

ORIGINALISM AS AN "ISM"

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I. INTRODUCTION

Outside the comfortable confines of the Federalist Society, originalism is far from fashionable. Indeed among constitutional law scholars at elite schools, the idea of being an originalist is tantamount to being some sort of intellectual Luddite. As Robert Bork discovered at his confirmation hearings, those who are originalists lack intellectual respectability. And, as Judge Bork noted subsequently, "[i]n the legal academies in particular, the philosophy of original understanding is usually viewed as thoroughly passé, probably reactionary, and certainly—the most dreaded indictment of all—'outside the mainstream.'"¹ For this reason alone, particularly because so many Federalists are originalists, it seems to me to be a good idea to address the issue of originalism broadly rather than simply arguing that it produces desirable results in particular cases.

The purpose of this Article is to accomplish two objectives. First, I want to make the point that despite the professed antipathy for originalism, originalism is not nearly as rare as one might think. Indeed, I will argue that the very constitutional scholars who decry originalism most loudly rush to use originalist arguments when they serve their purposes.

The second goal of this essay is to make the point that the basic pragmatic defense of originalism is highly problematic. The pragmatic defense of originalism is that it avoids the problem that judges will assert their own vision of the good as law. Because constitutional interpretations from the originalist position are complex, difficult, and subject to various interpretations by well-meaning scholars, the danger of willfulness exists simply because judges will be tempted to put their hands on the scales of justice to generate outcomes that they favor.

It is important to observe at the outset that, at least in my view, constitutionalism is, of course, an "ism" like socialism or fascism

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1. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990). Bork went on to note that the fact that originalists are considered outside of the mainstream "says more about the lamentable state of the intellectual life of the law, however, than it does about the merits of the theory." *Id.*

or communism or, more happily, capitalism, in the sense that it refers to a philosophical orientation that relates to social ordering, a commitment to a hierarchical approach to law in which the interpretation of the Constitution is considered to trump other more transient values and norms. In sum, then, originalism is defensible not because it restrains judges completely, or even well, but because it restrains judges better than alternative methods of judging. The point is that defenders of originalism give originalism a bad name by suggesting that originalism is a panacea for the problems of judicial willfulness and overreaching. It is not. Rather, originalism is defensible because, despite its myriad imperfections, it is vastly superior to alternative methods for deciding constitutional cases in a constitutional system of divided, and separated powers.

Turning to Lillian BeVier's remarks about Gerald Gunther,² I think Gunther has it absolutely right when he argues that judicial review is not a natural or inevitable outgrowth of constitutionalism. That is to say, it is perfectly possible to have a Constitution without judicial review because it is possible to have a government in which there is a strong norm that the government cannot exceed its constitutional powers. But that does not answer the question which *institution* is to decide whether the government has exceeded its constitutional powers and when there is a conflict with the Constitution.

But to me, although Gunther is right about this, he is asking the wrong question. The fact is that we live in a post-*Marbury v. Madison*³ age, in which judicial review is a well-settled matter of constitutional law. In this environment, the issue is whether originalism is desirable. That is the argument to which this Article now turns.

II. ARGUMENTS AGAINST ORIGINALISM

The basic argument against originalism is that it cannot be done because it is impossible to avoid the temptation to twist the constitutional text to meet one's own needs or what one perceives to be the needs of society in changing times and circumstances. Alternatively, it generally is assumed that originalism is impossible because the original document, either standing alone

2. See Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283 (1996).

3. 5 U.S. (1 Cranch) 137 (1803).

or supplemented by contemporaneous historical sources, simply does not generate answers to modern legal questions of constitutional interpretation.

