A NONORIGINALIST PERSPECTIVE ON THE LESSONS OF HISTORY

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Usually when judges, lawyers and legal scholars refer to normative indeterminacy with respect to originalism, they have in mind something like Ronald Dworkin's distinction between a concept and a conception.[1] For example, there may be agreement that the Constitution contains a concept of equality, but there is disagreement as to what conception of equality the broad concept entails. Originalism tries to resolve the disagreement by preferring the conception that was widely shared at the time the relevant constitutional language was adopted.

Very few people who call themselves originalists consistently prefer the Framers' conceptions. Thus, for example, when Judge Bork states that the Equal Protection Clause[2] may be interpreted to contain a broader norm of equality than that held by the drafters and ratifiers of the Fourteenth Amendment,[3] he adopts a nonoriginalist approach to specifying the content of a textually indeterminate norm.

Let us put aside the semantic debate over the definition of originalism, and assume that originalism is at least a presumptive strategy for dealing with normative indeterminacy. In the absence of countervailing considerations, the originalist exhibits a preference for the normative views of the Framers.

In justifying their approach, nonoriginalists often make the point that originalism does not solve the problem of normative indeterminacy. The nonoriginalists argue that the views of the Framers are themselves indeterminate. The argument rests on a number of familiar problems: (1) How do we ascertain the intent of a Constitutional Convention composed of multiple delegates from different States? (2) Do we look to the understanding of the drafters or the ratifiers? (3) What do we do where the text ap-

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1. *See* Ronald Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1, 6 (1987).

2. *See* U.S. CONST. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

3. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 150 (1990).

pears to be deliberately ambiguous? The goal of the nonoriginalist in pointing out these problems is to show that original meaning is historically indeterminate—and that therefore it does not constrain judges in the way that originalists claim.

Although original meaning is historically indeterminate, this indeterminacy alone is not a dispositive argument against originalism;[4] for originalists do not purport to prefer original meanings to other meanings simply as a method of constraining judicial discretion. They have a reason for attempting to constrain judicial discretion in this particular way. Originalists prefer original meaning because they subscribe to a political theory about the nature of law in general and constitutional law in particular.[5]

Attorney General Meese sketched the political theory that underlies originalism.[6] This political theory is fundamentally rooted in a positivist conception of democracy, which asserts that law is binding because it expresses the view of the sovereign. Accordingly, the text of the Constitution should be construed in accordance with its widely understood meaning at the time of adoption, because that meaning reflects the sovereign's will.

In the context of this political theory, historical indeterminacy is not a reason to abandon originalism. If one is committed to the underlying political theory, then one tries very hard to paint as complete a picture of the original understanding as possible, recognizing that there will be gaps and contradictions, but striving to bring as much coherence as possible to that picture. If, however, one rejects the political theory underlying originalism, one will also reject originalism as a strategy for coping with normative indeterminacy. It is not the goal of this Article to demonstrate why one should reject originalism and its underlying theory. Instead, this Article will briefly describe the alternative political theory that most nonoriginalists hold, and then make a

4. For an analysis of original meaning's historical indeterminacy as part of a larger argument against originalism, see LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 10, 98-101 (1991) (contending that originalist jurisprudence is flawed because historical traditions are ambiguous, many traditions are rejected in later historical periods, and actions which violate the Constitution cannot be validated by longstanding tradition).

5. Originalists are not necessarily motivated by political judgments in the sense that they hope to achieve certain predetermined political results in contemporary controversies. Rather, "political theory" refers to the theory of the state and the judiciary that underlies any interpretive view.

6. *See* Edwin Meese III, *Introduction*, 19 HARV. J.L. & PUB. POL'Y 347 (1996).

few observations about the role of historical sources within that theory.

In a recent article,[7] Jed Rubenfeld succinctly states the nonoriginalist's objection to originalism: originalism merely substitutes one countermajoritarian difficulty for another.[8] It empowers judges to override modern majorities in the name of old majorities. But why should a modern majority be any more willing to cede power to long-dead generations of Americans than to unelected judges? The originalist answers this question by asserting that those long-dead generations enacted the relevant text. This does not satisfy the nonoriginalist, though, because the nonoriginalist does not deny that the constitutional text is binding; she challenges the originalist's assertion that the old understanding of the text should prevail.

