

THE INTEGRITY AND IMPERSONALITY OF ORIGINALISM

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I. INTRODUCTION

Properly addressing the question of constitutionalism is fundamental to a genuine understanding of our system of government. The issue does not go first and foremost to the merits of particular constitutional controversies. We will not address what actual limits should exist on federal legislative power, how power between the President and Congress should be divided, whether the Fourteenth Amendment incorporates the provisions of the Bill of Rights into a "one size fits all" set of rules for the treatment of accused criminal defendants, or even whether the Constitution is colorblind. Important as these questions are, the issue for us is even more fundamental. It is not what decisions to make, but *which institution of government should make them?* What is the source of decisionmaking power, and what criteria should guide and evaluate these decisions? At one extreme, does this power rest with the Justices of the Supreme Court, guided only by their own notions (or those of some law professor or clerk) of what is good for the country?¹ Or, at the other end of the spectrum, is it found in the text of the Constitution and the intentions it embodies, with the present Justices acting instead as the Framers' agents by interpreting the Constitution as faithfully and impersonally as humanly possible?²

The arguments which either attack originalism or support some form of nonoriginalism are often intellectually sophisticated, sometimes eloquent, and usually nonlegal—self-consciously eschewing "formalism," and nearly always adorned with

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1. See, e.g., William J. Brennan, Jr., Speech to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11, 20 (Federalist Soc'y 1986) (stating that the "great challenge of the modern era" is the solving of constitutional questions from the perspective of "preserv[ing] [human] dignity" via "a personal confrontation with the well-springs of our society").

2. See *THE FEDERALIST* NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure for that of the legislative body.").

extraordinarily impressive rhetorical embellishments.³ These arguments invoke the Constitution's "aspiration to social justice, brotherhood, and human dignity,"⁴ insisting that adherence to the values of 1789 entails "turning a blind eye to progress"⁵ and ignoring "the transformative purpose of the text."⁶ At bottom, the proponents of such arguments feel it is too horrible to contemplate the straitjacket that the Founders' intentions and commands would impose upon their ability to accomplish a progressive social and political agenda.

Stripped of their very considerable academic gloss, the arguments of the nonoriginalists sound something like this:

If the Supreme Court were constrained by an obligation of fidelity to the text of the Framers, then we might not be able to get the results we want when we want them. We might have to wait, and we might have to go through channels other than the Supreme Court—political channels, which might not have the advantage that the combination of our superior intelligence and our moral intuitions gives us in the courts. Going through these other channels might delay us in securing that which we value and think to be embodied by the very concept of constitutional justice: the right to abortion, gender equality, the right to remain silent when questioned by the police, the right not to have prayers intoned at public school graduations.

One would hardly know that these arguments are supposed to be part of a debate about the *legal authority* of judges to accomplish such results, were they not dressed up with footnotes and published by law professors in law reviews. One would think instead that the debate was strictly a matter of politics or policy regarding what today's law should be—and that any person in her right mind would agree that once "we" have decided what "we" think the law should be, it follows as the night follows the day that judges can reach that result under the cover of the Constitution.

On the other hand, the arguments on behalf of originalism seldom depart from the question of the legal authority of judges. Indeed, these arguments are preoccupied utterly with the examination of judicial power's legitimacy, beginning with an uncompromising premise and ending with an uncompromising

3. See, e.g., Brennan, *supra* note 1, at 25 ("If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity.").

4. *Id.* at 11.

5. *Id.* at 15.

6. *Id.* at 18.

conclusion:⁷ the text of the written Constitution is law;⁸ the Constitution is the sole source of judicial power, including the power to set aside acts of other branches of the federal government and of the States;⁹ and as the sole source of political authority, the Constitution also specifies the limits of the legitimate exercise of judicial power.¹⁰ Those who argue on behalf of originalism are not inclined to intone the virtues of brotherhood, human dignity, moral evolution, adaptability, flexibility, or any other such bromides. Instead, they speak of *law* and the scope of the Court's legitimate authority to do *anything*. When this is the framework, originalism tends to appear axiomatic.¹¹

