THE POLITICAL FUNCTION OF ORIGINALIST AMBIGUITY

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The prescribed topic for this Panel, "Alternatives to Originalism," is far less meaningful than it appears, and it is also more than a bit slanted. My principal aim is to explain why. In doing so, I also hope to make some points about originalism and the debate surrounding it.

Briefly stated, my thesis is that defenses of originalism, with rare exceptions, leave its nature mushy and confused, and the mush and confusion almost inevitably spill into the subject of "alternatives to originalism." Clarification is undoubtedly possible, but the necessary conceptualism would serve no useful purpose. Originalism has dominated too many agendas for too long. We should move on to more fruitful topics.

The immediate difficulty with the topic "alternatives to originalism" is that, in order to talk about it, one must first assume or develop answers to two related questions, which are far more complex than often is appreciated. First, what is originalism? Second, for what purpose are alternatives to originalism wanted?

About the first question—What is originalism?—I have nothing to say that has not been said more fully by others. Clearly, diverse views claim the label. The more robust maintain that constitutional questions should be answered in the way that the Framers or ratifiers would have answered them.[1] More relaxed variants insist only that original intention or understanding should be consulted to identify a constitutional value, which then can be applied in ways that might not have been foreseen by, or might even have astonished, the Framers or ratifiers.[2] Similarly, the more robust versions of originalism would pay no heed to precedent—or at least to nonoriginalist precedent[3]—whereas

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1. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 290-91, 329-30, 364-66 (1977); Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 350-51 (1988).

2. *See, e.g.*, Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84 (1993).

3. *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

more moderate versions would accept the claims of precedent in some cases.[4]

I claim no competence to judge which of the competitors most deserves the title of "originalism" and would wish to avoid the question altogether. Yet it seems impossible to discover what would count as an alternative to originalism without knowing what originalism is.

The reason, simply, is that most views—my own included—assume that original understanding and purposes are relevant to constitutional interpretation. Differences emerge only over how, and how weightily, these considerations enter the interpretive matrix. For example, I once defended a theory of constitutional interpretation that acknowledges a significant role for original understanding, but also gives weight to considerations of constitutional structure, precedent, and the changing needs, values, and expectations of changed times.[5] Precedent and arguments of prudence and morality could be accommodated with attention to original understanding, I argued, by trading on the familiar fact that original understandings and purposes can be described in various ways.[6] This being so, the appropriate description of original understandings and purposes (for purposes of constitutional interpretation) may vary over time in response to evolving lines of precedent, changed circumstances, altered social understandings, and considerations of normative desirability.[7] A view such as this stands as a stark alternative to some versions of originalism, but is rather close to several others that have claimed the designation.[8]

The second question that stands in the way of considering alternatives to originalism, which to me seems more interesting, involves the purpose for which an alternative to originalism is sought. The answer to this question might seem obvious. The purpose of originalism is to tell us how to interpret the Constitu-

4. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 154-59 (1990).

5. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

6. *See id.* at 1254-55.

7. *See id.* at 1255-58.

8. *See, e.g.*, Perry, *supra* note 2; *cf.* BORK, *supra* note 4, at 162-63 ("[A]ll that a judge committed to original understanding requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That major premise is a principle or stated value that the ratifiers wanted to protect against hostile legislation or executive action.").

tion, and the purpose of an alternative would be to answer the same question. But the question how we ought to interpret the Constitution turns out to be ambiguous. This will become clearer if we imagine that the interpreter is a judge or a Justice of the Supreme Court.

The question how a judge should interpret the Constitution is most naturally treated as being, in the first instance at least, a legal question, along the lines of, "What are the legal principles establishing a judge's obligations in interpreting the Constitution if she is to follow the law?" We sometimes speak of judges as acting "lawlessly." Clearly, then, it is meaningful to ask how judges must interpret the Constitution to act other than lawlessly, or to decide cases in accordance with law.

If this is the question that originalism aims to answer, I think it is clear that at least the more robust versions are failures. Much constitutional adjudication is not originalist in any strong sense.[9] Precedent matters; considerations of feasibility and normative attractiveness count. Indeed, no one contends otherwise as a descriptive matter.

But description, the originalist may say, is irrelevant; it is impossible to get from a descriptive to a normative proposition—from an account of what judges do to a proposition about what it is right for them to do.[10] This familiar retort will not work, however. Recall my assumption that the purpose of originalism is to answer a legal question about the bounds of lawful and lawless judicial action. Questions of law bridge the "is" and the "ought"—in the strictly legal sense of the latter term; for propositions of law, though they are normative propositions of a kind, are necessarily grounded in social practice.[11] Any theory implying that nearly all judges and Justices regularly decide cases lawlessly, and that the public's long-term acceptance of their decisions as lawful implies no imprimatur of legality, is not only implausible on the surface, but deeply mistaken.

9. *See, e.g.*, BORK, *supra* note 4, at 19-128; Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727-39 (1988).

10. *See, e.g.*, BORK, *supra* note 4, at 155.

11. *See* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994); Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987).

Law, as H.L.A. Hart famously argued,[12] is largely a matter of convention.[13] The Constitution, for example, is law not because the Framers and ratifiers said so, but because we today accept it as such.[14] The same sort of acceptance that validates the Constitution as law is equally capable of validating, and indeed has validated, nonoriginalist principles of constitutional interpretation as lawful.

