THE MISUNDERSTOOD RELATIONSHIP BETWEEN ORIGINALISM AND POPULAR SOVEREIGNTY

SAIKRISHNA B. PRAKASH*

Since *The Tempting of America* was published,[1] many originalists, seeking to justify their preference for adhering to the original meaning of the Constitution, have taken up the banner of popular sovereignty.[2] The Constitution, we are told, was ratified by "We the People."[3] According to many, the popular ratification of the Constitution and its many amendments grants the Constitution an enduring legitimacy.[4] Because popular sovereignty is said to be the principal basis of the Constitution's legitimacy, one ought to follow the meaning ascribed to the Constitution by "They the People"—namely, those who ratified the Constitution and its amendments over the course of 200 years. In other words, if the American people gave the Constitution a continuing legitimacy, they also should be the ones to give it an enduring (and somewhat stable) meaning. Recently, Professor Kurt Lash asserted that popular sovereignty is the "most common and most influential justification for originalism."[5] Whether or not Professor Lash is correct, his assertion seems plausible.

This Essay does not take issue with those who celebrate popular sovereignty. Nor does it deny that the Constitution's

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* Herzog Research Professor of Law, University of San Diego School of Law.

1. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

2. *See, e.g.*, PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 63–64 (1992).

3. *Id.*

4. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999). For a discussion of the relationship between originalism and popular sovereignty, see JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 190–91 (2005).

5. Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007).

legitimacy arises by virtue of numerous acts of ratification, most of which took place several generations ago. Those are debates for another day. Instead, this Essay contests the interpretive assertion that proponents of popular sovereignty often make: that originalism is a legitimate means of making sense of the Constitution merely or primarily because of the manner in which the Constitution was ratified and amended.[6] This position unduly narrows the strength and appeal of originalism, which, properly understood, has nothing to do with how the legal document in question came into being. Legal documents generally ought to be understood through the originalist lens, whether those documents are the products of petty dictators or the united voice of the people. Indeed, *any* text or utterance, legal or not, should be understood through the originalist lens.

Originalists interested in discerning the meaning of a legal text usually ask some variant of the question: What did these provisions mean when they were enacted? Some originalists look to the lawmakers' subjective meaning: What did the actual lawmakers mean by the text that they purported to make law? Other originalists try to identify a semantic meaning, which is a sort of generic public meaning that might sometimes be distinct from what the actual lawmakers intended: What would this language mean to most ordinary people at the time?[7]

Originalists of all stripes eventually have to examine evidence that sheds light on their preferred version of original meaning. No one can properly say what a text written over two centuries ago meant at the time without examining far more than the text alone. Hence, originalists typically examine materials like Samuel Johnson's *A Dictionary of the English Language*,[8] debates from the time of the Constitution's framing and ratification, and post-ratification history (including material from Congresses, Presidents, and courts).[9] More resourceful original-

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6. *See* KAHN, *supra* note 2, at 63.

7. For a discussion of these differences, see Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

8. *See, e.g.*, Altman v. City of High Point, N.C., 330 F.3d 194, 201 (4th Cir. 2003) (opinion of Luttig, J.).

9. *See, e.g.*, Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 346–47 (1999) (Scalia, J., concurring) (citing dictionaries "roughly contemporaneous with the ratification of the Constitution" to determine the original meaning of "enumeration" in Article I of the Constitution); United States v. Lopez, 514 U.S.

ists may examine letters from the era, newspaper articles, books, and any other available document to determine original meaning.[10] After all, common usage not only establishes a public, semantic meaning; it also provides evidence of legislative intent, for lawmakers often intend the common meaning of the words they use.

But an obvious question arises once one examines something besides the text: How are we to make sense of these other sources that are being used to unearth a constitutional provision's original meaning? If one does not apply originalism to these documents but instead applies the theory of a living dictionary, a living letter, or a living *Federalist Paper*—the obvious counterparts to the living Constitution theory—then one will not really be discerning and recovering the Constitution's *original* meaning. In using modern or post-modern understandings of words and phrases in dictionaries, letters, and debates, we will have abandoned any chance of discerning the original meaning of words and phrases in the Constitution.

