INTERPRETIVISM AND THE JUDICIAL ROLE IN A CONSTITUTIONAL DEMOCRACY: SEEKING AN ALTERNATIVE TO ORIGINALISM

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The approach of the various members of this Panel to the topic "Alternatives to Originalism" is almost a microcosm of the interpretive dilemma. In a certain sense, we can view ourselves as interpreters who have been given a governing text. Before giving you the governing text that today binds me, I must admit that I do not normally consider Federalist Society publications to be authoritative governing text. Nonetheless, to make a more general point about interpretation, I do so in this case. Thus, I take as my textual directive the subject of this Panel, "Alternatives to Originalism."

It is interesting, though perhaps not surprising, that even though the same "governing text" binds the panelists, each panelist approached his task differently. Frank Easterbrook interpreted his task to be to compare originalism to everything else. Basically, he dismissed everything else and was therefore left with originalism.[1]

Dick Fallon practiced a form of interpretative civil disobedience by suggesting something along the following lines (though of course, not in these exact words): "I am appealing to a higher law. Originalism is worthless, and I will not bother discussing it, no matter what my interpretive task was."[2] In contrast, Sandy Levinson took a definitional approach. As I understood him, he believes that, in a sense, everyone is an originalist, even though originalism is impossible.[3]

My task, as I view it, is an intentionalist, if not an originalist, one. In so doing, I asked myself: what did the drafters of our

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1. *See* Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479 (1996).

2. *See* Richard H. Fallon, Jr., *The Political Function of Originalist Ambiguity*, 19 HARV. J.L. & PUB. POL'Y 487 (1996).

3. *See* Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495 (1996). In relevant respects, Tom Merrill's approach is very similar to my own, so I do not have to view it differently. *See* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996).

topic intend by their directive to discuss alternatives to originalism? What did the drafters want me to discuss?

Of course, I could have walked down the hall at Northwestern and asked the Panel's "framers," Gary Lawson or Steven Calabresi, but that would have completely destroyed the illusion of the governing dead hand. Besides, I was very busy this week.

Prior to this Symposium, I saw signs around the Northwestern Law School saying, "Federalist Society's Originalism Conference: 36 speakers, no waiting." I am the thirty-sixth speaker out of thirty-six. It is a truly eminent list of speakers, causing me to predict that by the time I spoke, they undoubtedly will have talked out the whole normative value and practicality of originalism. I therefore surmised that the drafters wanted to direct me to say, "And now for something completely different."

Thus, I interpret my task, consistent with my understanding of the Symposium's "framers'" most likely intent, to be to begin my analysis with the assumption that originalism, for whatever reason, is to be excluded. Therefore, rather than discuss the merit of originalism, I must ask, "What do we do instead?"

In fashioning an alternative interpretive model, we should utilize Cass Sunstein's directive: "No approach to interpretation is self-justifying. Any system of interpretation needs a justification."[4] Before trying to justify a mode of interpretation, we need to inquire about the basic first principles of normative political theory which govern our political system.

It is not a controversial statement to suggest that the American system is a constitutional democracy. This is certainly not the only form of government our nation could have adopted. We could have adopted pure democracy. We could have adopted a monarchy. We could have adopted ideological totalitarianism. For that matter, we could have adopted anarchy, if only we could have gotten the anarchists together for an organizational meeting.

But our nation did not make any of these choices. Instead, we chose a constitutional democracy. I believe that constitutional democracy can be and has been defended as a normative matter of political theory, but at some point we need to move on. We need to proceed to what I refer to as "second level" theoretical

4. Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 311 (1996).

analysis, taking as a positivistic given our form of government. Thus, we must ask how we can develop ancillary methodologies and devices designed to assist achievement of those goals.

To illustrate, I employ a metaphor to the fifty-five miles-per-hour speed limit: it is not just a good idea, it is the law.[5] Unfortunately, we adhere to the precepts of constitutional democracy about as much as we have adhered to the fifty-five miles-per-hour speed limit. It is not hyperbolic to suggest that a large portion of modern constitutional scholarship ignores the adjective in the phrase, "constitutional democracy," and an equally large grouping ignores the noun in the same phrase. In viewing this debate, I have an emotive reaction similar to that of a Chicago Cub fan watching a Mets-Cardinal game: the fervent hope that somehow both will manage to lose. (And that, by the way, is the closest I will ever get to game theory.)

