

TWO (MORE) PROBLEMS WITH ORIGINALISM

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In this Essay, I wish to offer two simple points. The first is that originalist arguments misconstrue history, and the second is that there is no such thing as pragmatic originalism—to the contrary, originalism is by definition unpragmatic and at odds with legal pragmatism.

To understand why being an originalist works only if one ignores or misstates history, we must look briefly at the history of originalism. Some notion of originalism, understood as the theory that the Framers' or Founders' thoughts regarding the Constitution are relevant to constitutional interpretation, has been part of the legal landscape for a very long time, appearing as early as the 1790s.¹ But originalist constitutional interpretation as a discipline—that is, as a distinct subject with a distinct methodology—actually came into being only in the late nineteenth century.² Legal treatises and other works on the Constitution written before that time did not contain originalist theories of interpretation. The treatises discuss particular interpretations and offer descriptions of the proper or best understanding of particular clauses, but it took some time before people began to think about the problem of interpretation more broadly and sys-

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1. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1197–208 (1986) (noting that early debates in Congress included reference to Philadelphia Convention participants' recollection of the drafting as an aid to interpretation and arguing that Washington, Madison, and others emphasized originalist approaches); Jack N. Rakove, *The Original Intention of Original Understanding,* 13 CONST. COMMENT. 159, 171–73 (1996) (finding that "the germ of an interpretive theory of original understanding" was present in a speech by James Madison in 1791).

2. See Clinton, *supra* note 1, at 1213 ("The fact that historical originalism was not perceived as the exclusive, or even the predominant, interpretive strategy during the late eighteenth and early nineteenth centuries is not surprising in light of the general unavailability at the time of primary historical materials necessary to undertake originalist research.").

tematically. For most of the nineteenth and early twentieth centuries, even as the problem of interpretation emerged, the main controversy concerned how much deference courts should give to legislatures.³ The debate was about *who* should interpret, not *how* to interpret. When it came to the question of how to interpret the Constitution, there was general agreement on a kind of conventional approach that mixed different arguments without much systemization—something very much like the mix of arguments lawyers use when interpreting statutes or common law.⁴ The Framers' intent was one of these arguments, used alongside text, precedent, and policy, but not superior to them.⁵

The idea of originalism as an exclusive theory, as *the* criterion for measuring constitutional decisions, emerged only in the 1970s and 1980s.⁶ The theory first appeared as "original intent originalism," and it looked to what the fifty-five men who drafted the Constitution in Philadelphia intended when they framed the Constitution.⁷ That originalism first emerged in this guise is hardly surprising, given that the most readily available evidence about the origins of the Constitution's provisions consisted of notes from the Constitutional Convention collected in a neat four-volume set by Max Farrand.⁸ Consequently, a great deal of early originalist work asked what the Framers thought

3. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 945–46 (1985) (noting debate in the 1830s regarding whether the Supreme Court or the States held the final authority to interpret the Constitution).

4. See *id.* at 948 ("Of the numerous hermeneutical options that were available in the framers' day . . . none corresponds to the modern notion of intentionalism. Early interpreters usually applied standard techniques of statutory construction to the Constitution."); see also Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 111 (1988) (citing examples of the Supreme Court, Alexander Hamilton, and Thomas Jefferson drawing on treatises, context, and common-law rules for guidance in constitutional interpretation, rather than on subjective intent).

5. See Clinton, *supra* note 1, at 1208 (arguing that sources indicate that originalism "never was considered an exclusive interpretive methodology" in the late eighteenth and early nineteenth centuries).

6. See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 6 (2006) (noting "the introduction of original framers' intent originalism in the 1980s").

7. See *id.* at 5–6.

8. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911); see also Clinton, *supra* note 1, at 1213 (noting the unavailability of primary historical materials necessary for originalist research during the late eighteenth and early nineteenth centuries); Powell, *supra* note 3, at 945 (noting increased interest in the Founding Era as original materials were made available).

they were doing when they wrote this or that clause of the Constitution.

