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## ORIGINALISM AND EMERGENCIES: A REPLY TO LAWSON

ERIC A. POSNER\* & ADRIAN VERMEULE\*\*

Professor Gary Lawson, in an elegant and counterintuitive contribution, argues that the original understanding of the Constitution supports what we call the judicial deference thesis – that courts should defer to the executive and legislative branches during emergencies.<sup>1</sup> In our book *Terror in the Balance*,<sup>2</sup> to which Lawson is responding, we did not address the original understanding of the Constitution, but we assumed *en passant* that our view could not be squared with the original conception of the presidency.<sup>3</sup> Lawson’s treatment thus suggests the possibility of an overlapping consensus between nonoriginalists and originalists who advocate extensive deference to the presidency in times of crisis. However, we are skeptical that the consensus holds up, in part because even deferential originalist judges might think that deference is owed to Congress rather than to the executive. Moreover, if originalist adjudication is at all justified by reference to its consequences, then judges should be less originalist in emergencies than in normal times.

According to Lawson’s account, the Necessary and Proper Clause permits Congress to pass “reasonable” laws during emergencies that would not be permissible during normal times, because the range of laws that are necessary and proper to address an emergency will expand beyond the range of laws necessary and proper in ordinary times.<sup>4</sup> So too, the Vesting Clause, limited by implicit reasonableness and proportionality requirements, permits the President to take “reasonable” actions during emergencies that he may not take during normal times: an action that is reasonable for addressing an emergency may not be reasonable for addressing ordinary problems.<sup>5</sup> And courts should defer to the political branches’ determination of the reasonableness of their

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<sup>1</sup> Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 293 (2007).

<sup>2</sup> ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

<sup>3</sup> See *id.* at 56 (“Our original constitutional structure, with a relatively weak presidency, reflects the concerns of the eighteenth century and is not well adapted to current conditions.”).

<sup>4</sup> Lawson, *supra* note 1, at 308.

<sup>5</sup> *Id.*

own actions because judges, in order to discharge their obligation to try cases, must respect the emergency-related expertise of the other branches, at least for the duration of the crisis.<sup>6</sup>

Happily, then, the original understanding of the Constitution converges with our institutional analysis. Lawson's founders believed, as we do, that courts should defer to the political branches during emergencies, leading to a "cycle of deference during crises followed by more searching judicial review once the emergency has passed."<sup>7</sup> Perhaps this should not be surprising, although we predict that many originalists will disagree with Lawson. The judicial deference thesis, as we defend it, is based on a common sense evaluation of relative institutional competence, one that was fully accessible to the founders. So deference during emergencies should recommend itself both to originalist judges and nonoriginalist judges who are sensitive to their institutional role. A converging agreement by differing methodological camps supports the judicial deference thesis.

However, we have some descriptive and normative concerns about this happy state of affairs. To begin with, we suggest some cases in which Lawson's approach may yield different outcomes from our own. Lawson has not said much about the allocation of emergency powers between the legislature and the executive – an allocation that may, even under Lawson's account, make all the difference. Lawson says that the Constitution requires judges to be epistemically humble and thus deferential,<sup>8</sup> but to whom is that deference owed? Congress or the President? On our theory, the answer is the President. We are not sure what answer Lawson would or could give – presumably it depends on what the originalist materials say<sup>9</sup> – and that uncertainty illustrates our qualms with originalist adjudication during emergencies.

Accordingly, we also raise broader questions about originalist judging during emergencies. If originalist adjudication is justified, even in part, by reference to its consequences, then it is unlikely that judges deciding constitutional cases during emergencies should be originalist. Even if originalist judges will sometimes or often come to the same deferential results we urge on nonoriginalist grounds, it will only be a fortuity that they do so; originalism incurs costs of decision making, and of delay, that are more serious in emergencies, and the costs of orienting law toward eighteenth-century materials is much higher during emergencies, which by their nature pose unanticipated problems. Overall, because each emergency presents novel questions of law and policy – a premise with which Lawson seems to agree<sup>10</sup> –

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<sup>6</sup> *Id.* at 312.

<sup>7</sup> *Id.*

<sup>8</sup> *See id.* at 311.

<sup>9</sup> *See id.* at 299 n.55.

