

ESSAY

THINKING ABOUT ORIGINALISM

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If the Federalist Society is associated with a single word, it is “originalism.” Although well-known for its noble efforts to encourage freedom of thought and debate in law schools (and among lawyers), the Society’s own thoughts and debates have revolved primarily around originalism; and the Society is probably best known for its members’ embrace, propagation, and defense of that concept.

In a Federalist Society symposium, Chief Judge Frank Easterbrook once proposed that the opponents of originalism be called “inventionists.”¹ The neologism did not catch on, alas. But didn’t “originalism” itself have to be invented? It is not a term used by the framers and ratifiers of the United States Constitution, for example, though they knew of course its source words (origin, original, and so on). Those words denote two rather different things: an “original” is closest to the origin (the words were once synonyms), the first of its kind, the oldest example (and thus distinguished from later copies); but to be “original” is also to be new, pathbreaking, creative (and thus not a copy of anything previous). An original can be old or new. As the doctrine defended today by the Federalist Society and by American conservatives in general, originalism is a new term for fidelity to something old, namely, the Constitution.

But liberals and other critics of such originalism will object that that old Constitution was once new; indeed, that it was once the culmination or the terminal moment of a political

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1. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 59 (1988); Frank H. Easterbrook, *Pragmatism’s Role in Interpretation*, 31 HARV. J.L. & PUB. POL’Y 901, 901 (2008).

revolution. They will point out that imitation is the sincerest form of flattery, and that true “originalism” should therefore include approaching the interpretation of the Constitution in a bold, new, creative spirit, even as its framers had approached the Articles of Confederation.² In effect, fidelity to the Constitution, properly understood, should mean making it new, surpassing it, leaving it gradually behind in pursuit of more timely and progressive modes of government and administration.

Franklin D. Roosevelt and other liberal political leaders used to talk like that, and appeals to the American founders’ pragmatic, forward-looking spirit still echo occasionally in our politics and even in the academy. But such sentiments are rarer than they used to be for the simple reason that modern liberals’ opinion of the Constitution and its framers is lower, or at any rate more crudely expressed, than it used to be.³ Exponents of the progressive or evolutionary Constitution used to emphasize its continuity with the past; evolution, after all, is supposed to connect the best of the past with the present. Today, by contrast, it is common to hear, especially from political figures who do not have to stand for election, that the Constitution comes from “a world that is dead and gone.”⁴ They mean that the Constitution would be dead and gone, or at least irrelevant, like the eighteenth-century world from which it sprang, had it not been infused with new meaning(s) vouchsafed by subsequent, more enlightened ages.

Since its proximate origins in the Progressive Movement early in the twentieth century, American liberalism has taken a jaundiced view of the Constitution. The most famous of the so-called Progressive historians—especially Charles Beard, Vernon Parrington, and J. Allen Smith—regarded the American Revolution as a nascent social revolution, the beginnings of an egalitarian democratic order that would liberate, and empower, the inter-

2. See Charles R. Kesler, *Ratification Clause*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 298–301 (Edwin Meese III et al. eds., 2005); Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 *S. CAL. INTERDISC. L.J.* 549 (1995).

3. For a modern pragmatist’s account of the shift from what he calls “reform liberalism” to “cultural liberalism,” see RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* (1999).

4. William J. Brennan, Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 55–70 (Steven G. Calabresi ed., 2007).

ests of the vast majority of Americans who were farmers, artisans, and laborers. According to the historians, this powerful impulse towards social democracy arose not so much from the theory of the Revolution as contained, say, in the Declaration of Independence and the colonists' earlier protests against the British parliament, but mainly from the deeds or actions of revolution itself. As the majority discovered its power in street demonstrations and legislative halls, it discovered itself as a social force capable of standing against domestic as well as foreign elites. The innermost character of the Revolution revealed itself, therefore, in anti-Loyalist mobs, the seizure of Tory property, and the new state constitutions with their casting off of monarchy and aristocracy and their proud adoption of annual elections, populist legislatures, and weak courts and governors. Shay's Rebellion (1786–87) was, in this view, not a threat to but a reaffirmation of the Revolution's essential spirit.⁵

