2012

Forty Years of Originalism

Joel Alicea

Forty Years of Originalism

By JOEL ALICEA

In the immediate aftermath of his 2010 election as the newest senator from Utah, Mike Lee spoke before a crowd of enthusiastic practitioners, scholars, and students at the Federalist Society National Lawyers Convention. Senator Lee focused on the role of Congress in constitutional interpretation, and he ended his remarks with the following pledge: "I will not vote for a single piece of legislation that I can't reconcile with the text and the original understanding of the U.S. Constitution." The senator's statement rejected the idea that the Supreme Court is the only relevant constitutional interpreter in the federal system and struck at the heart of the "living Constitution," the notion that the original meaning of the Constitution is not binding on today's government officials. By requiring adherence to the original meaning of the constitutional text, Senator Lee sided with originalism. The late scholar Gary Leedes once complained that while originalists ask the federal judiciary to be originalist, they "permit the electorally accountable officials substantial leeway. The Congress can interpret the tenth amendment and the necessary and

Joel Alicea is a student at Harvard Law School.

proper clause virtually as it pleases." Senator Lee's speech represents a forceful reply to Leedes's challenge: Congress must be originalist, too.

The senator's pledge highlights a remarkable fact about American constitutionalism today: Only a generation removed from the constitutional revisions of the Warren and Burger Courts, originalism has not only established itself as a respectable interpretive theory in the federal judiciary, but it has also been taken up by some members of Congress. Even a major-party presidential candidate, Newt Gingrich, has pledged that as president he would interpret the Constitution using originalism. Such a state of affairs was unthinkable decades ago when, as Judge Robert Bork characterized the conventional wisdom of the era, lawyers came to "expect that the nature of the Constitution [would] change, often quite dramatically, as the personnel of the Supreme Court change[d]."

But it was precisely because of an article by then-Professor Bork that so much has changed and that Senator Lee's pledge was possible. Bork's 1971 article in the *Indiana Law Journal*, "Neutral Principles and Some First Amendment Problems," is widely recognized as having launched modern originalist theory. While Professor Noah Feldman has underlined the role Justice Hugo Black played in the development of modern originalism, it was not until Bork's article in 1971 that the modern originalist movement took flight. Thus, having just passed the 40th anniversary of that landmark essay, it is appropriate that we survey how modern originalism began, how it has changed, and what challenges lie ahead.

The birth of modern originalism

Although Justice Antonin Scalia is fond of saying that originalism was once orthodoxy within the judiciary, Johnathan O'Neill, professor of history, helpfully reminds us that "traditional textual originalism and contemporary originalism should not be ahistorically equated." As O'Neill tells the story, what we might think of as originalism in the 18th and 19th centuries was heavily influenced by the traditional notions of statutory interpretation articulated by William Blackstone in his *Commentaries on the Laws of England*. Modern originalism, by contrast, focuses more on historical sources to determine the meaning of the constitutional text, such as the records of the state ratification debates. In this sense, modern originalism is much more of a historian's art than that of a Blackstonian lawyer, and it makes sense to think of modern originalism as distinct from the 19th-century brand that preceded it.

The distinguishing features of modern originalism could only be vaguely perceived in Bork's *Indiana Law Journal* article, which, as Bork said at the time, "did not offer a complete theory of constitutional interpretation" but rather set out to "attack a few points that may [have been] regarded as salient in order to clear the way for such a theory."

Bork's article began with and focused on a fundamental question: "When is authority legitimate?" The Warren Court, he wrote, had "posed the issue in acute form" because the issue of authority "arises when any court either exercises or declines to exercise the power to invalidate any act of another branch of government." When the Court reviews the constitutionality of legislation, it confronts what Bork later called the "Madisonian Dilemma." The dilemma arises from two competing principles of the American constitutional system: majority rule and minority rights. The system assumes that the will of the majority will be decisive in most instances. But there are some areas, Bork noted, where "society consents to be ruled undemocratically . . . by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution." He claimed that the Supreme Court was entrusted with the power to "define both majority and minority freedom through the interpretation of the Constitution." But this responsibility, he continued, "imposes severe requirements upon the Court," because "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." If the Court does not have such a theory and instead decides cases based on "its own value choices," it "necessarily abets the tyranny either of the majority or of the minority." This conclusion owed much to the work of Bork's Yale colleague and friend, Alexander Bickel, who famously defined the "counter-majoritarian difficulty" inherent in judicial review.

The identifying features of modern originalism could only be vaguely perceived in Bork's 1971 journal article.

The problem facing the Supreme Court, then, is to find a theory based on "neutral principles" derived from the Constitution. Unfortunately, as Bork observed, "it would not be amiss to point out that the principles required of the Warren Court's decisions never did put in an appearance." According to Bork, judicial review by the Warren Court was founded on a flawed premise: that courts must "'make fundamental value choices' in order to 'protect our constitutional rights and liberties.'" But if the Constitution already makes those fundamental value choices, then for the Court to do so is profoundly illegitimate. The Constitution might make the choice by granting permission — "The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises" — or by withholding it — "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." When the Court imposes its own value choices rather than implementing those embodied in the Constitution, it privileges its own views over those of the democracy and, in so doing, as Bork wrote, "claims for the Supreme Court an institutionalized role as perpetrator of limited coups d'etat."

