WebMemo
Published by The Heritage Foundation
No. 2617
September 16, 2009

The Originalist Perspective

David F. Forte

Written constitutionalism implies that those who make, interpret, and enforce the law ought to be guided by the meaning of the United States Constitution—the supreme law of the land—as it was originally written. This view came to be seriously eroded over the course of the last century with the rise of the theory of the Constitution as a "living document" with no fixed meaning, subject to changing interpretations according to the spirit of the times.

In 1985, Attorney General Edwin Meese III delivered a series of speeches challenging the then-dominant view of constitutional jurisprudence and calling for judges to embrace a "jurisprudence of original intention." There ensued a vigorous debate in the academy, as well as in the popular press, and in Congress itself over the prospect of an "originalist" interpretation of the Constitution. Some critics found the idea too vague to be pinned down; others believed that it was impossible to find the original intent that lay behind the text of the Constitution. Some rejected originalism in principle, as undemocratic (though it is clear that the Constitution was built upon republican rather than democratic principles), unfairly binding the present to the choices of the past.

As is often the case, the debate was not completely black and white. Some nonoriginalists do not think that the Framers intended anything but the text of the Constitution to be authoritative, and they hold that straying beyond the text to the intentions of various Framers is not an appropriate method of interpretation. In that, one strain of originalism agrees. On the other hand, many prominent nonoriginalists think that it is not the text of the Constitution per se that ought to be controlling but rather the principles behind the text that can be brought to bear on contemporary issues in an evolving manner.

Originalism, in its various and sometimes conflicting versions, is today the dominant theory of constitutional interpretation. On the one hand, as complex as an originalist jurisprudence may be, the attempt to build a coherent nonoriginalist justification of Supreme Court decisions (excepting the desideratum of following *stare decisis*, even if the legal principle had been wrongly begun) seems to have failed. At the same time, those espousing originalism have profited from the criticism of nonoriginalists, and the originalist enterprise has become more nuanced and self-critical as research into the Founding period continues to flourish. Indeed, it is fair to say that this generation of scholars knows more about what went into the Constitution than any other since the time of the Founding. To paraphrase Thomas Jefferson, in a significant sense "we are all originalists" now.

This is true of both "liberal" and "conservative" judges. For example, in *United States Term Limits, Inc. v. Thornton* (1995), Justices John Paul Stevens

This paper, in its entirety, can be found at:
www.heritage.org/Research/Thought/wm2617.cfm

Produced by the B. Kenneth Simon
Center for American Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

and Clarence Thomas engaged in a debate over whether the Framers intended the Qualifications Clauses (Article 1, Section 2, Clause 2 and Article I, Section 3, Clause 3) to be the upper limit of what could be required of a person running for Congress. In *Wallace v. Jaffree* (1985), Justice William H. Rehnquist expounded on the original understanding of the Establishment Clause (Amendment I), which Justice David Souter sought to rebut in *Lee v. Weisman* (1992). Even among avowed originalists, fruitful debate takes place. In *Mclntyre v. Ohio Elections Commission* (1995), Justices Thomas and Antonin Scalia disputed whether the anonymous pamphleteering of the Founding generation was evidence that the free speech guarantee of the First Amendment was meant to protect such a practice.

Originalism is championed for a number of fundamental reasons. First, it comports with the nature of a constitution, which binds and limits any one generation from ruling according to the passion of the times. The Framers of the Constitution of 1787 knew what they were about, forming a frame of government for "ourselves and our Posterity." They did not understand "We the people" to be merely an assemblage of individuals at any one point in time but a "people" as an association, indeed a number of overlapping associations, over the course of many generations, including our own. In the end, the Constitution of 1787 is as much a constitution for us as it was for the Founding generation.

Second, originalism supports legitimate popular government that is accountable. The Framers believed that a form of government accountable to the people, leaving them fundamentally in charge of their own destinies, best protected human liberty. If liberty is a fundamental aspect of human nature, then the Constitution of 1787 should be defended as a successful champion of human freedom. Originalism sits in frank gratitude for the political, economic, and spiritual prosperity midwifed by the Constitution and the trust the Constitution places in the people to correct their own errors.

Third, originalism accords with the constitutional purpose of limiting government. It understands the several parts of the federal government to be creatures of the Constitution, and to have no legitimate existence outside of the Constitution. The authority of these various entities extends no further than what was devolved upon them by the Constitution." [I]n all free States the Constitution is fixd," Samuel Adams wrote, "& as the supreme Legislative derives its Power & Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation."

