaning, have any particular authority? If the authority of the Constitution lies in the fact that founders were specially authorized to give instruction, to create supreme law, then the meaning of the law that they laid down must be as authoritative as the particular words they used to convey that meaning.

II. What Is Originalism?

By the original meaning of the Constitution, I am referring to the meaning that the constitutional text was understood to have at the time it was drafted and ratified. To adopt originalism does not mean that judges must hold a séance to call the spirit of James Madison to ask him what was on his mind in Philadelphia in the summer of 1787 or how he would deal with the tricky constitutional question that is raised by the case before the court. It does mean that judges should not feel free to pour their own political values and ideals into the Constitution. It means that the constant touchstone of constitutional law should be the purposes and values of those who had the authority to *make* the Constitution—not of those who are charged with governing under it and abiding by it.

One important point should be clarified. The commitment to originalism is not a commitment to the particular practices, plans and expectations of particular framers or of the founding generation. We are bound by the constitutional text that they adopted and by the principles embodied in that text. Their understandings about the practical implications of those principles and the particular applications that they expected to flow from them may be helpful to us as we try to figure out what exactly those constitutional principles were, but those early applications are rarely equivalent to the constitutional requirements themselves. The founders and early government officials who were members of or close to the founding generation may well have fully implemented the principles of the Constitution, but in many cases they did not. Some issues may simply not have arisen at an early date, or the circumstances with which they dealt may not have tested the limits or full extent of those constitutional principles. They may have self-consciously limited themselves, adopting policies that did not test or stretch the limits of the powers that they thought the government possessed or the rights to which they thought individuals were entitled. They could also be wrong about what their own principles required.

The members of the founding generation were as aware as anyone of the limits of human reason and of the temptations of political power. They drafted constitutions precisely because they knew that they and their successors would need constant reminders of the principles that they held dear and the foundational agreements that they had struck. As constitutional interpreters, we are required to reason from the principles that they laid down, not take their word for the particular applications that should be made of those principles. The task of constitutional interpretation requires wisdom, learning and discernment, but it also requires humility and discipline. The operative question for a faithful constitutional interpreter is not what *would* Madison do in such a situation, or even what *did* Madison do in such a situation, but what does the principle that Madison and his fellows wrote into the Constitution require in such a situation. Reference to the founders is indispensable to answering such a question, but it remains only a starting point.

This should also caution us against confusing a commitment to originalism with hostility to the full range of methods that judges normally employ to resolve legal problems. A jurisprudence of originalism is entirely consistent with traditional doctrinal analysis, engagement with constitutional text and structure, and attention to constitutional purposes and values. Originalism does not insist that judges eschew doctrinal analysis or that they refuse to draw inferences from the structure of the Construction and the government that it creates ("unwritten" though those structural implications might be). Originalism does insist that such interpretive aids be recognized as the tools that they are. Their value lies in their ability to help us in the process of discovering and applying the original meaning of the Constitution. They become inimical to originalism only when the interpreter forgets that they are mere tools, when the manipulation of precedent becomes an end in itself or when a focus on larger constitutional purposes leads us to ignore the specific ways in which the original Constitution was designed to achieve those purposes.

III. Originalism and Judicial Activism

It should be emphasized that the point of originalist constitutional interpretation is not to clear the way for current legislative majorities. Originalist arguments have frequently been marshaled to criticize what the Supreme Court has done, to show how the Court is guilty of "judicial activism" and of striking down laws without constitutional warrant. In that context, it makes sense to say that the Court was mistaken because it departed from original meaning and that a properly originalist Court would not have taken the same action, that an originalist Court would have upheld rather than struck down a particular statute, that an originalist Court would have left a particular policy choice up to the legislature. But we should not generalize from those particular cases. Originalist judges are not necessarily deferential judges. It may well be the case that the originalist Constitution has little of substance to say about some particular current political controversy. The Constitution may not require anything in particular in regards to euthanasia, abortion, homosexuality, or affirmative action. Deferring to the Constitution in such cases may simply mean holding them open for future political resolution, and the constitutional interpreter should be sensitive to that possibility. The judge should have the humility to recognize that the Constitution may not provide clear answers to all the questions asked of it, that elected officials have the right to make important policy choices without judicial

intervention, and that the Constitution may not simply write the judge's own preferred policies into the fundamental law.