Of course, relying on such evidence was immediately subjected to a strong critique that I think everybody is probably familiar with. The sparseness of the evidence was said to leave every question indeterminate.⁹ Some people found this sort of argument persuasive, others did not. But a more powerful critique of original intent soon emerged, this one arguing that relying on Framers' intent could not be justified as a normative matter.¹⁰ The intent of the drafters in Philadelphia does not matter, this critique argued, because the Constitutional Convention had no lawmaking authority. The underlying premise of originalism is one of positive law: the Constitution is a species of legislation, authoritative only because and insofar as it was enacted by an authoritative lawmaker. As such, the authoritative intent is that of the people who had the power to make it law, not of the people who drafted the Constitution in Philadelphia.¹¹ Looking to their intent is like giving authority to a speech writer for the President. It is like giving authoritative weight to the intent of the lobbyists who drafted a bill for Congress, as opposed to the Congress that actually adopted it.

This was a pretty devastating critique, and it required a response. So originalism changed and reemerged in a second form, which we can call "original understanding originalism." Unsurprisingly, given the critique, originalism in its new guise evolved to focus mainly on the views of the ratifiers.¹² It was, perhaps, more than serendipity that this second form of originalism emerged just as extensive material on ratification became easily available to legal scholars through the publication of the multi-volume *Documentary History of the Ratification of the Constitution*.¹³ Suddenly everybody could be an historian of ratifi-

9. See, e.g., Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 214–15 (1980); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437 (1996).

10. See, e.g., Lofgren, *supra* note 4, at 84–85. Douglas G. Smith, *Does the Constitution Embody a "Presumption of Liberty"?*, 2005 U. ILL. L. REV. 319, 325 (2005) (book review).

11. See, e.g., Lofgren, *supra* note 4, at 84–85.

12. See Barnett, *supra* note 6, at 5–6.

13. THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen ed., 1978).

cation, because a vast reserve of primary sources were available in neatly bound volumes.

This development made sense as a response to the critique of original intent originalism. But originalism in this second guise soon ran into a set of critiques similar to those that its first form encountered. The indeterminacy argument became stronger, because indeterminacy of intent was magnified by the expansion of the number of individuals whose intent was to be considered.¹⁴ It was not now a small group of fifty-five in Philadelphia whose intent was to be considered, but rather a vast body including every individual who voted on the Constitution. Originalists found themselves trying to recover the understanding of an exceedingly large group of people, a task made even more difficult because different issues were discussed from state to state. There were issues discussed in Pennsylvania that just did not come up in Virginia and vice versa.

As with original intent originalism, there was a second critique that proved fatal to original understanding originalism, and, surprisingly, this critique came from the Right. It built on Justice Scalia's criticism of reliance on legislative history when performing statutory interpretation.¹⁵ Many of the same arguments made in the statutory context applied equally to the Constitution, and so originalism evolved, again, into "public meaning originalism," the form that is most prevalent today.¹⁶

The easiest way to understand public meaning originalism is to play out the analogy to statutory interpretation. How do we understand the meaning of a statute if we are not using legislative history? We look to the language of the statute and ask about the public meaning of the words, which is to say, how those words are or ought to be understood by the relevant audience. We may, of course, disagree about what that public meaning is, and we may have to litigate the issue. There are arguments made about the proper way to interpret the public meaning of a statute: when to use ordinary parlance, when to

14. See Brest, *supra* note 9, at 214–15.

15. See Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1005–06 (1992) (summarizing Justice Scalia's approach to statutory interpretation, which generally does not include reference to legislative history).

16. See Barnett, *supra* note 6, at 5–6; Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1502 n.66 (2007).

use the dictionary, when to treat something as a term of art, and when to deploy a canon of construction. There are similar arguments that can be used to recover the public meaning of the Constitution, and the “public meaning” originalist argument is that the proper way to understand the Constitution is according to its original public meaning. This means interpreting the text using the kinds of arguments that would have been used in the late eighteenth century, at the time the Constitution was enacted and became law.

