Soc (2013) 50:535–542
DOI 10.1007/s12115-013-9708-3

COMMENTARY

The Constitution: Dead or Alive

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Published online: 8 October 2013

In recent years, theories of the legal interpretation of the Constitution have been a battlefield on which self-described originalists, preeminently Justice Antonin Scalia, who view the meanings of the Constitution as fixed at the time of its framing, are arrayed against living constitutionalists, who declare it to be alive and subject to change over time. Viewing the battle in this way is somewhat misleading since some of the most formidable antagonists of originalism, Lawrence Tribe and Ronald Dworkin, refuse to be described as advocates of a living constitution. As both Tribe and Dworkin, who have their own differences, have shown, it is possible to hold the view that the text is the main or ultimate arbiter of interpretation without being an originalist in Scalia's understanding of the word. The division between the two camps is in political terms a division between conservatives and liberals, Scalia on the conservative side, Tribe, Dworkin and liberal constitutionalists, on the liberal. In the current composition of the Supreme Court the conservatives have the advantage. I begin with Scalia. As a Supreme Court Justice with a forceful and provocative style, he has commanded the spotlight. My focus is on his recent book written in collaboration with Bryan A. Garner *Reading Law: The Interpretation of Legal Texts* (2012) and an earlier essay "A Matter of Interpretation" (1997).

According to Scalia's version of originalism, the business of the Supreme Court should be the determination of the objective meaning of the constitutional text and its application to evolving law. There is a narrow range of, if not a single right, understanding, and many wrong interpretations of constitutional law. "In their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations" (*Reading Law*, 16). There are originalists for whom the intentions of the framers matter, indeed are crucial, but Scalia is not one of them. He strenuously resists allowing the intentions of the framers of the Constitution into the deliberations about meaning for an obvious reason.

How can anyone be confident in ascertaining the intentions of the framers? We know that the text emerged as compromises of differences among them and that any statements about what they collectively or individually meant cannot be trusted as reliable. Scalia opposes "purposivism," which refers to the presumed intention of the author of a text. If there is a purpose, it is in the text itself. What can be relied on, Scalia holds, are the words on the page *as they were understood by reasonable people versed in the law at the time they were formulated*. He does not tell us why we can be more confident that we know how the text was understood when first received than we are of what the framers intended? (How "reasonable" or linguistic competence is to be determined, Scalia does not say.) It is hard to believe that those who ratified or received the Constitution at the time of its framing were a unanimous collective in their understanding of the meaning of its words. As with the framers, there were surely differences among the ratifiers and the citizenry in general about the meaning of articles of the Constitution. Tribe rightly challenges the confidence of Scalia and, surprisingly of Dworkin, who is not an originalist, in "their conclusions about how various people in fact understood particular phrases a century or two ago" (*A Matter of Interpretation*, 72). Even if the collective understanding of reasonable readers at the time of the framing of the constitution could be determined, Scalia never addresses the question of why such readers should be authoritative interpreters of the Constitution in perpetuity. The conferring of authority on contemporaries of the framers seems absolutely arbitrary.

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In fact, the judicial history of the early republic belies Scalia's confident view that there existed a harmonious, reasonable understanding of the language of the Constitution and how it was to be interpreted and applied as well as the implication that those who received the Constitution from the framers meant to set themselves as the final arbiters of its meaning for all time. Jeffersonian Republicans and Hamiltonian Federalists fiercely disagreed about the role of the judiciary in government. The Federalists argued for a strong independent judiciary serving the cause of a strong, united nation. The Republicans viewed the independent judiciary as a threat to states rights and opposed the idea that the judgment of the constitutionality of laws was the exclusive possession of the judiciary (i.e., the Supreme Court [of the time] of six unelected justices) as undemocratic. The Republicans believed that the interpretation of the Constitution was the province of the executive and legislative branches as well as of the judiciary. Hamilton and John Marshall, the first Chief Justice, on the one side, and Jefferson and Madison, on the other, all reasonable men (or at least, men of reason) were sharply divided on how they viewed the role of the Constitution and the judiciary. Gordon Wood, generally acknowledged as the preeminent historian of the period, provides the following summary: "Although many Americans in the 1790's had come to accept most of the principles that made for an understanding of judicial review, that acceptance remained largely partisan—shared by most Federalists but not by most Republicans and probably not by the bulk of the American people" (Wood, (452). (It is ironic that contemporary conservatives like Scalia are the heirs of the progressive [states rights] Jeffersonians, while liberals are heirs of the conservative Hamiltonian advocates of a strong central government.)

