

ORIGINALISM AND THE BILL OF RIGHTS

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I shall begin with a disclaimer. I am a separation of powers scholar. I do not think of myself as a Bill of Rights scholar. I study the Constitution of 1787. My bicentennial was four years ago. This topic for me is something new.

In my separation of powers jurisprudence, I often am described by those who have read my work as an originalist.¹ I do not necessarily describe myself that way, but that label will do for the time being. I am something of an originalist, not because I believe that the Founders wanted things that way, but because, for some of the reasons that Gary Lawson² and Lino Graglia³ have stated, and for some other reasons that I will not bother to explain just now, originalism—at least the right form of originalism—is the only methodology through which courts can solve both the problems of determinacy and justification that Gary Lawson mentions.⁴

There are many ways of solving the problems of determinacy; there are many ways of solving the problems of justification. There are not, however, many ways to solve both simultaneously. Both are solved when courts are able to say that they are enforcing the understanding under which particular constitutional provisions were adopted. I make no claim that the understanding thereby enforced will always be a good thing, only that the judicial decisions that enforce it are more legitimate than those that do not.⁵

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1. See, e.g., Erwin Chemerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review*, 66 B.U. L. REV. 47, 50 (1986) ("Professor Carter concludes that because the Constitution is clear as to the manner in which government should be structured and operated, the Court should follow an originalist approach in deciding cases related to the political Constitution."); see also E. Donald Elliott, *Why Our Separation of Powers Jurisprudence is so Abysmal*, 57 GEO. WASH. L. REV. 506 (1989).

2. See Gary S. Lawson, *An Interpretivist Agenda*, 15 HARV. J.L. & PUB. POL'Y 157, 158-60 (1992).

3. See Lino A. Graglia, *How Should Courts Interpret the Bill of Rights?*, 15 HARV. J.L. & PUB. POL'Y 149, 153-55 (1992).

4. See Lawson, *supra* note 2, at 153-55.

5. For my extended justification for this position, see, for example, Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Stephen L. Carter *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719.

Applying this methodology to the Bill of Rights, however, raises some interesting problems: What type of originalism are we talking about when we talk about the Bill of Rights? Are there unusual hermeneutical problems here—problems of interpretation that are different from those flowing from the structural provisions of the Constitution that I ordinarily study? My tentative conclusion is that there are indeed some different problems. The research project that Gary Lawson has laid out for us,⁶ and that Lino Graglia has in some ways implicitly endorsed,⁷ may face some special difficulties when one looks at the Bill of Rights. The reason has nothing to do with the notion that, “Oh, well, the world is a complex place and we need lots of new rights.” The reason flows from the other side of my own scholarship; it flows from problems involving the 1787 Constitution—the structure of government, the separation of powers, and the system of checks and balances that the Constitution sets out.

In the course of my years of studying the 1787 Constitution, I have occasionally encountered references to the Bill of Rights. One can scarcely read the history of the ratification of the 1787 Constitution without coming across references to a “bill of rights,” usually an argument about whether there should be rights specified in the Constitution or not.⁸ There were, in 1787, two principal arguments that were pressed against the addition of a bill of rights for the Constitution. The arguments are both quite enlightening, and they help point to the problems we face in trying to apply the Bill of Rights today.

One objection was the very explicit concern that if a bill of rights were added to the Constitution, future generations less wise than the Founders would believe that only those rights enumerated in the bill are protected against government intrusion.⁹ So we begin with this problem: When one sets out to interpret the Bill of Rights, what exactly is one aspiring to do?

6. See Lawson, *supra* note 2, at 161.

7. See Graglia, *supra* note 3, at 153-55.

8. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587-88 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS]; CLINTON ROSSITER, 1787: THE GRAND CONVENTION 226-27, 259, 284 (Norton 1987).

9. See, e.g., THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed. 1961); James Wilson, Speech in the Pennsylvania Convention (Nov. 28, 1787), in 3 RECORDS, *supra* note 8, at 143-44; see also James Madison, Speech to the House Explaining His Proposed Amendment (1789), in THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 51 (Randy E. Barnett ed., 1989).

Is one aspiring to assuage the fears of opponents of the Bill of Rights that we will consider those rights to be *all* of the rights protected against the government? Or is one simply trying to say that because these are all the rights that are stated, these are all the rights that we will protect—thereby walking into exactly the trap against which the Founders warned in the debate about ratification?