However, the key insight of Bork's article was not that constitutional interpretation must be guided by neutral principles. The conceptual break-

through of his essay was his tripartite notion of neutral derivation, definition, and application. According to Bork, the problem with past attempts to fashion neutral principles was that the focus had been entirely on neutrally applying the principles — essentially prizing consistency across cases. Bork argued that these efforts did not go far enough. Using *Griswold v. Connecticut*, the 1965 Warren Court decision often thought to have found a general constitutional right to privacy, Bork attempted to show that it is equally important to define principles with sufficient precision that they become capable of neutral application. But if the Court defines the principle however it pleases, this is just as illegitimate as applying a principle in inconsistent ways, since the definition will necessarily embody the justices' value choices rather than the people's. How a principle is defined, then, must also be accomplished in a neutral fashion.

It was Raoul Berger who, with the possible exception of Black, made the first foray into the practice of modern originalism.

While this commentary on *Griswold* would on its own probably have been enough to get Bork into hot water in his 1987 confirmation hearings, he went further and questioned the very idea of a constitutional right to privacy. Having already argued that the right to privacy embodied in *Griswold* was neither neutrally defined nor capable of neutral application, Bork stated that "the derivation" of a privacy right was "utterly specious." Bork saw no general right to privacy in the Constitution: "When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh . . . respective claims."

But how are principles to be neutrally derived? Bork offered two possible methods. First, principles can be derived by taking from the Constitution "rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules." Second, some principles are "derivative rights" — i.e., rights that "will lead [a citizen] to defend them in court and thereby preserve the governmental process from legislative or executive deformation." By this latter category, Bork seems to have had in mind rights that are instrumentally valuable to a society's functioning or to the protection of fundamental rights, but he never explicitly defined what he meant.

For our purposes, it is Bork's first method of neutral derivation that is most important: the original intent of the Framers. Bork was right when he said that "Neutral Principles and Some First Amendment Problems" did not set forth a comprehensive theory of constitutional interpretation. Its purpose was to identify the shortcomings of the Warren Court's jurisprudence in an effort to show the need for a new interpretive framework, one based on neutral principles. All of this work was necessary to clear the way for modern originalism, and Bork offered the original intentions of the Framers as the

interpretive theory that could meet the requirements of neutral derivation and definition and solve the Madisonian Dilemma. But because the article was an opening salvo, it left fundamental questions of theory and methodology unanswered. Bork never defined what he meant by "original intent," never answered who "the Founders" were, and never said why the Founders were the relevant group from which to derive the Constitution's meaning. Why should not the ratifiers of the Constitution be the relevant referent? These questions and more would be answered by subsequent originalists — and to some extent by Bork himself — in the decades that followed. But Bork had opened the way for such discussions to take place. He had cleared the underbrush of tangled constitutional theory that had spread wildly for decades, and constitutional theorists could now look afresh at the foundational questions of constitutional theory. It did not take long for others to begin answering those questions.

Originalism in transition

The story of how originalism developed over the next 40 years is well known among scholars. Professor Richard Kay has called it the "standard story about the originalist approach to constitutional interpretation." Johnathan O'Neill's *Originalism in American Law and Politics* is an ambitious attempt at a comprehensive retelling, but it is Professor Keith Whittington's essay "The New Originalism" that has been most important in recent years.

A few years after Bork published "Neutral Principles and Some First Amendment Problems," Justice William Rehnquist delivered a lecture called "The Notion of a Living Constitution." The lecture reinforced Bork's critique of the Warren Court as illegitimate. Rehnquist's argument, like Bork's, was grounded in the idea of popular sovereignty: "The people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it." For the Court to modernize the Constitution rather than stick to its limitations was therefore a usurpation of the popular sovereign. Bork's clarion call had been answered by a member of the Supreme Court.

However, it was Professor Raoul Berger who, with the possible exception of Justice Black, made the first foray into the actual practice of modern originalism. His consequential 1977 book *Government by Judiciary* made the explosive claim that the Supreme Court's 1954 decision in *Brown v. Board of Education* was irreconcilable with the original intent of the Fourteenth Amendment. Berger, like Bork and Rehnquist, grounded his theory in popular sovereignty and used sentences descended from "Neutral Principles," such as Berger's claim that the "Constitution represents fundamental choices that have been made by the people, and the task of the Courts is to effectu-

ate them . . . When the judiciary substitutes its own value choices for those of the people it subverts the Constitution by usurpation of power." In the process of developing his historical analysis, Berger ventured a few answers to the questions raised by Bork's 1971 article. For instance, Berger defined "original intent" as "shorthand for the meaning attached by the Framers to the words they employed in the Constitution and its Amendments." All of this went a long way toward showing originalism's staying power. It was becoming clear that originalism was no speed bump on the way to a second era of living constitutionalism.

