

ALTERNATIVES TO ORIGINALISM?

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“Alternatives to Originalism.” What a title. Are there alternatives to originalism? The subject conjures up the old exchange: “Do you believe in infant baptism? Hell yes, I’ve seen it done!” Just so with this topic. Are there alternatives to originalism? Hell yes, the law reviews overflow with them, and I decide cases under them every day—every time I must interpret or apply an opinion of the Supreme Court written when nonoriginalist methods prevailed. There have been several such periods, the Warren Court being a recent example on the left wing, comparable to the Fuller Court on the right.

Many of today’s proffered alternatives stem from fear of the dead hand. Does not originalism consign us to the Eighteenth Century? How can that be acceptable? We do not go about by horse drawn carriage; how can our law regulate by the equivalent of the horse drawn carriage? That worry—plus a belief that the social, legal, and political context has changed so much that the original understanding is unrecoverable—led Justice Brennan to put originalism aside in favor of what he described in 1985 as “a personal confrontation with the well-springs of our society.”¹ No, I am not making it up. He really wrote that one should derive “[s]olutions of constitutional questions from that perspective”² One wonders how a judge should confront a social well-spring—water pistols at ten pages?—but let that pass.

The belief that originalism implies outmoded solutions to today’s problems is wrong. The core original prescription is organization of the government as an indirect, representative democracy. States, Congress, the President, and the People acting through legislation and constitutional amendments are always in control; they need only follow the prescribed procedures. The largest threat to modern law for an evolving world is a judiciary claiming to act in the name of the Constitution. Democracy is not an alternative to originalism; as Benjamin Franklin put it

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1. Justice 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).

2. *Id.*

when emerging from the Constitutional Convention, the drafters gave us “a republic, if you can keep it.”³ We keep it by respecting the Constitution’s structures.

Wrong, too, is the belief that we need an alternative to originalism because originalism is imperfect, historically indeterminate, represents the values of dead white males—you can fill in the rest of the blanks. All of these things may be true, but let us not commit the Nirvana Fallacy of assuming that if one approach to a subject is imperfect then something else must be better.⁴ Let us study and compare the virtues and foibles of every approach.

Many people, some in this room, have shown that originalism is itself flexible. Consider Professor Michael Perry’s new book *The Constitution in the Courts: Law or Politics*.⁵ Perry demonstrates that, for many clauses, the original level of abstraction is intentionally high, to permit and even encourage flexible application. Every originalist should concede that the document poses questions about which there is normative indeterminacy: we know what the rule is but do not know what it means in application. For example, does “the freedom of speech” include the right to say that a Marxist historian has “no standing” in his profession?⁶ To speak anonymously?⁷ To post political lampoons on “The Spectacular” in Grand Central Station?⁸ Old rules necessarily post hard questions when they encounter novel contexts, and we cannot answer these questions by repairing to nonexistent original “intentions” about them: there were none. Often the document fairly cries out that it has appointed the living to make their own decisions; one has only to think of the “reasonableness” clause of the

3. Recorded by James McHenry in his diary and published in 11 AM. HIST. REV. 618 (1906).

4. I have expatiated on this before. See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992), reprinted in *THE BILL OF RIGHTS IN THE MODERN STATE* 349 (Geoffrey R. Stone, Richard A. Epstein & Cass R. Sunstein eds., 1992); Frank H. Easterbrook, *Approaches to Judicial Review*, in *THE BLESSINGS OF LIBERTY: AN ENDURING CONSTITUTION IN A CHANGING WORLD* 147 (Jack David & Robert B. McKay eds., 1989), reprinted in *POLITICS AND THE CONSTITUTION: THE NATURE AND EXTENT OF INTERPRETATION* 17 (National Legal Ctr. for the Pub. Interest 1990).

5. See MICHAEL PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS* (1994).

6. See *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc) (putting Judges Bork and Scalia on opposite sides of a debate about the level of abstraction at which to read the First Amendment).

7. See *McIntyre v. Ohio Elections Comm’n*, 115 S. Ct. 1511 (1995) (putting Justices Scalia and Thomas on opposite sides of a debate about the original meaning of the First Amendment).

