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An Originalist Congress?

Joel Alicea

THE “PLEDGE TO AMERICA”—a compendium of campaign promises released by the House Republican Conference in the run-up to November’s congressional elections—was not exactly full of surprises. More than a bold statement of conservative policy ambitions, it was a cautious list of familiar generalities. But buried deep within the 45-page document appeared this curious promise: “We will require each bill moving through Congress to include a clause citing the specific constitutional authority upon which the bill is justified.”

At first, the proposal might seem superfluous. Doesn’t Congress already consider its constitutional authority when making laws? The answer, sadly, is all too often no. In fact, lawmakers frequently go out of their way to avoid considering the constitutionality of the bills they aim to enact—preferring to push their legislation through first, and leave it to the Supreme Court to decide later whether the contents pass constitutional muster. Sometimes, laws are even carefully crafted with litigation in mind: Justifications and findings written into the text of the legislation are drafted not to resonate with the language of the Constitution, but rather with the language of judicial opinions articulating what the *Court* has said the Constitution means.

A recent example of this phenomenon is the Patient Protection and Affordable Care Act enacted last March, and particularly its “individual mandate” requiring every American to carry health insurance approved by the federal government. From the outset, there were serious concerns about the constitutionality of the government’s forcing Americans to buy a particular product. And yet, when asked whether these objections had any validity, House Speaker Nancy Pelosi dismissed them as “nonsensical”—saying “the power of Congress to regulate health care is

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essentially unlimited.” Senate Majority Leader Harry Reid took a more subtle approach; the version of the bill he sponsored made sure to reference the kind of language the Supreme Court has employed in various decisions justifying expansive federal regulation under the commerce clause. As Gene Healy (a vice president of the Cato Institute) noted, the “findings” section of Reid’s bill “[hit] all the jurisprudential buzzwords: The individual mandate ‘substantially affects interstate commerce,’ and regulates ‘activity that is commercial and economic in nature.’” To Healy, this approach to legislating—crafting laws with judges, not the text of the Constitution, in mind—represented a perilous neglect of congressional responsibility. “Members of Congress swear an oath to uphold the Constitution,” Healy wrote, “not the court’s funhouse-mirror version of it.”

In principle, then, the Republicans’ pledge could do a great deal of good, by refocusing Congress’s attention where it belongs: on the document from which Congress, and the rest of our government, draw their legitimate authority. But what would the constitutional-citation provision mean in practice? Members of Congress could cite any constitutional provision they wished in support of their bills, and the citations would carry little weight. Legislators, like many of today’s judges, could impose meanings on the Constitution foreign to its history and purpose.

What Congress needs as a companion to its constitutionality pledge is a theoretically coherent and legitimate method of constitutional analysis. Legislators of a more conservative bent—including many members of the new Republican House majority—might be most inclined to turn to “originalism”: the notion that the Constitution’s interpreters should adhere to the meaning of the text as understood by the men who enacted it. Depending on one’s particular brand of originalism, the understanding that matters belongs to either the framers of the document or the people who ratified it; the key point, however, is that an originalist refuses to substitute his own views on what the Constitution should mean for how the document was originally understood.

But adopting an originalist approach to congressional constitutional interpretation is no simple matter, because conventional wisdom (even among many originalists) places the authority to determine the Constitution’s meaning solidly in the hands of the courts, not the legislature. Members of Congress who would claim to be originalists will first need to decide what exactly that means in a legislative context—and whether Congress ought to assert itself as a constitutional interpreter in its own right.

JUDICIAL SUPREMACY

It is worth asking first whether Congress ought to play a major role in interpreting the Constitution at all. Here, “major” is the operative word; of course Congress does *some* interpreting of the Constitution all the time. As Jack Balkin of Yale Law School notes, “every Congressional enactment passed under the commerce power, and every appropriation under the General Welfare Clause, involves an implicit interpretation of these clauses, whether or not any court ever considers them.” The real issue is whether Congress’s constitutional interpretation should be seen as carrying roughly equal authority as that of the Supreme Court, or whether we ought to think of the Court as having the final word on the Constitution’s meaning. After all, if the Court is the final arbiter—and therefore the only meaningful arbiter—of the document, then why should Congress even bother to consider the Constitution while making law?