Public meaning originalism is the prevalent version of originalism today, which makes sense given the way it responds to the critiques of both original understanding originalism and original intent originalism. Yet public meaning originalism has some pretty serious defects of its own—the main one being that there was no agreed-upon public meaning of the constitutional terms most often in dispute. This was something the Founding generation learned to its dismay early in the 1790s, when strong disagreements arose regarding the meaning of many of the provisions we are still debating today.¹⁷ Interpretation, the Framers came to understand, was then, as it is today, a process of filling gaps, resolving ambiguities, and settling conflicts. And insofar as there were, at the time, two or more plausible positions on the correct original public meaning of a provision of the Constitution, all one does in embracing one of them today is to take sides in a historical dispute that was not resolved at the time of the Founding, and so is not resolvable on originalist terms today. Originalism claims to be grounded on a theory of positive law, but it actually has no more objective grounding or authority than what Ronald Dworkin does when he applies moral theory to interpret the same provisions.¹⁸

If, at the time of the Founding, there had been an agreed upon set of conventions for interpretation, then originalists could claim to be applying the same principles of interpretation while disagreeing about their application. That happens all the time, and the test for whether there is a discernible public meaning does not and cannot require that there be unanimity

17. For discussions of some of these disagreements, see Clinton, *supra* note 1, and Powell, *supra* note 3.

18. See, e.g., RONALD DWORIN, TAKING RIGHTS SERIOUSLY 149 (1977) (arguing for a “fusion of constitutional law and moral theory”).

as to its precise content. The problem is that there was *not* an agreed upon set of conventions for interpreting the Constitution at the time of the Founding, as evidenced by the extensive debates that erupted. On the contrary, the very concept of something we could call constitutional law was new. Such questions as whether constitutional law was like ordinary law and whether the same principles of interpretation used for statutes should apply to the Constitution were up for grabs, and it took two to three decades for the Founding generation to develop principles that applied to these matters. Even then, different and competing principles developed, and there was no more agreement about what the “correct” way to interpret the Constitution was or should be in the early years of the Republic than there is today.¹⁹

That being so, it is impossible to talk about the notion of an original public meaning, because at that point you really are just making it up from the top down. You are deciding what principles should have been used in the eighteenth century to determine public meaning, because those principles were never settled. You then use those principles, from which you can generate a variety of plausible interpretations, to pick one that you think makes sense. Whatever that accomplishes, it is *not* ascertaining what would have been the original public meaning of the constitutional text at the time that text was adopted.

So, how have originalists handled this problem? They have ignored it.²⁰ You see this in the originalist scholarship being done today, none of which looks remotely like the way those issues were or would have been debated at the time.²¹ As I explained, there was no agreement in the late eighteenth century on how to do constitutional interpretation. There were, rather,

19. See, e.g., Powell, *supra* note 3, at 912–21 (recounting some of the early debates regarding constitutional interpretation, and noting that “there were sharp disagreements over which interpretive approach was acceptable”).

20. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 520–21 (2003) (noting the lack of effort by originalists to identify the Founders’ interpretive conventions); William Michael Treanor, *Taking Text too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487, 500 (2007) (“While constitutional textualists embrace . . . close-reading textualism, no one has explained why the conventions they employ capture the way the text was originally read.”).

21. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

different modes of interpretation just beginning to emerge, with no general consensus or agreement on which was right.²² But whatever the debate was two hundred years ago, it did not look anything like the scholarship we get today from people who tell us they have deciphered the authentic eighteenth-century public meaning of this or that clause of the Constitution.²³

Any interpretation of original public meaning is a wholly fictitious construct—a construct made possible only because the person presenting it has not learned much about how the Founding generation actually thought matters should be handled. What one invariably discovers about the Founding era is that there was no original understanding or settled means of fixing meaning. There was, rather, indeterminacy at the deepest level, at the level necessary in order even to begin the originalist project.

My second main point is that originalism is by its very nature unpragmatic. To understand why, forget about the Constitution for a minute and think about ordinary legal interpretation. Suppose that yesterday a statute was enacted, and a case involving that statute arose today. There will be questions under the statute that are easy, questions for which everybody would agree about the proper interpretation and outcome. And there will also be questions that are hard, questions for which the proper interpretation is a matter of legitimate disagreement because the text is unclear. Assume this is one of the hard cases. Difficult or not, the court is going to resolve it somehow, employing some set of interpretive principles. For present purposes, I do not particularly care what those principles are. Whatever they are, they produce a resolution.

Hard cases like this are inevitable, because language is unavoidably imprecise. There are always gaps, conflicts, and ambiguities. The court resolves them by whatever techniques, and in so doing closes the gap, resolves the conflict, or eliminates the ambiguity. That solves the immediate problem, but it also

22. See Powell, *supra* note 3, at 887 (outlining the competing theories of constitutional interpretation at the time of the Founding).