It is a common mistake to assume that an argument along these lines leads either to a nearly complete abdication of judicial enforcement of the Constitution, as embraced by minimalists such as Lino Graglia,[9] or to an unconstrained judicial activism in the name of the evolving principles of a living Constitution. According to the first view, the ultimately majoritarian nature of our constitutional system implies broad deference to contemporary legislative choices. According to the second, enforcing the Constitution against contemporary majorities implies an appeal to some amorphous higher conception of the popular will.

Rubenfeld suggests an alternative to these two extremes. He argues, as others (including myself) have argued,[10] that the Constitution derives its current legitimacy from an intergenerational commitment to be bound by it. On this view of legitimacy, the Constitution ought to be interpreted in a way that synthesizes divergent intergenerational understandings. Most people who do not consider themselves originalists—and perhaps a good number who do—hold something like this view.

Turning from the abstract to the concrete, let us assume that a judge wishes to apply some indeterminate norm in a particular context. To specify or narrow the norm, her judicial philosophy

7. *See* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119 (1995).

8. *See id.* at 1133.

9. *See, e.g.*, Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 633 (1993) (defending the proposition that "the Supreme Court should not hold anything unconstitutional . . . that is not, in fact, [explicitly] prohibited by the Constitution).

10. *See* BRUCE ACKERMAN, WE THE PEOPLE 34-57 (1990); TRIBE & DORF, *supra* note 4, at 21-23.

requires her to engage in intergenerational synthesis. How does she go about this task?

The job is complicated by the fact that the judge must synthesize not only divergent intergenerational understandings, but also text, structure, precedent, and prudential considerations—what Philip Bobbitt has termed the "modalities" of constitutional argument.[11] Richard Fallon has elaborated a similar taxonomy.[12] As experienced constitutional lawyers know, the goal of constitutional adjudication is to make the different kinds of arguments appear to point towards the same result.

When lawyers and judges attempt to synthesize various kinds of constitutional arguments, they typically posit that what one ought to do when considering originalist sources is to ask the following question: What did the founding generation, either in 1787 and 1789 or in the 1860s, think about the particular question? They take the thoughts of the founding generation, at whatever level of abstraction, as evidence for the view that the Constitution ought now to be interpreted in accordance with what the founders believed. In other words, if the framers and ratifiers thought "x," that is an argument for believing that the relevant provision of the Constitution now means "x."

The other factors identified by Bobbitt and Fallon may point with sufficient strength in the direction of "not-x" to outweigh the original meaning. But the essential modus operandi does not differ from that of the pure originalist. Thus, under the conventional approach, one simply alters the weight one gives to original meaning in the process of interpretation, but not the qualitative role it plays in that process. One allows that original intent is a factor, rather than the exclusive or primary factor for interpreting vague provisions.

This conventional approach to synthesizing originalist arguments, however, does not fully capture the underlying political philosophy of nonoriginalists. Synthesis implies more than mere amalgamation or even balancing of distinct parts. It involves the creation of a new whole. Thus, from a truly synthetic viewpoint,

11. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991) (identifying historical, textual, structural, doctrinal, ethical, and prudential "modalities" of constitutional argument).

12. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987) (discussing text, framers' intent, constitutional theory, precedent, and policy).

sometimes the fact that the framers believed "x" might count as an argument for saying that the Constitution now means "not-x."

Let me illustrate this point with an example where the intent of the framers is fairly clear—the question of whether the Equal Protection Clause prohibits most forms of gender discrimination by the States. We do not even need to consult the unratified, unspoken assumptions of the framers and ratifiers of the Fourteenth Amendment, because the text itself suggests an answer. Section 2 of the Fourteenth Amendment, which is now for the most part a dead letter, addresses what would happen to the States' representation in Congress if they continued to disenfranchise African-Americans. When Section 2 describes the implications of limiting the franchise based on race, it refers to *male* inhabitants twenty-one years of age.[13] In the very Amendment that establishes a norm of equal treatment, the Constitution affirms the permissibility of gender discrimination in the critically important distribution of the right to vote.

