

ON THE HYPOTHESES THAT LIE AT THE FOUNDATIONS OF ORIGINALISM

JOHN HARRISON*

Constitutional law, as taught in American law schools today, is primarily a course in religious indoctrination. Stories are told about the gods and heroes that in part convey information, but mainly shape the character of the students, teaching them appropriate emotional reactions so that they can be good members of the community.

My constitutional law teacher did not do it that way. He rejected the gods of the city. He brought in new gods. And he corrupted the young. Thirty years later, still corrupt but no longer young, I will do as my constitutional law teacher taught me, and disagree with him.

One of the questions considered by the essays collected in this volume is: "Is Originalism an effective bulwark against judicial activism? Or, is the approach just as susceptible to indeterminacy and abuse as any other judicial philosophy?" On that score, Robert Bork, my constitutional law teacher, says:

The interpretation of the Constitution according to the original understanding . . . is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people. Only that approach can lead to what Felix Frankfurter called the "fulfillment of one of the greatest duties of a judge, the duty not to enlarge his authority."¹

I do not think that is true. I am deeply skeptical of the capacity of any methodology to constrain any interpreter and thereby to keep Americans from doing what they love to do, which is to find that their Constitution is good, and, therefore, contains what it needs to contain. I also have a second-order disagreement with that claim: I do not think it is very impor-

* D. Lurton Masee, Jr., Professor of Law and Henry and Grace L. Doherty Charitable Foundation Research Professor, University of Virginia.

1. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 159-60 (1990).

tant. I will mainly discuss my grounds for skepticism about the substance of Bork's claim concerning originalism, and then briefly consider whether originalism's capacity to constrain interpreters is an important question.

Can originalism, or any methodology, keep interpreters from interpreting the Constitution along the lines that they think good? I will give three grounds for thinking that it cannot, each of which relates to one of three slightly different ideas of what originalism is.

Originalism is often understood as giving special place to the views of people at the point of origin in time of a legal text. Originalism means following the views of those people. If that is what originalism means, and if originalism is constraining, then people who had to be originalists because of their location in time, for example because they were located right after the Constitution was ratified, would have been more constrained than subsequent interpreters. That is unlikely, so it is unlikely that originalism in this sense is constraining.

One way to see how unlikely is to read the first volume of David Currie's wonderful books about the Constitution in Congress.² In that book, Currie recounts and analyzes in brilliant detail the arguments about the Constitution that took place when it was still new, at a time when every interpreter's methodology, whatever it was, *had* to be "originalist," because the origin had been so recent. One lesson of Currie's books, including that first volume about the time of the Constitution's origin, is that interpreters' positions on constitutional questions overwhelmingly lined up with what they thought were good ideas.³

Another example comes, not from the early history of the primary document, but from the early history of the first of the three Reconstruction Amendments, the Thirteenth Amendment. That Amendment was proposed by Congress in the late

2. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1997).

3. One example involves an issue that is still with us today: whether Congress may designate its own officers, including the Speaker of the House and President Pro Tempore of the Senate, to act as President when both the President and Vice President are unavailable. As Currie explains, views on that question were strongly influenced by the Senators' and Representatives' views on Secretary of State Thomas Jefferson, who likely would have been first in line if the congressional officers were excluded. *Id.* at 139-44.

winter of 1865 and ratified in December of that year.⁴ Within a year of its proposal, and within less than a year of its adoption, there was a major fight over what it meant. The primary question left unclear by the Amendment's text was whether it went beyond eliminating the forced labor relationship of master and slave, and also affected legal rights other than pure self-ownership.⁵ An especially important aspect of that issue was whether the Amendment entitled freed slaves to all the civil rights of other free people.⁶

There was a major debate about that last question immediately after the ratification of the Thirteenth Amendment, one that started within weeks of the Amendment's adoption. Soon after its ratification, Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee and a leading proponent of the Amendment, introduced legislation that would become the Civil Rights Act of 1866.⁷ That legislation forbade race discrimination with respect to civil rights, ensuring that freed slaves would have the same civil rights as white people. Senator Trumbull and most of the supporters of the legislation argued that Congress had power to enact it under Section 2 of the Thirteenth Amendment, because of the connection between slavery and race discrimination with respect to civil rights.⁸ There was a hard struggle over the Civil Rights Act's constitutionality, in Congress and with President Johnson, over whose veto it was eventually adopted.⁹ In all the debates over the Civil Rights Act, the participants' views on the constitutional question lined up significantly (not exclusively, but mainly) with their views as to what was sound policy. Those participants were *all* originalists; they had to be, because there had been no time in which to become anything else. They were still

4. On January 31, 1865, the House joined the Senate in voting, with a two-thirds majority, to propose the Amendment to the States for ratification. MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 205–07 (2001). Ratification followed promptly, and on December 18th, the Secretary of State issued a proclamation that the necessary three-fourths had ratified and the Amendment had become part of the Constitution. *Id.* at 233.