That spirit was thwarted, however, by the Constitution. Beard and the other Progressive historians regarded the Philadelphia Convention and the resulting frame of government as a kind of counterrevolution against American democracy. Echoing and broadening the charges made by the Constitution's original opponents, the Anti-Federalists, the Progressives argued that the events of 1787 had brought the Revolution to an end by subverting it. Their overarching criticism was that the Constitution had subordinated human rights to property rights, democracy to oligarchy. The new system weakened the state governments, protected the obligations of contract against popular interference, and erected a powerful central government (crowned by a federal judiciary with good-behavior tenure) designed to limit the people's rule—and designed to be very difficult to alter or abolish. Far from being political demigods, the Framers were agents of the rich—of the bondholders, speculators, stockjobbers, bankers, and lawyers. Beard held, in fact, that the authors of *The Federalist* had explained the scheme forthrightly in *Federalist 10*: for

5. See generally CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (The Free Press 1941) (1913); VERNON LOUIS PARRINGTON, MAIN CURRENTS OF AMERICAN THOUGHT: AN INTERPRETATION OF AMERICAN LITERATURE FROM THE BEGINNINGS TO 1920 (Univ. of Okla. Press 1987) (1927, 1927, 1930); J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT: A STUDY OF THE CONSTITUTION (Harv. Univ. Press 1965) (1907).

the sake of private property and finance capitalism, the Constitution had to check majority faction, which meant, (according to Beard) suppressing majority rule itself.⁶

Not all Progressive critics were so quasi-Marxist in their indictment of the Constitution. Woodrow Wilson, for instance, attributed the document's failings to the time-bound and imaginary character of its "literary theory": the state of nature, natural rights, and the social contract were sheer fantasy, he maintained.⁷ Although certainly historicist, his views had a different flavor from Beard's. Nonetheless, broadly speaking, these thinkers attacked the Constitution as unfair and out-moded, reserving special scorn for its least democratic features, the separation of powers and judicial review.

From the late nineteenth century to the New Deal, American progressives were bitter enemies of the Supreme Court's reigning jurisprudence. The judiciary seemed the living embodiment of the original Constitution's zeal for property rights, and in the Constitution's name the Court continued to strike down reform legislation passed by the states (for example, the New York law regulating bakers' hours of labor, invalidated in *Lochner*). It was, to the critics' eyes, a familiar story of democratic experimentation short-circuited by the least democratic branch of a not very democratic, and in some respects frankly oligarchic, national government.⁸

But it was the separation of powers that bore the brunt of Progressive and liberal criticism of constitutional arrangements. For the better part of a century—from Woodrow Wilson to James MacGregor Burns to Lloyd Cutler—liberals had the same complaint: that the separation of powers resulted in government deadlock or gridlock, thereby foolishly and unconscionably re-

6. BEARD, *supra* note 5, at 152–88; SMITH, *supra* note 5, at 205–07. For a neo-Beardian analysis, see JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1994).

7. See WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 25–81 (Columbia Univ. Press 1917) (1908) [hereinafter WILSON, *CONSTITUTIONAL GOVERNMENT*]; WOODROW WILSON, *THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS* 1–16 (1889).

8. For a specimen of the Left's impatience with judicial review, see HENRY STEELE COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* (1943).

tarding the nation's forward progress.⁹ Better to have a parliamentary system, or any system that would replace checks and balances with cooperation among the branches of government, in order to get the country moving again. In his influential statement of the Progressive case, Wilson drew on Charles Darwin, noting that government must be open to easy change and mutation if it is to survive, to evolve. "Living political constitutions must be Darwinian in structure and in practice," he wrote.¹⁰ Wilson invented the argument for the Living Constitution, which in his original, Social Darwinist version, was a theory of the entire government or state, not merely of the judiciary.

In the theory of the Living Constitution, liberals found a way to make peace with the Constitution of 1787, but only by turning it into the Constitution of What's Happening Now. To replace the actual frame of government with a new one proved impossible, but also unnecessary. Liberals merely had to pour a new wine into the old bottle—to introduce into the system a radically new spirit of interpretation. The old constitutional forms remained, but were bent to a new purpose: constitutional development, or the movement of the polity into the future. The Fourteenth Amendment proved a convenient vehicle for progress on the judicial front, but the national executive and legislative branches cooperated and in many instances (the New Deal, for example) took the lead.

The future that the Living Constitution steers for is nominally democratic or, more precisely, social democratic. Although the American people have not always been keen on that transformation, and have sometimes positively resisted it, their recalcitrance has not derailed the liberal project. Nonetheless, popular resistance has helped to inspire a darker, more radical version of the enterprise. Earlier critics had argued that the Constitution was un- or anti-democratic. Today's liberals, especially in the judiciary and academy, are more likely to denounce the Constitution of 1787 as racist, sexist, and homophobic. The first con-

9. See generally WILSON, CONSTITUTIONAL GOVERNMENT, *supra* note 7, at 54–81; WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 33–54 (Doubleday, Page, & Co. 1918) (1913); JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA (1963); Lloyd N. Cutler, *To Form a Government*, FOREIGN AFF., Fall 1980, at 126–43; see also ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 4–33 (1956).