That question has been raised in recent months by several critics of the House Republicans’ pledge document. Dahlia Lithwick, legal-affairs correspondent for the popular liberal web site *Slate*, wrote of one candidate’s reference to the pledge commitment: “How weird is *that*, I thought. Isn’t it a *court’s* job to determine whether or not something is, in fact, constitutional? And isn’t that sort of provided for in, well, the Constitution?”

The Constitution, of course, says nothing of the sort. But better informed and less snide readers of the pledge might nonetheless have been similarly perplexed, given the Court’s repeated declarations of its ultimate authority to determine the Constitution’s meaning. After all, it was Chief Justice John Marshall’s opinion in the 1803 case *Marbury v. Madison* that famously asserted: “It is emphatically the duty of the Judicial Department to say what the law is.”

Most contemporary legal scholars would no doubt argue that the Court does have the last word on the Constitution’s meaning—a doctrine known as judicial supremacy. But this has not always been the consensus view, and it is hardly self-evident. The meaning of Chief Justice Marshall’s statement in *Marbury* is open to debate, and the notion that his opinion in that case endorses the idea of judicial supremacy has been disputed by scholars, perhaps most forcefully by Stanford Law School dean Larry Kramer in his book *The People Themselves*.

Indeed, our constitutional history is punctuated by episodes in which the other branches of the federal government—especially the

executive branch—refused to go along with the notion that the Court alone is entitled to interpret the meaning of the Constitution. Of these, the best-known example is Abraham Lincoln’s renunciation of judicial supremacy in his first inaugural address. Responding to the Court’s 1857 *Dred Scott v. Sandford* decision, Lincoln said:

The candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal.

As president, Lincoln resisted the Court’s authority not only in theory but also in practice. He deliberately flouted the justices’ ruling when he ordered the State Department to issue passports to blacks, something foreclosed by the Court when it expressly denied blacks citizenship status in the *Dred Scott* opinion.

Of course, Lincoln was not the only executive to go toe-to-toe with the Court over the power to interpret the Constitution. Thomas Jefferson also insisted on the independent authority of the president and Congress to assess the meaning of the document. In an 1819 letter, he argued:

If this opinion [i.e., the doctrine of judicial supremacy] be sound, then indeed is our Constitution a complete *felo de se* [act of suicide]. For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others, and to that one, too, which is unelected by and independent of the nation.

When President Andrew Jackson vetoed Congress’s re-chartering of the Second Bank of the United States on the grounds that the charter was unconstitutional, he did so despite the fact that the charter had been upheld by the Court in the 1819 case *McCulloch v. Maryland*. Jackson’s famous veto message to Congress was an emphatic denial of the judiciary’s exclusive authority to interpret the Constitution. “Each public

officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others,” Jackson argued. Since then, other presidents—from Franklin Roosevelt to Ronald Reagan—have now and then expressed, in word and deed, an aversion to letting the judiciary alone determine exactly what the Constitution does and does not allow.

Overall, however, such challenges to the Court’s authority from the elected branches have been few and inconsistent, and most presidents and members of Congress have been more than happy to defer to judicial authority. One reason, as Princeton University’s Keith Whittington points out in his book *Political Foundations of Judicial Supremacy*, is that it is politically advantageous for the popular branches to avoid inserting themselves into the messy and controversial morass of constitutional interpretation. Rather than anger one constituency or another, they generally prefer instead to let the Court decide.