5. *Id.* at 234.

6. *Id.* at 234–36.

7. *Id.* at 234.

8. *Id.*

9. *Id.* at 233–39.

at the origin point. They do not seem to have been much constrained by their status as originalists.

The second understanding of originalism that I will address is more specific. It takes seriously the point that "original" in this context is an adjective, as in "original intent," and that an adjective is less fundamental than the noun it modifies. The first and most important question is to identify the phenomenon one is seeking to understand, be it meaning or intention. Locating that phenomenon in time, as by wanting to understand the original version, is of secondary importance. I believe that the binding content of a legal text is found in its semantic meaning. As to the secondary question of the proper location in time of that semantic meaning, I think that the governing content is the original semantic meaning.

I am originalist in that sense, but being one gives me pause, because my second ground for doubting the constraining power of originalism is a cautionary tale about a fellow seeker for the original semantic meaning. I have mentioned my constitutional law teacher. The cautionary tale is about *his* constitutional law teacher, William Winslow Crosskey of the University of Chicago. Professor Crosskey had a legal mind of immense power. He conducted prodigious research into the history and original understanding of the Constitution, and into legal and terminological conventions at the time of its adoption. He adopted an interpretive canon that for its textualist and originalist rigor I find inspiring, though as I say, I also find the ultimate story disturbing. Crosskey used as the epigraph for the first two volumes of his astonishing work, *Politics and the Constitution in the History of the United States*, this quotation from Justice Holmes: "We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English using them in the circumstances in which they were used."¹⁰ That was Crosskey's interpretive principle, and he applied it with tremendous ability and massive research.

In applying his interpretive principle, Crosskey discovered that the original meaning of the Constitution was that Congress was not subject to the principle of enumerated powers. It had general authority to legislate.¹¹ The States, however, were sub-

10. 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES*, at ii (1953).

11. See, e.g., *id.* at 391.

ject to very strong limitations, for example by a Contracts Clause that forbade both prospective and retrospective changes in the law of contracts,¹² and by a Fourteenth Amendment that imposed the Bill of Rights on them.¹³ Crosskey also discovered that, although the States were subject to judicial review, there was no judicial review, or hardly any judicial review, of acts of Congress.¹⁴

Crosskey discovered, that is to say, that the Framers had drafted the New Deal Constitution. He discovered Franklin Roosevelt's constitution, which was the one that Crosskey himself believed in. As far as I know no one has questioned Crosskey's intellectual integrity, and certainly no one who reads the work should question his ability or the volume of his research. And I do not question his originalist, textualist interpretive canon. But apparently it did not constrain him enough to keep him from finding in the Constitution what he was looking for.

A third way of thinking about originalism assumes that originalism is the practice of originalists, as history may be thought to be the practice of historians. Originalism, on this understanding, is what a certain group of interpreters, including some judges, do. In that case, originalism should include what Robert Bork does, and what he did when he was a judge.

The example that casts doubt on the constraining capacity of originalism I will discuss here is Judge Bork's opinion in *Ollman v. Evans*.¹⁵ That case involved a defamation action by Professor Bertell Ollman against Rowland Evans and Robert Novak, two newspaper columnists.¹⁶ Evans and Novak had published a column in which they asserted that Professor Ollman was regarded by his peers as a political activist (he was a Marxist) and quoted an anonymous academic as saying that "Ollman has no status within the profession."¹⁷ Ollman sued for defamation, claiming that Evans and Novak had defamed his professional reputation as a scholar.¹⁸ The question before the D.C. Circuit was whether what Evans and Novak had written quali-

12. *Id.* at 352–57.

13. 2 CROSSKEY, *supra* note 10, at 1089–95.

14. *See, e.g., id.* at 1007.

15. 750 F.2d 970 (D.C. Cir. 1984) (en banc).

16. *Id.* at 971, 973.

17. *Id.* at 987, 993.

18. *Id.* at 973.

fied as opinion rather than as an assertion of fact.¹⁹ If it did, it came within the privilege for opinion under the First Amendment.²⁰ If not, it was a false assertion of fact that defamed Ollman, and he was entitled to recover damages. The majority of the court of appeals, speaking through Judge Kenneth Starr, concluded that Evans and Novak had been expressing their low opinion of Professor Ollman's conduct as an academic, not making untrue factual claims, and that there was no issue for a jury to consider.²¹

Judge Bork wrote an intellectually powerful concurring opinion, arguing that the opinion privilege was not the proper analytical category.²² Instead of asking narrow and wooden questions about the difference between fact and opinion,²³ Judge Bork contended that the First Amendment required courts to employ a more nuanced, totality-of-the-circumstances balancing test that would determine whether the speech in question was the kind of expression that should be protected.²⁴

19. *Id.* at 971.

