THE WRITING OF THE CONSTITUTION AND THE WRITING ON THE WALL

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I come before you today as someone who is, in some moods at least, an originalist wannabe. The usual, across-the-board objections to originalism—that the Framers' intent is an incoherent concept, that we never can know the Framers' intent, that we would not want to bind ourselves to the Framers' intent even if we could know it—seem troublesome, but not necessarily decisive.[1] Or at least they are not decisive in all cases. In addition, originalism seems to have one major virtue: it is not vulnerable a priori to the principal objection to nonoriginalism—or to what I call the problem of "mindlessness." Unfortunately, given the way our history has unfolded, it turns out that most of the time originalism *is* susceptible, not inherently but as a matter of fact, to that same objection. So we would-be originalists may as well admit that originalism, for all of its appeal, is by and large not a position that we can usefully invoke.

Stated in this terse form, this difficulty will seem obscure. This Article will try to make the problem more clear.

I. THE PROBLEM OF MINDLESSNESS

Let me begin by describing what I think is the primary objection to nonoriginalism—and the objection that originalism in principle manages to avoid. Sometimes nonoriginalist approaches, exemplified by the writings of such scholars as Laurence Tribe and Ronald Dworkin,[2] are criticized for being too easily manipulated in the service of partisan political ends. Sometimes these approaches are criticized for cutting off constitutional decisions from the source of their authority or legitimacy. Both kinds of criticisms may be cogent, but there is a more basic

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1. *See* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS 46-47 (1994); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988) (critically examining the three common reasons modern scholars have for rejecting original intent as the proper norm for judicial review of constitutional issues: adherence to original intentions is (1) impossible; (2) self-contradictory; and (3) wrong).

2. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

problem: nonoriginalist interpretation severs constitutional meaning from mind.

This problem has been discussed at length elsewhere,[3] but for now a simple analogy may serve to make the point. Suppose that astrology were perfected into a sophisticated method for generating determinate answers to specific public or political questions. Would we want to resolve important public issues by interpreting and following the stars? One objection might assert that the stars have no authority over us; our political community has never consented to be subject to the stars. This objection seems plausible enough, but it also neglects the more fundamental difficulty.

The deeper problem is that rule by astrology would separate governance from mind.[4] With a certain type of upbringing, of course, we might succeed in overlooking this separation because, after all, a sophisticated practice of astrology might generate virtuoso intellectual performances by astrological scholars of the highest rank. But such performances would serve only to conceal the real problem, which is that the changing configurations of the stars do not reflect any relevant or directed act of mind. The qualifiers "relevant" and "directed" are critical here. The stars may, to be sure, reflect an act of mind. But even if "God has numbered in the sky all the stars that shine on high," still we have no reason to suppose that the providential mind that placed the stars in their positions was thereby attempting to address the mundane questions for which we are seeking answers.

With respect to our questions, in other words, the changing configurations of the stars are purely fortuitous. So despite the intricate mental operations that astrology might involve, governance through astrology would be, in the most important sense, mindless. Indeed, the more determinate and the less manipulable astrology is, the more mindless governance by astrology would become.

The analogy may seem inapplicable to constitutional governance because we suppose that the words of the Constitution *are* an expression of mind. But this defense is available only so long as in our operations we treat the words *as* the expression of an

3. *See, e.g.*, Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 VA. L. REV. 583 (1993); Steven D. Smith, *Law without Mind*, 88 MICH. L. REV. 104 (1989).

4. The assumption that law has authority is itself probably dependent on the assumption that law is an expression of mind. For thoughtful explorations of the relationship, see JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986); JOSEPH VINING, FROM NEWTON'S SLEEP (1995).

actual author's mind. Conversely, if we choose to sever author's meaning from textual meaning, and thus to treat the text as an autonomous artifact,[5] as nonoriginalism attempts to do, then at the same time we separate the text from mind.

With a certain type of upbringing it is easy to overlook this separation, because nonoriginalism generates virtuoso intellectual performances by constitutional scholars of the highest rank. Indeed, it is hardly surprising that nonoriginalism allows for more original and creative academic performances than does an approach which merely tries to figure out what the authors meant. But these performances serve only to conceal the real problem, which is that we have no reason to suppose that the words of the Constitution considered as an autonomous text reflect any act of mind directed to the questions for which we are seeking answers.[6]

I should quickly acknowledge that it is doubtful whether terms like "originalism" and "nonoriginalism" usefully describe the approaches that judges and scholars actually take in addressing constitutional questions. Nonoriginalism, as the term is used here, refers to the view that we should treat the Constitution as an authoritative and autonomous text—autonomous in the sense that its meaning is thought to be, to a large degree, independent both of the conscious intentions of its enactors and of the meanings that we ourselves would like the Constitution to have. Not everyone who is not an originalist is necessarily a nonoriginalist in this sense.[7] And even those who are nonoriginalists may not actually manage to treat the Constitution as the autonomous document just described. So I do not claim that nonoriginalism *succeeds* in achieving mindlessness, but only that it *aspires* to mindlessness.

