

Originalist Theories of Constitutional Interpretation

Raoul Berger

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 Cornell L. Rev. 350 (1988)
Available at: <http://scholarship.law.cornell.edu/clr/vol73/iss2/13>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

ORIGINALIST THEORIES OF CONSTITUTIONAL INTERPRETATION

Raoul Berger †

I feel somewhat like Rip Van Winkle, who, opening his eyes on a brave new world, is not all sure he understands what is going on around him. I was greatly comforted by Charles Fried's observation that he deplored the eruption of philosophy into the law. When I emerged from the cave, one of the things that struck me, was current discourse about levels of abstraction. Jacques Barzun remarked that abstraction is a ladder that leads into the clouds, so that if one climbs high enough, then the croaking of a frog and the song of a great soprano are the same because both generate airwaves.

Let me start with an observation that was made thirty-five years ago by Willard Hurst. He said, "when you are talking about constitutional law, you are talking about the balance of power in the community and . . . the question of how you find meaning boils down concretely here to who finds the meaning."¹ This morning, Judge Posner emphasized that the Constitution is a text. Let me add that it is a text of very special and peculiar significance. It is a text that was designed to limit and hobble the exercise of power by the delegates of the people. That is the starting point from which we have to proceed and to evaluate what the delegates were seeking. Long before Acton, a remarkable North Carolinian, Thomas Burke, emphasized that it was necessary to guard against the greediness of power. On top of that, the founders had a profound distrust of judicial discretion. Even a Tory judge, Thomas Hutchison of Massachusetts, said, ". . . *the Judge* should never be the *Legislator* . . . this tends to a State of Slavery."² It was for this reason that Chancellor Kent referred to judges' "dangerous discretion . . . and to roam at large in the trackless field of their own imaginations."³

I am a little surprised to hear about varieties of originalism. The only variety I know is the good, old-fashioned kind. Let me define it. I understand by original intention, the explanation that

† Charles Warren Senior Fellow in American Legal History, Retired, Harvard University. J.D. 1935, Northwestern University; LL.M. 1938, Harvard.

¹ SUPREME COURT AND SUPREME LAW 74 (E. Cahn ed. 1954) (remarks of Professor Hurst).

² Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, 5 PERSP. AM. HIST. 287, 292 (1971).

³ 1 J. KENT, COMMENTARIES ON AMERICAN LAW 373 (9th ed. 1858).

draftsmen gave of what their words were designed to accomplish, what their words mean. Why, activists ask us, should we allow the founders to rule us from their graves? On such reasoning the text is also not binding. Whence, then, comes the authority of the judges? From the founders that conferred that authority, and it is confined by their written restrictions.

Resort to original intention is required if only because some words in the Constitution are susceptible of an enormous range of meaning. One has only to think of equal protection, for example. It means so much that one commentator says it means nothing. Unless limited by the original intention, those words serve as a crystal ball from which a judge, like a soothsayer, can draw forth anything he wants. That flies in the face of the founders' distrust of judicial discretion. Then too, one who studies the historical records finds that the states very grudgingly, very jealously, delegated only so much of their powers as they considered necessary for "national" purposes. It is utterly inconceivable that these jealous states would endow the judges with a power that would place them utterly at the judicial mercy, as in fact, has proven the case under the Court's readings of the Commerce Clause.⁴ That is not what the founders had in mind at all.

Remember, too, that Hamilton reassured the electorate that the judges were next to nothing—an idea that is incompatible with a delegation to them of the power to re-write the Constitution. That is what we are really talking about—let's get rid of the euphemisms—may judges revise the Constitution, in order, as Justice Black scornfully said, to bring it "in tune with the times"?⁵ Let me allude, also, to the basic presupposition—that appears as early as Francis Bacon, and is reiterated by our own James Wilson, and by Chief Justice Marshall—that the function of a judge is to construe, to interpret the law, not to make it. That distinction was drawn time and again in later opinions by the Supreme Court.

We also need to remember that there was a very strenuous struggle over the adoption of the Constitution. In many states it was touch and go. In some, such as North Carolina, adoption was utterly defeated. In order to allay hostility to the document, to reassure the ratifiers, the federalists sought to explain to them the meaning of the text. Thus, Hamilton downgraded the powers of the Presidency to an extraordinary degree. Those assurances were designed to garner votes; they were representations. Justice Story later wrote about similar representations that to repudiate them

⁴ See *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005 (1985).