Where Jefferson and Hamilton were in agreement, though from different motives, was on a view of the Constitution diametrically opposed to Scalia's doctrine of originalism. Jefferson: "Can one generation bind another, and all others, in succession forever? I think not…A generation may bind itself as long as its majority continues in life; when that has disappeared, another majority is in place, holds all the rights and powers their predecessors once held, and may change their laws and institutions to suit themselves. Nothing then is unchangeable but the inherent and unalienable rights of man" (Letter to John Cartwright, 5 June 1824, in *The Political Writings of Thomas Jefferson*, 126.) Here is Clinton Rossiter, another distinguished historian of the period, on Hamilton's approach to the Constitution: "From time to time he could not resist the temptation, so natural to the insider, to buttress constitutional argument with a knowing reference to the 'intent' of the Framers. For the most part, however, he felt that each generation of Americans should shape the clauses of the Constitution to it own needs rather than try to read the thoughts of men who had passed from the scene—and whose thoughts, in any case, had been tentative or ill-formed about many crucial words in that charter" (Rossiter, 191). Scalia has invoked the early history of the Republic without demonstrating his knowledge of it.

Scalia's way with Constitutional words is illustrated by his interpretation of "cruel and unusual punishment" in the Eighth Amendment:

> "The Supreme Court of the United States held in *Hudson v. McMillian* that the Eighth Amendment's prohibition of *cruel and unusual punishments* covered such things as beatings by sadistic prison guards, even though until then *punishments* had been taken to refer to what the defendant was *sentenced* to undergo rather than to everything that took place during confinement. (A beating that was not part of the sentence would form the basis of a tort suit rather than a constitutional claim.) And it held in *Greg v.Georgia* that a punishment could be 'cruel' within the meaning of the Constitution if it is excessive for the offense involved, even though until then the word had been thought to refer to punishments that were in their nature physically cruel (thumbscrews, for example" (*Reading Law*, 84).

Can Scalia say with historical authority that no reasonable reader of the Constitution at the time of the framing of the Constitution would have understood "cruel and unusual punishment" to apply to sadistic beatings by prison guards. And even if that were the case, wouldn't the openness of the phrase, as it exists on the page, invite such a reading by reasonable readers? After all, what Scalia says people at the time of the framing thought "cruel" to mean is not explicitly defined in the Eighth Amendment and therefore open to different and conflicting interpretations.

Originalist textualism, as Scalia conceives it, has an imperfect analogue in the New (literary) Criticism, a method of analysis that prevailed in the academy in the mid twentieth-century. The literary theorist William Wimsatt labeled a concern with authorial intention as "the intentional fallacy," insisting that the reader pay careful, if not exclusive, attention to the meanings of words on the page. The New Critics of the middle of the last century believed that what is put down on paper may acquire meanings over which the author has no absolute control. Freedom from a concern with authorial intention allowed the reader/critic to explore the range of meanings that the words conveyed, even when those meanings seemed to go beyond or even contradict the expressed intentions of the author. Of course, no dogma can be sustained absolutely in practice, and one can find examples of originalist interpretations and New Critical practice that violate the dogma, in which legislative history (in the case of the law) and authorial intention and historical context (in the case of literature) are invoked. A critical difference between legal interpretation and literary criticism is that the judge, while acknowledging the possibility of interpretations different from

his or her own, tries to restrict meaning so that judicial action is possible, while the literary critic seeks out multiplicity of meaning, ambiguities and paradoxes that are irreducible to singular meaning. The only action required by a literary interpreter is the action of the mind. (One of the classics of the New Criticism is William Empson's *Seven Types of Ambiguity*.) Literary criticism aims to enrich consciousness, while legal interpretation provides a guide to action.