Originalism, by contrast, seems to avoid this embarrassment by linking constitutional meaning to an act of mind—the decision of the Framers or enactors—that is thought to have been directed not to the exact questions, of course, but to the kinds of issues or problems that we are currently seeking to resolve. But even though originalism is not inherently or in principle mindless, it might still be mindless in fact. The provisions of the Con-

5. *See* Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993).

6. *See* PERRY, *supra* note 1, at 48-49.

7. It would be helpful to recover the older term "noninterpretivist" to describe one set of approaches to the Constitution.

stitution might reflect acts of mind directed to the kinds of questions we are trying to answer in constitutional cases; but then again, they might not. The Framers might have been addressing different kinds of questions. Or they might have written the provisions on which we rely without much thought at all.

So there is no a priori guarantee that originalist interpretation secures a place for mind in the relevant sense. We must investigate to find out.

II. The Framers' Big Blunder?

The results of this investigation may at first seem reassuring. The problem of constitutional law might roughly be described as the problem of defining the content and the limits of government power. The Framers of the Constitution clearly perceived that problem, and they devoted considerable thought and effort to dealing with it. So it may seem that their thought and effort supply the collective act of mind needed to exonerate originalism from any suspicion of mindlessness. And indeed, it is fair to say that at least at a very general level, the Framers were pursuing the same basic objectives that we are, and that they thought very carefully—more carefully, probably, than most of us can claim to have done—about how to achieve those objectives.

The difficulty is that, for reasons about which we can only speculate, the original constitutional strategy adopted by the Framers seems to have reflected a judgment error of major proportions.[8] This error had the effect of directing the Framers' thinking away from the kinds of constitutional questions subsequent generations have had to address. More specifically, the Framers chose to rely on a single strategy—we call it the enumerated powers doctrine—both for creating and for limiting governmental power. The Framers tried to define the powers to be conferred on the national government, and they insisted that the national government would have those and only those powers. Indeed, the Framers had so much confidence in this strategy that they regarded a bill of rights as superfluous.

Of course, opponents of the Constitution argued that the enumerated powers doctrine could not effectively contain national power, and it seems clear by now that they were right. The inabil-

8. *See* Leonard W. Levy, Constitutional Opinions 113 (1986) (describing the Framers' decision to rely upon the enumerated powers doctrine in lieu of a bill of rights as a "colossal error of judgment").

ity of the enumerated powers strategy to support significant limits on national power became apparent in New Deal decisions such as *Wickard v. Filburn*,[9] and again in later decisions such as *Katzenbach v. McClung*.[10] Indeed, it seems that the ineffectiveness of this strategy should have been—and, at least for the more perceptive of the founders, was—apparent by the time of *McCulloch v. Maryland*,[11] and probably even earlier.

During Washington's first term, for example, Hamilton argued that the Constitution gave Congress implied powers to create a bank. Madison's portentous response asserted that if Hamilton's view were accepted, then the entire constitutional scheme would be subverted[12]—Hamilton's position would mean that "[t]he essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed . . . ."[13]

In retrospect, it seems clear that Hamilton was right. At least, his view of implied national powers has flourished, perhaps beyond anything he could have imagined.[14] But if Hamilton was right, it does not follow that Madison was wrong.

III. The Casual Bill of Rights

Typically we do not grieve over the demise of the enumerated powers doctrine. At first glance, our serenity in this matter might

9. 317 U.S. 111 (1942) (substantially broadening the scope of the Commerce Clause by holding that Congress had the power not only to regulate direct interstate commerce, but also those intrastate activities that had an indirect relationship with interstate commerce, such as wheat grown for home consumption and intrastate railroad rates).

10. 379 U.S. 294 (1964) (broadening the scope of the Commerce Clause further by holding that the power of Congress over interstate commerce could reach even local activities not regarded as commerce, but that had a substantial effect on interstate commerce, such as discrimination in local restaurants).

11. 17 U.S. (4 Wheat.) 316 (1819) (holding that Congress, in incorporating a bank, did not overreach its authority because nothing in the Constitution excluded incidental or implied powers).

12. For a summary and relevant excerpts of the arguments by Hamilton, Madison, and Jefferson, see Paul Brest & Sanford Levinson, Processes of Constitutional Decisionmaking 10-17 (3d ed. 1992).

13. *Id.* at 12.