Nonetheless, it may also be the case that faithful constitutional interpretation requires turning aside the preferences of current legislative majorities. The Constitution enshrines popular, not legislative, sovereignty. It creates a republic with a limited government, not simply a majoritarian democracy. The goal of a jurisprudence of originalism is to get the Constitution right, to preserve the Constitution inviolable. It denies that judges are freewheeling arbiters of social justice, but it also denies that they are mere window dressing. As Chief Justice William Rehnquist once wrote, "The goal of constitutional adjudication is . . . to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not."[5] The jurisprudence of originalism seeks to hold true that balance, whether that requires upholding the application of a statute in a particular case or striking it down. The issue for originalism is which laws should be struck down, not how many (something which, after all, also depends greatly on the behavior of legislators). Proponents of originalism merely open themselves up to charges of hypocrisy when they approve of instances of judicial review if they do not make plain that it is not deference to politicians that they seek but fidelity to the Constitution.

It is also sometimes contended that the value of originalism lies in its ability to limit the discretion of judges. Originalism, it has been argued, will prevent judges from legislating from the bench or imposing their own value judgments on society. There is something to this argument but it can be overstated. To be sure there was a time in which judges and scholars often thought that the very purpose of courts and the power of judicial review were simply to pursue social justice. Thankfully, such hubris is less common today. But here again, judicial discretion as such is not the issue. The issue is the role of the courts and how the power of judicial review is to be used. Individual judges may well feel little discretion about what they should do in a given case, even if their jurisprudential philosophy is one based on, say, theories of liberal egalitarianism or utilitarian pragmatism. Such judges are in error not because they feel free to do what they personally want in constitutional cases but because they misperceive the basis of their own power and the requirements of constitutional fidelity.

At the same time, proponents of originalism should not delude themselves or others as to the difficulty of the task of identifying and applying the original meaning of the Constitution. It is in no way "mechanical." Disagreement among individuals seeking in good faith to follow a jurisprudence of originalism is entirely possible. The judgment, intelligence, skill, and temperament of the individuals called upon to interpret the Constitution still matter. Judges must still resist the temptation to line up the constitutional founders to agree with their own personal views, just as they must resist the temptation to line up the precedents or the moral philosophies or the policy considerations. A jurisprudence of originalism will at least insure that judges are focused on the right discussion—what the Constitution of the founders requires relative to a given case—even though it cannot insure that everyone will reach the same or the correct conclusion once engaged in that discussion. It is one thing, however, for judges to be open to the criticism that they cut corners in their effort to discover the original meaning of the Constitution. It is quite another for them to be open to the criticism that they are imposing the wrong moral

[5] Webster v. Reproductive Health Services, 492 U.S. 490, 494 (1989).

value judgments on the political process. A jurisprudence of originalism insists that judges should strive never to be guilty of the latter criticism, while endeavoring to avoid being guilty of the former.

IV. Constitutional Self-Government

There are three ways to resolve current political disagreements. We can somehow work them out ourselves, through majority rule, bargaining and compromise, deliberation and debate, and the like. That is, we can make our decisions through normal politics. Alternatively, we can delegate the decision to somebody else. To some degree we almost always delegate anyway, by electing and hiring representatives to hash out the nation's business in the capital while we get on with the more important business of living our lives. But "we" could choose to delegate our controversial political decisions to an even greater degree, throwing the issue into the lap of a "blue-ribbon commission," some executive administrator, or even the courts, perhaps with little or no guidance as to how that issue ought to be resolved by this favored agent. We can simply divest political discretion to some third party and live with the results. We do sometimes use courts in this way. The Sherman Antitrust Act famously handed the problem of identifying monopolies and monopolistic behavior over to the courts, instructing them to do *something* but not leaving many clues as to what they were to do.