The example of abortion comes to mind in this context. Of course the Constitution does not address the issue directly. To adjudicate the constitutionality of a statute limiting abortion, one must have a theory of constitutional interpretation. Robert Bork's originalist theory of constitutional interpretation requires that judges "find the meaning of a text—a process which includes finding its degree of generality, which is part of its meaning—and to apply that text to a particular situation"⁴ However, Bork recognizes that finding the appropriate level of generality to be used to resolve a particular problem is itself not merely difficult; it involves a contextual approach to the constitutional analysis. He writes:

With many if not most textual provisions, the level of generality which is part of their meaning is readily apparent. The problem is most difficult when dealing with the broadly stated provisions of the Bill of Rights. . . . [A] judge should state the principle at the level of generality that the text and historical evidence warrant.⁵

But even Bork has trouble applying his interpretive rule that the Constitution must be interpreted in its historical context. From a historical perspective, there is no doubt that the Equal Protection Clause⁶ was drafted to give equal legal rights to blacks.⁷ But does Bork's historical perspective mean that the Equal Protection Clause applies only to blacks, in which case discrimination against whites would be perfectly acceptable? He says no, on the grounds that the Fourteenth Amendment states, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁸ Because the language of the amendment refers to "persons" rather than blacks, Bork reasons that the drafters of the amendment were attempting to achieve racial equality.⁹

4. BORK, *supra* note 1, at 149.

5. *Id.*

6. See U.S. CONST. amend. XIV.

7. See BORK, *supra* note 1, at 180.

8. U.S. CONST. amend. XIV.

9. See BORK, *supra* note 1, at 149.

The point here is that originalism is not nearly so determinate as its most vocal proponents would suggest. Sophisticated originalists, like Judge Bork, readily admit to the indeterminacy of an originalist approach, even as to simple matters such as the constitutionality of reverse discrimination under the Fourteenth Amendment. The point here is that an originalist cannot credibly claim that his approach is superior because it provides perfect clarity, or even that it constrains judges. After all, if the originalist approach is indeterminate, willful judges will be able to use this indeterminacy to justify whatever results they want on originalist grounds.

Moreover, it seems clear that there is something much worse about willful originalism than other sorts of outcome-oriented judging. This is because other sorts of outcome-oriented judging are more honest. Take, for example, Laurence Tribe. His approach to constitutional adjudication is almost entirely results-oriented. But at least he is honest about it, more or less. For example, in addressing abortion and other issues for which there is a result that Tribe clearly wants to reach, Tribe derives his so-called "antidomination principle," which "finds" in the Fourteenth Amendment the notion that the Framers generally intended "to break down legally created or legally reenforced systems of subordination that treat some people as second-class citizens."¹⁰

Tribe at least is being honest—or transparent—in the imposition of his own principles as constitutional values. He thinks it is a bad idea for women to be subordinated, and that laws protecting unborn children do just that. Tribe then translates this view of the good into a constitutional norm. But Tribe does more than this. Like Bork, Tribe tries to maintain fidelity to the Framers' original understanding of the Constitution by tying his argument to the Thirteenth Amendment's concept of involuntary servitude. Tribe then concludes (I am not making this up) that this supports a constitutional right to abortion:

To give society—especially a male-dominated society—the power to sentence women to childbearing against their will is to delegate to some a sweeping and unaccountable authority over the lives of others. . . . Even a woman who is not pregnant

10. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1515 (2d ed. 1988).

is inevitably affected by her knowledge of the power relationships thereby created.¹¹

The point here is not that Tribe's bizarre attempt to ground his personal vision of the good in the Framers' original understanding is convincing. Rather, the point is that once judicial review becomes a feature of a legal system, as it has in the United States, there is a danger that the constitutional text will be transformed to coincide with the political interests of whoever is interpreting the document. Moreover, the people doing the constitutional manipulation will lay claim to the originalist mantle, as Tribe has done.

The reason this manipulation is possible is because all mechanisms of constitutional interpretation—including Judge Bork's originalism—require that judges at least should "expound" the law made by the Framers.¹² But as Judge Bork readily admits, expounding on the meaning of the Constitution means declaring what its meaning is. And it is not enough to say that a judge is bound by prior decisions, because, in the most difficult cases, there is no applicable precedent. And even when there is a direct precedent, in our post-Warren and post-Brennan court era, there is no reason to think that the available precedent will reflect the Framers' intentions.

III. THE GRAVITATIONAL PULL OF ORIGINALISM

Another way of looking at the analysis presented above is that it implies that originalism exerts a very strong gravitational pull on constitutional scholarship and adjudication. In fact, it may be the case that the schism between the originalists and the non-originalists is not really quite so great.