It is conceivable that the framers and ratifiers of the Fourteenth Amendment believed that voting was sufficiently different from other rights that one cannot infer anything about Section 1 from the text of Section 2.[14] But even if one accepts that in the Nineteenth Century voting was viewed differently from most other rights, Section 2 does tell us that in that context at least, racial classifications were seen as invidious and gender classifications were not. It is reasonable to conclude that race was generally seen as different from gender in other contexts as well.

In any event, for present purposes it is not especially important how one determines that the framers and ratifiers of the Fourteenth Amendment thought that gender discrimination was permissible. Let us assume that whatever our standard of proof, we have sufficient evidence to conclude that the original understanding of the Equal Protection Clause would have permitted, for example, a categorical ban on the practice of law by women—as the Supreme Court held in *Bradwell v. Illinois*,[15] only four years after the ratification of the Fourteenth Amendment. Let us assume, in other words, that there is no historical indeter-

13. *See* U.S. CONST. amend. XIV, § 2 ("But when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years if age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime . . . .").

14. Akhil Amar took this position during the question-and-answer period.

15. 83 U.S. 139 (1872).

minacy to the original meaning of the Equal Protection Clause as it applies to the question whether the States may exclude women from the practice of law.

If a strict originalist were to confront the question whether the Equal Protection Clause permits the States to bar women from practicing law in 1995, he would have little doubt that it does. But as is argued above, very few judges, scholars, or lawyers are strict originalists,[16] in part because they find results such as this unacceptable. How, then, should a nonoriginalist, who nonetheless deems original meaning relevant to the interpretive exercise, go about integrating the 1868 understanding of the Equal Protection Clause? For concreteness, assume that in 1995 the United States Supreme Court confronts a case involving a State ban on the practice of law by women.

The Court might begin by noting that the text of the Equal Protection Clause requires equality for every "person," a term that encompasses both male and female alike. The Court could then look to its precedents invalidating various gender-based classifications.[17] Within those precedents it would find, among other things, convincing ethical and prudential grounds for treating gender as irrelevant to most legal entitlements. Thus the Court would find that constitutional text, precedent, and policy favor invalidating the prohibition, but, under the conventional view, original meaning points in favor of upholding it. The conventional nonoriginalist Justice (or scholar) would at this point conclude that the text, precedent, and policy *outweigh* original meaning.[18] Observe that, on this account, the fact that in 1868 the Equal Protection Clause was understood to mean that most

16. With respect to practicing lawyers, Sanford Levinson astutely observed in his remarks on a different Panel that to be an "originalist attorney" would often constitute malpractice. *See* Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 506-07 (1996). If the courts are moved more by non-originalist than by originalist arguments, then the lawyer with her client's interest at heart pitches her case accordingly. Hence, one must be quite careful to distinguish the roles of judge, lawyer, and commentator. *See, e.g.*, Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651 (1995) (arguing that the value of analytic methods such as the predictive approach depends on who in the legal system is employing them).

17. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982); Craig v. Boren, 429 U.S. 190, 204-205 (1976); Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Reed v. Reed, 404 U.S. 71, 74 (1971).

18. Alternatively, a pragmatic originalist might say that it is simply too late in the day to revert to the original meaning, invoking stare decisis and its underlying concern for stability. *See, e.g.*, Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723-24 (1988).

gender discrimination was permissible counts as an argument for interpreting it as meaning the same thing today; it just happens that there are stronger countervailing arguments.[19]

Yet if the goal of constitutional argument is to make different forms of argument cohere,[20] we might wish to see whether there is a plausible reading of the past which does not require us to balance the somewhat incommensurate arguments from text, precedent, and policy against the argument from original meaning. Some scholars with an affinity for originalism will try to do this by claiming that the historical facts differ from what they previously have been understood to be. Thus, for example, several of the panelists at this Symposium suggested a creative reading of history to render *Brown v. Board of Education*,[21] and even *Bolling v. Sharpe*,[22] consistent with the original meaning of the Fourteenth and Fifth Amendments, respectively.[23] Although one should be careful not to accept the received wisdom unquestioningly, at some point one wonders whether the revisionism is not motivated by the hope that the original meaning can be made to fit the preferred modern understanding.[24]

There is an alternative method of reading the past that might align the forms of constitutional argument in one direction. Let us grant that the original meaning in our no-women-lawyers case would uphold the prohibition. If we reject the notion that constitutional text serves simply as a place-holder for the intent of the enacting generation, we will try to understand the original mean-

19. In addition to the arguments advanced in the text, one might argue that the Nineteenth Amendment—which granted women the right to vote—alters the meaning of the Fourteenth Amendment. *See* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

20. *See* Fallon, *supra* note 12, at 1239-40.

