THE RELEVANCE OF THE FRAMERS' INTENT

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Ever since the revival of interest in originalism that occurred in the 1980s, critics have charged that for a variety of reasons it is impractical, if not impossible, to determine the Framers' intentions.[1] In addition, they argue that we today should not be bound by the intentions of a few men who lived and died over two-hundred years ago.[2] In sum, adherence to original intent is rejected as being impractical, unjust, or both.

In this Article, I will argue that we cannot assess either the *practicality* or the *justice* of discerning original intent without first asking *why it is* we are consulting the intentions of the Framers. I shall discuss two reasons to consult the Framers. The first views the Framers as wardens; the second as designers or architects.

I. THE FRAMERS AS WARDENS

Let me begin by posing a question: does a law enacted by Congress and signed by the President create a duty of obedience in the people? Would it be appropriate not merely to punish, but also to condemn a person who disobeys a law for having done something morally wrong? To put the matter starkly, did the Branch Davidians in Waco have a duty in conscience to submit to the commands of the Bureau of Alcohol, Tobacco & Firearms agents who came calling one morning? Did Randy Weaver do something wrong, not merely illegal, when he failed to surrender to the U.S. Marshals who approached his cabin or to the FBI agents who then surrounded it?

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1. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 317-24 (1986) (describing the practical difficulties in identifying an authoritative intention of the framers of legislation); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213-17 (1980) (same, as applied to the Framers of the Constitution).

2. *See, e.g.*, Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 357 (1985) ("The dead hand of the past ought not to govern, for example, our treatment of the liberty of free speech, and any theory of interpretation that demands that it does is a bad theory."); Larry G. Simon, *The Authority of the Framers of the Constitution*, 73 CAL. L. REV. 1482, 1499-500 (1985) ("The Constitution was adopted by propertied, white males who had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales who were alive then, much less those of us alive today who hold conceptions of our interests and selves very different from the ones held by those in the original clique.").

Although most constitutional scholars do not consider these sorts of questions explicitly, those attracted to originalism imply that a law creates a duty of obedience if it reflects the will of the people.[3] In practice, this means the will of the majority of the people. What, then, is the role of the Constitution? According to this view, the Constitution places limits on what laws a majority may impose on the people, but these limits are themselves a reflection of majority will; the Constitution reflects the will of the majority who elected representatives to state constitutional conventions, a majority of whom, in turn, voted to ratify the Constitution. Because the Constitution, like a statute, is viewed as a command from the majority, we need to determine the intentions of those who issued the command to determine its meaning.

Of course, as many have noted, this is exceedingly difficult to do.[4] How exactly does one determine the collective intentions of thousands of persons who elected hundreds of representatives who then voted to ratify the Constitution in thirteen different assemblies—not to mention the intentions of those who voted for thousands of state legislators who in turn voted to ratify the various constitutional amendments at different points in our history?

As a surrogate, we consult the statements made by various members of the constitutional convention, supplemented perhaps by statements made by members of ratification conventions, with the assumption that others shared these stated views. But these arguments can get extremely complicated. Witness, for example, my debate with Professor Thomas McAffee concerning

3. Because the claim is usually implicit, it is difficult to document. One example is Raoul Berger, *The Ninth Amendment, As Perceived by Randy Barnett*, 88 NW. U. L. REV. 1508, 1533 (1994) ("Ours, the Declaration of Independence declared, is a government that derives its powers from the 'consent of the governed.' That consent was given by the Ratification Conventions.").

Another writer who has made the connection between popular will and legitimacy more explicit is Robert Bork:

> It is asserted . . . that the judicial philosophy of original understanding is fatally defective in any number of respects. If that were so, if the Constitution cannot be law that binds judges, there would remain only one democratically legitimate solution: judicial supremacy, the power of the courts to invalidate statutes and executive actions in the name of the Constitution, would have to be abandoned. For the choice would then be either rule by judges according to their own desires or rule by the people according to theirs.

ROBERT H. BORK, THE TEMPTING OF AMERICA 160 (1990).

4. *See, e.g.*, DWORKIN, *supra* note 1, at 315-23; Brest, *supra* note 1, at 213-17.

the original meaning of the Ninth Amendment's protection of the rights "retained by the people."[5]

Moreover, the difficulties in discerning the Framers' intentions increase both as time elapses and as we need to get more specific. Would the Framers have considered a wiretap to be a "search"?[6] Would they have considered flag-burning to be a form of "speech"?[7] Would they have considered cable television to be a form of "the press"?[8] We make these specific inquiries because we view the Framers as wardens having issued commands, the meaning of which depends on their intentions.

In response to these difficulties in answering very specific questions concerning the Framers' intent, proponents of originalism employ a number of techniques. Often, in the absence of evidence, a hypothetical group of framers is consulted—as in, "The Framers would have been shocked to learn that the First Amendment protects [fill in the blank]."[9] One may think of this as a type of constitutional "channeling" in which originalist clairvoyants ask: "Oh Framers, tell us what would you think about the following law?"