We can, if we wish to, walk into that trap, and there are even arguments in favor of doing so. For example, one might argue that because we cannot possibly know what other rights the Founders might have had in mind, we should just enforce the ones that we know, and trust the rest to the good sense of the people.¹⁰ This is a perfectly reasonable argument. It may be a persuasive argument. It is not, however, an originalist argument because it has very little to do with the original understanding of the purpose of the Bill of Rights.

My next point about the problems of understanding across the generations deals with what has happened to the power of the federal government since 1787. Indeed, the balance of my remarks will be about the Bill of Rights as a check on federal power, not state power. The second argument made against the adoption of a bill of rights was that the federal government did not have enough power to make the Bill of Rights necessary.¹¹ A number of delegates said, for instance, that there was no need to adopt a special provision protecting freedom of the press because the federal government had not been delegated any power to regulate the press.¹² Moreover, if such a provision were to be adopted, the implication for future generations would be that the federal government has powers beyond those expressly delegated to it, which is exactly what the Founders were trying to guard against.¹³

10. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

11. See, e.g., JAMES IREDELL, ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION (1788), reprinted in 2 BERNARD SCHWARTZ, *ROOTS OF THE BILL OF RIGHTS* 449 (1971). James Iredell argued:

[A]fter defining the powers that are to be exercised, to say that [the government] shall exercise no other power (either by a general or particular enumeration) would seem to me both nugatory and ridiculous. As well might a Judge when he condemns a man to be hanged, give strong injunctions to the Sheriff that he should not be beheaded.

12. See, e.g., 2 RECORDS, *supra* note 8, at 617-618.

13. See THE FEDERALIST No. 84, *supra* note 9, at 513. Arguing against the inclusion of a bill of rights, Alexander Hamilton wrote:

This second assumption of the Founders, however, has utterly collapsed. We live in a world in which virtually no one—certainly no one who wants to be taken seriously as a scholar, as an intellectual, or as a private citizen—considers the federal government to be a government of limited and delegated powers. The federal government is conceded, even by the courts, to possess a broad plenary authority to do pretty much anything it likes so long as it does not tread on some particular right that can be found somewhere else in the Constitution.¹⁴ I am not evaluating this development, nor am I suggesting that this development is bad. Rather, I only suggest that it makes the world in which we must apply the Bill of Rights very different from the Founders' world. I am not referring to social, political, and economic changes. I mean that it is a different *constitutional* world.

The Bill of Rights was written and understood in a world in which the federal government was expected to have relatively little power and to exercise it rarely, in which the Congress was expected to be in session occasionally rather than constantly, in which the President was not expected to have very much to do other than occasionally fight wars and receive foreign ambassadors. We live in a world in which none of that is true, and the question then is what the originalist judge does when faced with the problem of applying the Bill of Rights in such a world. I will not answer that question by proposing a theory. Instead, I will suggest that many of the decisions that give an expansive reading to various provisions of the Bill of Rights—expansive as against federal power—may plausibly be understood as an

I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this account would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

14. Cf. *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding the enforcement of a congressional prohibition of racial discrimination against a small restaurant on the grounds that all segregated restaurants worked to inhibit interstate commerce); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding congressional power in Title II of the Civil Rights Act of 1964 to prohibit racial discrimination in places of public accommodation); *United States v. Darby*, 312 U.S. 100, 115 (1941) (“[Whatever] their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.”).

effort to return to an original understanding under which the federal government has limited rather than extensive power to regulate in as many areas as it may please.

Let me mention two areas in which the Supreme Court has handed down very controversial decisions that are sometimes thought indefensible on originalist grounds. In presenting them I am suggesting “what was really going on,” in the sense in which scholars use the phrase—which is to say, we could tell a story that went this way, even though we do not necessarily believe that anybody actually thought this way. I will tell a story to justify those decisions using a checks-and-balances approach rather than the “emanations from the penumbras” approach that Professor Graglia discussed.¹⁵

First, criminal procedure is an area in which the Supreme Court has handed down any number of decisions that are very difficult, I gather, for originalists to comprehend, let alone justify. I will not pretend to know the original understanding of the Fourth¹⁶ or Fifth Amendment¹⁷—not only not in detail, but not at all. I do know, however, that they certainly were not understood at the time the Constitution was adopted to mean that the federal government would be in the habit of enacting many criminal statutes—quite the contrary. Criminal law was basically the province of the States. There were some areas in which the federal government was expected to have a criminal law. Many of the crimes that one finds discussed in the debates involve acts that occur on the high seas,¹⁸ which is perfectly understandable when you realize that the United States was largely a maritime nation at the time. Likewise, many of the debates, especially the ones in the ratification conventions, had to do with commercial and economic relations among these sovereign States that were banding together, or commercial and economic relations with foreign nations.¹⁹

So the federal government was not expected to have very many criminal laws; indeed, it was not until the middle of the

15. See Graglia, *supra* note 3, at 149.

16. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects . . . shall not be violated”).