The best example of this approach may well be President George W. Bush’s decision in 2002 to sign the McCain-Feingold bill, which imposed severe restrictions on political campaign donations and expenditures. Even as he signed the bill, Bush stated that he believed several sections to be unconstitutional. And yet he said he would sign the legislation anyway—because, as he put it, “I expect that the courts will resolve these legitimate legal questions as appropriate under the law.”

This shirking of constitutional responsibility by presidents and legislators has helped the Court cement its claim to being the sole interpreter of the Constitution. And that claim was further strengthened by the crisis that arose in the aftermath of the Court’s decision in the 1954 case *Brown v. Board of Education*, which was met with vehement opposition and defiance in the state of Arkansas. In the 1958 case of *Cooper v. Aaron*, the Court ruled that Arkansas was obligated to comply with the decision in *Brown*, citing the supremacy clause of Article VI of the Constitution, which declares federal law supreme over state law. This would have been a sufficient justification for the Court’s decision, but the justices went further and interpreted *Marbury* as conferring ultimate constitutional authority on the Court: “This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”

Of course, as noted above, whether *Marbury* made such a declaration is a highly debatable question, and even a casual glance at the history of judicial supremacy undermines the Court's claim that this doctrine has been a "permanent and indispensable feature of our constitutional system." But given the crisis atmosphere surrounding the *Cooper* decision — and given the need to present a united front against the violence and bigotry of segregationists — this bold assertion of power was not seriously contested.

As the Warren and Burger Courts began issuing increasingly controversial decisions, however, the implications of judicial supremacy over constitutional interpretation came into sharper relief, and the debate over the role of extrajudicial actors in interpretation was joined. Constitution scholar Donald Morgan, for instance, argued in his 1966 book *Congress and the Constitution* that Congress ought to resist a "judicial monopoly" over constitutional interpretation, given the firm historical basis for a congressional role in that enterprise. Morgan saw policy and constitutional questions as closely interconnected, and he wrote of the need for Congress to adopt a legislative framework incorporating both aspects of lawmaking.

Perhaps the most significant scholarship in this area in recent years has come from Mark Tushnet, Jeremy Waldron, and Larry Kramer, of Harvard, New York University, and Stanford law schools, respectively. Tushnet and Waldron, in different books, argue against the very idea of judicial review. Taking an approach rooted in jurisprudence and political theory, both scholars contend that the political branches should be the ultimate arbiters of constitutional meaning, though Waldron's argument is more focused on the British constitutional system. This radical assault on the idea of judicial supremacy is less evident in the work of Kramer, who argues for the historical basis of what he calls "popular constitutionalism," a theory that attempts to marry judicial review (though not judicial supremacy) with vigorous popular participation in constitutional decisions. Like Tushnet, Waldron, and Morgan, then, Kramer argues for an expanded role for Congress in constitutional interpretation.

This debate over Congress's proper role in interpreting the Constitution has manifested itself politically as well, most recently in the clash over the constitutionality of Obamacare's individual insurance mandate. As noted above, Nancy Pelosi provided a pitch-perfect example of the dominant view that Congress has little to say about constitutional

interpretation. When asked by a journalist if the individual mandate was constitutional, she shot back in exasperation, “Are you serious?” The idea that Congress ought to think carefully about the constitutionality of legislation, rather than deferring to the courts, seemed alien to America’s highest-ranking legislator.

But it turns out that some Americans today take this notion quite seriously. A conservative revival, taking form most prominently in the Tea Party movement, has urged a return to constitutional principles by all levels and branches of government. Conservative talk-radio stations have suddenly been flooded with ads for institutions offering to teach citizens about the Constitution and the founding era — so that they, not judges, might decide what the document does and does not say. In its September profile of Glenn Beck, the *New York Times Magazine* described the intense fervor with which conservatives are speaking of the Constitution and the wisdom of the founders, particularly at Beck’s rallies and appearances. And, then, of course, came the House Republicans’ commitment to cite constitutional authority for any bill they enact.