⁵ *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

would "be a fraud upon the whole people."⁶ Activists scorn the original intention, not because they have access to a deeper well of interpretation, but because that intention undermines the modern decisions that have effectuated their aspirations.⁷ I share those aspirations, but I won't warp the Constitution in order to effectuate them. Until activists sought to bolster the Warren Court's decisions, Judge Robert Bork observed, "there was never any doubt that the document was to be construed so as to give effect, as nearly as possible, to the intentions of those who made it."⁸

What is at stake is revealed by Benno Schmidt, President of Yale University, who recently said, referring to the desegregation decision, that the fourteenth amendment's general language allowed it to be used to spur a revolution in race relations, despite the clear probability that its authors did not intend it as such. In other words, the Court read general words in disregard of the specific intention in order to work a revolution in race relations. One may agree that a revolution was needed, and yet question whether the Court was meant to be the instrument of revolution. That is the issue that is involved in this colorless phrase "original intention."

On the basis of a recent study that I published, I am convinced that the Anglo-American doctrine of original intention reaches back 600 years or more.⁹ For centuries, courts have turned to the original intention. An English historian, S.R. Grimes, concluded that "the rule of reference to the intention of the legislators . . . was certainly established by the second half of the fifteenth century."¹⁰ My own studies place it even earlier. In 1615, Chief Justice Coke said that in construing Acts of Parliament, "the original intent and meaning is to be observed."¹¹ Express words, he stated, were to govern "when the meaning of the makers doth not appear to the contrary."¹² That is a rule which the medievalists adopted before him, as exemplified by the famous bloodletting in the streets of Bologna. It became the rule, for example, in statutory construction.

⁶ 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1084, at 33 (5th ed. 1905).

⁷ "Those who favor abortion, busing . . . and who oppose capital punishment . . . obviously have no faith whatever in the wisdom of the will of the great majority of the people, who are opposed to them. They are doing everything possible to have these problems resolved by a small minority in the courts and the bureaucracy." Bishop, *What is a Liberal—Who is a Conservative?*, 62 COMMENTARY 31, 47 (1976).

⁸ Bork, *Foreword to G. McDowell, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY* at v (1985).

⁹ Berger, *Original Intention in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986).

¹⁰ S. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 293 (1966).

¹¹ *Magdalen College Case*, 77 Eng. Rep. 1235, 1245 (K.B. 1615).

¹² *Edrich's Case*, 77 Eng. Rep. 238, 239 (C.P. 1603).

If the intention appears, it overrides the words. Our own Justice James Wilson, second only to Madison as an architect of the Constitution, stated, "The first and governing maxim in the interpretation of a statute is, to discover the meaning of those, who made it."¹³ Little wonder, then, that Chief Justice Marshall observed that he could cite from the common law "the most complete evidence that the *intention* is the most sacred rule of interpretation."¹⁴

A constitution is a written document, and as John Selden, the seventeenth century sage, observed, "a man's writing has but one true sense, which is that which the Author meant when he writ it."¹⁵ This is the essence of communication. It is for the writer to explain what his words mean; the reader may dispute the proposition, but he may not insist in the face of the writer's own explanation that the writer meant something different. When a doctrine is 200 years old, said Justice Holmes, it should take a mighty strong case to overturn it.

Activists argue that words change their meaning. To be sure, they do, and were we to write a new constitution, we could use words according to our present meaning. But we have no right to saddle our meaning on the clearly different meaning that the founders assigned to their words. That is just a device for escaping their explanation of what they meant to accomplish. To this day, we seek to ascertain the intention of Congress in construing statutes; every student of statutory construction knows that. And I would ask, why should judges feel bound by the legislators' intention and yet feel free to ignore the will of the framers, a will that was ratified by the people?

Limited government, Jefferson declared, is designed to bind our delegates "down from mischief by the chains of the Constitution."¹⁶ In carrying out their purpose to curb excessive exercise of power, the founders used words to forge those chains. We dissolve the chains when we change the meaning of the words. Certainly the Supreme Court from earliest times was a devotee of the original intention.¹⁷ I call your attention to a rarely noted early case, *Rhode Island v. Massachusetts*.¹⁸ "The solution of this question [of construc-

¹³ 1 THE WORKS OF JAMES WILSON 75 (R. McCloskey ed. 1967).

¹⁴ JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 167 (Gunther ed. 1969) (emphasis in original).

