Originalism vs. a living Constitution

Is the Constitution dead or alive?

The late Justice Antonin Scalia, long the chief advocate of originalism on the Supreme Court, was unequivocal. “The constitution that I interpret is not living but dead,” he said in a 2008 speech.

His counterpart, the late Justice William J. Brennan Jr., intellectual leader of the Warren Court, was equally insistent it was a “living Constitution.” He said, “the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone.”

At the time the two men staked out their positions in the 1980s, Brennan’s was more widely held and Scalia’s on the margins.

But Scalia’s view is dominant on today’s court. Even the justices appointed by Democrats talk at times more like originalists than adherents of a living Constitution.

The Dobbs v. Jackson decision last June – overturning the abortion right – dramatized that originalism has captured a majority of the current court. In other words, the majority believes that today’s decisions should be based on what the original framers of the Constitution meant when they wrote the text.

Since Dobbs, an outpouring of legal scholars and commentators have criticized and ridiculed originalism as “bunk,” a “charade” and misleading con job that promises objectivity it can’t and doesn’t deliver.

Among the questions the critics raise are:

- Why link the meaning of the Constitution to the flawed Founding generations who protected slavery and denied women rights?
- Why link the meaning to Framers who left out many important values – equality, democracy, the right to vote?
- Why originalism when the Constitution itself says nothing about how it is to be interpreted?
- Why originalism when the Framers themselves did not advocate it? In fact, a number of the Framers suggested otherwise. The advocacy of originalism did not grow out of the Founding generation but was a 1970s phenomenon built by the conservative movement directly targeting the rights revolution of the Warren Court and seeking to roll back Roe.
- Why rely on the meaning of the Framers of the 14th Amendment after the Civil War for the interpretation of liberty and equal protection when those Framers ran racially segregated schools, opposed interracial marriage and refused to include women under the equal protection guarantee? The notion that same-sex marriage, interracial marriage or contraception were covered by the 14th Amendment would have seemed to them like it came from outer space.
- Why in the Dobbs decision would the court look for historical guidance at the practices in England in the 1300s, during the Middle Ages?

Growth of originalism

No one would have believed when Roe was decided in 1973 that a majority of the Supreme Court would believe in originalism half a century later when the right was read out of the Constitution.

Robert Bork, a brilliant Yale law professor, planted the seeds

of originalism in a 1971 article in the Indiana Law Journal criticizing the Warren Court's constitutional interpretations as unmoored from the text of the Constitution.

Central to his argument was his critique of Griswold v. Connecticut, the 1965 decision where the court struck down a Connecticut law making it a crime to provide married women with contraceptives.

Justice William O. Douglas, in his decision, recognized zones of privacy that extended from various parts of the Bill of Rights. He likened these zones of privacy to penumbras, the lighter part at the outside edge of a shadow.

He found penumbras of privacy in the First Amendment freedom of association, the Third Amendment ban on quartering troops in homes, the Fourth Amendment guarantee against unreasonable searches of homes and private effects, the Fifth Amendment right to remain silent and the Ninth Amendment reservation of unenumerated rights to the people.

Not a few constitutional scholars thought Justice Douglas' constitutional reasoning in Griswold was decidedly ephemeral. Eight years later when the court decided Roe, it was equivocal on where it found the right of a woman to make the abortion decision. Was it in the shadows of the Bill of Rights or in the liberty protected by the 14th Amendment? Justice Blackmun said the court favored the latter approach.

Justice Samuel Alito, in writing the Dobbs opinion this year, ridiculed the lack of a clear constitutional basis in either of those formulations.

Bork's defeat

Bork ended up paying dearly for arguing there was no privacy right. When President Ronald Reagan nominated him for the Supreme Court, Democrats led by Sen. Edward M. Kennedy, D-Mass., ran a political style campaign against confirmation

emphasizing Bork opposed privacy. Bork didn't help himself by testifying that privacy was not in the text of the Constitution so it wasn't covered.