8. See *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995).

Fourth Amendment. Professor Lessig's *Fidelity in Translation* has much in common with this understanding⁹ as does Professor Powell's observation that the Founders were not themselves originalists in the sense of being "intentionalists." They thought that a government would evolve in practice and that the flexible accommodation that wins the test of time is best.¹⁰ That is why President Madison signed the bill establishing the Second Bank of the United States, even though Representative Madison opposed the First Bank of the United States on constitutional grounds. He thought practice, plus the collective wisdom of the other drafters who supported the Bank, outweighed his own views.

John Marshall offered two originalist pictures. *Marbury v. Madison*¹¹ is the one we remember today: the Constitution is a set of laws, superior to statutes; having deciphered the meaning of both we need only apply standard choice-of-law principles. *Marbury* depicts the Constitution as a catalog of rules, with a meaning comprehensible to all who take the trouble to read it carefully. That is associated with one strand of contemporary originalist thought (and is very attractive to me, in particular). But listen to John Marshall the originalist in another context.

The Bank of the United States was created in 1791; its charter expired in 1810, with debate on extension during Jefferson's second term (which ended in 1809). In 1816 President Madison concluded that the acceptance of the Bank settled constitutional questions in its favor, and he signed the bill renewing its charter. States replied with punitive taxes, and litigation ensued.

When the case came before the Court in 1819, the Bank's opponents pointed to two things: the Constitution is a charter of limited federal powers, and nothing gave the national government the ability to create financial intermediaries. Congress could lay taxes and regulate commerce, but to charter a bank, it needed to rely on the grant of power to enact laws "necessary and proper" to put the other powers into effect. But how could the Bank be "necessary?" The nation could survive without a central bank; between 1810 and 1816 it did (and would again between 1836 and 1913). By taking "necessary" strictly, the Court could

9. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

10. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 935-41 (1985).

11. 5 U.S. (1 Cranch) 137 (1803).

have set itself up as a potent political force, reviewing the wisdom of laws.

The Court resisted. Chief Justice Marshall explained:

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.¹²

There is that famous phrase: "we must never forget, that it is a constitution we are expounding." But in context, it is a description of the power of the legislature. Marshall was explaining why the political branches have power and judges do not! He had two theories of originalism—one for Congress, which wields explicit grants of power, and the other for judges, who have none. It should hardly be necessary to remind you that there is a real Necessary and Proper ("Sweeping") Clause, but there is no Judicial Review Clause. That leads to major differences in authority—including authority to interpret. Congress could disagree with the Court, and so could a President. In 1836 President Jackson did, vetoing a further extension for the Bank.¹³

In *McCulloch*, Chief Justice Marshall observed that "necessary" has many possible meanings: "The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other

12. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–07 (1819).

13. For more details, see Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990).

words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases."¹⁴ What followed from this is that the people, through their representatives, could choose. "The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end."¹⁵ This implies a very limited judicial role in assessing validity. Here is the final famous passage:

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.¹⁶

In this vision courts serve to enforce laws and private bargains. As conditions change, the living change their institutions and laws. The Constitution is a permissive framework. We do not need alternatives to this vision of originalism, which preserves to the living ample power to solve today's problems. And although many persons may want alternatives, they come with a particular cost attached: no judicial review, for they deny the premise (legal certainty) that serves as the foundation for *Marbury*.

Consider a few of the nonoriginalist alternatives available today:

14. *McCulloch*, 17 U.S. at 414.

15. *Id.* at 415.

16. *Id.* at 421.

There is the program of footnote 4 in *Carolene Products*,¹⁷ which proposes using the judicial process to protect minorities from majorities, even though the principal function of the Constitution is to enable majorities to legislate.

There is the program of Richard Epstein,¹⁸ who would use the judicial process to protect majorities from the coalitions of minorities that generate laws that we call rent-seeking, even though the original Constitution (perhaps erroneously) expresses no fear of minority coalitions.

There is the program of Cass Sunstein,¹⁹ who would use the judicial and legislative process to protect what he calls under-enforced constitutional norms: ideas that animate the document but do not find expression in concrete rules.