¹⁵ J. SELDEN, TABLE TALK 13 (Quartich ed. 1927).

¹⁶ C. WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 153 (1925).

¹⁷ The Court "has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the people who adopted it." tenBroek, *Use by the United States Court of Extrinsic Aids in Constitutional Construction: The Intent Theory of Constitutional Construction*, 27 CALIF. L. REV. 399 (1939).

¹⁸ 37 U.S. (12 Pet.) 657 (1838).

tion] must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the [ratification] conventions . . . to which this Court has always resorted in construing the constitution."¹⁹ We are not dealing with some idle originalist fantasies, but with a doctrine that even the activist Thomas Grey said has deep roots in history, deep roots in constitutional law.

Did the founders mean that their intentions should prevail? Madison wrote that "if [the sense in which the Constitution was accepted and ratified by the nation] be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers."²⁰ Jefferson pledged himself to exercise the presidential powers in accord with the intention of those who framed and ratified the Constitution. That the framers intended posterity to resort to their intention is evidenced by the preservation of the Convention journal. James Wilson's reason for doing so, as Madison explained, was that, "As false suggestions may be propagated it should not be made impossible to contradict them."²¹ In other words, we should keep this journal because in the future others may have a false view of what we meant, and this journal will confute them. In the state ratification conventions, for example, there were quite a few framers who attended, and were asked repeatedly to explain what they had meant. And the framer who was a delegate from Virginia, or from Massachusetts, explained to those who were not at the Convention, "Oh no, we had no such purpose in mind, we meant thus and so." How in good conscience can we disregard such representations?

I close with a seldom noted remark of Justice Harlan, who to my mind was the outstanding judge of this generation, "When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect."²²

¹⁹ *Id.* at 721.

²⁰ 9 WRITINGS OF JAMES MADISON 191 (G. Hunt ed. 1910).

²¹ 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 648 (1911).

²² *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., concurring in part and dissenting in part).

ORIGINALIST THEORIES OF CONSTITUTIONAL INTERPRETATION

Robert Bennett†

Our subject is “Originalist Theories of Constitutional Interpretation,” but I want to argue, in a sense, that this is not a real subject; that what is commonly called originalism is not a real or at least not a very coherent option for constitutional interpretation. I know of much dispute about originalism, but most of the proponents of what goes under that name seem to me not to have taken very seriously the theory either of interpretation or of originalism.

The sub-heading for our topic is “textualist and intentionalist options.” I want to make clear that the kind of originalism whose viability I dispute is called “intentionalism,” i.e., the notion that contemporary constitutional questions are to be answered by reference to the intentions of those responsible for putting the provision in question on the books. What is called “textualism,” by contrast, seems to me unproblematic. To be a textualist, as I understand it, is simply to feel that those interpreting the Constitution are bound by its words. It is common to assume that interpreting words is an easy process, and, in particular, to confuse fidelity to language with a narrow literalism. Literalism in interpretation raises familiar problems, and I am certainly not a literalist. But if textualism is merely an acknowledgement of the authority of the Constitution’s language, I am a dyed-in-the-wool textualist. Intentionalism, or (as I will call it from here on out) originalism, is quite another thing.

I will first simply mention, without discussing, three well understood and serious problems with originalism. The first is the obvious historical problem. The second is what I call the summing problem: how to define the appropriate group of intenders and then combine their individual subjective states of mind to come up with a constitutional intention. The third is the problem of the easy manipulability of levels of generality and specificity in defining the relevant intention.

I would like to concentrate, instead, on what seems to me a more fundamental problem with the originalist enterprise, one that has received relatively little attention in the discussions of the subject. The problem is basically this. Assuming that we have sur-

† Dean, Northwestern Law School. B.A. 1962; LL.B. 1965, Harvard University.

mounted the summing problem, so that we can talk of a single intender, consider the hypothetical question of how the original intender would resolve a contemporary constitutional problem had he promulgated the language originally, and had he decided all the cases that had arisen pursuant to it in the meantime, and indeed, had he lived through everything that had happened in the meantime. Is the originalist answer to the contemporary constitutional question necessarily the same as the answer to this hypothetical question, or might it be different? Let us consider those two possibilities in turn.

