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"Originalist" Values and Constitutional Interpretation

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"ORIGINALIST" VALUES AND CONSTITUTIONAL INTERPRETATION

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"Originalism" is of too recent vintage to permit a meaningful discussion about its "true" definition. It has been used to describe a method of adjudication that has been roughly identified and debated by academic commentators on American constitutional law in the last twenty or so years.[1] Advocates of this method have typically been reacting to a practice of adjudication in which the Constitution has been invoked, but the actual bases of decision appear to be broad standards of governmental conduct, standards whose association with the constitutional text is, at least, problematic.[2]

It is not obvious, however, what it means to be faithful to the original text of the Constitution. And the writings of those who might be called originalists (those who think that courts should make constitutional decisions exclusively in a manner called for in some way by the Constitution itself)[3] have not been entirely consistent. Still, two central values seem to underlie most originalists' positions.

The first is the value of *certainty*: that public power should be limited by rules of law that are abstract, a priori, knowable, and fixed—the value of "the rule of law."[4] The second is the value of *legitimacy*. This is a political value: it demands that binding rules, and especially the rules about the extent of public power, should

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1. *See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 8-9, 28-53 (1994); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204-05 (1980); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1-2 (1984).

2. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 2-4 (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 72-74, 95-100, 143 (1990); EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW 50-64 (1994); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 226-28 (1988).

3. I exclude from this category writers who think that the text and original meaning of the Constitution, however defined, play merely a supplementary or advisory role in the decision making process. Thus, Michael Perry may properly claim to be writing as an originalist, *see* PERRY, *supra* note 1, at 29-30, and Richard Fallon may not. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 11 89 (1987).

4. *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210-29 (1979).

issue from a source which, in the relevant society, generally is seen as a good and proper source for making such rules.[5] This Article measures against these two values four methods of constitutional interpretation that are sometimes advanced as originalist. I call these methods (1) original text; (2) original intentions; (3) original understanding; and (4) original values. My conclusion is that the second, the method of original intentions adjudication, is most consistent with these originalist values.

(1) *Original Text.* This method holds that the Constitution is properly interpreted as any set of rules consistent with the dictionary meaning (at the time of interpretation) of the words of the constitutional text.[6] The meaning chosen need not be the same meaning that those words were intended to carry by the enactors of the relevant constitutional text.

With respect to the criterion of certainty, the original text method does limit the application of the Constitution to meanings that are available from a mere inspection of the text. But, in the very common situation in which more than one meaning is reasonably attributable to the text, this approach introduces an inevitable element of uncertainty because, by hypothesis, each of the meanings satisfies fully the interpretative requirements; one cannot predict what the Constitution will and will not permit.

More importantly, however, this kind of interpretation presents an acute problem of legitimacy. The value of legitimacy concerns the political basis on which the Constitution claims obedience as supreme law. This must have something to do with the historical political process by which the text of the Constitution was created—with the people and processes involved in writing and ratifying it. Creating the Constitution was an essentially political act and it is the historical and political circumstances of that act that invested it with the legitimacy that made it law.[7] The method of original text, by definition, makes those circumstances irrelevant to the formulation of constitutional meaning.

(2) *Original Intentions.* This technique holds that the Constitution is properly interpreted as that set of rules intended to be

5. *See* Richard S. Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111, 116, 120-21 (1984).

6. *See* Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 804-12, 831 (1982).

7. *See* Richard S. Kay, *Original Intentions, Standard Meanings, and the Legal Character of the Constitution*, 6 CONST. COMMENTARY 39, 44-45 (1989).

created by the Constitution-makers at the time of enactment.[8] This understanding is so conventional, and so firmly rooted in American judicial practice, that it used to be called simply constitutional interpretation.