But already Reagan had succeeded in naming another brilliant originalist to the court, Scalia, whom the Senate confirmed unanimously – partly because he was very smart, partly because the Democrats were more focused on trying to stop the elevation of William Rehnquist to chief justice and partly because he was Italian-American, a big Democratic constituency.

Attorney General Edwin Meese also chimed in on originalism. At a July 9, 1985, speech to the American Bar Association, Meese advocated a "Jurisprudence of Original Intention."

It is our belief," he said, "that only 'the sense in which the Constitution was accepted and ratified by the nation,' ….provides a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of the Constitution and its rule of law."

Meese went on to maintain that the Supreme Court's application of the Bill of Rights to the states was at odds with the original intent of the Framers. The First Amendment's ban on an established church should not have been applied to the states, he said.

Meese's speech was mostly received with criticism and ridicule. Gerald Gunther, then a leading constitutional expert, called his speech "an extremely unusual position…Of the many scholars writing on the proper criteria for constitutional interpretation, I know of only one…who advocated simply reading the legislative debates of the Constitutional Convention to define what the Framers would have said about all the problems this constitutional polity has faced over the years. I think Attorney General Meese has

made a mistake identifying himself with that discredited notion of constitutional interpretation."

Supreme Court Justice John Paul Stevens, a Ford nominee, said in a speech that "no justice who has sat on the Supreme Court during the past 60 years has questioned" incorporation of the First Amendment to apply to the states.

Brennan gave the main response in a speech Oct. 12, 1985, at Georgetown University. He said, "Those who would restrict the claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.

"Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. Thus, for example, when we interpret the Civil War Amendments to the charter – abolishing slavery, guaranteeing blacks equality under law, and guaranteeing blacks the right to vote – we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of slave caste."

Scalia prevails

Meese's advocacy of original *intent* didn't catch on.

Determining original intent is too tricky. Where would one look for the original intent of the drafters of the Constitution? In James Madison's diaries? In the statements made at ratifying conventions? In the Federalist papers written by Madison, Alexander Hamilton and John Jay under the pseudonym Publius? Historians know those papers emphasized the democratic portions of the Constitution to give people a more positive impression.

And what of Thomas Jefferson and John Adams, two important Founders who were out of the country on diplomatic assignments to France and England respectively? Jefferson is the author of the metaphor about a "wall between church and state," but he wasn't around for the adoption of the Bill of Rights. Justice William H. Rehnquist argued that made Jefferson's metaphor irrelevant.

Scalia emphasized original meaning instead of original intent.

Scalia directly addressed his objection to a living constitution in an interview with NPR's Nina Totenberg: "If you somehow adopt a philosophy that the Constitution itself is not static, but rather, it morphs from age to age to say whatever it ought to say – which is probably whatever the people would want it to say – you've eliminated the whole purpose of a constitution. And that's essentially what the 'living constitution' leaves you with."

With a living Constitution, the Supreme Court becomes a roving constitutional convention without the needed supermajorities. If people want to change the Constitution, say the originalists, they must pass an amendment, even though that is hard.

Scalia called himself a "faint-hearted" originalist because he didn't want to get rid of all of the precedents he thought were wrongly decided. Clarence Thomas, on the other hand, is much more likely to throw out a precedent he thinks was wrongly decided. That's why he was ready in Dobbs to move on to same-sex marriage and contraception.

Scalia told NPR, "You can't reinvent the wheel. You've got to accept the vast majority of prior decisions…I do not argue that all of the mistakes made in the name of the so-called living constitution be ripped out. I just say, 'Let's cut it out. Go back to the good, old dead Constitution…I am a textualist. I am an originalist. I am not a nut."

Like an umpire

One of the attractive things about originalism is that it's simple to explain and it sounds more empirical and less judgmental than a living Constitution. Originalists say the method discourages justices from activism and reaching out for new rights not specified in the Constitution.