The new House majority, then, seems inclined against the notion of judicial supremacy that has been so prominent in American political life for half a century. They believe that members of Congress — the duly elected representatives of the people — should play a significant role in interpreting the Constitution’s meaning.

It is not enough, however, to simply assert the right of the legislature and the executive to interpret the Constitution. Nor is it enough for Congress to say it will no longer abdicate to the courts the responsibility to determine whether the legislation it enacts is or is not constitutional. For a renewed claim to interpretive authority to have any weight, Congress must demonstrate, in some credible way, that it takes the Constitution seriously when it legislates. Such an undertaking requires a theory of constitutional interpretation. Having decided that they *should* play a role in interpreting the Constitution, members of Congress must now decide *how* they will do so.

A NOVEL ORIGINALISM

For conservatives, one would think the answer would be obvious. Thanks to paragons of the conservative judiciary like Justice Antonin Scalia and Judge Robert Bork, originalism has long been the right’s preferred approach to constitutional interpretation. But should originalism

be adopted by Congress? And what would it look like as a method of congressional constitutional interpretation?

Relatively little effort has been made to answer these questions—in part because the modern conception of originalism is a far more novel idea than its champions suggest. While Justice Scalia is fond of saying that originalism was the orthodox judicial approach to interpretation from the founding until the early 20th century, its true history is more complex. As Georgia Southern University history professor Johnathan O’Neill has chronicled in his book *Originalism in American Law and Politics*, the 18th- and 19th-century version of originalism that Justice Scalia cites was in fact quite distinct from modern strains of the theory.

Originalism in the founding era was heavily influenced by the thought of the 18th-century English jurist William Blackstone. As Harvard law professor Mary Ann Glendon has argued, Blackstone’s *Commentaries on the Laws of England* served as “the law book in the United States in the crucial years immediately preceding and following the American Revolution”; its dominance continued throughout much of the 19th century. Moreover, O’Neill identifies the “canons of interpretation” elucidated by Blackstone in the *Commentaries* as being the primary lens through which American lawyers viewed the Constitution prior to the 20th century. Those canons—rules to guide interpreters in their task—aimed to ascertain the intent of the lawgiver, using the text of the law as the principal means of discovering that intent. Words were given their everyday meanings, and evidence extrinsic to the text was considered, at most, of secondary importance. Thus, the records of debates surrounding the passage of a particular law—what is commonly referred to as “legislative history”—were only marginally relevant.

These rules had profound implications for the development of originalism during this period. Originalism, following the Blackstonian canons, focused on the intent of the Constitution’s drafters and ratifiers as revealed by the text. Chief Justice John Marshall’s opinion in *McCulloch v. Maryland*, which addressed the state’s tax on notes of the Second Bank of the United States, provides a good example of this approach. The case raised the issue of the elasticity of the Constitution’s necessary and proper clause (located in Article I’s enumeration of congressional powers, and giving Congress the authority to make laws needed to exercise the powers that the Constitution grants to the U.S. government). The chief justice compared the use of the word “necessary” in this clause to its use in other

parts of the document, in addition to discussing its usage in everyday life. As described by O'Neill, this form of originalism, with a focus on text and intent, was common throughout the 19th century.

What we think of as originalism today, however, is quite different. Its beginnings are usually traced to Judge Bork's seminal 1971 *Indiana Law Review* article, "Neutral Principles and Some First Amendment Problems." As it has developed since then, modern originalism has proven far more heterogeneous than the Blackstonian version. There is no consensus that the original *intent* is what is sought. While some originalists continue to search for intent, others restrict their inquiries to the meanings of the words as they were understood in the founding era, and still others prefer to know how the founding generation *should* have understood the words given the linguistic conventions of the time. And even where judicial originalists have agreed that their task is discovering the Constitution's original intent, there is fierce debate over *whose* intent matters: the framers', the ratifying conventions', or the general public's?

