THE DEAD HAND OF THE ARCHITECT

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Justice Holmes once said that continuity with the past is a necessity rather than a virtue.[1] In reality, as we look around us the dead hand is essentially everywhere. Our lives are ruled by past decisions in a variety of ways, many of which are quite humble, and many of which, in fact, escape our notice.

To take one small example: the very notes from which we lecture are written more or less in contemporary English spelling, much of which derives from the Seventeenth Century or earlier. The creators of our spellings, now long dead, made decisions for reasons that would make relatively little sense to us today. In some cases they were simply mistaken; they had ideas about Latin etymology that were wrong, and conformed the rules of spelling to them.[2] Yet in our most routine act of reading, we are immediately drawn into the structure that was created at that time. Whatever similarities we might be tempted to point out, the power of Norman scribes and Tudor printers over contemporary spelling is not the same as the influence of the dead hand in originalism. By linking originalism with the dead hand, the Symposium organizers have invited us to discuss whether originalism unduly empowers past generations at the expense of the living. One response to this criticism of originalism is simply that the dead hand is inevitable anyway. In particular, the Constitution itself is in some sense an exercise of the power of the dead hand. I will suggest that this response is correct in suggesting the inevitability of the dead hand in constitutional law, but flawed because it fails to justify the additional power that originalism conveys to past generations.

I would like to address that issue in the context of another relatively mundane example, that of architecture. I want to emphasize from the beginning that my subject is limited to law school architecture; I have no pretensions to a deep understanding of the history of architecture or its theory. I have, however, given some thought to the effects that law school architecture has

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1. *See* Oliver W. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 444 (1899).

2. *See* DAVID CRYSTAL, THE CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE 214 (1987).

on the life of an institution, and to how the patterns of academic life in an institution are sometimes dictated by the secret rulers of academia, the architects.[3]

How does architecture, even in the humble surroundings of a law school, affect the ongoing life of an institution? As with the Constitution, there are two forms of influence by the architect. The first (and most obvious) form involves architecture as a constraint. Educational reforms are not infrequently rendered impractical because of the way a building is designed, just as some legal reforms are entirely precluded by way in which our government is structured.

It is remarkable the extent to which, in the law school setting, important decisions about curriculum and other matters are dictated by seemingly trivial past decisions about room sizes, restrooms, elevators, and so forth. For example, several law schools that have seriously considered expanding their student bodies have found that the major barrier is the design of the classrooms in the building.[4] The classrooms were designed to require sections of a certain size and thus an entering class of a certain size.

What is rather interesting, at least in several of cases in which this has happened, is that this constraint was quite deliberate. The size restrictions were not an architectural accident; they were deliberate constitutional acts, intended to constrain administrators and later generations of faculty. The faculty who were in charge of designing the building design felt strongly about expansion, saw that there might be some temptation to expand in the future, and sought to prevent it in the way they structured the building. Architecture constrains not only class size but educational policy: those who would like to teach first-year classes in larger groups or smaller groups, or those who would like more clinics or fewer clinics, often find that classroom and building design are ultimately controlling. Thus we have the architect or constitutional drafter as source of constraint.

The dead hand also influences us in another way, and it is a way that as lawyers we tend to overlook. This is the cultural effect of the Constitution. Again, this is borne out in a very humble way in the law school analogy. Decisions that an architect or building

3. People who are usually distinguished by having little or no understanding or knowledge of academic life, I might add.

4. Recent examples include Minnesota Law School and Northwestern Law School.

committee made about office arrangements can exercise, decades later, a profound effect on the intellectual culture of a school. Let me provide three examples, without identifying the schools in question. In the first school, the faculty offices are incorporated into the intellectual heart of the building, the library, of which they are an integral part. Not coincidentally, this school is famous for its intense atmosphere of intellectual collegiality.