23. See Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 150 (2007) (criticizing original public meaning as a theory of interpretation “at odds with the dominant modes of constitutional interpretation in place at the time the Constitution was debated and ratified”).

inevitably creates new conflicts or new gaps or new ambiguities. So a day after that or a week after or a year after, at some later point in time, someone will confront the new problem and another case will arise. The court will at that point do the same thing it did in the first case. It will resolve the problem by whatever interpretive techniques it uses to decide cases. But it will do so not in light of the statute as it was originally enacted. It will do so in light of the statute as it has been modified by the first interpretation, which changed the law in some way by resolving the first problem, and in so doing created the framework that gave rise to the new problem. And this will be an ongoing process: cases are decided, reshaping the law, giving rise to new problems and so new cases, and so on. This is the way we interpret law, the way we understand it ordinarily to work. It is, moreover, a thoroughly pragmatic process because it recognizes the interdependency of legal rules and rulings, the “seamless webness” of the law. What one does in resolving one problem has effects on things around it. So when the next problem arises, it must be resolved in light of what the law has become through implementation and practice.

The same thing is true when it comes to interpreting the Constitution.²⁴ Indeed, when it comes to the Constitution, one cannot think only in terms of judicial decisions and judicial interpretations, because every time the Court interprets the Constitution, all the other branches of government respond. They change how they think. They change what they do. And the constitutional system develops accordingly. When it comes to the Constitution, in other words, even more than with a statute, what you have over time is courts giving the Constitution meaning, the other branches adapting, courts responding to what the other branches have done, and so on.²⁵ The interdependency argument is the same as with a statute, except it is

24. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1252 n.252 (1987) (arguing that because the Constitution’s meaning exists only in the context of an interpretive practice, that meaning changes when the practice authorizes revised interpretations or when the interpretive norms of the practice change).

25. See Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1109–10 (2006) (describing the dialogue between courts and the other branches of government in constitutional interpretation).

more complex and elaborate because there are more moving pieces. To see the powerfully pragmatic premises here, consider the process by analogy to a classic philosophical metaphor. You are in a boat in the middle of the ocean. Whatever problems you may confront in the design or structure of your boat, the one thing you cannot do is rebuild the boat from scratch, because then you are going to drown. You must deal with the boat as it is and take whatever problems present themselves, while doing your best to stay afloat. Think of the Constitution as, in effect, a blueprint for a boat. The Founding generation built and launched the boat, and we have now been out there sailing for a couple of centuries. The whole time we have been confronting and resolving problems, with each resolution changing the structure of the boat—sometimes in small ways, sometimes in large ways.

That being so, does it make sense, when you come upon a new problem, to fix it by going back to the original blueprint, to say “I am going to ignore everything that happened between then and now and resolve this in whatever way is most consistent with the original blueprint?” Well, maybe, except if the engine started in the bow and now it has been moved to the stern, and some new thing appeared only because the engine room was moved, you may be making a huge mistake to get rid of it because it was not in the original design.

This is the sense in which originalism is deeply unpragmatic. Because if you take originalism seriously, it says that wherever we are at any given time, we are supposed to resolve problems according to the original design, ignoring what has happened since then and forcing the problem in front of us back into the original framework, whatever the consequences.²⁶ Whether this is a good thing or a bad thing, it most certainly is *not* a pragmatic thing. Nor is it a sensible thing.

It does not follow that originalism is irrelevant. To solve a given problem, one would be wise to start with the original design. One cannot understand the boat as it is now without understanding the original design and how and why it evolved to look as it does today. In other words, original understanding is

26. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (acknowledging that at times originalism, in its “undiluted form,” may be “medicine . . . too strong to swallow”).

a sensible starting point in constitutional interpretation. One will not find answers to a large number of questions, not complete answers at least. Instead, one will find partial answers that led to problems for the Founding generation, which resolved them, creating new problems, which were then resolved by the next generation, and so on. We have been, as a nation, engaged in the process of creating and giving shape to our Constitution from the original blueprint for more than two hundred years. Constitutional law is a form of customary law, albeit customary law refracted through a text. Every generation has faced its problems and resolved them according to its best understanding of the text, handing a refashioned constitutional law on to the next generation to do the same. And that being so, when called upon to interpret the Constitution, we may want to think about original intent as a place to start, but not a place to finish.