This argument brings me, at last, to a small point about alternatives to originalism: a judge who decided cases solely on the basis of robustly originalist principles would often be acting contrary to law. If the question is what alternative to originalism exists for someone who wants to decide constitutional questions lawfully, the unhelpfully vague but otherwise accurate answer would be that the person should consult existing interpretive conventions and surrounding social practices.[15]

I said, however, that the question how we should interpret the Constitution is ambiguous; it might not be a question that can ultimately be answered by reference to existing practice. The purpose of originalism might be to answer a question of ideal political theory: if everyone else would go along and agree to follow the same interpretive rules, what would be the best approach to constitutional interpretation—the approach that judges ought to follow—as measured against ultimate moral and political ideals?

But I find it hard to believe that the purpose of originalism is to supply a theory of this kind. If this is the purpose, the more robust forms of originalism again are clear failures. The principal reason has to do with the passage of time, the entrenchment of nonoriginalist practice, and the accretion of precedent. An originalism that made no concession to precedent and historical

12. *See* HART, *supra* note 11.

13. That it is *largely* a matter of convention should be agreed even by those who deny that it is *exclusively* a matter of convention. *See* Greenawalt, *supra* note 11, at 629.

14. *See* Frederick Schauer, *Amending the Presuppositions of a Constitution, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 152-53 (Sanford Levinson ed., 1995).

15. Having consulted existing interpretive conventions and surrounding social practices, the person would then need to develop a theory that "fit" the admittedly disputatious practice reasonably well, and because more than one theory may fit well enough, considerations of normative attractiveness likely would come into play. *See* RONALD M. DWORKIN, LAW'S EMPIRE 52-53 (1986); Fallon, *supra* note 5, at 1231-37.

It is implicit in what I have said already that robust versions of originalism do not fit our constitutional practice sufficiently well to count as theories *of* that practice, rather than as prescriptive theories aimed at its reform.

evolution would be a truly revolutionary philosophy that would sharply reduce the powers of both Congress and the national executive, dismember the modern administrative state, and radically curtail a variety of long-recognized constitutional freedoms.[16] If contemporary majorities want smaller government and less federal authority, both at home and abroad, they surely are entitled to pursue those ends through the ballot box. But it would be judicial arrogance of the highest order to overthrow the accreting lessons reflected in our evolving constitutional tradition.[17] With respect to rights, a sharp break with the evolving understandings reflected in precedent would represent a similar form of political or intellectual hubris masquerading as ancestor-worship.

In its moderate versions, originalism appears to differ from its competitors mostly as a matter of degree, and assessment is more difficult. But those versions of originalism that would try to accept existing nonoriginalist decisions, even though proclaiming that no more nonoriginalist decisions should be rendered, provide nearly certain recipes for confusion and arbitrariness—even more than exists now—in constitutional law.[18] Although I cannot pursue this point in detail, any scheme attempting to accept entrenched nonoriginalist doctrines on grounds of stare decisis, but to preclude the expansion of those doctrines, would generate a complex and interminable debate about how to draw lines between cases that admittedly come under the same principle, but differ along some other dimension, such as that of time or factual proximity to a controlling precedent. In light of the purpose of law to furnish a coherent set of comprehensible guides

16. *See* Monaghan, *supra* note 9, at 727-39.

17. It is too often overlooked that there is at best a *contingent* connection between originalism and judicial restraint and that a robust originalism, if it could be implemented, would call for a relatively unrestrained assault on the now-accepted powers of Congress and the national executive, both of which are democratically accountable. Moreover, it is at least an open question whether originalist inquiries would yield clear rules to cabin judicial review under a variety of the Constitution's rights-protecting provisions, or whether the language of rights reflected an understanding that constitutional enforcement requires moral judgment. *See, e.g.*, JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 23-30 (1980). If the latter, judges would be left to apply standards requiring a good deal of case-by-case judgment, concerning which reasonable disagreement could only be expected. If democracy or judicial restraint is the normative value that originalists wish to advance, it would promote intellectual clarity for them to develop a theory expressly aimed to serve such values instead of deploying originalism as a surrogate.

18. *See* J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 946-54 (1988).

for conduct, this seems to me an almost inherently dysfunctional enterprise.

This criticism brings me back to a preference for the kind of approach to constitutional interpretation that I referred to, but did not develop, earlier. In that alternative, which has much in common with approaches that might be termed "common-law-like"[19] or "Burkean,"[20] original understanding is relevant, but must be accommodated with precedent and considerations of prudence, feasibility, coherence with the contemporary landscape, and so forth.

With that mild and vague endorsement, I approach the end. Having devoted far more energy to critiquing the prescribed topic of "alternatives to originalism" than to sketching a substantive constitutional theory, I want to conclude by giving a fuller explanation of my reasons for having done so.

When the topic of "alternatives to originalism" is raised, the natural supposition is that opponents of originalism are being challenged to propose a set of substantive norms to guide constitutional interpretation. If they do so, however, the objection will quickly be put that the suggested norms are politically contestable, and the question then will be asked: is it not contrary to the notion of the rule of law for judges to impose their political values on popular majorities? In short, given the framing of the question, things immediately look grim for the proponent of an alternative to originalism.

In my view, however, originalists too often perpetrate a trick—and perhaps even a trick on themselves—in claiming to occupy a position above the substantive fray. If originalism is not, as I have argued it cannot be, a theory of what the law is, and if originalism is not, as I have claimed, an attractive ideal theory, then what is it?

It is, I think, perhaps most often a political or rhetorical stalking horse for a set of substantive positions with respect to a relatively narrow set of constitutional issues in the current age. In my view, those positions deserve to be debated on their substantive merits, and I would welcome such a debate. But talk about "originalism" should not be used to block or obfuscate substan-

19. *See* HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 77-123 (1990).

20. *See, e.g.*, Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

tive discussion of what is at stake. That is part of why I think originalism generally is not worth talking about and why the topic of "alternatives to originalism" seems to me as slanted as it is confused.