17. See U.S. CONST. amend. V (“No person shall be . . . compelled . . . to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law”).

18. See, e.g., 2 RECORDS, *supra* note 8, at 312, 315, 316, 320.

19. See, e.g., THE FEDERALIST No. 11 (Alexander Hamilton).

Twentieth Century that the Supreme Court made it clear that the federal government can adopt criminal laws on just about any subject.²⁰ Under what authority did the Court do so? Under the general police power—we call it the Commerce Clause,²¹ but it is really the police power—the power the federal government shares with the States to do anything it pleases so long as it does not trample on rights. The Commerce Clause is the source of the federal government's power to enact criminal legislation banning just about anything it pleases.²² Although I perceive both substantive constitutional and policy problems with some of the Fourth and Fifth Amendment procedural protections that the Court has adopted, these protections, at least insofar as they limit federal criminal prosecutions, may largely be responses to an explosive growth in federal criminal power far beyond any authority the Framers thought they were delegating to the national government.

The second difficult area for originalists focuses on *Bolling v. Sharpe*.²³ In *Bolling*, the companion case to *Brown v. Board of Education*,²⁴ the Supreme Court announced, in effect, that all these years litigating under the Fourteenth Amendment were unnecessary because the Fifth Amendment had banned racial segregation by the federal government all along.²⁵ *Bolling* was an important moral statement by the Court, but no one pretends that *Bolling* is defensible on originalist grounds, and it may just be a decision that makes no constitutional sense at all. One way of explaining it, however, is by following an originalist, checks-and-balances approach. Because the Founders understood that

20. See, e.g., *Perez v. United States*, 402 U.S. 146, (1971) (upholding the application of the federal Consumer Credit Protection Act to local loan-shark racket); *United States v. Sullivan*, 332 U.S. 689 (1948) (affirming conviction of pharmacist under federal Food, Drug, and Cosmetic Act for failing to affix required warning label on pill boxes).

21. See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

22. See, e.g., *United States v. Harris*, 460 F.2d 1041 (5th Cir. 1972), cert. denied, 409 U.S. 877 (1972) (upholding the application of Organized Crime Control Act of 1970 to local gambling); *United States v. Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1979), aff'd without opinion, 605 F.2d 1199 (3d Cir. 1979), cert. denied, 444 U.S. 1072 (1980) (upholding application of federal RICO statute to local racketeering).

23. 347 U.S. 497 (1954).

24. 347 U.S. 483 (1954).

25. I drop a footnote in response to one of Professor Graglia's footnotes. See Graglia, *supra* note 3, at 153, n.10. Some people in the United States noticed a bit of racial tension for several hundred years before the courts began ordering anybody to be hired or admitted on the basis of race.

the States possessed a general police power and the federal government did not, one could plausibly say, and correctly so, that the States were presumed to have much greater freedom of action than the federal government. *Bolling* can then be understood in the following sense: If *Brown* was correctly decided, it limits the power of the States to treat their citizens in a certain way. To restore the original understanding of a federal government of limited and delegated powers, we must then put at least as much restriction on the federal government as we have just put on the States. That is one way of explaining it. It may not sound very good, and perhaps one cannot write a judicial opinion that way. I am just trying to tell a story about what might have occurred.

I do not belabor these examples in order to claim that this argument is correct. My argument does not rest on whether one agrees with any of these decisions. I only suggest that the originalists' problem when confronting the Bill of Rights is more complex than simply ascertaining a clause's original "meaning." The original vision of the balance of power between the federal government and the citizens who delegated authority to the federal government through the States has already been corrupted. One might nevertheless insist on limiting the Bill of Rights to the rights designed to protect people against a small federal government, but that would surely upset the balance from what the Framers expected the Bill to be.

If the courts are up to what I suggest, that, too, is originalism. One may like it or one may dislike it, but it is really the same animal.