Thus, the antagonists in the originalism versus nonoriginalism debate focus on vastly different issues, with originalists talking in terms of uncompromising first principles, and nonoriginalists talking in terms of progress and flexibility and (most especially) immediate results.¹² This characteristic of the debate brings to mind a story a friend told about a conversation with her preteen daughter and some of her daughter's friends, regarding a "Life Issues" class at school in which the topic for the day had been teenage pregnancy—the too familiar, heart-wrenching issue of babies having babies. The class discussed various solutions to the problem: sex education, of course, early and often; readily available birth control for the girls; and condom distribution at school for the boys. The class had a lively debate about abortion and whether it should be used as a method of birth control. My

7. In embracing—indeed in celebrating—the uncompromising nature of originalism's premises and its conclusions, I deliberately render my defense of originalism less subtle (and less complete) than it would have been had I not chosen clarity and salience of message over comprehensiveness of treatment. I trust the reader will bear with this choice, given the nature of the occasion.

8. See, e.g., Robert H. Bork, Speech Before the University of San Diego Law School (Nov. 18, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 43, 44 (Federalist Soc'y 1986) ("Any intelligible view of constitutional adjudication starts from the proposition that the Constitution is law.")

9. See *id.* at 45 ("[I]f the Constitution is not law . . . what authorizes judges to set at naught the majority judgment of the representatives of the American people?")

10. See *id.* at 44 ("The provisions of the Bill of Rights and the Civil War Amendments not only have contents that protect individual liberties, they also have limits. . . . The fact of limits means that the judge's authority has limits and outside the designated areas democratic institutions govern.")

11. See, e.g., Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 *STAN. L. REV.* 1019, 1020 (1992) ("Originalism is a virtual axiom of our legal-political system, necessary to distinguish the judicial from the legislative function.")

12. Indeed, the participants in the debate often seem to be talking past one another. Cf. *Delaney's, Inc. v. Illinois Union Ins. Co.*, 894 F.2d 1300, 1302 (11th Cir. 1990) ("In the immortal words of the chain gang boss . . . 'What we have here is a failure to communicate.'") (quoting *COOL HAND LUKE* (Warner Bros. 1967)).

friend listened with interest and fascination to this conversation, and then put in her own oar: "How about abstinence?" she suggested. One of the girls said, "What's abstinence?" The consensus among the rest: "Get real!"

Originalism is the legal equivalent of sexual abstinence by unmarried teens: a simple, straightforward, uncompromising solution, one that respects a command more permanent than that of the moment, demands self-restraint, and entails delayed gratification, but is not a permanent roadblock to the eventual, legitimate satisfaction of desire.

Originalists tend to ground their arguments primarily on a foundation of legitimacy.¹³ They seem wedded to the question of principle and to what *the law* requires. Even when turning to instrumental defenses, they tend to stress originalism's "legal" virtues of stability, predictability, and clarity.¹⁴ Originalism serves these ends relatively well. But two other virtues of originalism bear further discussion. The first is its *integrity* and the second is the *deliberate impersonality* (and hence the universal accessibility) of the decisionmaking criteria that it supplies.

II. INTEGRITY

Integrity characterizes a judicial process based on originalism, and its lack is one of the chief deficiencies of its alternatives. Many proponents of originalism bemoan the discrepancy between what the Court does—and what its nonoriginalist cheerleaders urge it to do—and what it *says* it does.¹⁵ The originalists

13. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 4-5 (1990); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991).

14. See, e.g., Edwin Meese III, Speech Before the American Bar Association, Washington, D.C. (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 9 (Federalist Soc'y 1986) ("By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid both the charge of incoherence and the charge of being either too conservative or too [sic] liberal."); see also Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 290 n.320 (1988) ("The rules issuing from original intentions adjudication will be *more* knowable and *more* stable than those from any other plausible model of judicial review.").

15. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 508, 520 (1965) (Black, J., dissenting) ("The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. . . . Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.").

urge upon the Court the simple virtue of candor.¹⁶ As even Judge Posner has noted, “[O]riginalism is the legal profession’s orthodox mode of justification.”¹⁷ So, originalists say, the Court should align its practice with its preaching. And to the extent that the nonoriginalists’ position condones this “orthodox mode of justification” but in fact rejects its premise, it is irredeemably hypocritical and essentially dishonest.¹⁸

Nonoriginalists intone along with the rest of us that we are fortunate indeed to have a government of laws and not of men. But although they appreciate that the coercive power of the state (and the Supreme Court’s power of judicial review) must wear at least an apparent cloak of legal legitimacy,¹⁹ the nonoriginalists actually have little respect for law, at least insofar as law might be a genuinely operative constraint on the Court or on their own arguments about what the Court should, must, or may do.²⁰ The hypocrisy of many of the nonoriginalists’ arguments, the deliberate masking of their real agenda, the lack of candor, the absence of respect for (or even acknowledgment of) law as a constraint—all of these features exert a corrupting influence on the enterprise, on the very idea of law itself. Thus, in response, an important function of originalism is to exemplify, to enforce, and to sustain the rule of law.