14. Since this talk was given, there are signs of a new effort by the Supreme Court to limit the scope of Congress's powers under the Commerce Clause. *See* United States v. Lopez, 115 S. Ct. 1624 (1995) (holding that the possession of a gun in a local school zone is not an economic activity that might have, through repetition elsewhere, a substantial effect on interstate commerce, and therefore may not be prosecuted under a federal statute). The failure of such efforts in the past makes the success of the current effort less than certain, to say the least. And of course, meaningful revitalization of the enumerated powers strategy would require the Supreme Court to rein in not only the commerce power but also other national powers, such as the taxing and spending powers. One may be pardoned for doubting whether the current Justices have the near heroic character that would be needed for such a campaign.

seem odd, because one would suppose that the failure of an assumption that the Framers thought central to the constitutional design might have catastrophic consequences. Yet in constitutional law casebooks the Framers' reliance on the enumerated powers strategy is commonly noticed in passing, and the failure of that strategy is treated as incidental to the changing construction of the Commerce Clause.[15] It is as if you received a letter from home that said, "There's a little bad news. The weather's been cold, Dad and Mom died, and the kitchen faucet has started dripping again. Otherwise, everything's fine."

We do not view this particular failure as catastrophic, of course, because of a story we tell ourselves about the Bill of Rights. This story explains that the flaw in the initial constitutional design—that is, its unwarranted reliance on the enumerated powers strategy—was soon remedied by the adoption of the first ten amendments. The Founders, we like to suppose, thereby supplemented their initial "enumerated powers" strategy with a fallback "rights" strategy. And as things have turned out, the fallback strategy has carried virtually the entire burden of limiting government. From our perspective it may seem quite obvious that the "rights" strategy always was more promising than the "enumerated powers" strategy. Indeed, it is difficult to fathom how the Framers could have misjudged the matter so badly. Still, the important point is that they did adopt the fallback strategy, and their adoption of a list of rights has given later generations a basis for limiting the scope of government power. So the Framers' misplaced reliance on the "enumerated powers" strategy amounts to a curious, slightly embarrassing, but ultimately not very consequential wrinkle in our constitutional fabric.

But the failure of the enumerated powers strategy cannot be dismissed so lightly. That is because, in itself, the subsequent adoption of the Bill of Rights does not supply the requisite act of mind needed to support a sensible originalist approach to developing constitutional limits on the powers of government.

To see why this is so, we need to remember some familiar facts about the Bill of Rights.[16] Despite earlier opposition to including

15. *See* U.S. CONST. art I, 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

16. *See generally* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 219-45 (1990) (presenting a history of the Bill of Rights); LEVY, *supra* note 8, at 105-34.

a list of rights in the Constitution, James Madison was obligated by ratification and campaign commitments to introduce some such measure in the First Congress. But Madison was forced to coax and cajole—to "beg the House to indulge him"—to persuade his colleagues even to consider the matter. They felt they had more important business. Observing Madison's anxiety, a colleague agreed to postpone discussion of his own bill for establishing a land office, but he added with respect to the land office bill that "in point of importance, every candid mind would acknowledge its preference."[17] Legislators, it seemed, just could not work up much interest; they regarded the provisions as "a few milk and water amendments," "trash," "nonsense," "an anodyne to the discontented," "little better than whip-syllabub, frothy and full of wind, formed only to please the palate."[18] Discussion of the proposals, when it occurred at all, was lackluster and apathetic. And the amendments were accepted in the States with similar lack of fanfare.

What should we make of such complacency? We might (and some scholars do) react with dismay or even anger, blaming the Founders for what looks to us like unconscionable apathy in such momentous matters.[19] And indeed it is unsettling to discover that provisions that have formed the bedrock of our constitutional order and that have generated libraries of commentary and exposition by judges, scholars, and editorialists were in fact adopted hastily, casually, virtually (it seems) without interest or reflection.

Viewed in context, though, the Founders' apparent indifference seems more understandable. What their attitude shows is that they were still counting on the enumerated powers strategy

17. FARBER & SHERRY, *supra* note 16, at 232.

18. The quotations, reported in GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 88 (1987), are from, respectively, Pierce Butler and George Mason, Fisher Ames, Robert Morris, Edmund Randolph, and Aedanus Burke.

19. In this spirit, Leonard Levy asserts with respect to the Religion Clauses of the First Amendment:

> [The debate in the House] was apathetic and unclear: ambiguity, brevity, and imprecision in thought and expression characterized the comments of the few members who spoke. That the House understood the debate, cared deeply about its outcome, or shared a common understanding of the finished amendment is doubtful.
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> Not even Madison himself, dutifully carrying out his pledge to secure amendments, seems to have troubled to do more than was necessary to get something adopted in order to satisfy popular clamor and deflate Anti-Federalist charges. Indeed, he agreed with Sherman's statement that the amendment was "altogether unnecessary . . . .