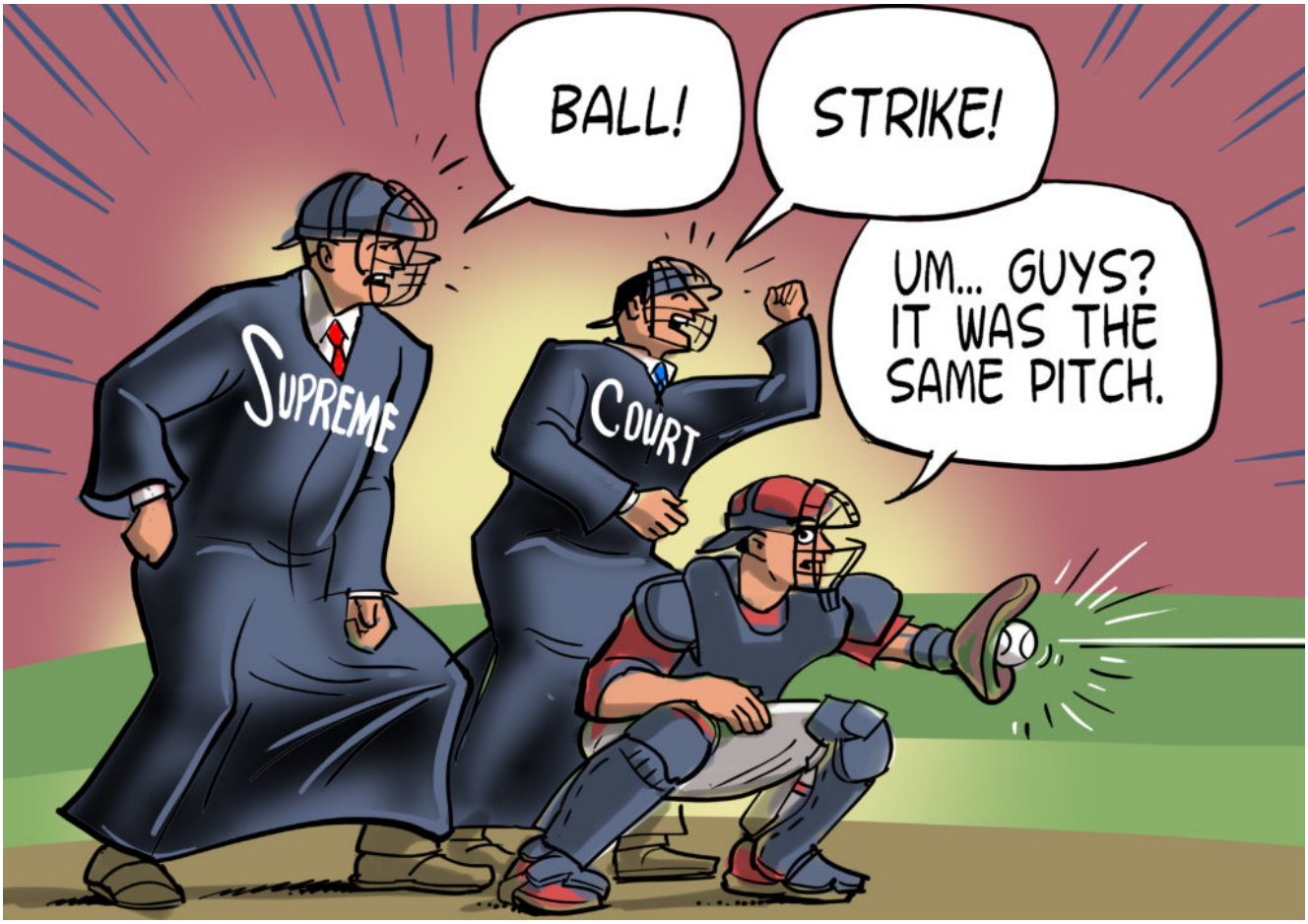

Illustration by Steve Edwards

Chief Justice John Roberts leaned on the appeal of empiricism in his confirmation hearing when he said famously: "Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire…I will remember that it's my job to call balls and strikes and not to pitch or bat."