All of these programs are attractive. A generous republic ought to protect minorities and dissenters, ought to protect property rights (which is to say, the welfare of the majority) from self-seeking interest groups, and ought to embrace the combination of classical liberalism and benevolence that Cass Sunstein represents. If someone asks me whether these are good nonoriginalist theories, my answer is: yes, they are excellent—for the purpose of provoking thought, reflection, study, for the purpose of building ideals and setting standards. We cannot afford to accept without challenge whatever is. As Holmes remarked, “[t]o rest upon a formula is a slumber that, prolonged, means death.”²⁰ We must explore alternatives not only to stay alive intellectually, not only to prevent repeating yesterday’s mistakes, but also to get ideas for the next constitution. Just as the Common Market has led to the European Union, with its own evolving constitution, the North American Free Trade Agreement will lead to some form of political union, over some domain, which will need its own constitution.

But if nonoriginalist ideas are useful—indeed are *essential*—the question remains: to what end? Collecting a set of ideas for the economic constitution of North America and the Western Hemisphere, which is slowly being assembled in treaties, certainly does not mean that judges should start intervening in rate regulation or wetlands preservation programs. What nonoriginal-

17. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

18. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993).

19. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

20. OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 306 (1920).

ist ideas have in common is nonenforcement by the courts—unless of course a statute provides for enforcement, after the fashion of the Administrative Procedure Act.

This is the point of *McCulloch*. Evolution is a democratic process, and it defeats the premises of *Marbury*. You can't have a hierarchy of law, with the Constitution prevailing by virtue of its pride of place, unless there is genuine meaning in that document. When form comes from evolving institutions and ideas, then the living must decide by elections—through the Constitution's explicit process of majority vote, divided constituencies, and agreement among multiple branches. For one branch, the judiciary, to claim the final word about debatable propositions is not only unoriginalist but also contraconstitutionalist.²¹ Nothing beats originalism *in court*, because nothing else is capable of supporting a judicial veto.

Let me try another way to put this. Many constitutional theories compete in the intellectual marketplace. They are not valid or invalid. The Constitution itself is not based on a unitary theory; the Framers did not share a single vision but reached a complex compromise; and even if they had a unitary theory, we must always ask why that theory should govern us today. The Framers were, after all, revolutionaries, and we have the right to be revolutionaries too if the document they wrote no longer supplies satisfactory answers to our controversies.

Each nonoriginalist theory comes, however, with its own set of implications for proper scope and usage. Truly revolutionary theories do not justify any judicial role, because Article III is part of the same Constitution the revolutionaries would throw over. I do not know and cannot imagine any nonoriginalist theory in which only Article III and *Marbury* are sacrosanct—or any in which the portion of *McCulloch* enlarging the powers of the legislature is sacrosanct, while the corollary that open-ended legislative power implies restrictions on judges is reversed.

One can say—two other speakers on this Panel do say—that judges ought to fit their work within the dominant view of the times. In part this is inevitable (we live today and hold today's thoughts), and in part attractive because it cuts the costs of idiosyncrasy. Just as most mutations are harmful, most bright ideas are wrong. Judges should rely on accumulated information

21. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 55, 166–67 (1990).

rather than treating the law as a replay of zero-based budgeting.²² But we hardly want to freeze errors—to say, for example, that the decisions in *Berea College*²³ and *Gong Lum*²⁴ were “right, for their times” and that the judges therefore decided them correctly.²⁵ They were not only wrong under the Constitution (*Berea College* violates the Religion Clauses as well as the equal protection rights of blacks) but also wicked. To say that judges should do what the legal culture thinks best is to deny the power of old texts to constrain. What then is the justification for judicial power? Why should the “legal culture” trump the “popular culture?” And by what right can one say that the Constitution, which is designed to limit today’s options, yields to today’s beliefs?

My point is simple. Meaning depends on the purpose to which we put it. It is not silly to maintain that the Constitution can mean one thing in a classroom, another in the legislature, still another in civic debate, and yet another in a courtroom. But each means of understanding the Constitution has implications. Judicial review came from a theory of meaning that supposed the possibility of right answers—from an originalist theory rooted in text.

Any student of constitutionalism who cares about preserving a judicial role needs a way of reading the Constitution that can support that judicial role. Such a theory will be neither broad nor narrow, neither pro nor con state power. But it necessarily is textualist and originalist. We must demand not that it conform to the reader’s political theory, but that it be law.

22. See Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988).

23. *Berea College v. Kentucky*, 211 U.S. 45 (1908).

24. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

25. A position to which ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., IX HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT (1984), comes uncomfortably close.