The nonoriginalists will say, "You know, the results generated by originalism are bad somehow in this context, so we're not going to use them because we have to have a living Constitution that evolves and changes to meet changing circumstances." But the implication of this analysis is that the original doctrine has undergone, by choice, by necessity, or perhaps by subterfuge, a variety of permutations so the current incarnation of this document differs in their view in important ways from the first. But still the current incarnation is derived from the first incarnation.

11. *Id.* at 1354.

12. See BORK, *supra* note 1, at 154.

Moreover, I do not believe that any nonoriginalist or critical-legal-studies proponent would deny this, which means that we are all originalists, at least to some extent. The only question is one of degree, which brings up the next question, the one that the nonoriginalists have raised, which is that originalism is not particularly useful because it does not really constrain judges. In fact, it is really bad, the other side would argue, because not only does it fail to constrain judges, it allows judges to do whatever they want under the *guise* of being constrained by this seemingly neutral doctrine called originalism. And in my view, the most pernicious form of this argument is the one made by Ronald Dworkin, who seems to say that originalism is no good, because it is not an absolute constraint on judges.¹³

In his very interesting essays in the *New York Review of Books*, Dworkin bashes Bork's brand of originalism by parading out a series of examples in which Bork's approach would yield indeterminate or even willfully imposed results.¹⁴ The problem with this analysis, in my view, is that it succumbs to a fallacy first noted by Ronald Coase, and characterized by Harold Demsetz as the "Nirvana" form of analysis.¹⁵ In other words, it is not enough to say that originalism does not perfectly constrain policymakers. The critical question is whether originalism constrains policymakers better than the next best alternative.

For some variance of originalism to prevail, all one has to show, and I think this is more or less consistent with what Lillian BeVier was saying in her remarks,¹⁶ is that originalism acts as a partial constraint. That is, it is a better constraint than the open-ended alternatives most often advanced by the critics of originalism. In other words, the best defense of some kind of originalism is that it constrains, checks, and guides judges better than these other alternatives, which do not even try to limit the power of judges.

Finally, we ought to recognize that people on the other side do not like originalism for the same reason that originalists do not like judicial activists. And the reason for that is because the other

13. See Ronald Dworkin, *The Forum Principle*, 56 N.Y.U. L. REV. 469, 471-76 (1981).

14. See Ronald Dworkin, *The Bork Nomination*, N.Y. REV. BOOKS, Aug. 13, 1987, at 3; Ronald Dworkin, *From Bork to Kennedy*, N.Y. REV. BOOKS, Dec. 17, 1987, at 36; Ronald Dworkin, *Reagan's Justice*, N.Y. REV. BOOKS, Nov. 8, 1984, at 27.

15. See Ronald Coase, *Discussion*, 54 AM. ECON. REV. (Papers & Proc.) 194-97 (1964); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON.

16. See BeVier, *supra* note 2.

side finds the positions, the substantive positions, generated by this method of interpretation to be odious.

That is to say, if you look at an originalist position in the Constitution, one must go back and observe the basic perspectives of the Framers. They strongly believed in private ownership and free enterprise. They constructed the separation of powers, the system of checks and balances, and judicial review to protect things like property rights.¹⁷ At bottom, that is what this debate is about, and originalists ought to be honest about it, just as the nonoriginalists ought to be honest about the results-oriented approach of their positions.

The basic arguments in favor of judicial review stem from the observations that judges are supposed to be independent, that they are supposed to be insulated from the vagaries of interest group pressures and from the push and pull of the day-to-day political process. This sort of political insulation, which is an undeniable element of the fundamental structure of the U.S. Constitution must be rendered compatible with an originalist interpretation. It is certainly incompatible with the notion that the Constitution is a "living document" that is supposed to evolve to reflect current attitudes and prejudices. After all, if you really want the Constitution to be dynamic, why do you need judges to be independent, where they are free to reject the will of the people? Thus, Bork's brand of originalism, which relegates the federal courts to an extremely passive role vis-à-vis Congress, seems incompatible with the basic structure of government established by the Framers. The U.S. Constitution emphatically separates the judicial role from the legislative role and makes the judiciary independent—presumably for a reason.