This dizzying array of differences in interpretation leads to differences in methodology. Some originalists look to the debates of the Constitutional Convention to understand the meaning of the final document, while others emphasize the newspapers and dictionaries of the relevant period. Originalism today thus relies a great deal on evidence extrinsic to the text. It has become, in this sense, much more of a historian's art than that of a Blackstonian lawyer.

Modern originalism has, moreover, focused almost exclusively on the judiciary. As constitutional-law scholar Gary Leedes once noted, originalists "permit the electorally accountable officials substantial leeway. The Congress can interpret the tenth amendment and the necessary and proper clause virtually as it pleases"; what matters in the end is not what Congress legislates, but rather what the Supreme Court decides Congress is allowed to legislate.

The reason for the attention paid to the courts is straightforward: They were the *raison d'être* of modern originalism. Judge Bork's article was written in response to decisions emanating from the Warren Court of the 1950s and '60s, and he was quickly joined by Justice William Rehnquist and Harvard professor Raoul Berger in developing originalism's modern form. All three wrote at a time when originalist theory was seen as an emerging alternative to the judicial philosophies of the Warren and Burger Courts, which handed down decisions — including *Griswold*

v. Connecticut and *Roe v. Wade*—based on constitutional interpretations that many legal scholars saw as complete fabrications. As a result, whereas the text-centered originalism of the 18th and 19th centuries was employed across all three branches of government, modern originalism was created almost exclusively to serve as an alternative *judicial* philosophy.

Modern originalism, then, has been around for only four decades or so, and has concerned itself almost exclusively with the courts—to the point that it might even seem to imply that Congress need not abide by an originalist understanding of the Constitution as long as the courts do. It is therefore no surprise that scholars—not to mention lawmakers—have largely ignored the implications of originalism for congressional constitutional interpretation.

THREE STRANDS OF ORIGINALISM

So what can we say about applying originalism to Congress? First, we should distinguish between pragmatic and theoretical justifications for legislative originalism. A pragmatic justification would consider the results one could expect from an originalist legislature—its demonstrable effects on a range of policies. Being more attuned to results, this approach would ask whether an originalist Congress would be obligated to dispense with, say, the Social Security program, on the grounds that the Constitution does not grant Congress the power to create such a program, and whether this outcome would be desirable. Appealing as this approach might initially seem, however, it is deeply flawed: Aside from the fact that it has no roots in any real principle, it would require us to consider innumerable policy discussions and outcomes—and so to predict an inherently unpredictable political process.

We would do better, therefore, to pursue an approach more grounded in theory. Such an approach might begin by flipping the question of whether Congress should adopt originalism and looking at whether originalism should adopt Congress—that is, whether originalism, as a theory of interpretation, logically requires that Congress be originalist.

To answer that question, it is useful to identify three different schools of originalism in contemporary legal thought. One might be called “institutional originalism,” because it justifies originalism by virtue of the roles played by various institutions within the constitutional scheme. The most prominent exponent of this approach is Judge Bork, who lays out a notion of originalism that, while accepting the Supreme Court’s claim

to dominance in constitutional interpretation, would limit the Court's discretion and allow for greater deference to legislative enactments. Bork articulates this originalist theory well in *The Tempting of America*, while discussing what he terms "the Madisonian Dilemma." The dilemma, in Bork's view, is that the Supreme Court—having the final word on constitutional interpretation—is forced to strike a Madisonian balance between majority rule and minority rights. If the Court tilts too much in one direction or the other, it risks either a tyranny of the majority (in which minorities have little legal protection from majority will) or a tyranny of the minority (in which a minority of the population dictates national policy through the courts). In his *Indiana Law Review* article, Judge Bork said of the dilemma: "[It] imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has . . . a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom." For Bork, that "valid theory" is originalism—because it ostensibly provides a neutral way of defining the "spheres of majority and minority freedom."

