

**PANEL V:
IS ORIGINALISM POSSIBLE?
HISTORICAL INDETERMINACY**

INTRODUCTION

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It is a special delight for me to moderate this Panel this morning, although I have to admit that everyone whom I have told I am a Moderator has expressed shock and incredulity. I am usually cast in the role of immoderator, intemporator, or provocateur. But I am going to try to be relatively even-handed today.

Still, I might say in opening, in an attempt to stir up the troops, that I would not be surprised if a good many of us here would, at this date, paraphrase our sometime hero, and say that moderation in defense of originalism is no virtue, and extremism in its advocacy is no vice.

Everybody, it seems, has deferred things to our Panel. What then are we to do? Our concerns are those raised by Paul Brest in his famous 1980 article¹ and elaborated since by, among many others, our own Bob Bennett and our own Michael Perry.

I will lay out the framework for this Panel's discussion by mentioning the key questions that I think our panelists will discuss. First, can one really capture the original intention or even the original understanding of the terms of the Constitution or the Bill of Rights? Is the task of objective constitutional history here simply insurmountable? Are the problems of historical indeterminacy just too great? Is originalism possible?

Now, one answer to this last question consists of just ten words. Is originalism possible? *Of course it is. See Raoul Berger or Lino Graglia.* But let us assume that you are not satisfied with that answer; let us assume that you are Paul Brest or Bob Bennett or Michael Perry. You might well ask: is it not true that the Constitution was a difficult political compromise between at least two groups that put categorically different interpretations upon the clauses on

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1. See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. Rev. 204 (1980).

which they agreed? And if it was not understood clearly then, how can it be now?

Second, one might ask, has not the passage of 200-some years clouded the historical record even further? Would we not need to live in the world of the Framers itself really to understand their words as they used them? And given that the values and conditions of our world have changed so radically, as modern analytical philosophy, as literary criticism, or as linguistic theory teaches, and that our reading of the text inevitably will be ours and not theirs, is their world not hopelessly lost to us?

And, finally, one might ask, if we can determine anything about the Framers' historical understanding, is it not true that they could not have anticipated everything that would happen 200 years down the road, and would not have wanted us to act as if they could have? They were not believers in a dead hand, as we were reminded yesterday.

Now, these and other questions soon should be decisively and finally answered for you. Randy Barnett of the Boston University School of Law will be our first speaker, followed by my colleague Gary Lawson. Then, Thomas McAfee, from the Southern Illinois University School of Law, and finally Suzanna Sherry of the University of Minnesota Law School.