Fourth, it follows that originalism limits the judiciary. It prevents the Supreme Court from asserting its will over the careful mix of institutional arrangements that are charged with making policy, each accountable in various ways to the people. Chief Justice John Marshall, overtly deferring to the intention of the Framers, insisted that "that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature." In words that judges and academics might well contemplate today, Marshall said,

> Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if theywere to be used as the instruments, and the knowing instruments, for violating what they swear to support! (*Marbury v. Madison*)

Fifth, supported by recent research, originalism comports with the understanding of what our Constitution was to be by the people who formed and ratified that document. It affirms that the Constitution is a coherent and interrelated document, with subtle balances incorporated throughout. Reflecting the Founders understanding of the self-motivated impulses of human nature, the Constitution erected devices that work to frustrate those impulses while leaving open channels for effective and mutually supporting collaboration. It is, in short, a remarkable historical achievement, and unbalancing part of it could dismantle the sophisticated devices it erected to protect the peoples liberty.

Sixth, originalism, properly pursued, is not result-oriented, whereas much nonoriginalist writing is patently so. If evidence demonstrates that the Framers understood the commerce power, for example, to be broader than we might wish, then the originalist ethically must accept the conclusion. If evidence shows that the commerce power was to

The Heritage Foundation LEADERSHIP FOR AMERICA

be more limited than it is permitted to be today, then the originalist can legitimately criticize governmental institutions for neglecting their constitutional duty. In either case, the originalist is called to be humble in the face of facts. The concept of the Constitution of 1787 as a good first draft in need of constant revision and updating—encapsulated in vague phrases such as the "living Constitution"—merely turns the Constitution into an unwritten charter to be developed by the contemporary values of sitting judges.

Discerning the Founders original understanding is not a simple task. There are the problems of the availability of evidence; the reliability of the data; the relative weight of authority to be given to different events, personalities, and organizations of the era; the relevance of subsequent history; and the conceptual apparatus needed to interpret the data. Originalists differ among themselves on all these points and sometimes come to widely divergent conclusions. Nevertheless, the values underlying originalism do mean that the quest, as best as we can accomplish it, is a moral imperative.

How does one go about ascertaining the original meaning of the Constitution? All originalists begin with the text of the Constitution, the words of a particular clause. In the search for the meaning of the text and its legal effect, originalist researchers variously look to the following:

- The evident meaning of the words.
- The meaning according to the lexicon of the times.
- The meaning in context with other sections of the Constitution.
- The meaning according to the words by the Framer suggesting the language.
- The elucidation of the meaning by debate within the Constitutional Convention. The historical provenance of the words, particularly their legal history.
- The words in the context of the contemporaneous social, economic, and political events.
- The words in the context of the revolutionary struggle.
- The words in the context of the political philosophy shared by the Founding generation, or by the particular interlocutors at the Convention.
- Historical, religious, and philosophical authority put forward by the Framers.
- The commentary in the ratification debates.
- The commentary by contemporaneous interpreters, such as Publius in *The Federalist*.
- The subsequent historical practice by the Founding generation to exemplify the understood meaning (e.g., the actions of President Washington, the First Congress, and Chief Justice Marshall).
- Early judicial interpretations.
- Evidence of long-standing traditions that demonstrate the peoples understanding of the words.

As passed down by William Blackstone and later summarized by Joseph Story, similar interpretive principles guided the Framing generation itself. It is the legal effect of the words in the text that matters, and its meaning is to be determined by well-known and refined rules of interpretation supplemented, where helpful, by the understanding of those who drafted the text and the legal culture within which they operated. As Chief Justice Marshall put it,

> To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; — is to repeat what has been already said more at large, and is all that can be necessary. (*Ogden v. Sounders*, Marshall, C. J., dissenting, 1827)

Marshall's dialectical manner of parsing a text, seeking its place in the coherent context of the document, buttressed by the understanding of those who drafted it and the generally applicable legal principles of the time are exemplified by his classic opinions in *Marbury v. Madison* (1803), *McCulloch v. Maryland* (1819), *Gibbons v. Ogden* (1824), and *Barron v. Baltimore* (1833). Both

Marshalls ideological allies and enemies, such as Alexander Hamilton and Thomas Jefferson, utilized the same method of understanding.

Originalism does not remove controversy, or disagreement, but it does cabin it within a principled constitutional tradition that makes real the Rule of Law. Without that, we are destined, as Aristotle warned long ago, to fall into the "rule of men."

—David F. Forte is Professor of Law at Cleveland State University and Senior Visiting Fellow at the Center on Religion and the Constitution at the Witherspoon Institute. He is Senior Editor of The Heritage Guide to the Constitution*, a clause-by-clause analysis of the Constitution of the United States, from which this selection is taken.*