20. *Id.* at 975 n.8.

21. *Id.* at 987–92.

22. *Id.* at 993 (Bork, J., concurring).

23. *Id.* (“Any such rigid doctrinal framework is inadequate to resolve the sometimes contradictory claims of the libel laws and the freedom of the press.”).

24. *Id.* at 997 (“The only solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury. This requires a consideration of the totality of the circumstances that provide the context in which the statement occurs and which determine both its meaning and the extent to which making it actionable would burden freedom of speech or press. That, it must be confessed, is a balancing test and risks admitting into the law an element of judicial subjectivity. To that objection there are various answers. A balancing test is better than no protection at all.” (citation and footnote omitted)).

It is hard to miss Judge Bork's ironic glee in rejecting “old categories which, applied woodenly, do not address modern problems,” *id.* at 995, and especially in clashing with then-Judge Scalia, who dissented. According to Judge Bork,

Judge Scalia's dissent implies that the idea of evolving constitutional doctrine should be anathema to judges who adhere to a philosophy of judicial restraint. But most doctrine is merely the judge-made superstructure that implements basic constitutional principles. There is not at issue here the question of creating new constitutional rights or principles, a question which would divide members of this court along other lines than that of the division in this case. When there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision—such as the first amendment—whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next.

Id.

Judge Bork's argument was that changes in the practical effects of defamation law, in particular the possibility of large jury awards against people who spoke their minds, were a threat to the freedom of speech as the framers of the First Amendment understood it, and that they intended the Amendment to vindicate.²⁵ Because of those changed circumstances, it was necessary to adjust the doctrine so that it would continue to produce the result the framers wanted, adapting the ground-level legal rules to changes in their practical consequences.

One can agree with Judge Bork's argument or not, but methodologically it is perfectly good originalism. Formulated more specifically, it is purposivism, taking as normative the original

25. As Judge Bork explained:

We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of those clauses. Perhaps the framers did not envision libel actions as a major threat to that freedom. I may grant that, for the sake of the point to be made. But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines? Why is it different to refine and evolve doctrine here, so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic surveillance, the commerce clause to adjust to interstate motor carriage, or the first amendment to encompass the electronic media? I do not believe there is a difference.

Id. at 996. The relevant change in circumstances was an increased threat to freedom of the press from large defamation awards:

Instead, in the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit. See [Anthony] Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 Colum.L.Rev. 603 (1983). It is not merely the size of damage awards but an entire shift in the application of libel laws that raises problems for press freedom. See [Rodney A.] Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U.Pa.L.Rev. 1 (1983). Taking such matters into account is not, as one dissent suggests, to engage in sociological jurisprudence, at least not in any improper sense. Doing what I suggest here does not require courts to take account of social conditions or practical considerations to any greater extent than the Supreme Court has routinely done in such cases as *Sullivan*. Nor does analysis here even approach the degree to which the Supreme Court quite properly took such matters into account in *Brown*, 347 U.S. at 492-95."

Id. at 996-97 (footnotes omitted).

purpose. It attributes to the creators of a legal norm, here a text, a particular goal that they were trying to accomplish and says that those who are applying the norm must apply it so as to achieve the creators' goal.²⁶

That is entirely unexceptionable reasoning, but consider how it works. The Judge began with the text of the First Amendment, which stands for a value. Judge Bork then attempted to discern that value by understanding the political theory and preferences of the people who created it. He understood the value so derived as an outcome state with respect to the practical availability of free speech.²⁷ Then he assessed the practical effects of different legal doctrines concerning defamation, and concluded that the practical effect of the existing doctrine, the one his court was applying, was insufficiently protective of speech. In order to achieve the practical effect that the First Amendment's framers adopted as their goal or value, it was necessary to devise a different doctrine.

As I indicated, that argument is, in form, perfectly legitimate purposivist originalism (or originalist purposivism, if you prefer nouns to adjectives). The methodology it employs is not very constraining, however, because of the moves that it licenses. Consider how one could reason in this fashion about the Fourteenth Amendment. One can reasonably say, first, that the goal or value that its framers were trying to achieve, or at least one of their main goals or values, was fully to integrate black Americans into the free market economy. That was the outcome state they were trying to achieve. Much evidence supports that formulation of the framers' goal,²⁸ just as much evidence supports Judge Bork's view concerning the goal of the First Amendment's framers.

26. *Id.* at 996 ("A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint.").

27. It is not clear whether Bork understands the outcome state as a set of incentives concerning expression or as the actual production of expression. More likely it is the former.