<sup>10</sup> *Id.* at 296.

historical information is of reduced value in emergencies; law should be more forward-looking than in normal times.

*Originalism, Deference, and Outcomes*

Incompletely theorized agreements tend to break apart along the margins, where the alternative theories no longer converge. Lawson argues that the originalist view and our view fully converge,<sup>11</sup> but we have some doubts. Let us quote a key passage of Lawson's paper:

[A]pplication of originalism to the Article II Vesting Clause and the Article I Sweeping Clause shows that each power is subject to the principle of reasonableness. *How that principle applies in given circumstances*, though, is not necessarily something that can be determined by legal methodologies. One can stare at the Constitution for a very long time and still not know whether a particular executive law enforcement action is or is not efficacious and proportionate enough to satisfy the principle of reasonableness and therefore survive constitutional scrutiny. One would need to know the facts that prompted the action, the risks of not taking it, the likely costs and benefits of various alternatives, and the costs and benefits of taking the time to figure out the costs and benefits of various alternatives while terrorists plant bombs. These are legal questions in the sense that they may determine the constitutionality of the action. But their resolution depends on facts, inferences, and evaluations that judges are extremely unlikely to be in a good position to acquire, make, and perform. In this limited class of determinations, when time is of the essence and the stakes are enormously high, deference to the factual judgments of those who are better situated to make them becomes part of the courts' legal obligation to determine the governing law through the best tools available. Sometimes – not often, but sometimes – deference really is the best tool.<sup>12</sup>

So an order that might seem unreasonable – intern all Japanese Americans living on the West Coast, for example – should nonetheless receive deference because it may have been prompted by facts (that these Japanese Americans actually pose a risk to national security) that judges cannot acquire or inferences that they are not qualified to make.

So far, fine, but as Lawson acknowledges, the judges' deferential position is contingent on their epistemological disadvantages;<sup>13</sup> it follows that if the President's or Congress' epistemological advantages wane or disappear, the case for deference weakens or disappears. Preliminarily, we clarify that, in our

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<sup>11</sup> See *id.* at 293.

<sup>12</sup> *Id.* at 312.

<sup>13</sup> *Id.* at 311 (“There is no general constitutional requirement of legal deference to executive or legislative actors; the deference that I have just described is *prima facie* epistemological.”).

view, relative epistemological competence is just one relevant factor. Other reasons for deference include the President's ability to act more quickly and decisively and with secrecy, and the tendency of the public to rally around the President.<sup>14</sup> Consider the possibility that a judge could learn all the relevant facts known to the executive branch and could make the necessary inferences; it still may be the case that judicial hearings would slow down decision making and compromise security.<sup>15</sup> Even an epistemologically unconstrained judge would sometimes defer under our theory. It is unclear whether he or she will ever do so under Lawson's originalist theory; we are not sure whether Lawson understands "epistemological deference" to include, or not to include, nonepistemic factors such as the direct and opportunity costs of delay. Or perhaps Lawson believes that judges are always epistemologically disadvantaged during an emergency, in which case the distinction between epistemic and nonepistemic grounds for deference is of no practical importance.

A more serious problem with the originalist theory – or the part of the originalist theory Lawson has presented here – is the crucial issue of how emergency powers are to be allocated between the legislature and the executive. The originalist view, as Lawson describes it, seems to imply, at least in many circumstances, what we call the statutory authorization thesis – the view that judges should defer to executive actions during emergencies if, but only if, those actions have legislative authorization.<sup>16</sup> Although a judge might acknowledge that he has epistemological disadvantages relative to the executive, he might also think that the legislature does not have such disadvantages, and so might defer to the legislature – which means *not* deferring to the executive. In *Terror in the Balance*, however, we offered consequentialist arguments to suggest that Congress too should defer to the President during emergencies, and therefore that epistemically humble judges should not require statutory authorization for emergency action by the President.<sup>17</sup> Lawson seemingly rejects those arguments on originalist grounds, in which case the overlapping consensus has started to fall apart.

Two (in)famous cases illustrate this divergence. In *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>18</sup> the Supreme Court enjoined President Truman from seizing the steel mills because Congress had not authorized, and indeed may have impliedly prohibited, this action.<sup>19</sup> The Court might reasonably have believed that even if it could not evaluate the security risk that, according to

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<sup>14</sup> POSNER & VERMEULE, *supra* note 2, at 55.