To get around the problem of specificity, some originalists adopt the presumption that, if a subject is not specifically men-

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5. For my contribution, see Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, *in* 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1993); Randy E. Barnett, *Introduction: James Madison's Ninth Amendment*, *in* 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989). For Professor McAffee's responses, see Thomas B. McAffee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, 16 S. ILL. U. L.J. 267 (1992); Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990); Thomas B. McAffee, *Prolegomena to a Meaningful Debate of the "Unwritten Constitution" Thesis*, 61 U. CIN. L. REV. 107 (1992).

6. *Cf.* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

7. *Cf.* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

8. *Cf.* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . . .").

9. Although this is typically done orally in speeches and lectures, for a published example of this approach to the contention that the Ninth Amendment authorizes judicial protection of the unenumerated rights retained by the people, consider Judge Bork's statement:

> [I]t is inconceivable that men who viewed the judiciary as a relatively insignificant branch could have devised, without even discussing the matter, a system, known nowhere else on earth, under which judges were given uncontrolled power to override the decisions of the democratic branches by finding authority outside the written Constitution.

BORK, *supra* note 3, at 185.

tioned in the text of the Constitution, it is said to be "silent" on the issue and the government therefore has plenary power to do what it wishes.[10] So because the Constitution does not mention flag-burning or cable television—or marijuana or contraception for that matter—it is presumed that the majority, acting through its representatives in government, may regulate or prohibit these activities as it pleases. Because the Constitution does not mention wiretaps or electronic surveillance, the government is not restricted by the Fourth Amendment in using these technologies. Thus the difficulties surrounding original intent are resolved by a simple default rule that favors enhanced governmental power whenever the Framers' opposition to such activity by government cannot be divined.

Notice how this originalist method leads to what can only be described as—well—the Leviathan: a Hobbesian result that would have shocked the conscience of all the hypothetical Framers *I* have consulted on the subject. Yet many originalists seem unembarrassed by this disconnection between the results of their methodology and the views of limited government that were universally accepted by the founding generation.

Despite these well-known weaknesses of originalism, there is something curious about the appeal of the Framers' intentions that is worth stopping for a moment to consider. In my experience, persons from *every* political group and interpretive school are fascinated by the intentions of the Framers. They are not, however, particularly interested in the intentions of delegates to state ratification conventions or the attitudes of the general population at the time of the framing.

This suggests to me that we are interested in the Framers' intentions not because they are a surrogate for the difficult-to-discern will of the majority of 1789, but because we respect their opinions. Perhaps they are "authorities," not in the sense that a statute is said to be authority, but in the sense that Story, Kent, Williston, Wigmore, and Corbin are authorities. We respect their opinions because we think they knew what they were talking about. The weight of their expertise, knowledge, and reflection influences us in a way that sheer majority will cannot. That the

10. *See, e.g., id.* at 150 ("Democratic choice must be accepted by the judge where the Constitution is silent."); *id.* at 259 ("[W]here the Constitution does not speak, the majority morality prevails."); *id.* at 345 ("[W]here the Constitution is silent, the people must decide through legislation.").

Framers advocated a particular idea suggests to us that it is a *good* idea, not merely that it reflected the preferences of the biggest or strongest group.

With this in mind, let me sketch my view of the Framers as Designers.

II. The Framers as Designers

Suppose that instead of viewing the Constitution as representing a command by a long-ago majority whose intentions we need somehow to discern, we view the Constitution as the blueprint for a machine that was designed to perform a certain function. In this case, the machine is designed to make laws to accomplish certain ends—laws that are supposed to be binding in conscience upon the citizenry.[11]

Think of the Constitution the way you might think of a machine designed to make sausages. We want a sausage-making machine to provide us with food, but we also want to ensure that the sausages the machine produces are wholesome and untainted by disease. Because we do not want to have to inspect each and every sausage to see if it is wholesome, we want a machine whose design gives us confidence that it produces good sausages.

Similarly, a constitution specifies the design of a mechanism to produce laws that are beneficial but not unjust; laws that, because they are both necessary and proper,[12] bind us in conscience. Yet because we cannot inspect every law individually, we need some confidence that the internal operation of the lawmaking process is designed to produce beneficial laws and to weed out those that violate the rights retained by the people. Only a constitution that establishes a lawmaking process with the requisite built-in quality controls can impart legitimacy on the laws enacted in its name.[13] A constitution that fails to contain such internal quality control procedures tells us nothing about the justice of the laws it produces. We may obey, like the Holmesian

11. I explain and defend this conception of the Constitution in Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 Const. Commentary 93 (1995).

12. *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993) (explaining the original understanding of the Necessary and Proper Clause).