Originalism's main antagonist is the idea of a Living Constitution. Scalia complains that "the American people have been converted to a belief in The Living Constitution, a 'morphing' document that means from age to age, what it ought to mean," as distinguished from what it actually means (*A Matter of Interpretation*, 47). David Strauss, writing in defense of a Living Constitution points out what we would have to "give up" in the moral progress we have made as a society if originalism were rigorously applied: schools would remain racially segregated, racial minorities and women would be the target of federal discrimination, the Bill of Rights would not cover the states; federal, labor, environment and consumer protection laws would be declared unconstitutional (See *The Living Constitution*, 12 ff). Since he finds the political results of the originalist approach to the Constitution morally repugnant, he looks elsewhere for guidance in interpreting and applying the law. He finds it in the place where laws have already evolved, the common law, which he characterizes as "the ebb and flow of precedent, not the text of the constitution or the original understandings, that accounted for the shape of the law" (67–68). Strauss would seem to agree with Scalia that the *written* Constitution per se is not alive. It is the ebb and flow of the common law supplemented by the written constitution that is alive. In the instances he provides, the common law seems to evolve in the direction of greater and greater equality, fulfilling the promise of The Declaration of Independence. "Ebb and flow" is a somewhat misleading metaphor, since it describes a forward and backward movement, which keeps things in place, whereas Strauss has the law ideally moving forward in a progressive direction. Scalia charges that living constitutionalists are motivated by a view of what the law ought to be, not what it is. Strauss in effect argues that the living constitution aspires to embody justice, and where it is lacking judges should find opportunities to interpret the law so as to advance the cause of justice. Scalia views the business of the law as the law, not justice.

Like Strauss, Scalia acknowledges that "ours is a common law tradition" (*Reading Law,* 3), and he concedes that *stare decisis* (precedent) allows for deviations from originalist interpretation. He and his co-author Bryan A. Garner "do not propose that all decisions made, and doctrines adopted, in the past half-century or so of unconstrained constitutional improvisations be set aside—only those that fail to meet the criteria of stare decisis. These include consideration of (1) whether harm will be caused to those who justifiably relied on the decision, (2) how clear it is that the decision was textually or historically wrong, (3) whether the decision has been generally accepted by society, and (4) whether the decision permanently places courts in the position of making policy calls appropriate for elected officials" (411–412). In footnotes Scalia and Garner provide examples of cases and allow that originalists may differ in their answers to these questions. We are now at a considerable distance from the presumption of what the text was understood to mean at the time of its framing. Who is to be the judge "whether harm will be caused" or "how clear…the decision was textually or historically wrong" or "whether the decision has been generally accepted by society" or whether it permanently preempts legislative authority? Originalism by itself can hardly be a guide.

Scalia complains that judges who hold the view that the Constitution is alive give themselves license to construe the law according to their ideological desires, allowing, in short, for rampant subjectivism in interpreting the law. Is this necessarily so? The alternative to originalism need not be the extreme of "anything goes." Responsible interpretation has its constraints, but it should also be free to range beyond the restricted area of meaning as *believed* to be understood at the time the text was written, so long as it doesn't willfully distort the language of the text.

Scalia maintains that at the time of the framing of the Constitution, a felony was assumed to entail the death penalty; hence, the death penalty is not unconstitutional.