For good reason, therefore, originalists use originalism not only as a means of understanding the Constitution, but also as a means of understanding the documents that are used as the building blocks for discerning the Constitution's original meaning. But if originalism is justified only because of the manner in which the Constitution became law, what is the justification for using originalism to understand letters or newspaper articles? None of these were the products of popular sovereignty. They were typically written by one or a handful of persons. Dictionaries, letters, debates, and other materials were not written by "We the People." Nor were they "ratified" or given any popular legitimacy or authority.

549, 585–87 (1995) (Thomas, J., concurring) (citing dictionaries from the Founding era, Madison's notes from the Constitutional Convention, *The Federalist*, and the ratification debates to define the meaning of "commerce" in the Commerce Clause); *see also* Van Orden v. Perry, 545 U.S. 677, 686–87 (2005) (plurality opinion) (discussing the meaning of the Establishment Clause by referencing President Washington's Thanksgiving Day Proclamation).

10. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 590–91 (1995) (Thomas, J., concurring); Steven G. Calabresi, *The Originalist and Normative Case against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1084 (2005); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 16 (1999).

Some might argue that if one assumes originalism is appropriate for documents with a popular-sovereignty basis, it somehow follows that all documents useful for discerning the meaning of texts with a popular-sovereignty basis should likewise be discerned using originalism.

Such arguments, however, raise further questions. If one adopts an originalist stance towards the Philadelphia Convention records, *The Federalist*, or the Pacificus-Helvidius debates when used to shed light on the Constitution's original meaning, what method of interpretation should one use when reading these documents, not as a means for understanding the Constitution, but instead for purely historical interest? If a student of history or political science wishes to understand the meaning of *Federalist No. 10*, without regard to the light it might shed on the Constitution, is she free to adopt a non-originalist approach because she is not using the source to understand the Constitution?

Most ordinary people would conclude that one should read *The Federalist* by trying to recapture its original meaning. What was Madison trying to communicate when he talked about how a large republic might better counteract the influence of faction?[11] Once one knows what he was trying to communicate, one will have a better understanding of *Federalist No. 10*.

This contention is hardly revolutionary. How do historians, students, and ordinary citizens make sense of documents like the Gettysburg Address, Washington's Farewell Address, and the Magna Carta? Like good originalists, they try to discern original meanings. Few advocate reading such sources as if they were "living documents," capable of different meanings that reflect changing times and preferences. These documents mean something irrespective of whether their readers are socialists or libertarians, statists or free-marketers. No doubt there are great and important debates about what these documents really mean, but there seems to be no debate about whether originalism or some other interpretive method ought to be used to make sense of them. Such arguments are only made in the context of the Constitution and laws that purport to have continuing legal validity.

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11. THE FEDERALIST NO. 10 (James Madison).

Indeed, when discussing the Articles of Confederation, the Constitution's predecessor, does anyone claim that its meaning has changed over time and now means something quite different than it meant in 1950? Or that it meant something different in 1850 than it did in 1788? Most people, even the most fervent non-originalists, understand that archaic legal documents have a static meaning arising out of their original context.

If this Essay's argument about how people typically make sense of documents and utterances is true, originalism has no special claim to legitimacy merely because the Constitution was the product of an act of popular sovereignty. Legal documents produced by a tyrant, ruling without any popular mandate and acting directly contrary to popular will, should likewise be understood as they were originally understood. Old dictionaries, speeches, and letters ought to be understood the same way.