LEVY, *supra* note 8, at 147.

to define and limit the power of government. So they evidently viewed the Bill of Rights not so much as a serious fallback position, but rather as a way of reinforcing the enumerated powers strategy by making its premises more explicit, or as a cosmetic addition calculated to appease opponents of the Constitution, or both.

More specifically, the Founders apparently viewed some of the provisions in the Bill of Rights as purely jurisdictional in nature. I have argued elsewhere that this was true of the Religion Clauses of the First Amendment.[20] The enactors of those Clauses were merely reiterating what they had asserted all along—that is, that the national government had no jurisdiction over religion. Consequently, they did not understand themselves to be creating any substantive principle of religious freedom at all. Modern debates which attribute to the Framers a decision to adopt various substantive principles or rights therefore are calling upon the Framers to answer a question they did not address and, hence, to which no even casual collective act of mind was directed. Akhil Amar's observation that the First Amendment itself was a sort of reverse Necessary and Proper Clause[21] suggests that a similar conclusion may hold for that amendment as a whole.

Other provisions sound more like enactments of substantive rights or principles. For example, the Eighth Amendment's proscription of cruel and unusual punishments[22] sounds substantive in nature. But because the Framers were confident that the national government lacked power to violate these rights or principles anyway, they apparently regarded them as window dressing, and consequently devoted virtually no thought to the substantive meaning of the rights or principles in question.

To avoid overstatement, it is important to acknowledge that in enacting a list of rights, the First Congress and the state legislatures were not starting from scratch. In the history of Anglo-American law, these rights had long been discussed and fought over, and they had been adopted in many of the state constitutions. So one might argue that the reason the Framers of the Constitution did not think much about what they were doing is

20. *See* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17-54 (1995).

21. *See* Akhil R. Amar, *Anti-Federalists,* The Federalist Papers, *and the Big Argument for Union,* 16 HARV. J.L. & PUB. POL'Y 111, 115 (1993).

22. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

that they did not need to; the rights in question already had a well understood importance and meaning as a result of thought that earlier generations (or the Founders themselves on other occasions) had already given to these rights.

If this depiction is accurate, what follows? It seems that the depiction might provide a basis for a practice of judicial review in the spirit of a James Bradley Thayer with an originalist bent—a practice, in other words, in which the function of the courts is to prevent government from transgressing constitutional limits on which the Framers would have agreed. For example, it may be that despite uncertainties about many questions of constitutional meaning and application, the Framers all would have understood that government cannot deny a defendant the right to a jury trial in a murder case. So this kind of right would be enforceable through judicial review. In short, the constitutional limits on government would be confined to whatever consensus existed at the time of enactment regarding the content of the listed rights.

It is clear, though, that we have not followed this course. Nor is there much to recommend it, at least from an originalist perspective. Certainly the Framers themselves did not expect the limitations on government to be so meager. Inevitably, therefore, we have had to address questions that the Framers did not consider and about which no consensus existed at the founding. Indeed, whenever we are forced to choose between controversial alternative versions of claimed rights or principles, we can be almost certain that the choice is one the Framers did not think about or resolve. Madison effectively told us as much; he reported that in crafting the Bill of Rights "everything of a controvertible nature" had been "studiously avoided."[23]

So when controversy exists, we have no choice but to resort to other kinds of reasoning—common law reasoning, or natural law reasoning, or pragmatic political calculations, or something else. Of course, if we really cherish the label of "originalist," we still can invoke it. All we need is to find some hook in the original decision—the words used, perhaps, or some principle or value or directive that we ascribe to the Framers—and then conspicuously hang these other kinds of reasoning on that hook. But the label does not matter much. The important point is that if we claim the authority of the Framers for one or another of the controver-

23. BRADLEY, *supra* note 18, at 88.

sial alternatives, we are merely deceiving ourselves—deferring to an ostensible act of mind that never in fact occurred.

IV. Conclusion

The difficulty can be put simply—in constructing and setting limits to the powers of government, the Framers of our Constitution chose to rely upon a strategy that has failed. Why the Framers chose that strategy, which from our vantage point may seem doomed from the start, is a fascinating question; answering it would no doubt shed much light on the disjunction between the Founders' constitutional world and our own. But the important practical fact is that we have not had the capacity, or perhaps the will, to make their strategy work.

The failure of the Founders' strategy has meant that subsequent generations have not realistically had the option of following the course originally contemplated. Instead, we have been forced to construct constitutional limits on government from tradition or expediency, or from scratch, all the while pretending to ourselves that we were merely elaborating and building upon the limits laid down by the Framers. Our "interpretations" have in reality been improvisations, disguised in patched-together fragments of the Framers' language. So for all of the abstract appeal of originalism, it seems time to admit that while we may share the Framers' objectives at a very general level, their original act of mind cannot in any meaningful way determine the course of our improvisations.