<sup>15</sup> We put aside the possibility that judicial delay might be desirable to offset executive hastiness or overreaction to the emergency – a possibility that neither Lawson nor we think supports a robust role for courts. See *id.* at 59-86; Lawson, *supra* note 1, at 297.

<sup>16</sup> See Lawson, *supra* note 1, at 305-06.

<sup>17</sup> See POSNER & VERMEULE, *supra* note 2, at 6.

<sup>18</sup> 343 U.S. 579 (1952).

<sup>19</sup> See *id.* at 588-89.

Truman, justified the seizure, Congress could, but had declined to authorize the seizure retroactively when Truman invited it to do so. Nor did Congress authorize the seizure in advance.<sup>20</sup> To the extent that *Youngstown* is a case of legislative refusal to authorize, rather than a case of implied prohibition, there is the problem that Congress can fail to act for many reasons, which is a ground for discounting the epistemic significance of its inaction. Yet even as discounted, legislative inaction may still be of decisive significance for a court that is quite nervous about making its own judgments. In *Hamdan v. Rumsfeld*,<sup>21</sup> the Supreme Court struck down President Bush's military commissions because they conflicted with an earlier statute.<sup>22</sup> Here, the Court may have believed that the relatively narrow statute, permitting military commissions only under certain conditions and for certain purposes, reflected Congress' wisdom about the optimal use of such commissions.

There are other possible ways in which the originalist judge and our ideal judge may differ. Lawson's originalist judge defers only when "time is of the essence and the stakes are enormously high."<sup>23</sup> This statement and the surrounding discussion suggest that the judge should make an independent judgment of whether time is of the essence and stakes are high – whether a crisis is at hand.<sup>24</sup> We lean toward the view that the judge should, and will have to, defer to the executive's own determination that time is of the essence and the stakes are high, at least within limits. Just as judges are ill-suited to determine the measures that are appropriate to address an emergency, they are ill-suited to determine whether an emergency exists in the first place. Indeed, Congress appears to believe this itself, as evidenced by its delegation of highly discretionary emergency powers to the President in various statutes.<sup>25</sup> There are limits, of course; judges should not defer if the executive declaration of emergency is obviously pretextual, but the lines will be blurry. Ultimately, there is little reason to think that this institutional evaluation coincides with Lawson's originalist interpretation.

### *Originalism, Consequences, and Emergencies*

Our second concern is that Lawson's approach is hostage to the historical sources – an odd and undesirable property for a theory of adjudication during emergencies. The overlap between our view and the originalist view about adjudication during emergencies (however great it may be) is entirely contingent. If archival research discloses that the original understanding was that judges should not defer, or should defer only under narrow circumstances,

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<sup>20</sup> *Id.* at 585.

<sup>21</sup> 126 S. Ct. 2749 (2006).

<sup>22</sup> *See id.* at 2791.

<sup>23</sup> Lawson, *supra* note 1, at 312.

<sup>24</sup> *Id.* at 310.

<sup>25</sup> *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1407-09 (1989).

then in times of emergency the originalist judge would need to be more interventionist than our theory requires. In this sense, it is at most an accident that Lawson's originalist account substantially overlaps with our consequentialist one; and the emphasis is on "accident," because other originalists with different readings of the legal and historical texts may well disagree with Lawson. More broadly, anyone who thinks originalism must be justified, if at all, by reference to its consequences will wonder why in a time of crisis the emergency powers of government should be determined, even in part, by what archival materials happen to say.

To explain this concern, we must first specify the issues more clearly. Lawson sharply distinguishes "interpretation" – the enterprise of deciding what a text means – from "adjudication" – how judges decide cases.<sup>26</sup> He believes that interpretation is necessarily originalist: to determine meaning is, necessarily, to determine what the original public meaning of the relevant text was, without regard to the consequences of one interpretation or another.<sup>27</sup> Whether adjudication should be originalist is a separate question; and there Lawson seems to think that consequences matter,<sup>28</sup> as other originalists clearly do as well. Randy Barnett puts it this way: "Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials – including judges – must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer."<sup>29</sup>

In this light Lawson's present contribution is somewhat ambiguous. It could fairly be read as either a claim about original meaning (what Lawson would call "interpretation"), or a claim about what judges should do in emergencies (what Lawson would call "adjudication"). Or it may be both; after all, the thrust of his discussion is that the Constitution itself says what judges should do in emergencies – they should defer.<sup>30</sup> A related ambiguity is whether Lawson thinks that judges should consult originalist materials on a case-by-case or emergency-by-emergency basis, or whether they somehow decide, once and for all, to defer (to whom?) during emergencies.

