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2008

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Recommended Citation

Frank H. Easterbrook, "Originalism and Pragmatism: Pragmatism's role in Interpretation," 31 Harvard Journal of Law and Public Policy 901 (2008).

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PRAGMATISM'S ROLE IN INTERPRETATION

FRANK H. EASTERBROOK*

Although the title of this panel is in the conjunctive—Originalism *and* Pragmatism—people usually assume that we must choose originalism *or* pragmatism. Pragmatists, such as Justice Breyer and Judge Posner, think it both wise and appropriate to change constitutional norms to serve modern needs.[1] Pragmatists differ from Justice Douglas and other inventionists by giving the political branches what they view as healthy sway, through a Dworkin-like process that treats judges as authors of chain novels.[2] The pragmatist is constrained by what earlier authors have done—but like the inventionists the modern pragmatists insist that in the end how much sway to allow is a question for judges, because judges write today's chapter. Originalists, such as Justice Thomas, deny that the Constitution has changed since its words were adopted; political society evolves informally and incrementally, but legal texts are fixed unless the rules for change (such as statutory or constitutional amendments) have been followed.

I want to defend the assumption of the panel's title—that both originalism *and* pragmatism play vital roles in constitutional practice.

The case for pragmatism is easy to state. Our Constitution is old, and modern society faces questions that did not occur to those who lived during the Civil War and penned the reconstruction amendments, let alone those who survived the Revolu-

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1. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); RICHARD A. POSNER, HOW JUDGES THINK (2008).

2. *See* RONALD DWORKIN, LAW'S EMPIRE 228–38 (1986).

tionary War and wrote the Constitution of 1787. What's more, originalism requires us to understand how the linguistic community that approved the words understood their application. A phrase such as "due process of law" or "commerce among the several states" is so much noise unless linked to the original interpretive community. But language is a social and contextual enterprise; those who live in a different society and use language differently cannot reconstruct the original meaning except by feats of scholarship and cerebration. More often, alas, unsupported and hubristic assertion takes the place of hard work.

New problems pose unanswerable questions to someone who thinks originalism the sole method of interpretation. Denying the obvious gives textualism a bad name. And we have had "new" problems from the start: think for example of the Bank of the United States. When James Madison first considered the Bank's constitutional status (while he was in the House) he thought it beyond the new national government's powers; on second take Madison (as President) signed the bill establishing the Second Bank; and then Andrew Jackson vetoed the bill establishing the Third Bank, issuing a veto message that still repays reading. None of what Madison, Jackson, and their contemporaries did or said was encoded in 1787; most problems lack original solutions. So much is inevitable; the Constitution is a very short document.

But no one who had a hand in creating this nation was so foolish as to think that all interesting decisions are encoded in the original text. The decision was to create a federal republic and let the people work out, through their representatives, the problems of time still to come. We do so pragmatically. How else does democracy work?

When the Bank came to the Supreme Court in *McCulloch*, the Justices approved that process. The Bank's opponents pointed to two things: the Constitution creates limited federal powers, and nothing authorizes the national government to create financial intermediaries. To charter a bank Congress needed to rely on the power to enact laws "necessary and proper" to put the other powers into effect. But how could the Bank be "necessary"? The nation could survive without a central bank; between 1810 and 1816 it did (and would again between 1836 and 1913).

By taking "necessary" strictly, the Court could have set itself up as a potent political force, reviewing the wisdom of laws.

The Court resisted. Chief Justice Marshall explained:

> Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.[3]

There is that famous phrase: "we must never forget, that it is a constitution we are expounding." But now you see its context: as a description of legislative latitude. Marshall was explaining why the political branches have power to act pragmatically, while judges do not! He had *two* theories of constitutional authority—one for Congress, which wields explicit grants of power, and the other for judges. It should hardly be necessary to remind you that there is a real Necessary and Proper Clause, but no judicial review clause.

Congress and the President derive authority from election, and they act under open-ended grants designed for an indefinite future. If a court is to do anything other than bless the

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3. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406–07 (1819).

product of the political branches, it must appeal to concrete decisions. Remember the rationale of *Marbury v. Madison*:[4] the Constitution is a set of laws, superior to statutes; having deciphered the meaning of both judges need only apply standard choice-of-law principles. *Marbury* depicts the Constitution as a catalog of rules, with a meaning comprehensible to all who take the trouble to read carefully. When judges can reach such a firm conclusion, they may insist that the political outcome yield. That is the originalist constraint. Otherwise judges must respect politically pragmatic decisions.