The central feature of a pure democracy is, of course, majority rule.[6] But although the Framers believed in democratic principles, they feared any unchecked power—even power lodged in the majority. Consequently, to limit the majority's power, the Framers established a constitutional form of democracy.[7] Through a written constitution, subject to stringent amendment procedures,[8] they limited certain governmental action, thereby protecting important values, principles, and rights from simple majoritarian control.[9]

Those scholars who ignore the noun in the phrase, "constitutional democracy" are primarily, though not exclusively, aligned with the political left.[10] These scholars effectively superimpose on the Constitution their own predetermined normative political values, for no apparent reason other than that they are their values. In doing so, they undermine the basic fundamental demo-

5. Recent legislative action notwithstanding, it is still the law in many States.

6. *See, e.g.*, Peter Bachrach, *Interest, Participation and Democratic Theory*, *in Participation in Politics*, 16 NOMOS 39, 41 (J. Roland Pennock & John W. Chapman eds., 1975) ("Democratic participation . . . is a process in which persons formulate, discuss, and decide public issues that are important to them and directly affect their lives.").

7. *See* Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 15 (1987).

8. *See* U.S. CONST. art. V.

9. *See* JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 52-55 (1984).

10. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). For a detailed critique of the work of these scholars, see Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994).

cratic notions of accountability, representationalism, self-determination, and all the values for which those principles stand. In effect, they hope to create a system of judicial philosopher-kings who are both unaccountable and unrepresentative, and can therefore superimpose their will on the public.

Many of these same scholars have taken this constitutional method of interpretation and extended it over into statutory interpretation. Even in the purely subconstitutional act of interpreting a statute, they have allowed the "interpreting" court to sit in judgment on the wisdom of the statute which they are only supposed to be interpreting.[11] To be sure, they use attractive terminology to describe what they are doing. They refer to it as "dynamic interpretation" or "practical reason."[12] Of course, these are also the people who characterize tax hikes as "revenue sharing" or "contributions." Whatever you call it, it is still picking our pockets.

In an important sense, then, these scholars ignore our system's basic underlying democratic values. On the other hand, another group of scholars, largely from the political right, ignore the adjective in the phrase, "constitutional democracy."[13] This group, in a question-begging manner, criticizes the Supreme Court for being antidemocratic in the exercise of the judicial review power.[14]

Our nation, however, is not a pure democracy. We live, rather, in a constitutional democracy. Our system derives from a governing document, framed in mandatory terms, subject to a difficult supermajoritarian amendment process.[15] I do not, by the way, consider myself an "Ackermanian," if that is the right term.[16]

11. *See* Jerry Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685, 1692 (1988) ("The judge as interpreter must consider how the constitutional order conceives of both the judicial and the legislative roles, as well as how those institutions are meant to interact."); *see also* United States v. Marshall, 908 F.2d 1312, 1334-35 (7th Cir. 1990) (Posner, J., dissenting) (explaining that the debate over textualism and practical reason in the constitutional milieu mirrors jurisprudential disputes over the role of the judiciary in cases involving statutory construction), *aff'd sub nom.* Chapman v. United States, 500 U.S. 453 (1991).

12. *See, e.g.*, William Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

13. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); Lino A. Graglia, *Do Judges Have a Policy-Making Role in the American System of Government?*, 17 HARV. J.L. & PUB. POL'Y 119, 119 (1994) (stating that "lawmaking by judges is obviously inconsistent with the most basic principles of the Constitution").

14. *See id.*

15. *See* U.S. CONST. art. V (providing for amendment of the Constitution).

16. "Ackermanian" refers to adherents of Bruce Ackerman's theories on how to amend the Constitution as posited in his book *We the People*. Ackerman argues that the Constitu-

We have not abandoned Article V of the Constitution, and the amendment process is still intact.[17] Until our nation experiences something approaching a revolutionary process in which we reject the governing document, the Constitution will remain the controlling document of our polity.

Thus, these scholars undermine our system when they suggest, without asking the initial constitutional question, that invalidation of majoritarian actions is undemocratic. If the majoritarian branches have violated the particular provisions of the countermajoritarian Constitution, then it is totally irrelevant that the Court's invalidation of those actions is "undemocratic."

Now, there are some people who seem to assume—and I really emphasize the word "assume," because I have never seen any analysis for this—that from an originalist perspective we will inexorably be led to this kind of differential, minimalist approach. I have not seen any evidence for this, and it seems counterintuitive. If the Framers were as much a group of democrats as this theory suggests, they certainly set up a rather bizarre governmental system, imposing all sorts of trip hammers on raw majoritarian action.[18] Indeed until the enactment of the Seventeenth Amendment[19] in 1913, state legislatures elected U.S. senators. This system hardly represented a commitment to pure democratic values. These scholars, therefore, are question-begging by attacking constitutional decisionmaking as undemocratic.