However these ambiguities are resolved, Lawson's contribution fairly raises the issue of the merit of originalist adjudication during emergencies. Even if

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<sup>26</sup> Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823 (1997).

<sup>27</sup> *Id.* For the view that interpretation is necessarily consequentialist, at least in part, see Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2238 (2006).

<sup>28</sup> See Lawson, *supra* note 26, at 1824 ("[A]djudication should take strong account of principles like political legitimacy and consistency with current practice.").

<sup>29</sup> Cass Sunstein & Randy Barnett, *Constitution in Exile?*, LEGAL AFF., May 3, 2005, [http://legalaffairs.org/webexclusive/debateclub\\_cie0505.msp](http://legalaffairs.org/webexclusive/debateclub_cie0505.msp). Thanks to Cass Sunstein for pointing us to this quotation. See Sunstein, *supra* note 27, at 2236 & n.8.

<sup>30</sup> See Lawson, *supra* note 1, at 312.

Lawson himself does not intend to claim that judges deciding cases during emergencies should use originalist materials, other originalists clearly do claim that. Supreme Court Justices conventionally tagged as “originalist,” such as Antonin Scalia and Clarence Thomas, have conspicuously relied upon originalist and historical sources in important cases after 9/11.<sup>31</sup> For that matter, so have nonoriginalist justices, such as John Paul Stevens.<sup>32</sup>

Assuming consequences matter, even in part, what exactly is wrong with originalist adjudication during emergencies? We suggest that the costs of originalist adjudication rise during emergencies, while the benefits diminish. It is hard to say, in the abstract, how much worse originalist adjudication is during emergencies; but historical and archival questions should not hold center stage when judges are determining the validity of executive detention in 2004, or the validity of military commissions in 2006.

Originalism is plausibly the most costly approach to constitutional adjudication in terms of time and effort. Instead of relying upon moral intuitions, or low-cost analogies to precedents (which may be quite arbitrary, but are nonetheless cheap), originalist judges do massive amounts of historical and archival research and provoke nonoriginalist judges to do the same in self-defense. In any event, most originalists are more or less “faint-hearted”<sup>33</sup> and rely upon nonoriginalist sources too; what makes them distinctive is that the sources they add are archival and thus especially costly. During emergencies, these practices are more harmful than during normal times, because the costs of delay are greater. Holding outcomes constant, it is important to know sooner rather than later whether the President can detain enemy combatants, or hold military trials; the costs of delay and uncertainty in the interim rise during emergencies. An originalist judge will take longer to answer these sorts of questions, all else being equal, and will thus generate more uncertainty and delay in instituting optimal policies.

These points about decision costs, however, do not really get at the oddity of originalist adjudication during emergencies. Even if, in normal times, originalist adjudication is sensible because its benefits outweigh its costs, during emergencies it seems curiously irrelevant for judges to pore through Madison’s statements and back issues of New York newspapers from two centuries ago. The benefits of historical information are lower; conversely, the costs of tying judges to eighteenth-century legal concepts are higher. Emergencies by their nature arise from unanticipated events. Each emergency presents challenges different from those faced by past generations.<sup>34</sup>

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<sup>31</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 554-79 (2004) (Scalia, J., dissenting); *id.* at 579-99 (Thomas, J., dissenting).

<sup>32</sup> Justice Stevens joined Justice Scalia’s originalist dissent in *Hamdi*.

<sup>33</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (“[M]ost originalists are faint-hearted.”).

<sup>34</sup> See Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 292.



Governments are at sea, not only executive officials but even more so judges; legal policy must be more experimental and creative, more forward-looking and less routinized, than during normal times.