Thus originalism is the tool of the judicial branch—not because it is the only right way to understand texts, not because it is easy, and certainly not because those who apply it will always be right, but because it is the *only* approach that explains why judges have the final word. When an issue lacks an original answer, the premise of judicial review is defeated. When originalism fails, so does judicial power to have the final say. And democracy remains.

Let us not lose sleep over a claim that this leaves a "wooden" Constitution or rule by a dead hand. Originalism is an approach to the allocation of power over time and among the living. Decisions of yesterday's legislatures (and the 109th Congress is as "dead" for this purpose as the 50th or the 10th) are enforced not only because our political system does not treat texts as radioactive (there is no legal half-life) but also because affirming the force of old texts is essential if sitting legislatures are to enjoy the power to make new ones. Our rules for making law were encoded in 1787 and are no more or less dead than other aspects of the process.

To say that "the dead" govern through originalism is word play. We the living enforce laws (and the Constitution that provides the framework for their enactment and enforcement) that were adopted yesterday because it is wise for us to do so today. Old texts prevail not because their authors want, but because the living want. This isn't a theory of *interpretation* but of political legitimacy. Originalists accept the Constitution's

4. 5 U.S. (1 Cranch) 137 (1803).

theory of political obligation, but it is important to separate the theory of political justification from the theory of interpretation appropriate to that theory of justification.[5]

The fundamental theory of political legitimacy in the United States is contractarian, which implies originalist interpretation by the judicial branch. Otherwise a pack of tenured lawyers is changing the deal, reneging on behalf of a society that did not appoint them for that purpose. This is not a controversial proposition. It is sound historically: the Constitution was designed and approved like a contract. It is sound dispositionally: it is the political theory the man in the street supplies when he appeals to the Constitution (or to the legitimacy of the electoral process, even though his candidate lost).

Contractual rights are inherited. If I buy a house with borrowed money, the *net* value of the house is what my heirs inherit; they can't get the house free from the debt. This is so whether my heirs consent to the deal or not; contract rights pass to the next generation as written.

Both private and social contracts are hard to change, but only someone distracted by babble about "contracts of adhesion" would think this an objection rather than a benefit. We the living accept the power of contract *because* they are hard to change. Stability in a political system is exceptionally valuable. Someone who loses a legislative battle today accepts that loss in exchange for surety that next year's victory on some other subject will be accepted by other losers in their turn. People accept old contracts and old legal texts because they know that this is the only way to ensure that promises *to them* are kept; if all is up for grabs, they are apt to lose both coming and going.

The constitutional contract is no more hypothetical than the losers' willingness to accept the election results today, in the belief that they may win tomorrow. Today's majority accepts limits on its own power in exchange for greater surety that its own rights will be respected when, sometime in the future,

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5. I flesh out this line of argument in *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004); *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998); *The State of Madison's Vision of the State*, 107 HARV. L. REV. 1328 (1994); and *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992).

power has shifted. An originalist system of interpretation facilitates and guarantees this allocation of power over time, and across groups.

Like other judges, I took an oath to support and enforce both the laws and the Constitution. That is to say, I made a promise—a contract. In exchange for receiving power and long tenure I agreed to limit the extent of my discretion. Sneering at the oath is common in the academy, but it was an important part of Chief Justice Marshall's account of judicial review in *Marbury* and matters greatly to conscientious public officials. It should matter to everyone. Would *you* surrender power to someone who can be neither removed from office nor disciplined, unless that power was constrained? The constraint is the promise to abide by the rules in place—yesterday's rules, to be sure, but rules.

Originalism is the constraint for judges, as short tenure is the main constraint for political officials. These different constraints imply different modes of interpretation—just as judges under *Chevron*[6] give politically accountable agencies more interpretive leeway than the judges allow themselves.[7]

My point is simple. Meaning depends on the purpose to which we put it. Judges seek the core of meaning within which further debate is ruled out. That core will be smaller than the scope of all constitutional interests and proprieties. In the end, the power to countermand the decisions of other governmental actors and punish those who disagree depends on a theory of meaning that supposes the possibility of right answers.

You can't view rules of interpretation as unitary. You must search for a norm simultaneously suited to the Constitution and to the actor's role—and judges fill roles different from political actors. We must demand not that the courts' interpretive norm conform to the reader's political theory, but that it be law.

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6. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

7. I expand on this in *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004).