21. 347 U.S. 483 (1954).

22. 347 U.S. 497 (1954).

23. *See, e.g.*, Akhil R. Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443 (1996) (arguing that *Bolling* is consistent with an originalist understanding of the Fourteenth Amendment); Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457 (1996) (arguing that *Brown* is consistent with an originalist understanding of the Fourteenth Amendment); *see also* Michael W. McConnell, *Originalism and the Desegregation Opinions*, 81 VA. L. REV. 947 (1995) [hereinafter *Desegregation Opinions*] (same).

24. *See Desegregation Opinions*, *supra* note 23, at 952 ("Such is the moral authority of Brown that if any particular theory does not produce the conclusion that Brown was correctly decided, the theory is seriously discredited."); *id.* at 955 ("It should be obvious that the historical issue raised here is more important for its implications for constitutional interpretive methodology than for the legitimacy of Brown, which is utterly secure."). Although McConnell's historical work appears to be quite thorough, it does serve an underlying theoretical purpose—as McConnell frankly acknowledges himself.

ing as part of a larger historical enterprise. We will not merely ask, "what did the framers and ratifiers think?" but also, "why did they think it?"

In 1868 the Equal Protection Clause was widely understood to permit many governmental gender-based classifications, because the legal and social culture of the time was the product and producer of gender-stereotyped thinking. Yet our (nonoriginalist) sources of constitutional meaning tell us that the Equal Protection Clause treats as invidious those classifications that disadvantage groups that have traditionally been subject to discrimination in this way.[25] Thus, the very fact that the framers and ratifiers of the Fourteenth Amendment believed women could be excluded from legal practice indicates that gender-discrimination has sufficiently deep roots as to be presumptively invidious. In other words, the fact that the framers and ratifiers of the Fourteenth Amendment practiced gender discrimination counts as a reason to conclude that gender discrimination violates the Fourteenth Amendment.

It should be clear that in this enterprise, original understanding does not count *qua* original understanding. Having rejected originalism in its strong form, nonoriginalists also should reject it in its weaker form. The meaning the terms of the Constitution have now is, in part, a product of the history of those terms—including the history of their adoption. But the history of adoption should not automatically be privileged. Thus, the history of adoption is relevant to constitutional meaning in the same way that history generally is relevant to our understanding of the Constitution.

In this respect, Rubenfeld has made a valuable contribution by distinguishing between consent and commitment.[26] If we believe that the Constitution derives its legitimacy from the (tacit or actual) consent of the governed, then, when we strive for an intergenerational synthesis, we will look for a consensus. And when we find that views diverge from one generation to another or even within a generation, we either will seek the lowest common denominator of agreement, or will try to devise some metric for

25. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 145-148 (1980) (analyzing strict scrutiny as reflecting a suspicion of invidious motivation); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 140 (arguing that the Equal Protection Clause prohibits States from declaring one citizen intrinsically superior to another).

26. *See* Rubenfeld, *supra* note 7, at 1154.

weighing the support for different views against one another. The enterprise will prove futile or appear artificial, rigged to produce some predetermined result.

By contrast, if the Constitution derives its legitimacy from a self-defining People's commitment to live in accordance with it over time, the substantive views of a subset of the People during any given period cannot define the Constitution's meaning. Indeed, the idea of a commitment to the written Constitution implies an obligation to a text that in some way stands outside of any person or group of persons.

None of this renders the views and experiences of earlier generations irrelevant to the meaning of the Constitution. The Constitution does derive its ultimate authority from the People, and however abstract and metaphysical a concept that may be, the People are ultimately comprised of, although not reducible to, actual people. Recognizing that the Constitution's meaning transcends the understanding of any group of interpreters does not require an ahistorical or acontextual approach. Instead, it requires engaging with the history of the People, so that the modern interpreter learns the lessons of history.