16. *See, e.g.,* Graglia, *supra* note 11, at 1031 (stating that Bork’s argument “rests on nothing more debatable than the proposition—which one might have considered axiomatic—that honesty is the best policy”).

17. *See* RICHARD A. POSNER, *OVERCOMING LAW* 245 (1995) (“The dominant rhetoric of judges, even activist judges, is originalist . . .”).

18. *See, e.g.,* Perry, *supra* note 13, at 688 (“The invalidation of a statute by a judge (especially an electorally unaccountable federal judge with life tenure) in the name of ‘the Constitution’ on the ground that the statute violates a political-moral principle not communicated directly, or even indirectly, by the constitutional text is an exercise of power not easily justified—and probably not justifiable—by any familiar first principles of modern American political or jurisprudential thought.”).

19. Justice Brennan, for example, treats legitimacy as a necessary perception—not for its own sake nor for the integrity of the system, but primarily as a means to ensure the enforcement of judicial decisionmaking. *See* Brennan, *supra* note 1, at 14 (“Precisely because coercive force must attend any judicial decision to countermand the will of a contemporary majority, the Justices must render constitutional interpretations that are received as legitimate.”).

20. *See, e.g.,* Stephen D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 119 (1989) (“[I]t is hard to think of any recommendation for a regime of law created by the ‘interpretation’ of disembodied words that have been methodically severed from the acts of mind that produced them.”).

III. IMPERSONALITY OF DECISIONMAKING CRITERIA

A further virtue of originalism is the impersonality of its decisionmaking criteria. In a way, this aspect of originalism is merely a variation on the familiar juxtaposition of the relatively determinate and disinterested nature of originalist decisionmaking criteria and the often arbitrary, partisan, subjective criteria of nonoriginalists. The impersonality of originalism's criteria invokes all the virtues of objectivity and by implication rejects subjective judging. But impersonality is also particularly important as a characteristic of the litigation process.

The outcome of any judicial process is supposed to be a function of impartial decisions based on the evidence submitted in court and on the arguments of counsel.²¹ A level playing field renders meaningful the litigants' participation in the process. The field is leveled by rules: rules for admissibility of evidence, rules on the relevance of arguments, and rules of decision, all specified in advance. The rules supposedly constrain all the participants in the game, including the referees—the judges. But the game is rigged when the referees disregard the rules, either changing them in the middle of the game or paying them lip service but making calls based on their own “good ideas.”

A party subjected to this kind of rigged litigation is in much the same position as a voter is when someone stuffs the ballot box. Both are, for all practical purposes, disenfranchised. The party's opportunity to make its case, to present its arguments, to persuade the Court—its opportunity, in other words, to be a genuine participant in the decisionmaking process—is rendered chimerical because the outcome has already been decided, on the basis of criteria it neither knew would govern nor could help to shape. What a charade the judicial process then becomes! How empty its promise of equal justice under law! One wonders why some even bother to show up—perhaps merely because, as Woody Allen said, eighty percent of success is showing up.²²

To illustrate the importance of impersonality and the potential for such disenfranchisement, consider the excellent recent biog-

21. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”).