Now consider a second school. The faculty offices there are scattered around the perimeter of the building; it often requires an extensive trip around the building to visit another faculty member. The faculty lounge is located outside the building and consequently receives little use. This is a law school whose culture traditionally has been relatively noncollegial—not anticollegial or hostile, but simply a culture in which professors tend to be remote from each other and not very heavily involved in a common intellectual life.

In the third law school, which also shall remain unidentified, the faculty are scattered across the campus in separate buildings, and have no neutral, common ground on which to meet. As it happens, in that law school factions within the faculty have become the academic equivalent of armed camps, and the intellectual atmosphere is hostile rather than merely distant. Thus does culture follow architecture.

In the constitutional arena, too, architecture molds culture. The ideas about separation of power and about individual rights that initially were set in motion in 1789 continue to have a profound effect on the way in which government officials relate to each other, how these officials view their positions, and how scholars think about our government.

One might wonder, given that these very strong dead hand effects surround us, what this has to do with original intent? The answer is, not very much at all. That is, one can fully acknowledge these inevitable forms of the dead hand's influence without embracing originalism. This came to my attention a few months ago when the University of Minnesota Law School faculty were considering revamping the administrative offices in a particular area of the building. We wanted to change the flow of traffic. Few things are more mundane than that. In the course of this discussion, one senior faculty member said, "You can't do that, because the architect intended the students to come up the main staircase and then turn into the main offices. This new plan violates

his intent." Everyone else in the room stared at each other in response to this invocation of the original intent of the architect. Why would we care what *he* thought? What debt did we owe the architect?

It is true that we literally live in the structure created by the architect; in many ways it shapes our lives. But to the extent that the architect's intentions are distinct from (or are given any separate consideration from) the actual building itself, it is very difficult to say why we should care about them. Perhaps if the architect were someone we greatly respect, such as Frank Lloyd Wright, this would be different. We might be inclined to defer to his personal views on architecture. The architect of the University of Minnesota Law School, although said to be fairly good, was not Frank Lloyd Wright. No one in the discussion described above could see why his personal views should be controlling. So original intent is not inexorably connected with the inevitable ways in which the dead hand influences our lives.

There are at least two objections to the architecture analogy I have outlined above. One response that an originalist might make is that the proper analogy to originalism is not the intention of the architect. Instead of the intent of the Framers, many originalists look to the original understanding or the views of the average ratifier.[5] This does not distinguish the traffic flow discussion. That is, it would have been at least as bizarre for somebody to have said, "At the time this building was designed, a reasonable architect examining the blueprints would have understood the traffic flow to be up the stairs and to the right." If there is little reason to care about the architect's intentions, there is surely even less reason to care about how other people would have understood the building plan.

A second objection is that buildings are fundamentally different from constitutions. Unlike constitutions, buildings exercise their influence through their physical presence. Because constitutions are texts which must be interpreted, an originalist might argue, their words can operate only through the original intent. A full treatment of this topic would require far more space than is available here. It seems a non sequitur, however, to say that interpretation is involved and *therefore* that the original intent,

5. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 n.1 (1994); Michael S. Paulsen, *The Most Dangerous Branch*, 83 GEO. L.J. 217, 227 n.23 (1994).

rather than other factors, must be the source of constraint. Moreover, the Constitution often has its most profound effects when it is least interpreted by courts. The simplest of constitutional provisions, like that which mandates two senators per State,[6] may have far more to say about our form of government than all of the Supreme Court decisions ever written about the Due Process Clause.[7] In this respect the Constitution functions quite powerfully as architecture.

Ultimately, the dead hand is inescapable. Originalism, however, seeks in some sense to bestow ultimate constitutional authority to some ghost in the dead hand, rather than to the dead hand itself. Rather than focusing on the tangible legal structure that the Framers bequeathed, originalism seeks to invest authority in the departed creators of that structure, as if their minds still animated their creation. Their intentions and understandings my be relevant, but should not be regarded as binding. Being governed by the dead hand may be inevitable, but we need not submit to rule by ghosts.

6. *See* U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State . . . .").

7. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").