Institutional originalism therefore uses originalist theory as a means to an end. Its goal is a proper relationship among the various branches of government, and originalism is the most legitimate way to achieve that balance. The reason institutional originalists focus almost exclusively on the Supreme Court is that they concede the reality that, in today's political and legal culture, judicial supremacy is widely accepted. They therefore see a pressing need for judicial originalism, lest the courts, riding this supremacy, make up constitutional meaning out of whole cloth. Questions of congressional originalism are thus largely ignored, because legislation will ultimately undergo judicial review anyway; at that moment, an originalist judiciary can correct any legislative errors. There is no similar institutional check on the Court itself.

There are two major problems with the institutional originalists' view of legislative originalism. The first is the assumption, historical or practical, that judicial supremacy corrects for any legislative enactments of dubious constitutionality. From a historical perspective, we have already seen that the idea of judicial supremacy has been contested throughout most of our history; it therefore seems wrong to assume that the current consensus in favor of judicial supremacy will endure indefinitely. The long-running debate about the Court's authority over interpretation is far from over.

More important, it is simply not true that the Court is able or willing to correct all of Congress's unconstitutional actions. There are both doctrinal and constitutional reasons why the Court might never pass judgment on a particular legislative act. The political question doctrine, developed over many years by the Court, relegates certain questions to the political branches, and the justices are loath to insert themselves into these issues. The 1993 case *Nixon v. United States*, in which a federal judge challenged the constitutionality of his removal from office by the Senate, is a perfect example. The Supreme Court refused to rule on the constitutionality of Judge Nixon's removal because the Constitution vests the Senate with exclusive authority over removing impeached judges from office. Even if Congress were to act in a way that appeared inconsistent with the impeachment and removal procedures outlined in Article I, Sections 2 and 3, of the Constitution, it is unlikely the Court would intervene.

The same is true with regard to "standing," a procedural hurdle mandated by Article III, Section 2, that must be cleared before the merits of a constitutional case can be decided by a federal court. The threshold for establishing standing to sue was articulated by Justice Scalia in his majority opinion in the 1992 case *Lujan v. Defenders of Wildlife*—in which environmental activists argued that they could sue the U.S. government for harm it caused endangered species in foreign countries, because these activists might someday want to travel to observe those species (and thus were being harmed themselves). The Court's majority, however, disagreed. Scalia contended that the "irreducible constitutional minimum of standing" contained three elements—the first being "injury in fact," described as "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent" (instead of merely "conjectural" or "hypothetical"). The second was a "causal connection" between the plaintiff's injury and the defendant's conduct; the third was that it had to be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable [court] decision." These criteria for standing would make it almost impossible for many congressional enactments to be effectively challenged on constitutional grounds. After all, when the only directly injured party is the Constitution, who under this rubric would have standing to sue?

It is clear, then, that placing total trust in a sympathetic Supreme Court to remedy unconstitutional congressional actions is a foolish undertaking for any originalist. If one thinks that originalism provides the

best means of ensuring a proper balance of power among the branches, then it only makes sense to advocate an originalist Congress as well.

Moreover, if institutional originalists seek a Court that is restrained in its actions and that is deferential to legislative enactments, while simultaneously allowing the legislature to be decidedly non-originalist, then the result will inevitably be non-originalist laws upheld by a restrained, originalist Court. The argument for judicial restraint works only if the legislature lives up to its end of the bargain. By their own logic, institutional originalists like Judge Bork ought to champion legislative originalism, too.

The second category of originalists can be termed “interpretation originalists.” They see originalism as the only correct way of interpreting the Constitution, and often they go further in claiming that the original intent of the author is the only way to legitimately interpret other kinds of documents, from the legal to the literary. This brand of originalism is concerned with implementing originalism for its own sake, not as a means to an end. It pays little attention to institutional dynamics, because it simply sees any form of non-originalism as an incorrect way of interpreting the Constitution. This category includes many prominent originalists past and present, with University of Virginia law professor Saikrishna Prakash and University of San Diego law professor Lawrence Alexander being notable current examples. Prakash has summed up this view neatly: “Indeed, *any* text or utterance, legal or not, should be understood through the originalist lens.”