22. Woody Allen's often-misquoted axiom (notably, by President Bush, in at least 48 NEXIS articles) has been the source of much confusion, and apparently Mr. Allen has not come forward to set the record straight. *See* William Safire, *On Language*, N.Y. TIMES, July 23, 1989, § 6, at 10 (“I have written to Mr. Allen about this quotation, which bids fair to immortalize him if we can just get the percentages straight.”).

raphy of Justice Lewis F. Powell by my colleague John Jeffries.²³ Justice Powell is quite a challenge for any biographer—almost too good, too virtuous, and too incorruptible to be particularly interesting in human terms. He seems to have no human foibles to overcome. He was a Supreme Court Justice in very interesting times, though, and played quite a pivotal role on the Court while he was there. A wise and prudent man, conscientious and kind, Powell was a self-described devotee of judicial (and every other kind of) restraint. As a Supreme Court Justice, however, he embodied the originalists' nightmare. He embraced no real theory of the Constitution nor of his role as a Justice, except that he had to continue to be wise and prudent, or to appear to be, and he most especially had to do what he thought was "right for the country." His conscience was his guide. But even though it was a perfectly fine conscience as consciences go, it was not much of a guide to what the Constitution said or meant.

Professor Jeffries's masterful treatment contains many revelations about how Justice Powell reached his decisions. Few of these anecdotes portray a man encumbered with worry that the *Constitution* might impose constraints on his decisionmaking freedom. An example, paradigmatic of his judicial "philosophy," is the story of how this paragon of judicial restraint came to cast his vote with Justice Blackmun *et al.* in *Roe v. Wade*.²⁴

Professor Jeffries reports that Justice Powell found the decision easy: "He would vote to strike the abortion laws because he thought it intolerable that the law should interfere with a woman's right to control her own body during early pregnancy."²⁵ Justice Powell was personally opposed to antiabortion laws because of his background (white, upper-middle-class, well-educated), his respect for his father-in-law (an obstetrician whose judgment the Justice trusted implicitly), his searing experience helping a mailroom clerk at his law firm (whose girlfriend had died from a botched abortion), and the persuasive powers of his daughter Molly (a staunch supporter of a woman's right to choose).²⁶ In addition, all the momentum on the Court seemed to be in the proabortion direction.²⁷ The only two opposing the decision, Justices Rehnquist and White, were doing so not be-

23. See JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* (1994).

24. See *Roe v. Wade*, 410 U.S. 113 (1973); JEFFRIES, *supra* note 23, at 332-70.

25. JEFFRIES, *supra* note 23, at 346.

26. See *id.* at 347.

27. See *id.* at 350.

cause they thought abortion was wrong, but because they could not find a right to abortion in the Constitution.²⁸ To Justice Powell, this reason was practically irrelevant. Justice Powell thought the country was ready to recognize a right to abortion. He did not anticipate how divisive the decision would turn out to be, so he did not have to wrestle at the moment with the possibility that there might be a discrepancy between his personal views and what was "good for the country."²⁹

Would there have been any point in arguing the antiabortion case to Justice Powell? First of all, would an advocate have had to tell him that the case was not about whether abortion was wrong or right, but whether individual States were prohibited by the Constitution from making that judgment for themselves? Then, supposing she knew about his father-in-law, his mailroom clerk, and the influence of his daughter Molly, should the advocate have tried to counter these influences directly? And if the advocate knew that Justice Powell thought that legalizing abortion really was good for the country, should she have tried to persuade him otherwise? But of course she could not know that Justice Powell had already decided the case, nor the bases for his decision. The most potent argument available—that the Constitution, which gave Justice Powell the power to decide this momentous issue for the country, did not protect such a right—was essentially irrelevant to him. So what would have been the point of argument? Indeed, except to provide the Justices with the occasion to enact their judgment, the entire Court proceeding was an elaborate charade.

Rather than making Justice Powell or his vote in *Roe* the object of particular criticism, the purpose of raising the incident is only to illustrate how very unfair it is to litigants, who think they are getting their day in court and that their arguments are to a purpose, to have their cases decided by judges who in fact are listening only to their own inner voices and who view themselves as constrained only by their own sense of right and wrong and what is good for the country.³⁰ Originalism seems much more fair to litigants precisely because, however difficult it may be to discern

28. *See id.*

29. *See id.* ("Underlying Powell's abortion vote was an appeal to the future. He predicted—or rather assumed—that misgivings about the origin of the constitutional right would be lost in the widespread satisfaction with the result.")

30. *See, e.g., BORK, supra* note 13, at 242 ("The judge who looks outside the historic Constitution always looks inside himself and nowhere else.")

them, its decisionmaking criteria are deliberately external to the judges who apply them, and thus they are equally accessible to all. The criteria of originalism constrain all the participants in the game—including, most especially, the referees.