> "For me…the constitutionality of the death penalty is not a difficult, soul wrenching question. It was clearly permitted when the Eighth Amendment was adopted (not merely for murder, by the way, but for all felonies—including, for example, horse-thieving, as anyone can verify by watching a western movie). And so it is clearly permitted today. There is plenty of room within this system for 'evolving standards of decency,' but the instrument of evolution (or, if you are more tolerant of the Court's approach, the herald that evolution has occurred) is not nine lawyers who sit on the Supreme Court of the United States, but the Congress of the United States and the legislatures of the 50 states, who may, within their own jurisdictions, restrict or abolish the death penalty as they wish" ("God's Justice and Ours" adopted from remarks given at a conference sponsored by the Pew Forum on Religion and Public Life at the University of Chicago Divinity School).

The passage is remarkable for its cool acceptance (no soul-wrenching for Scalia in the matter of the death penalty) of what is surely "cruel and unusual" punishment allowed by the Constitution, according to originalist understanding. If all felonies, regardless of their enormity, may lead to the death

penalty, we are indeed in barbaric times. Any person at the time of the framing who would accept such an understanding of the death penalty could hardly be called reasonable. Remember this is the time of the Enlightenment. In the spirit of being a flexible originalist (an oxymoron he embraces), Scalia would not uphold the sentence of death for a horse thief—as a judge at the time of the framing of the Constitution might have done without a twinge of conscience. But such flexibility on Scalia's part would only illustrate the vulnerability of originalism as a judicial doctrine. It is hard to know what to make of his somewhat off-putting concession to "evolving standards of decency," which he encloses in quotation marks as if the phrase belongs to a language foreign to him. He allows the legislature to evolve, but there is apparently little room for evolution in the Court. And isn't it odd that Scalia, who rigorously insists that reasonable persons living at the time of the framing of the Constitution are the final arbiters of its meaning, would invoke Hollywood's version of our early history as proof of what the Constitution permits?

"Originalism is the *only* approach to text that is compatible with democracy" (*Reading Law*, 82). Scalia repeatedly insists that originalist theory is a democratic legal theory, since it defends the primacy of the legislature against the judicial activism of non-originalists and living constitutionalists in making laws. "Only in the theater of the absurd does an aristocratic, life-tenured, unelected council of elders set aside laws enacted by the people's chosen representatives on the ground that people do not want those laws" (408). In practice, however, originalists (Scalia and Clarence Thomas openly subscribe to the doctrine,) rule against the legislature when they view laws as unconstitutional—for instance, against laws on the role of money in elections, voting rights and health care. In apparently venerating both the Constitution and democracy, Scalia shows no awareness of the vulnerability of the Constitution as a democratic document, since it allows for minority control of the Senate by providing each state, irrespective of the size of its population, two senators, effectively giving a minority the power to block the will of the majority. The democratic ideal is not in the Constitution, but rather in the Declaration of Independence in its affirmation of equality. Equality appears late in the Constitution in the Fourteenth Amendment as equality before the law. Moreover, Scalia's trumpeting of the originalist interpretation of the Constitution as democratic seems devoid of reality, given the power of nine unelected justices serving life terms (all of which he embraces) to decide whether laws enacted by the legislature are constitutional.

Originalists charge the advocates of a living Constitution as judicial activists, bent on remaking the Constitution in the interests of their liberal agenda. The fact is that interpretation is inescapably an exercise in activism on both sides of the ideological spectrum, especially when cases arise that have not been anticipated in the Constitution such as those involving abortion or health care or gun control. The ambiguous language of the Second Amendment is open to conflicting interpretations. The non originalist, whose bias is liberal, actively wanting to limit, if not ban, the availability of guns, insists that the Second Amendment applies only to militias and not to individuals, the originalist, whose bias is conservative, with an affection for guns and mistrusting government intervention, actively gives the words of the amendment wide berth, construing the right of "the people" to bear arms to apply to individual ownership. The words by themselves do not determine the interpretation or its application to a particular case. The minds of the interpreters on either side of the political and judicial spectrum are not blank tablets that passively receive the meanings of words.