With regard to certainty, the technique of original intentions has the potential to produce rules that are *relatively* clear and stable because the rules that it aims to apply are, definitionally, fixed at a specific time—the time the Constitution-makers engaged in the purposive act of creating the Constitution. Moreover, at least when applied in the context of litigated cases, the method points the judge to the meaning that is more likely to conform to the intentions of the enactors, even when each of the competing meanings might be consistent with the language of the relevant text considered by itself.

Interpretation according to the original intentions is also consistent with the criterion of legitimacy. By adhering to that rule that was intentionally created by the people whose actions created the Constitution, a judge gives due deference to that political judgment. I believe the drafting, ratification, and amendment of the 1787-89 Constitution continue to be seen as events that express the will of a properly empowered American "people" to set and define the character and limits of the polity. The constitutional Founders still seem to enjoy a regard, if not reverence, that has not significantly diminished over time, an attitude evidenced in popular culture, as well as in Supreme Court opinions.

(3) *Original Understanding.* This model holds that the Constitution is properly regarded as any set of rules consistent with the dictionary definition of the words of the relevant text *at the time the text was enacted* and that are plausible in light of the historical context in which the Constitution was enacted.[9] It thus differs from the "original text" version by focusing on the objective circumstances in which the text was written and from the "original intentions" version by eschewing reliance upon the supposed subjective intentions of the enactors of the Constitution.

Notwithstanding this distinction, in practice the "original understanding" and "original intentions" methods are quite similar. When people use certain words they probably intend to commu-

8. I have elaborated this model more fully in Kay, *supra* note 2, at 230.

9. *See* BORK, *supra* note 2, at 144; Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725-26 (1988).

nicate the meaning which people, in general, in that time and place, and dealing with that kind of problem, would intend in employing that language. That is, the objective meaning, qualified this way, and the subjectively intended meaning almost always will be identical. This identity is particularly likely in the case of the United States Constitution of 1787-89. The relevant actors were not the actual drafters of the language, but the members of the ratifying conventions that gave it the force of law. Their subjective intentions are even more likely to coincide with the meaning of the text that would have been generally understood at the time.[10]

Consequently, original understanding almost always will yield the same results as will original intentions. The relative appeal of these two approaches, therefore, turns on the superiority of one or the other in those rare cases in which they produce different interpretations, that is, when the application of the original understanding will result in a meaning that was not intended by the Constitution-makers. Choosing the original understanding in such a case, therefore, raises exactly the same issues of legitimacy that were associated with the original text alternative.

In disagreeing with both the original text and original understanding techniques, I have suggested that legitimacy concerns may oblige us to choose a constitutional meaning that was intended by the enactors, even when that meaning was not inferable from an examination of the text, either on its face or in the context of the time of enactment. Fidelity to the original intentions thus may appear to require application of a hidden or secret rule, a result that is squarely at odds with the originalist criterion of certainty.

As an abstract matter, this objection has undeniable force. When expressions and intentions do not match, the objective of clear, knowable rules is in necessary tension with the goal of submission to the authority of legitimate lawmakers. In practice, however, adherence to the intended meaning rarely will lead to application of an unknowable rule. That is because it supposes a case in which people express their intentions in patently inapt words.[11] Communication by words often is difficult but usually is

10. For these reasons, the first and principal source for determining the original intentions under the second technique will be an examination of the original understanding.

11. I am speaking here of situations in which the language fails to give a fairly clear notice of the character of the legal rule. I am *not* concerned about the case of language, the meaning of which is doubtful only in marginal situations. This problem, that of vague-

possible, particularly when people take care in choosing their language and debate and discuss the phrases they will employ, as they do in legislative and constitutional drafting.