We add that although originalists are not the same as traditionalists, the two shade into one another, and these points about originalism also cast doubt on whether Burkean or common-law traditionalism is a sensible approach to adjudication during emergencies.<sup>35</sup> When both the majority/plurality and the dissenters in *Hamdan* scrutinize the details of General Winfield Scott's actions in 1847 and treatises from the nineteenth century to help decide whether Salim Ahmed Hamdan can be put on military trial for conspiracy in 2006,<sup>36</sup> something has gone wrong. Emergencies breach the routine practices of a settled legal order; it is odd to decide what to do in emergencies by referring back to the interrupted routines.

The main reason for relying on tradition is that norms and statutes that survive a long time may have been subject to a great deal of thought and criticism, and so are more likely to be socially valuable than novel practices.<sup>37</sup> Furthermore, people who have relied on traditional understandings will be harmed if the government suddenly changes course. But emergencies shatter old understandings and frequently reveal the limits of traditions. Emergencies by their nature are episodic rather than continuous, so that "emergency traditions" are necessarily of more limited duration than normal traditions. The information value of an emergency tradition, like the military tribunal, is similarly limited. The claim that people have relied on traditional understandings – that, for example, al Qaeda members expected that the United States would use the type of military tribunals that it used in the past and that their legitimate expectations would be harmed if the United States acted otherwise – is absurd. To be sure, the fact that something has been done before is not entirely irrelevant: defenders of tribunals and other security measures like to point to precedent to deflect the claim that the Bush administration is uniquely tyrannical, just as critics like to point to the counter-tradition of after-the-fact repudiation of such measures. But the notion that traditions generally, or "emergency traditions" in particular, are sufficiently robust to provide a basis for effective judicial review of emergency measures seems wrong.

Originalism and traditionalism have other advantages, of course, and conceivably these advantages offset the disadvantages that we have identified. Perhaps the originalist or traditionalist judge is more closely bound to an external source of norms and thus less likely to allow his political biases to influence his decision making than is a nonoriginalist judge. Whatever the importance of this advantage in other contexts, however, it is of reduced

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<sup>35</sup> For a qualified defense of Burkean constitutional adjudication, see generally Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

<sup>36</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006); *id.* at 2831-39 (Thomas, J., dissenting).

<sup>37</sup> See Sunstein, *supra* note 35, at 367-68.

importance during emergencies. Biases cannot much influence the maximally deferential judge because he avoids making substantive decisions. That is to say, judges on the left and right who agree with our theory will both tend to defer during emergencies, even though they might be more or less skeptical about the President's claims. Politically biased judging is less of a worry during emergencies because the more serious the emergency, the less political disagreement there will be. Judges of all parties and views will concur in wanting to defend the nation against its enemies and will tend to defer heavily to the executive as the best means of doing so.

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Theorists who support originalist adjudication on consequentialist grounds basically advocate a form of rule-consequentialism. Judges ought not think directly about consequences on a case-by-case basis; rather, they will do best overall, across an array of cases, by following the original understanding.<sup>38</sup> A rule, however, can often be improved by adopting a rule-with-exceptions that captures the rule's benefits while reducing its costs. We suggest a rule with an exception: even if originalist adjudication is best during normal times, it should be put aside during emergencies. When novel crises reduce the value of historical information, judges should lift their noses out of the stack of archival materials. This need not mean that judges should think for themselves; quite the contrary, we argue that during emergencies judges should let the executive think for them. But they will not be deciding on originalist grounds.

Against this backdrop, Lawson adds the striking claim that the rule-with-exceptions is already required by originalism; the original understanding itself expands governmental powers during emergencies, instructing judges to defer, so that the rule-with-exceptions produces the same outcomes as the rule.<sup>39</sup> We are skeptical that this is so, especially in the class of cases that involve the allocation of emergency powers between the legislature and executive. But even if it is so, from our perspective, it is but a happy coincidence, one that other originalists may not agree with (for all we know) and one that underscores the oddity of determining the emergency powers of government by reference to legal materials generated circa 1789.<sup>40</sup>

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<sup>38</sup> This is the thrust of Barnett's argument. See *supra* note 29 and accompanying text.

<sup>39</sup> See Lawson, *supra* note 1, at 309, 312.

<sup>40</sup> We emphasize that we are not sure whether Lawson wants judges to actually consult originalist materials during emergencies. If he does not, the issue is still an important one fairly raised by his contribution, so we take the opportunity to address it.