As for The First Amendment, the guarantee of freedom of speech does not specify its range or limitations. What it means and how it applies are by no means always clear and straightforward. In Citizens United versus Federal Election Committee, the Court decided by a five to four vote (by a single vote!) to remove the limits placed by Congress on the expenditure of money in political campaigns by corporations, unions and wealthy organizations as unconstitutional. So ruled the conservative majority, Scalia among them. The decision to free corporations and super pacs (generally favoring Republicans) and unions (generally favoring Democrats) to spend vast amounts of money in support of one side or another might be viewed as an exercise in evenhandedness. But corporations have much more money than unions, so the practical effect of the Court decision is to enhance the electoral influence of corporations and the very wealthy. The risk is that the freedom of the wealthy overwhelms the freedom of those without money in the electoral process? The Court majority did not take into consideration the potential, if not actual, threat to the freedom of those who do not have money and the power to go with it. Or, if they did, they decided on balance that the "free speech" of those with money outweighed the claim of those without money.

Here is an analogy from ordinary life. In a conversation or debate, a person who cannot stop talking makes it difficult, if not impossible, for a person of fewer words to express herself. Think of how those without money can be overwhelmed by the speech bought by those who have money. The phrase "freedom of speech" does not automatically yield the meaning that determined the decision in the case. My general point is that judges are not passive or detached readers; they come to the text with contending ideas of what the text means and permits or proscribes, reflecting their different ideological biases. Those ideas may or may not be the outcome of careful and disinterested reflection. They may or may not distort the meaning of the text. Whichever way one decides, for or against, an exercise of judicial activism occurs. In providing examples of conservative bias in the interpretation and application of the Constitutions, I do not mean to exempt liberal justices from bias. I have focused on

conservatives of originalist persuasion, because they generally raise the specter of judicial activism as something to beware of as if they themselves are free of what they regard as a vice. They are not.

Notwithstanding the justices rejection of the view that political or ideological motive plays a role (indeed, a major role) in its decisions, it is hardly an accident that in politically fraught cases one can often predict how the decisions will fall out on political lines. We generally know how liberal and conservative justices will rule on abortion, gun control, and health care legislation. When Scalia compares moral views of homosexual conduct to murder or speaks of the Voting Rights Act as endorsing "racial entitlement," he has *actively* gone beyond his role as a textualist prescribed by his own originalist doctrine. We can be fairly confident in our prediction that he will vote against extending the Voting Rights Act, which protects minorities against efforts to prevent them from voting. And indeed, he joined the conservative majority in voting against the clause that eviscerates the act. Which is not to say that he will not find legal reasons for his decisions. (DOMA, the Defense of Marriage Act, should have proved a challenge to Scalia and his fellow originalists, because it is a federal act and laws affecting marriage are the jurisdiction of the states. The results are in. Scalia, consistent with his antipathy to homosexual conduct but not with his judicial doctrine, voted to uphold DOMA.) If judicial decisions were the results of politically or morally disinterested motivation, why would the results be so politically predictable—unless of course the Constitution itself could be said to have a conservative or liberal bias? In which case, a conservative justice would be applying the conservative aspect in the Constitution, and a liberal justice would be doing the same with the liberal aspect in adjudicating a case. But even if the Constitution could be typed in this manner judicial action would still be informed by politics since the Constitution or the portion of it being considered would be held to have a political character congenial to one side or the other.

Occasionally, a justice may escape the constraints of ideology (as apparently Chief Justice John Roberts did in his decision on the Affordable Health Care Act), but it is his very deviation from what was expected of him, a conservative suspicious of government run health care, that points up the presence of political ideology in the operations of the Court. Roberts's conservative colleagues were doubtless disappointed with what they regarded as an exercise of judicial activism on his part. In redescribing the penalty for not taking out health insurance under the Health Care Act as an exercise in taxation, Roberts removed the commerce clause espoused by the Obama Administration from the decision and saved the law, thereby satisfying conservatives in narrowing the application of the commerce clause. He did not entirely abandon his conservative colleagues.