Put another way, the stability norm for having an independent judiciary is inextricably related to the idea of originalism. Similarly, the basic criteria that everybody—from Tribe to Bork—applies to the selection criteria by which we choose judges is fundamentally originalist. These people, I suspect, will disagree about who meets that selection criteria, but these people all agree that we ought to look for good lawyers, people with judicial temperament, people who are able to reason well using common law methodology. This means that judges are supposed to be

17. See THE FEDERALIST No. 10 (James Madison).

able to do legal research, to treat like cases alike, and above all, to be able to recognize and distinguish applicable precedents.

Now, these are not the selection criteria that we would use for selecting judges if we were not originalists of some kind. If we were not originalists, if we were going to be true activists for a particular political ideology, why not just pick the best philosopher or the best economist that you can find to do the job of applying the Constitution to changing norms of fairness, or to changing economic conditions? Why does everybody seem to agree that we want lawyers to be judges, unless we are all originalists?

So basically my idea is that judicial review is extremely difficult to justify in our system without some manifestation of originalism. In sum, we are all originalists after a fashion. This is because the very act of engaging in constitutional interpretation, whether by judges or law professors or legislators, is the act of being engaged in the process, however abstract, of figuring out what the Framers' wishes were. In engaging in judicial review, a judge is recognizing that the Constitution is the supreme law of the land, an idea that is only possible from an originalist point of view.

True, those who embrace the idea of a living Constitution and who purport to reject the concept, much less the teachings, of originalism, assert that the Framers' own Constitution exerts much less gravitational force on policy-makers than originalists would assert, but that is all they assert. In other words, the difference between originalists and nonoriginalists is only a matter of degree. Everybody agrees that the Framers' original design exerts at least some pull. To see how this is true, consider the following: those who reject originalism reject it only occasionally. They fully embrace originalism whenever the originalist methodology generates results that they find congenial.¹⁸ They use originalism as their trump card whenever they possibly can.

18. See, e.g., *Colgrove v. Battin*, 413 U.S. 149, 160 (1973) (concluding "that a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases"). The majority's holding in the case provoked an impassioned dissent, steeped in originalist language, from a very unusual source:

We deal here not with some minor tinkering with the role of the civil jury, but with its wholesale abolition and replacement with a different institution which functions differently, produces different results, and was wholly unknown to the Framers of the Seventh Amendment.

....
When a historical approach is applied to the issue at hand, it cannot be doubted that the Framers envisioned a jury of 12 when they referred to a trial by jury. . . .

IV. CONCLUSION

Despite the fact that originalism is not the binding constraint on judges that its most ardent proponents would have us believe, the fact remains that, absent originalism, judicial review—at least by judges—would be much, much harder to justify. On the other hand, it is also the case that Judge Bork is probably wrong to conclude that originalism must yield the kind of judicial restraint he triumphs. The reality is that the Framers were staunch supporters of free markets. It is also true that they were very suspicious of legislatures. They understood public choice and interest group politics very well. That is why they erected a governmental structure with checks and balances, and a separation of powers. The whole point of the design was to raise the transaction costs of government. That is why originalism and judicial activism are not unrelated concepts. Judicial activism in pursuit of free markets, which the Framers understood were crucial to the survival of the Republic, should be encouraged. In other words, judicial activism is not the problem. The problem is the nonoriginalist, anti-free market judicial activism that is so closely associated with those who reject the originalist position.

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I think history will bear out the proposition that when constitutional rights are grounded in nothing more solid than the intuitive, unexplained sense of five Justices that a certain line is "right" or "just," those rights are certain to erode and, eventually, disappear altogether. Today, a majority of this Court may find six-man juries to represent a proper balance between competing demands of expedition and group representation. But as dockets become more crowded and pressures on jury trials grow, who is to say that some future Court will not find three, or two, or one a number large enough to satisfy its unexplicated sense of justice? It should be clear that constitutional rights which are so vulnerable to pressures of the moment are not really protected by the Constitution at all. . . .

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. . . It may well be that the number 12 is no more than a "historical accident" and is "wholly without significance 'except to mystics.'" But surely there is nothing more significant about the number six, or three, or one. The line must be drawn somewhere, and the difference between drawing it in the light of history and drawing it on an ad hoc basis is, ultimately, the difference between interpreting a Constitution and making it up as one goes along.

Id. at 166-82 (Marshall, J., dissenting) (citation omitted).