It is possible to use courts in that way, but we should be reluctant to conclude that constitutional judicial review was such a delegation of unfettered policy discretion. Statutory delegations such as those contained in the original Sherman Act are subject to legislative oversight and revision; judges exercise discretion, but only for now and only with implicit or explicit accountability to elected representatives. It is possible that the Constitution contains similar delegations to judges. The founders might have said the equivalent of "protect 'liberty,' whatever that is." Given the general design of the Constitution and the political assumptions on which it was based it would be surprising if they did so, or at least did so very often or in especially important ways. Those who would claim such an authority on the part of judges bear a very high burden not only to show that the founders did not give more substantive content to their constitutional language but also to show that when they left constitutional discretion to later generations that they entrusted that discretion to unelected and largely unaccountable judges rather than to the people and their representatives. Those who would give a freewheeling discretion to judges to develop and enforce "preferred freedoms," "fundamental values," or "active liberty," unconstrained by the value choices that were already made at the time of constitutional drafting, bear a heavy burden to show why it is that judges rather than legislators or citizens should have the ultimate authority to identify "our" favored values and most cherished liberties or what is to be done to best realize our national aspirations.

The other way to resolve our current disagreements is to abide by decisions that have already been made; that is, we can adhere to the existing law. Rather than revisit controversies ourselves or trust the discretion of someone else, we can simply defer to earlier judgments embodied in the law. Having made the decision to keep faith with the law, we may appoint someone to interpret and apply the law for us and keep things on even keel until we are ready to revisit the issue—perhaps recognizing that we ourselves may be too tempted to deviate from the law in particular instances or may be too prone to make unintended or unthoughtful mistakes in

applying the law. We should recognize that the interpretive effort will require the exercise of some judgment, but we would, of course, expect the appointed interpreter not to exercise the discretion of a delegated decisionmaker.

The issue is what standard should be used to resolve contemporary political controversies and who should have the authority to make the resolution. Contemporary political actors are displaced by any judicial decision. If judges offer an interpretation of the text in accord with the language and intent of the founders, then those contemporary political actors have only deferred their right to make the choice themselves and remake the law. If judges make constitutional law without offering an interpretation of the original Constitution, then we have simply replaced one relatively democratic set of contemporary policymakers with another much less democratic one. If judges interpret the originalist text, then the people retain their sovereign lawmaking authority to create, amend or replace the higher law. If judges do not, then the legislative power of the sovereign people would have been lost. The basic constitutional choices would be made by judges rather than by those who draft and ratify the constitutional text, whether those drafters and ratifiers did their work two hundred years ago or yesterday. As future Supreme Court justice James Iredell observed even as the federal Constitution was being drafted, there would be no point to assembling and writing a constitution if those charged with interpreting and adhering to it could ignore what was decided in those assemblies and instead chose to follow a different rule.[6] The supreme power would no longer lie with those who write the Constitution but instead would lie with those who write the constitutional law.

We privilege the intentions of the founders out of respect for the role of the constitutional founder, not out of respect for any particular founder. It is commonplace that we distinguish between the office and the officeholder, between institutional and personal authority. We respect the actions of the president and the Congress out of regard for the offices, not out of regard for the individuals who hold those offices. Likewise, those who drafted and ratified our present Constitution occupied a political role. It is a role that we do and should respect, not least because it is a role that we could ourselves play. There is no question that the founding generation was uniquely situated at the historical birth of the new nation and uncommonly blessed with political talent and wisdom, but too much myth-making can also be subversive of consensual constitutional governance and should certainly form no part of our current justification for adhering to the inherited Constitution. We should respect the substance of the constitutional choices of the founding not because the founders were especially smart, because they necessarily got it right or because we happen to agree with them on the merits. Although the founders did create a remarkably flexible and successful constitutional system, there are any number of individuals in our own society who are smart, think they can get it right, or whose values others would likely endorse. If being smart or "right" was the sole lodestar for our judgments about constitutional meaning, then there would be plenty of aspirants who could claim that we should follow them rather than the founders. We should respect the substance of choices of the founders because only they spoke on the basis of the "solemn and authoritative act" of the people. We should respect their choices because we should take seriously the idea of constitutional deliberation and choice through democratic means, of constitutional foundings as conscious, real-time political events. We should act so as to preserve the possibility of constitutional self-governance.

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[6] JAMES IREDELL, LIFE AND CORRESPONDENCE OF JAMES IREDELL 174 (Griffith J. McRee ed., vol. 2, 1858).