We have comparable exceptional instances on the other side of the political spectrum. The liberal Justice Ruth Bader Ginsburg asserts a conservative caveat in her concern that the Supreme Court may have been too hasty in its decision on Roe versus Wade, given the fact that the general public was apparently not yet ready to accept abortion as legal. Here the argument is that where fundamental change is concerned, public sentiment should be taken into account in judicial decisions. Ginsburg doesn't say how she would have voted if she had been a justice when Roe versus Wade was decided. A supporter of abortion rights outside her judicial role, she would doubtless have experienced moral tension in deciding a law that from a strictly legal point of view is viewed by many of different political persuasions as vulnerable. Does Ginsburg's caveat apply to Brown versus The Board of Education, which ended, legally speaking, the segregation of the races in the schools? Was public sentiment ready for Brown? To which the answer is that an injustice may be so profound that it would be a gross betrayal of our humanity not to proceed even against majority public sentiment. If a woman's right to have control over her own body is comparable to the cause of the equality of the races, should the waiting that Justice Ginsburg counsels have been followed? It is by no means clear that the waiting would have eventuated in general acceptance of the right of women to choose to have an abortion. In any event, Ginsburg's caveat (I repeat conservative caveat) introduces a consideration that takes us beyond the text itself and what the words say. Whether or not one agrees with Ginsburg, she is an example of thinking disinterestedly, correctly or not, against the grain of her liberal bias.

Lawrence Tribe, not a Supreme Court Justice but someone certainly qualified to be one, emphasizes the complexity of the Constitution as a whole and resists its reduction to a single theory of interpretation. Though a liberal, he is not an advocate of a living Constitution, which presumably would give him license to interpret the Constitution in the interests of his liberal agenda. He is scrupulous in interpreting the text, though he refuses to be bound by the presumed understanding of it by "reasonable" readers at the time of its framing. Like Scalia, Tribe declares his fidelity to the Constitution, but differs from him in his understanding of what fidelity entails. The Constitution itself offers little guidance of how the Constitution should be interpreted, but it least one provision suggests a kind of openness that one guesses Scalia does not find congenial. The provision is in the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (cited in *A Matter of Interpretation*, 78). The provision opens up the Constitution to questions. What are those other rights? Who determines what they are? What if there are conflicts between rights, such as the right of a woman to have control over her body versus the right of the fetus to exist.

Tribe is a critic both of the conservative Scalia, who bases his interpretation on what he understands provisions were meant at the time of ratification and of the liberal Dworkin, who reads the same words as "self-evidently intended to enact a broad moral principle" (80). Both views, according to Tribe, presume too much. "I cannot bring myself to insist either that the words can bear no other interpretation or that I know mine to be the dominant understanding among whatever category of persons in 1791 might be thought to count as determinative in a suitable theory of original meaning." I find Tribe's intellectual humility and openness appealing, but one must then ask him what determines his interpretations, since he admittedly does not have a theory of interpretation to put up against either Scalia, or for that matter Dworkin. He is closer in spirit to Dworkin when he says, "I too read the First Amendment to embody a set of moral and political principles about freedom of expression" (80), suggesting that there are political motives at play that, however, he does not wish to transmute into a theory of interpretation. He wants rather interpretive flexibility and openness to the differing views of other interpreters.

Tribe's practice may be characterized as principled disinterestedness. A test of disinterestedness is whether an interpretation decides a case in a manner that goes against the interpreter's politics, because the words of the text seem to require it. I don't know if Tribe shares my liberal fantasy of a gun-free citizenry, but even if he did, he would still uphold the Second Amendment. On another issue, he came out against the urgings of Obama's liberal base to invoke the Fourteenth Amendment in order to exercise executive power and raise the debt ceiling (the raising of which he doubtless supported) if the Congress failed to do so, because he believed that the language of the Amendment did not warrant it. Again these are exceptional instances. Politics is normally a powerful presence in the decision making on the Supreme Court when the cases that come before it seriously divide the political parties. The bad faith is not in its presence, but in the denial of its presence. The originalists and the living constitutionalists or any other cohort of interpreters are all in one degree or other judicial activists. It is not activism that necessarily compromises the cause of justice, but rather the failure of the judge to make a wise, just and persuasive case for his or her interpretation and application of the law. Disinterestedness is a value to be cherished. It is not, however, an antonym to interestedness when its object is justice.