The difficult remaining question is: "What is the proper alternative model of constitutional decisionmaking?" In answering, we must recall that the constitutional decisionmaking process begins with the constitutional text. By that term, I do not necessarily refer to an originalist perspective on that text. The text is what

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tion can be amended by methods not found in Article V. Ackerman believes that the American people amended the Constitution twice through non-Article V methods by fighting the Civil War and by endorsing President Franklin D. Roosevelt's New Deal. *See* BRUCE A. ACKERMAN, WE THE PEOPLE (1991).

17. As proof of this, one need look no further than recent efforts to amend the Constitution by both the right and left sides of the political spectrum. In the 1970s, citizens of a liberal stripe advocated the Equal Rights Amendment. *See* JANET K. BOLES, THE POLITICS OF THE EQUAL RIGHTS AMENDMENT: CONFLICT AND THE DECISION PROCESS (1979). Even more recently, the 104th Congress attempted to send a Balanced Budget Amendment to the States for ratification. *See* Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons From the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENTARY 217 (1995).

18. In exercising judicial review, the judiciary enforces "the countermajoritarian norms embodied in the Constitution." Redish & Chung, *supra* note 10, at 851.

19. U.S. CONST. amend. XVII.

was ratified. People owe allegiance to the text, not to some underlying separate, distinct intent.[20]

It is true, of course, that the text is not always framed in ways that allow an interpreter to decide upon definitive interpretations. Often, the text is ambiguous, and often it is intentionally ambiguous.[21] It has been suggested that perhaps we should not let the dead hand of the past control us, and therefore we should not deem ourselves bound by the textual constraints give us by the Framers.[22] This argument has been employed as an attack on originalism, but it could be used as an attack on textualism also. I find the focus on the question whether the actual drafters of the document that one is interpreting have died to be a rather ghoulish irrelevancy. I have this image of somebody reading the obituaries every day. Finally, when the last drafter dies, he exclaims, "I thought he'd never go. Free at last!"

It is largely irrelevant to me whether those who draft a governing document are dead or alive—unless, of course, I am one of them. It is the document, from a purely positivistic perspective, that controls—that is, if you believe in the rule of law. This is the problem I have with Bruce Ackerman's approach. I find it tacitly a cynical, almost deceptive kind of analysis to say that we are ignoring Article V without admitting it and the fact that we basically have abandoned the amendment process.

The question remains, however, what do you do when the text does not give you an answer? Often, it will not. As Fred Schauer has said, "Textualism is like a painting. You don't know exactly what's going to go on the painting, but you know when you have gone off the canvas."[23] On the other hand, textualism would answer a lot more questions than just the extreme hypothetical of

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20. This view espouses the notion that interpretation does not entail discovering "legislative intent," but rather, what the law is. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J. concurring) (arguing that a court's role is to "interpret laws," not to "reconstruct legislators' intentions"); *In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.) ("Legislative history . . . may help a court discover [the law] but may not change the original meaning."); *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988) ("Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem.").

21. Some commentators argue that words are indeterminate in that they can have more than one plausible meaning. *See* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 42 (1985) ("If simply *reading* the Constitution the 'right' way were all the Justices of the Supreme Court had to do, the only qualification for the job would be literacy, and the only tool a dictionary.").

22. *See* Panel I, *Originalism and the Dead Hand*, 19 HARV. J.L. & PUB. POL'Y 243 (1996).

23. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414-23, 430-31 (1985).

three U.S. senators.[24] It would also tell us, for example, that there is no Dormant Commerce Clause.[25] It would tell us that enumerated powers have to serve as a meaningful limit. It would tell us that there is no equal protection limit on the federal government.

I should emphasize that I do not necessarily endorse these views as a matter of normative political theory. Actually, that is the point. The question that an interpreter of the Constitution asks herself must be different from the question that a legislator asks herself, or else we have collapsed the two into one process, with the unaccountable judicial process being stripped of its legitimacy within a largely democratic society. In effect, this is what I refer to as the "I-just-work-here" principle. Judges should be able to interpret the constitutional document in a coherent way, but are confined by both the text and principled interpretation. It is really only in this manner that we can assure that both the adjective and the noun in the phrase "constitutional democracy" are given adequate attention.

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24. This hypothetical illustrates that idea that there are easy cases in constitutional law in that the concerned parties know the answer without even consulting their lawyers. *See id.* One of these easy cases would be if a State attempted to send three senators to represent it in the United States Senate. Article I, Section 3 of the Constitution expressly provides that "[t]he Senate of the United States shall be composed of two Senators from each State . . . ." U.S. CONST. art. I, § 3, cl. 1. This language is so clear and definite that no two literate people could dispute the number of senators a State may have represent it in the United States Senate.

25. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 63-98 (1995).