Critics say, however, that judging isn't like that. Voting patterns of justices show unsurprisingly that most justices

vote their philosophic preferences, which often are linked to their political preferences and the president who appointed them. And originalists often are activists, the critics say, citing Dobbs, which overturned a 49-year-old precedent, and the decisions recognizing the individual right to own and carry a gun in the house and on the street.

Critics also point out that justices aren't historians and that law office history often falls short.

"For most constitutional provisions, there is no 'original meaning' to be discovered," writes Berkeley law dean Erwin Chemerinsky, author of a new book, "Worse Than Nothing: The Dangerous Fallacy of Originalism." He said that instead of a clear historical answer "there is a range of possibilities that allows for exactly the kind of judicial discretion that originalism seeks to eliminate."

A number of historians thought Justice Stevens' history on the original meaning of the Second Amendment was more persuasive than Scalia's, but Scalia had the fifth vote to recognize an individual Second Amendment right.

Similarly, Justice Ketanji Brown Jackson probably had her originalist history right in an oral argument earlier this fall in a race case, but that doesn't mean she will persuade the originalists.

She said, "I understood that we looked at the history and traditions of the Constitution, at what the framers and the Founders thought about. And when I drilled down to that level of analysis, it became clear to me that the framers themselves adopted the equal protection clause…in a race conscious way. I don't think that the historical record establishes that the Founders believed that race neutrality or race blindness was required, right?"

Historians say she is right, but those who count votes on the Supreme Court don't expect many of the originalists to go

along with her analysis.

Admonitions through history

Critics of originalism point to famous statements by founders, framers and great justices that seem to reject elements of originalism.

Thomas Jefferson wrote: “Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched…40 years of experience in government is worth a century of book-reading; and this they would say themselves, where they to rise from the dead.”

John Marshall, the great chief justice of the first third of the 19th century, wrote in support of the continuation of the Bank of the United States: “…we must never forget that it is a *constitution* we are expounding” and that the Constitution is “intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.”

Justice Robert Jackson wrote in the Supreme Court decision rejecting Harry S. Truman’s seizure of the steel mills during the Korean War: “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”

David Cole, national legal director of the ACLU and a professor at Georgetown University Law Center, says the broad language of the Framers in parts of the Constitution are clues that they were writing for the future and not just their time.

“The fact that the framers used general terms, such as ‘liberty,’ ‘due process,’ ‘equal protection,’ and ‘cruel and unusual punishment,’ strongly suggests that they understood they were drafting a charter meant to long outlive them, one that could guide unforeseeable resolutions to unforeseen problems. If you want to bind people to your specific

intentions, you write with specificity. The framers chose not a stringent straitjacket but a set of enduring core principles whose meaning and applicability would unfold over time to meet the evolving needs of a growing nation…"

Alternatives

There are alternatives to originalism and the living Constitution, but they don't have the same pithy sound bite quality.

David Strauss, a law professor at the University of Chicago Law School, advocates a common law approach. This method recognizes that broad and open-ended provisions are fleshed out gradually over time as judges confront particular cases and seek to make sense of previous decisions. "It's what judges at every level have always done when they confront new cases," says Strauss.

Justice Stephen Breyer advanced another approach in a book on "Active liberty." It is making decisions about the Constitution "in light of its text, purposes, and our whole experience." He emphasizes judicial modesty, deference to Congress, connection to the people with recognition of people's changing needs and demands."

At the moment, though, the active and activist Supreme Court isn't looking for alternatives. Just as it took originalism half a century to take hold, any other approach would probably take decades to develop.

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