The Constitution as Sacred Text

The ideology that unites the parties, conservative and liberal, left and right, is the view of the Constitution as sacred text. Citizens are expected to follow both the letter and the spirit of the Constitution in all their actions. Originalists in theory, though not necessarily in practice, are analogous to religious fundamentalists and literalists in their reverent relation to biblical scripture—with the following qualification: their reading of the text is mediated by the understanding of "reasonable" interpreters at the time of the framing. In practice, originalists often *actively* construe or stretch the meaning of the text (e.g. Citizens United) to fit their prejudices. I confess to sympathy with liberal justices who like nonfundamentalist theologians in their reading of scripture view the text as susceptible to a wide range of understanding. Historical change in a democracy, it would seem, requires a constitution that permits an elasticity of interpretation as a check against the dead hand of the past. Americans glory in the Constitution as if it were our national bible. As with all documents composed by human beings, our *written* Constitution for all its admirable qualities has its limitations and imperfections. Not all countries have written constitutions. The British have an unwritten constitution, most memorably represented in Walter Bagehot's classic *The English Constitution*, that has certain advantages over our written constitution. Its tradition of common law (which we share) unconstrained by a written constitution gives it greater flexibility and freedom to evolve in the light of changing historical circumstances than does the American Constitution.

In his classic *The American Commonwealth* (1888), James Bryce, a Scotsman inward with English common law, anticipates the argument for a living constitution, in analogizing the American Constitution to theological writings as follows: "It resembles theological writing, in this, that both, while taken to be immutable guides have to be adapted to a constantly changing world, the one to political conditions which vary year to year and never return to their former state, the other to new phases of thought and emotion, new beliefs in realms of physical and ethical philosophy. It will come, it cannot be averted, for it comes in virtue of a law of nature: all that men can do is to shut their eyes to it, and conceal the reality of change under the continued use of time-honoured phrases, trying to persuade themselves that these phrases mean the same thing to their minds to-day as they meant generations or centuries ago" (375). Bryce holds up Chief Justice John Marshall, who spoke of the Constitution's "flexibility and capacity for growth" (386), as model of judicial wisdom. His "function was not to change but to develop" (385) the words and meanings of the Constitution. The phrase "cruel and unusual punishment," for example, remains fixed in its meaning, but new manifestations of cruelty allow for an extension of its application.

In providing for amendment, the framers seem to have acknowledged that the Constitution, the product of compromise, was an imperfect creation and that it should be given the possibility for evolving. Unfortunately, the bars for amending the constitution are so high that in a closely divided electorate, amendment has become virtually impossible. Both Houses of Congress require two-thirds vote in order to propose an

amendment or two-thirds of the State legislatures are required to call on Congress to hold a constitutional convention. In order to ratify, three-quarters of the state legislatures must approve or three-quarters of states must approve via ratifying conventions. By making the amendment process so onerous, the framers made future fundamental change very difficult? The originalist might say: "the possibility of change exists in the right to amend the Constitution." To which the non originalist might respond: "the bar to amendment, requiring a supermajority, is so high that the Constitution as interpreted by originalists would in effect bind the present to the past in perpetuity."

The Declaration of Independence has no formal or official authority in the interpretation of the law. As I have already noted, absent from the main body of the Constitution is the powerful affirmation of the equality of all men that we find in the Declaration of Independence. Voting Rights and same sex marriage: these are contemporary issues that reflect the theme of equality, for which the originalist interpretation of the Constitution provides little or no support. The Fourteenth Amendment introduced the theme of equality in the Constitution. Equality is, so to speak, an appendage to the main body of the text. We need then to keep in mind the moral limits of the Constitution—which means granting to judges as much interpretive freedom as the words of the Constitution *reasonably* allow. Scalia provocatively speaks of the Constitution as "dead" or "enduring," which in his lexicon means unchanging. The question should not be whether the Constitution is dead or alive, but rather whether its interpreters are alive or dead. Elected officials from the president down do not swear to uphold the Declaration of Independence, but there is no law forbidding the president or a member of Congress or a judge from keeping it in mind as he fulfills his promise to uphold the Constitution.