10. WILSON, CONSTITUTIONAL GOVERNMENT, *supra* note 7, at 56–57.

tention implies that the people, the overwhelming majority, were virtuous but politically duped and defeated. The second implies that the people, the vast white majority, were themselves racist, sexist, and homophobic. Given this legacy of democratic tyranny, liberals do not wonder that contemporary majorities are not always enlightened. To square this brute fact with the assumption of moral and political progress, however, liberals often have to put their faith in future majorities. For example, when Justice Brennan explained his eccentric view that capital punishment is unconstitutional, he appealed for support not to the actual Constitution or to existing majorities (who were overwhelmingly in favor of the death penalty), but to a future majority that would agree with him.¹¹ Thus does Darwinian evolution become a faith in things unseen and to come, and putative democracy give way to rule by History's priests.

Defenders of the Constitution's original intent have their work cut out for them. For it is not enough to assert that judges should be bound by the original intent of the framers or ratifiers, nor that the original meaning of the Constitution's words ought to be authoritative. These contentions are exposed to familiar, though not insuperable, objections. Briefly: The text itself does not say to abide by the text itself. Those who live by positivism therefore risk dying by positivism. The text plus tradition leaves open what counts as tradition, or more precisely how one should distinguish between good and bad traditions, for surely not every precedent or line of precedent is sound, or even coherent. What is "the tradition" of equal protection law and jurisprudence, exactly?

To resolve such objections would involve recourse to principles latent in the text of the Constitution and well discussed in the pages of *The Federalist* and other early commentaries. But these principles are not positive law, even though they are presupposed by it. They belong to what *The Federalist* calls "the nature and reason of the thing."¹² Many originalists shun these ideas of natural justice because they seem akin to the historical velleities of today's "activist" judges, even though the Living Constitution has nothing to do with such timeless

11. Brennan, *supra* note 4, at 68–69.

12. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter & Charles Kesler eds., 1999).

notions and the original Constitution had very much to do with them, and its makers and defenders said so copiously and carefully.¹³

Agile originalists often try to sidestep these issues by insisting that for judges, at least, it is enough to apply the law as it is, not as it should be, and that the former consists of the text read modestly and in light of the prevailing tradition. Judges are here to enforce the rules of the game, as stated originally and most broadly in the Constitution. The rules are fact; everything else is values, to be left to the people's whim—that is, to democracy. The rules are meant to be counter-majoritarian in important respects, but they are exceptions to democracy that the people themselves approved. As Justice Scalia and Judge Bork like to say, originalist judges are not seeking to protect any substantive or natural goals but merely to enforce the rules the people themselves have made.

As a defense of originalism, this argument leaves much to be desired. It seems to assume that judges can avoid questions such as these: What is the purpose of the game? Why do the people get to make the rules? Did they in fact make the rules? Why can't the people change the rules, not to mention the game and the players, at will? Is fairness whatever the rules and the umpires say it is, or can an umpire's rulings and even the written rules be challenged on grounds of fairness?

Yet even if a judge could consistently and conscientiously steer clear of these considerations, the larger, political case for originalism cannot be made without them. For why continue to enforce the rules of a game that has been exposed as fixed, flawed, and fraudulent from the very beginning?

And that is exactly the indictment of the Constitution that progressive liberalism has been mounting, in various guises, for more than a century. If the original Constitution was fundamentally immoral—anti-democratic, racist, sexist, homophobic, and so on—then why, liberals ask, should modern Americans want to abide by its original intent?

13. Cf. HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* 85–133 (1986); see generally HARRY V. JAFFA, *STORM OVER THE CONSTITUTION* (1999).

To defend originalism in the political arena, and to secure the appointment and confirmation of properly originalist judges, will take presidents, legislators, and yes, even judges, who can explain the *goodness* of the U.S. Constitution. That case, in turn, will rest on their sense of the Constitution as something deeper and higher than the rules of the democratic game. Originalism had to be invented because of the far-reaching assault the Constitution has endured in the twentieth century. But to be perfected, it will have to adopt the very arguments for the Constitution's goodness and republicanism made by its framers, and later vindicated against those who scorned it as a pact with the devil.