When the actors do fail to employ words that comport with their intentions, the problem usually involves a discrete drafting error that is readily apparent to the reader. Thus, when the Arkansas legislature provided that "all laws and parts of laws, and particularly Act 311 of the Acts of 1941, are hereby repealed," although its language failed to express its true intention, that fact was rather obvious. When the Supreme Court of Arkansas held that the law should be applied only to laws in conflict with the relevant statute, the court was hardly imposing a surprise rule.[12]

(4) *Original Values.* This model holds that the Constitution is to be interpreted as something other than a finite set of rules. It calls for the Constitution to be "invoked" in litigated cases when a court holds invalid some action of government that it deems in conflict with the more or less general substantive values that were sought to be advanced by the enactors of the Constitution. This technique involves a relatively unconstrained approach to judicial review.[13]

Honestly applied, this model may well satisfy the criterion of legitimacy. This is because the determining factors of decisions are attributable, in a general way, to the Constitution-makers whose values are being interpreted and applied, and, as I have argued, their will is the most plausible source of legitimate constitutional law.

This method of constitutional "interpretation," however, fails the certainty criterion. To distinguish this approach from original intentions, the governing values must be taken at a level of generality *broader* than that understood to have been intended by the constitutional enactors.[14] Values defined at that level of generality may reasonably support inconsistent decisions on the con-

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ness due to the open texture of language, is well known, *see* H.L.A. HART, THE CONCEPT OF LAW 123, 128-36 (2d ed. 1994), and is unavoidable in any employment of language. That ubiquitous feature of linguistic communication cannot reasonably be characterized as creating an issue of hidden or secret rules.

12. Cernauskas v. Fletcher, 201 S.W.2d 999, 1000 (Ark. 1947).

13. *See, e.g.*, Ronald M. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 472-76 (1981).

14. Those who claim that the enactors themselves intended only to specify values at a high level of generality and that the specification of those values was to be entrusted to the judges are arguing on the basis of the model of original intentions. *See e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). My disagreement with these writers is on a matter of history, not theory.

stitutionality of the same action. Thus, if the Fourteenth Amendment is understood effectively to prohibit unjustified state interference with "liberties that are 'deeply rooted in this Nation's history and tradition,'"[15] the Constitution, in this respect, provides no firmer ground for predicting the permissible limits of governmental behavior than is available from an informed estimate of the likely political behavior of the legislature.

Of the four possibilities listed, the model of original intentions comes closest to satisfying the objectives of constitutional government that seem to matter most to originalists. It is important, however, to emphasize the limits of this argument. Most importantly, I have discussed these methods only in light of the two "originalist" values noted. But there are, of course, other values at stake as well. Most importantly, I have not addressed the relevance of the substantive contents of the constitutional rules that might be derived from one or another of the methods of interpretation mentioned. Instead, I have used the term *legitimacy* solely in connection with the presence or absence of an acceptable source from which the rules issue. One also might insist, however, that no constitutional rule is legitimate if its application leads to consequences that are seriously out of touch with prevailing political and social values of the society in which it is applied.[16]

These two senses of legitimacy obviously are related. A society usually will regard the rules that issue from a legitimate source as substantively legitimate because the things it values in the source are manifest in the contents of the rules created by that source. If a society were to display a kind of split personality, whereby it continued to esteem a certain constitution-making process but despised the rules that process intended to generate, the model of original intentions, although most faithful to originalist values, still could be criticized as incapable of producing suitable constitutional rules for that society.

Whether this state of affairs exists is a matter of empirical inquiry. In the United States, that inquiry may be framed as whether, notwithstanding the continuing political veneration of the constitutional founding, the rules intentionally generated in that process would be politically unacceptable if they were faith-

15. Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

16. *See* Kay, *supra* note 2, at 156-58.

fully applied by the courts. Without entering into the merits of that contention, I think it presents, at least, a genuine question about the long-term viability of written constitutions.

That matter, however, is beyond the present point. Assuming that the rules intentionally created by Constitution-makers meet some minimal level of political acceptability (*not* that they are the best possible rules for a given society), people who value political legitimacy and certainty and stability, those who value the peculiar virtues of constitutional government, will be drawn powerfully to constitutional interpretation that seeks the original intentions of the Constitution-makers.