28. See James W. Ely, Jr., "To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century, 8 U. PA. J. CONST. L. 917, 932 (2006) (describing the importance of economic rights to the framers of the Fourteenth Amendment).

One might also conclude, as an empirical matter, that in order to fully integrate black Americans into the free market economy it is necessary, or at least permissible, to employ racial preferences in higher education. That is a judgment about the practical effects of possible legal rules, just like Judge Bork's judgment about the practical effects of possible legal rules governing defamation. Justice O'Connor almost certainly believed it when the Court decided the Michigan affirmative action cases.²⁹ That practical judgment is controversial, and many conservatives strongly disagree with it, but it is one that reasonable people can and do embrace. The mode of reasoning that Judge Bork adopted in *Ollman* can thus quite legitimately lead to Justice O'Connor's position in the Michigan cases.³⁰ Others will formulate the goal of the Fourteenth Amendment differently, and come to different conclusions about the effects of legal rules, or both. Purposivist originalism will lead them to quite different conclusions, conclusions also consistent with that methodology.

Methodologies are not strongly constraining. That is in large measure the burden of American constitutional history. Having said that, and having disagreed with Judge Bork on the first-order question, I will also disagree with him on a second-order question, and say that I do not think that the constraining capacity of methodologies is an important question, at least when one is deciding whether originalism or any other interpretive approach is the correct interpretive approach. That is because the reasoning according to which originalism is correct because it constrains judges is itself wrong in principle. That reasoning is wrong in principle because it commits one of the characteristic errors of American constitutional theory. That error is to develop a theory of judicial review rather than a theory of the Constitution.

Theories of judicial review routinely begin by assuming that there will be extensive judicial power, and then ask how that power should be exercised. If you think that judicial subjectivity is bad, as many do, and if you assume that there will be judicial review, you may well ask if there is a methodology that

29. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

30. See *Grutter*, 539 U.S. at 306 (approving use of racial considerations in law school admissions); *Gratz*, 539 at 276–80 (O'Connor, J., concurring).

can constrain judicial subjectivity. If you believe that originalism is such a methodology, you may favor originalism.

The problem with this line of reasoning is that it is not a theory of the Constitution at all; it is a theory of judicial review. The right way to conduct constitutional theory is to begin with more fundamental questions. On this point I have the authority of Robert Bork, in *Neutral Principles and Some First Amendment Problems*,³¹ a short piece that was, for a brief time in 1987, the most famous law review article ever written.

Bork's mode of reasoning in *Neutral Principles* does not take judicial review for granted. Instead, it goes to the foundations of the American constitutional system, seeking the basic premises that ground the written Constitution itself. From those premises Bork derives principles about judicial review, among other features of the system.³² In particular, he derives from foundational premises conclusions about the conditions under which judicial review can be legitimate.³³ That is a genuine constitutional theory, not just a theory of judicial review. It is, in my view, the sound mode of reasoning.

It is astonishing that Bork was able to write that article, especially given the intellectual circumstances of the time. A scholar primarily of antitrust law, without the benefit of the relatively more sophisticated conceptual tools that are available to us, many years later, in thinking about the Constitution, Bork came to the field and, largely on his own, reasoned in the right way when so many were reasoning in the wrong way. While others were taking judicial review for granted, Bork started with more fundamental considerations and came to conclusions that remain powerful and persuasive today.³⁴ It is a remarkable achievement.

31. 47 IND. L.J. 1 (1971). In the first paragraph of that article, Professor Bork foreshadowed the importance of the decision the Senate would make in 1987, and offered an explanation: Because of a lack of a theory of constitutional law, "courts are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes." *Id.* at 1.

32. *Id.* at 2-4.

33. *Id.* at 4. ("If it does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution, judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate.")

34. This is on display in the subtitle of a work published at the end of the decade in which Bork wrote and that remains profoundly influential today: JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

There is a parallel for that achievement with which I will conclude. When he was an old man, Sir Isaac Newton had a number of conversations with his niece's husband, a fellow named John Conduit.³⁵ Conduit later wrote a biography of Newton, based in part on those conversations with the great scientist.³⁶ One of the notes he made from his talks with Newton concerned Newton's invention of the reflecting telescope, and the construction of the first such instrument. Conduit's note reads,

I asked him where he had it made, he said he made it himself, & when I asked him where he got his tools said he made them himself & laughing added if I had staid for other people to make my tools & things for me, I had never made anything.³⁷

Fortunately for us, and for America, Robert Bork did not wait for anyone else. He just did it himself.

35. JAMES GLEICK, *ISAAC NEWTON*, at vi, 193 (2003).

36. *Id.*

37. *Id.*