13. *See* Barnett, *supra* note 11, at 105 ("[T]he requisite binding quality must go in before the name 'law' goes on.").

"bad man,"[14] to avoid punishment, but not because we are bound in conscience to do so.

By this approach, the Framers are viewed as designers or architects of the lawmaking "machine." We consult them when we want to know how the machine is supposed to work, not because they are a surrogate for the majority of the people who lived two-hundred years ago, but because they might have special insight into the machine that they designed—especially its internal quality-control procedures. They gave its purpose and design much thought—perhaps more thought than we have—and we benefit from their learning in interpreting their design.

More important, however, in designing this machine, the Framers adhered to certain basic principles, analogous to principles of engineering. These principles are either sound or unsound. Adhering to them leads either to laws that bind in conscience or to ones that do not. If they are sound, we must continue to operate the machine according to these principles or we will pay a heavy price.

Consider another analogy: by cutting the cables on a suspension bridge we risk collapsing the bridge because we are violating the principles that the bridge designers engineered into the structure. The designers' intentions do not bind us, but their design does. Assuming we share the designers' objectives, we cut the cables at our peril. Similarly, by eliminating the safeguards built into the constitutional structure by its Framers, we risk the adverse consequences they consciously sought to avoid.

We need to learn about and adhere to the principles of the Framers, then, not because they rule us from the grave, but because the principles they discovered and embodied in their machine are as valid and useful today as they were then. If the laws produced by their machine bind us, they do so because they were produced by a machine that still adheres to the sound principles of lawmaking that the Framers devised.

Notice some of the advantages of the Framers-as-Designers way of looking at the Framers' intent. First, it explains why we remain so fascinated and influenced by the views of the small group of

14. *See* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

persons who *framed*—as opposed to ratified—the Constitution (as well as the Bill of Rights and the Fourteenth Amendment). Indeed, we generally confine our attention to just a *handful* of the Framers, such as James Madison or James Wilson or George Mason, as opposed to the views of other members of the convention or of the reigning majority of the time. We listen to them more carefully than others because we respect their opinion, especially the opinion of the chief architect or designer, James Madison.

Second, this Framers-as-Designers approach answers the question why we are bound by the decisions of a few dead white males. The answer is that we are *not* bound by their decisions per se. Instead, if their principles are correct and we seek what they sought, then we must adhere to the principles they discovered and embodied in the Constitution. In sum, we are bound by the *correctness* of their principles, not by their source, though we consult their source to discern what exactly these principles are and to understand them better.

It should come as no surprise, therefore, that scholars and activists who reject the Framers' views of *limited government* seek to undermine the operation of the machine they designed to effectuate these views. By the same token, some who share the Framers' views of *liberty* might think them to have been mistaken in certain of their design decisions—for example, in refusing to abolish slavery, by failing to provide congressional term limits, or by failing to find some means of protecting citizens from abuse by their state governments.

Third, according to the Framers-as-Designers approach, we consult the writings of the Framers to discern not their specific hypothetical intentions towards particular legislation, but the *principles* that they designed into the constitutional structure we interpret. Among these principles are federalism, separation of powers, judicial review, and freedom of speech and religion. I would add to this frequently cited list the principle embodied in the Tenth Amendment[15]—that the government of the United States is supposed to be limited to the delegated powers—which

15. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

undermines any interpretation of the Commerce Clause[16] that gives plenary power to Congress. And it should come as no surprise that I also would emphasize the principle embodied in the Ninth Amendment[17]—that constitutional protection of liberty is not limited to the few liberties that were mentioned expressly in the constitutional text, but that this protection extends to all the other rights retained by the people as well.

We are quite capable today of discerning the meaning and the merit of these general principles. Perhaps, after seeing them violated for sixty years, we can even appreciate these principles better. If the proof of the pudding is in the eating, the misery and injustice created by the modern welfare state is testimony to the wisdom of the Framers. Indeed, one indicator of the obviousness of the Framers' principles is the convoluted theories that have been invented to supplant them, such as the theory that the Second Amendment protection of the *people*'s right to keep and bear arms[18] was intended to protect the *States*' power to maintain a militia.[19]

In sum, provided we are looking for the right intentions and for the right reasons, a commitment to original intent is not barred by the indeterminacy of historical materials. We should look to the Framers' intentions, not because we are bound by their intentions as such, but because we today share their intentions to limit the power of government in a way that enhances and protects the liberty of the people. We are "bound" to adhere to their principles because they are as vital to protecting liberty as the principles by which one designs a bridge are to preventing its collapse. We ignore them at our peril.

16. *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 . . . .").

17. U.S. CONST. amend IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

18. *See* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

19. For an example of this argument, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 299 n.6 (2d ed. 1988). The extensive historical evidence to the contrary is summarized in Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); *see also* Glenn H. Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995) (summarizing recent Second Amendment scholarship).