In some cases the lessons of history will be relatively straightforward. For example, the Religion Clauses of the First Amendment[27] were enacted after the former colonists had witnessed a century of religious war in Europe. The need for religious tolerance as a precondition of civil order was their central point. Nothing that has happened in the United States or on the world stage since the Eighteenth Century undermines this need. Thus, all modern interpreters take the principle of tolerance as a starting point—although of course they give different content to the norm of toleration in particular cases.[28]

In many contexts, however, the lessons of history will be quite indeterminate, even though the historical facts are not in doubt. For example, what does our tragic past tell us about contemporary legal questions concerning governmental use of racial classifications? Persons who agree that slavery and segregation were

27. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

28. *Compare* Lee v. Weisman, 505 U.S. 577, 590-91 (1992) (Kennedy, J.) (invoking the idea of tolerance in the course of invalidating public school graduation prayer) *with id.* at 646 (Scalia, J., dissenting) ("[N]othing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration . . . for one another than voluntarily joining in prayer together.").

evils disagree whether they teach the danger of any race-based line-drawing or merely the danger of those racial classifications designed to oppress a relatively powerless group.[29] No amount of attention to historical detail will resolve this essentially normative debate about the lessons of the past.[30]

Thus, when the nonoriginalist looks to history, she will typically find that it teaches lessons at a rather high level of generality. A history of racial and gender inequality suggests the need for applying the Fourteenth Amendment's Equal Protection Clause with special sensitivity to racial and gender inequality—but history often will be unable to resolve for us which challenged practices constitute such inequality. Ordinarily, the lessons of history give rise to constitutional concepts, not conceptions.

An originalist examining this nonoriginalist approach to history would no doubt argue that it does an even worse job in resolving the problem of normative indeterminacy than originalism does—and the originalist would be correct if the nonoriginalist's search for constitutional meaning were solely based on history. But it is not. The nonoriginalist looks to history in connection with other sources: chiefly, text, structure, precedent, and policy. The nonoriginalist looks to history as a means of providing context for these sources, not as a means of overriding them.

Some might raise a philosophical objection to the way this Article speaks about constitutional meaning. If the meaning of the Constitution transcends the understanding of any group of interpreters at any period or across periods, is not a mystical view of language espoused? Does this whole approach rest on a pre-

29. In recent years, the Supreme Court has tended towards the first lesson, treating the Equal Protection Clause as a mandate of race-neutrality. But the central Equal Protection case of the modern era, Brown v. Board of Education, 347 U.S. 483 (1954), clearly voices both concerns. On the one hand, segregation is unlawful because separate is "inherently" unequal, *see id.* at 495, that is, racial lines are suspect without regard to their purpose or effect. On the other hand, *Brown* also rests on the premise that the vice of segregation is to be found in the message of inferiority it communicates to "the hearts and minds" of African-American schoolchildren. *See id.* at 494. Contemporary race-neutrality advocates would purge Equal Protection jurisprudence of this second, historically contingent, strand. *See, e.g.*, Missouri v. Jenkins, 115 S. Ct. 2038, 2064-65 (Thomas, J., concurring).

30. For a critique of the practice of history by legal academics, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (criticizing legal historians who rely too heavily on rights and autonomy or self-government and democracy to explain American constitutional development). For a response, see Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 (1995) (stating that constitutional lawyers should search for a "useable past," that is, elements in history that can be brought to bear on current problems).

Wittgensteinian view of meaning independent of any interpretive community? In other words, does this Article constitute a postmodern heresy?

The view espoused here does not depend on a correspondence theory of language. Meaning is not a property of text independent of readers. At any given time, the meaning of the Constitution is wholly a product of its readers. For example, if some suitably large group of modern readers were to decide that the Second Amendment is a nullity, it would be largely pointless to insist otherwise.[31] Of course, readers supply meaning.

Nonetheless, the question remains: how should readers supply meaning? In sketching an answer here, this Article suggests that insofar as they look to history, modern interpreters should look beyond the particular views of any group of historical actors. This would be an approach worthy of the title nonoriginalism.

31. *See, e.g.*, Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 157 (Sanford Levinson ed., 1995).