Here, the case for legislative originalism is straightforward. If originalism is the correct way of interpreting the Constitution, then how can it be correct only when it is the judiciary that is doing the interpreting? Interpretation originalists make a very strong claim about the nature of interpretation, and that nature ought to apply across contexts. The interpretation originalists cannot appeal to the different roles that Congress and the Court play, or to any other set of extrinsic factors. There is a theory that admits of no wiggle room: Either an interpreter is performing his task properly by using originalist methods, or he is, as an objective matter, misinterpreting the text.

Finally, there is a third category of originalists who argue for originalism for other reasons, such as those who do so on the basis of popular sovereignty. This is the idea that, because the Constitution was ratified by the people, and because the preamble of the Constitution implies that the

people are the ultimate sovereign, the judiciary is bound to interpret the text with the people's intentions in mind. Keith Whittington articulates this rationale in his book *Constitutional Interpretation*, and it is a justification that has real currency among originalists. In fact, University of Illinois law professor Kurt Lash recently called popular sovereignty "the most common (and most influential) justification for originalism."

This approach comes closest to offering a real case against legislative originalism. Champions of popular-sovereignty originalism argue that judges, as mere agents of the people's will, are not authorized to alter the charter expressing that will. Their job, as judges, is simply to interpret the will of the people, remaining in a subordinate capacity to the popular sovereign. But Congress, because it is supposed to represent the current will of the people, would seem to have far greater authority to depart from the original intent of the Constitution—which, after all, expresses the public will as it stood many years ago. Here the dispute might seem to come down to whose will is authoritative: that of the people who ratified the Constitution, or that of today's electorate as represented in Congress?

It is important for a popular-sovereignty originalist to tread carefully here. If an originalist concedes that any Congress, channeling the will of the people at that moment, may alter the meaning of the Constitution through ordinary legislation, then he has effectively committed methodological suicide. The popular-sovereignty originalist cannot demand that the Supreme Court adhere to the will of the people of the late 1780s while simultaneously holding that, through the mechanism of congressional action, the will of today's electorate supersedes the authority of the Constitution as originally drafted and ratified. If both were right, what justification would the Supreme Court have for striking down a congressionally enacted law on originalist grounds? Clearly, if the will of today's electorate is supreme, then whatever Congress does is constitutionally legitimate; it would thus be a usurpation of authority for the Court to invalidate a congressional enactment by appealing to the Constitution's original meaning. Either the will of the people of the 1780s is binding on all branches of government, or it is binding on no branch of government. The logic of popular sovereignty allows for no middle ground. If popular-sovereignty originalists are judicial originalists, they must be congressional originalists, too.

It would appear, then, that the internal logic of modern originalism—in all of its major forms—requires an originalist Congress. Under the originalist view, every time Congress levies a new tax, creates a new program, or

imposes a new regulatory requirement, it first needs to consult the original meaning of the Constitution's relevant provisions to determine whether Congress in fact has the authority to enact the proposed law. Were members of Congress to pass that particular buck to the Supreme Court, they would be committing a serious dereliction of duty.

This is a necessary conclusion of originalist theory, albeit one that most scholars and public officials have thus far failed to act upon. If the Republican majority is serious about its pledge—and is looking for a method of constitutional interpretation to use in implementing that pledge—it will find a ready instrument in originalism: a theory that demands precisely the approach to congressional constitutional interpretation that the Republican promise proposes.

LEGISLATIVE ORIGINALISM IN PRACTICE

What would this mean for the everyday work of the Congress? One concern about legislative originalism involves the question of whether such an approach would require the Congress to undo major policies and programs—for instance, the Social Security program—with constitutional foundations that are deemed questionable by some originalists. Would legislative originalism respect legislative precedent?