First, if the originalist answer is necessarily the same as the answer to this hypothetical question, if that is what originalism means, then originalism is meaningful. But it brings with it none of the answers to contemporary questions that those who style themselves originalists so confidently assert it does. It does not tell us that *Roe v. Wade*¹ is wrong or right, nor that the legislative apportionment cases are wrong or right. Originalism, in this sense, tells us precious little about how contemporary constitutional questions are to be answered, because the determinants of an individual's decision over time are many and complex. Individuals often change their minds as they live and learn and grow, or fail to grow.

Consider a single individual first harboring some original intention as he promulgates a constitutional provision, and then successively confronting two different cases that arise under that provision, two cases that are different from each other and different from anything he had thought about when he promulgated the provision. I would assert that the answer to the problem that arises in the second case would very much be influenced by the process of reasoning that went into the first case. We have much to learn about reasoning by analogy, but it is clear that much legal reasoning requires judgment that one situation is like an earlier one, that in real cases those judgments of similarity are seldom unproblematic, and that once one judgment of similarity has been made, there are then two potential bases for further judgments of similarity—the subject of the original intention on the one hand, and of the first decision on the other. I would further assert that the relationship of analogy is not, in any obvious sense, a transitive one. That is, if B is analogous to A, C can be analogous to B, even though C is not analogous to A.

If this is so, then the judge (or my hypothetical original intender) deciding all cases over time is inevitably off on a decisional journey, informed by analogies that after a while may suggest con-

¹ 410 U.S. 113 (1973).

clusions bearing only a faint historical relationship to what was originally intended. The journey through analogies or other real-world influences on an individual's decisions can quite possibly even lead to a repudiation of something that the intender would recognize as originally intended.

My favorite example of a step in such a journey of analogies is *Yick Wo v. Hopkins*,² the early fourteenth amendment case that raised the question (among others) of whether Chinese aliens were entitled to the protection of that amendment. The Court held in favor of their claim. I do not know of a single contemporary constitutional scholar, be he self-styled originalist or some other breed, who claims that *Yick Wo* was wrongly decided, at least in that respect. Yet the question in *Yick Wo* is not identical to any subject of original intention. *Yick Wo* becomes an easy case, if it is one, only by means of a non-obvious, analogical step—and once that step is taken, *Yick Wo* becomes available to inform further steps in the journey that the deciding agency must travel.

Let us now turn to the second possibility: that originalism means something other than answering questions by reference to my hypothetical intender deciding all cases over time. If this is the case, then one must acknowledge that the contemporary decision is governed by something other than the mental state of the intender as it would interact with events and information over time. About any such assertion, I have two questions. First, how do we choose what part of the mental state of the intender that would have actually influenced his decisions to ignore? There is very little discussion of this question in the literature. One scholar who has addressed this question is my colleague in that other part of the Northwest Territories, Michael Perry, with whom I have talked about this subject many times. Professor Perry says that the originalist's obligation is to follow that part of the intender's mental state that he authoritatively established. But I do not know how to identify that part. The intender has a perfectly good way of authoritatively establishing constitutional language, but none that I know of for authoritatively establishing a part of his mental state.

My second question is this. Supposing that we could segregate part of the intender's mental state from the rest, and answer constitutional questions by reference to only that part, what would be the appeal of doing so? I understand the appeal of construing language by reference to the state of mind of the author of the language: the approach has several virtues that I will not belabor here. (In contracts, however, Professor Berger to the contrary notwithstanding,

² 118 U.S. 356 (1886).

we do not always take that route; we often prefer the understanding of the addressee of the language.) But when we choose only a part of what actually would have informed the author's decision had it been his to make, we would be more candid to acknowledge that the decision is really ours and not try to clothe it with the authority of the language the intender promulgated by pretending that it is really a decision referable to his intention.

Let me close with a plea for candor. If one takes what I have said seriously, then it is apparent that originalism does not provide a basis for resolving constitutional questions that can be abstracted from the actual process of confronting and deciding those questions. In particular, the role of precedent will likely loom large in any decision making process that is used to elaborate the meaning of language promulgated at one time and then applied to a series of problems over an extended period. Precedent would certainly play such a role for the intender, were he the decision maker.

What really animates much of the originalist enterprise is not a reasoned conclusion that there is a theory there, but rather a dissatisfaction with what is perceived to be mischievous judicial activism. Nothing that I have said is meant to reflect a choice between judicial activism and judicial restraint. That is a debate that has and should be carried on in its own terms and that will proceed to a happier ending, I firmly believe, when we no longer cloud the issue by reference to an unattainable regime of decision according to original intention.