Lincoln's view of the Constitution and the right relation to it is instructive. He opposed the Supreme Court's decision in the Dred Scott case, which declared that slaves, whether free or not, could never become citizens of the United States, but, as John Burt contends in *Lincoln's Tragic Pragmatism*, he was not prepared to repudiate it in behalf of "higher law idealism." Lincoln did not "claim that one has in one's own conscience an authority higher than the Court to declare the meaning of the Constitution" (481). He did, however, hold the Declaration of Independence with its assertion that all men are created equal in higher regard than he held the Constitution. Again according to Burt, the Constitution had an imperfect conception of liberty and, he might have added, of equality. He gave "the promises of the Declaration priority over the Constitution, reaching back [in the Gettysburg address] four score and 7 years ago to 1776" (651), not to 1787. The decision of the Supreme Court in the Dred Scott case did not disqualify Lincoln or any citizen from dissenting from it in the political arena and seeking change, even to the point of trying to influence the interpretive decisions of the judiciary. If Scalia has his way, it would not only be possible to ignore the Declaration of Independence, it would be necessary. "If you want aspirations, you can read the Declaration of Independence, with its pronouncement that 'all men are created equal' with 'unalienable rights' that include 'life, liberty and the pursuit of happiness.'…There is no such philosophizing in our Constitution, which unlike the Declaration of Independence…is a practical and pragmatic charter of government" (*A Matter of Interpretation*, 134). He may be right in distinguishing the characters of the two documents, though he gives short shrift to the theme of equality, minor as it is, in the Constitution. In any event, there is no prohibition in the Constitution or elsewhere against judicial action that is inspired by the Declaration of Independence.

What America was in 1787 is not what it has become. A Constitution that is unresponsive to historical change does not deserve to be the object of reverence. Which is not to say that those who interpret the Constitution are required to endorse every change that occurs. But for interpretation to remain stuck in understandings of the past can turn the document into an obstacle to the free and healthy development of the society it helped create. Consider the Second Amendment; it did not foresee a gun culture of over 300 milllion guns in the hands of ordinary citizens and the daily occurrence of multiple murders in the inner city and elsewhere. And yet all attempts to enact gun-control laws are not only resisted by gun lobbies, but even those who favor such laws feel the necessity to declare their support for the Second Amendment—as if the Amendment does not itself require amendment. The anti-gun control advocates may in fact be right that the reforms that have been proposed may do little to diminish violence. What is needed then, short of a constitutional amendment almost impossible to achieve, is the enactment of very strong laws that would reduce the number of guns in circulation. Such laws would doubtless be found to be unconstitutional by originalists on the court. To be sure, laws themselves cannot legislate a culture; for laws to be effective our gun culture would have to change; such change, if it is to occur, will not be helped by piety about the Second Amendment.

The Constitution was a compromise. Its very conception is informed by compromise, for instance, in its establishment of three branches of government and a bicameral legislature. In working together the various branches are required of necessity to negotiate and conciliate their differences. The failure to do so is dysfunctional government. We know too well what that looks like. The originalist view of the Constitution is uncompromising, very much contrary to its spirit. What it declares in effect is that the past (what reasonable people understood the Constitution to mean at the time of its framing) has almost absolute authority over the present (what reasonable people now understand the Constitution to mean). Shouldn't the principle of compromise apply to the relations between past and present? The originalist will doubtless disagree with this characterization and point to the amendment

process; but if the process is so onerous, requiring as it does supermajority support at every level of government, the Constitution as interpreted by originalists becomes an intransigent, immovable, and undemocratic force blocking all movement for change—in contradiction to the democratic spirit of compromise that went into its making.

Further Reading

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