This is not to suggest that popular sovereignty is irrelevant to society's willingness to treat the Constitution as law. As noted at the outset, many might choose to adhere to a legal document because of the manner in which it was made law. Documents adopted by democratic means will strike many as having some unique entitlement to legitimacy, even when they were democratically adopted generations ago, and even though many people at the time were excluded from participating in the adoption of those documents.[12] Indeed, for many, the Constitution has a special claim to legitimacy because of the manner of its adoption, however imperfect that process may seem to modern eyes. It is also true that many regard laws made by tyrants as illegitimate precisely because of their source.

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12. In colonial America and during the early history of the United States, the franchise was restricted to white adult males. At one time or another, all of the colonies also restricted voting to Protestant Christians, and property restrictions further limited the size of the potential electorate. Scholars estimate that anywhere from 50 to 80 percent of adult white males were eligible to vote in the colonial period. Because adult white males made up 20 percent of the population as a whole, only 10 to 16 percent of the whole population might have been eligible to vote on the eve of the Revolution. Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 19, 20–25 (Donald W. Rogers ed., 1992).

These sorts of arguments address the normative question of whether one ought to follow some document—to treat it as binding law—because of the procedures used to adopt it. These arguments, however, have little to do with how to decipher the meaning of an ancient document. If one understands the Articles of Confederation and the ordinances and treaties enacted by the Continental Congress through the lens of originalism, even though none of those documents were the products of a process reflecting popular sovereignty, then originalism is not the proper means of understanding the Constitution merely because the latter resulted from acts of popular sovereignty. The popular foundations of the Constitution give reasons (good and bad) for accepting the Constitution as the continuing "supreme Law of the Land," but they supply no sound reason for believing that originalism is the proper method for discerning the Constitution's meaning.

Indeed, originalism, properly understood as an interpretational methodology, can never hope to provide an argument for a document's authority or legitimacy. It can no more provide such an argument than a key used to decipher a coded message can command the decoder to follow the coded message's instructions. Meaning tells us what somebody was trying to convey. But the meaning of a communication, by itself, does not necessarily provide a compelling reason to do anything.

The claims made here against the use of popular sovereignty as a justification for originalism can be generalized. *Any* theory that supposes that originalism is uniquely qualified or fit to determine the meaning of the Constitution has the same sets of problems as the prevalent popular sovereignty justification. Suppose that one thinks that the Constitution should be understood in light of its original meaning because of the supermajoritarian ratification process,[13] the excellence of the Constitution's provisions,[14] or the supposed legitimacy conferred by the many acts of informed and extraordinary higher law making that generated the Constitution,[15] to take but three other

13. *See* WHITTINGTON, *supra* note 4, at 130.

14. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 3–5 (2004) (arguing that the Constitution is legitimate because it contains adequate procedures to protect "natural rights").

15. *See* WHITTINGTON, *supra* note 4, at 111.

theories. Adherents of these theories must explain how we ought to understand the documents that help us discern the original meanings, almost none of which will enjoy the features that supposedly favor originalism as applied to the Constitution. Once one posits a unique justification for originalist methodology as applied to the Constitution, one has to explain how one derives meaning from all other documents relevant to unearthing the Constitution's original meaning.

It is doubtful that narrow justifications for originalism—popular sovereignty, super-majoritarian ratification process, and so on—provide sound and unique reasons for using originalism to determine the Constitution's meaning. Originalism is not a narrow, specialized technique that has unique (or even extra) purchase in the context of documents meeting some exacting procedural or substantive criteria. It has a broader appeal as a theory of interpretation, and it should not be tied to controversial normative arguments that have more to do with whether we ought to adhere to the rules found in the original Constitution.

But perhaps I am woefully mistaken in all this. Those originalists who disagree might choose to edify me. Such originalists might try to explain the methods by which we are to decipher the meaning of writings advancing their more narrow originalist theory, as well as ordinary texts like statutes, old letters, and so on. If popular sovereignty uniquely justifies originalism as applied to the Constitution, then we need other interpretive theories to help us make sense of all the other documents and utterances we encounter in the law and in ordinary life.

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