The question of whether originalism in any form is reconcilable with precedent has long divided originalists. Many noteworthy originalists emphatically answer no, including prominent theorists like University of St. Thomas law professor Michael Stokes Paulsen. But many others—including, most notably, Justice Scalia—have attempted to make the marriage between originalism and precedent work. If Congress chose to accept this form of originalism, which it undoubtedly would, then there is no reason to think it could not keep many of the programs and policies that have become well-accepted parts of the constitutional framework, including Social Security. The real work would be in devising criteria for deciding which precedents are acceptable and which ones must be thrown out, a task that remains unresolved even within originalist scholarship relating to the courts.

Members of Congress will no doubt pursue that effort in a variety of informal ways, informed by their different understandings of their constitutional responsibilities. Indeed, the application of originalism to the work of the Congress more generally will by necessity be somewhat informal. The proposal in the Republican pledge document is

non-binding; presumably, it would involve a bill's sponsor simply citing the provision of the Constitution that he believes justifies the action that his bill proposes to take. That citation could then be criticized or debated, sparking an argument about the meaning of the Constitution — an argument from which the Congress could surely benefit, and in which the original intent of the document would play an important role.

It would not be easy to make such a process more formal, as any means of doing so would involve both procedural and substantive risks. Congress could, for instance, create in each house a permanent committee charged with scrutinizing the constitutionality of all legislation. If the committee deemed a bill constitutional, it would report the legislation out of committee; otherwise, the bill would die. But while this method would yield robust constitutional oversight, it would also produce a procedural nightmare for both the committee and the entire Congress. And of course, the committee's approach to the Constitution would depend on which party controlled the Congress, and therefore the majority of the committee.

Congress could even create some sort of advisory agency — on the model of the Government Accountability Office, perhaps — with the sole task of examining the constitutionality of proposed legislation. Bills would be referred to this office in much the same way legislation is presented to the Congressional Budget Office for cost estimates before being voted on; the agency's reports on proposed laws would be made available to Congress and the public. The advantage of this agency model is that it would allow for a less fragmented legislative process than under the committee proposal. And because of the public disclosure and transparency, Congress could still approve legislation even if the office found that a bill was, in all likelihood, unconstitutional. The wisdom of such a decision would ultimately be determined by an informed electorate in the next voting cycle. Of course, a major problem with this sort of agency is that it could easily be exploited to advance political agendas that have nothing to do with interpreting the Constitution.

In practice, then, the process of congressional interpretation of the Constitution envisioned by the new House Republican majority is likely to remain fairly unstructured — a matter of individual members, or groups of members, who gather together to sponsor a bill offering their colleagues and the broader public a sense of why they believe the action they propose would be permissible under the powers delegated

to Congress by the Constitution. Members could make simple or sophisticated arguments, could refer to judicial precedent or to the plain language of the Constitution, and could explain their method of analysis and interpretation even as they articulate the intent of their legislation. Such a process, and the debates it would spark, would be very good for the Congress, the voting public, and our constitutional system. It would also remind the nation (including the federal judiciary) that the Constitution belongs to everyone—and that the branches of government are co-equal in their obligations to the Constitution.

Admittedly, all of this may seem a touch absurd. How could we possibly expect that Congress would ever bind itself to originalism, and thus impose significant constraints upon its own power, when there is no political incentive to do so? In the past few months, though, we have seen that a political movement can coalesce around a vision of the Constitution—a vision closely tied to originalism. Conservative activists have taken the issue of constitutional interpretation seriously, and, at least for the moment, politicians ignore the issue at their own electoral peril. Why not make the most of this moment, and establish some rules and practices that future Congresses would find politically difficult to reverse? Why not force all newly proposed legislation to pass at least some constitutional muster? Americans are clearly hungry for a new vision of governance—why not start by taking the Constitution seriously?

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