As scholars began to grapple with this reality, the intellectual assault on originalism began in earnest. The first body blow came from Professor Paul Brest, who in 1980 pointed out what became known as the "summing" problem. Brest argued that "there may be instances where a framer had a determinate intent but other adopters had no intent or an indeterminate intent." If different Framers had different intentions, how could there be a single, homogenous "original intent"? And even if such an intent could be found, how could scholars know the contours of it? This latter question related to levels of generality. Assuming for the sake of argument that the Founders only intended to protect "political speech" with the Free Speech Clause — the position adopted by Bork in "Neutral Principles" — how broadly did the Founders define "political speech"? Originalists were starting to confront difficult theoretical and conceptual dilemmas.

In the mid-1980s, Attorney General Edwin Meese began publicly pushing originalism in a series of lectures and articles.

The next serious challenge came from Professor H. Jefferson Powell, who argued that the original intent of the Framers was that the Constitution should *not* be interpreted using original intent. If originalism was based on how the Framers thought about the Constitution, then perhaps the correct originalist interpretation of the Constitution was to use nonoriginalist methods for deciding cases. This argument was actually anticipated by Brest in his 1980 article, but it was Powell who did the historical legwork to make it plausible, and it was Powell who subsequently engaged in a years-long scholarly battle with Berger over the accuracy of the former's research.

It was around this time in the mid-1980s that Edwin Meese, the attorney general, began publicly advocating originalism in a series of lectures and articles. Combined with the Reagan administration's laser-like focus on confirming suitable judges to the federal bench, Meese's speeches showed that originalism had catapulted itself from the pages of law review articles to become the default interpretive theory of the Republican Party.

One of the judges confirmed during this time was Scalia, who stepped in to play a major role in the scholarly debates of the 1980s. Brest and Powell's criticisms presupposed that originalism was based on the original intentions

of the Framers, i.e., how the Framers believed the Constitution would be interpreted in the future. If this premise was removed, Brest and Powell's criticisms carried much less force. Scalia proposed a theoretical shift: "Change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning." Scalia argued that originalism should not focus on how the Framers thought the Constitution would be interpreted. After all, those expectations were not part of the text that was ratified, and determining those intentions was speculative. What governed was the original meaning of the text, the meaning that the public at large attached to the words of a constitutional provision when it was ratified. A scholar or judge should use all available sources to understand how the words of a provision were defined at a particular moment in history, not to understand how the Framers expected it would be defined by future interpreters.

Originalists had to acknowledge that there are times when the original meaning of a constitutional provision is unknowable.

This shift from original intent to original meaning was followed by three other significant changes in originalist theory. First, a sprawling debate over the nature of interpretation took place from the late 1970s through the 1990s and produced theories that could justify originalism in terms of what it means to interpret. Professors Richard Kay and Larry Alexander were the most notable originalists who argued that to accurately interpret a document *simply was* to adhere to the original intentions of the author. This was an important evolution in originalist theory because it opened the door to explaining originalism without reference to popular sovereignty.

Second, originalists were forced to acknowledge that there are times when the original meaning of a constitutional provision is unknowable or has hazy contours. This led scholars to begin distinguishing between "constitutional interpretation" and "constitutional construction." As Whittington — who was probably the most important early exponent of this distinction — sees it, interpretation is the activity of "discovering the meaning of the Constitutional text" and applying it directly to the facts at hand, whereas construction refers to the process of applying the Constitution in circumstances where the text does not have a readily discernible or applicable original meaning. Constructions are essentially political in nature; they are attempts to fill in the gaps between known constitutional meanings and are thus owed less deference than interpretations. The "constitutional constructions" label was initially intended to be descriptive of how constitutional law operates, but it cleared a path for some theorists to attempt to build normative arguments legitimizing departures from original meaning.

Finally, theorists began deemphasizing judicial restraint as a central tenet of originalism. Since Bork's article, originalists had insisted on the virtue of judges who deferred to the political branches and excoriated judges who

were comfortable wielding power. But originalists began to argue that there was nothing inherently virtuous about a restrained judge; what mattered was what the Constitution commanded. If the judge thought the original meaning of the Constitution required him or her to invalidate a piece of legislation, the judge should not hesitate to do so. Professors Whittington and Randy Barnett were two of the theorists at the forefront of this movement, though each scholar approached constitutionalism from very different standpoints. Whittington has hypothesized that the move away from judicial restraint resulted from the rise of conservative judges in the federal judiciary and the desire to exercise that power in a conservative direction. Whatever the reason, the shift happened, and the stage was set for the theoretical turmoil of the first decade of the 21st century.

The future of originalism

At a 2006 lecture to a group of constitutional theorists, Professor James Fleming opened his remarks by posing a startling question: "Are we all originalists now?" He was quick to provide the answer: "It would not mean much to claim that this display shows that we are all originalists now. Indeed, we are witnessing the Balkinization of originalism."

Fleming's question highlighted the central problem facing originalism as it passes year 40 — its internal incoherence. After decades of theoretical mutation, originalism has arrived at the point where "there are numerous varieties of originalism, and the only thing they agree upon is their rejection of" living constitutionalism. As the scholars Thomas Colby and Peter Smith have argued, originalism is no longer "a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label." All of this led Fleming to conclude his lecture by flipping the question around on his audience and asking whether, in fact, all of those in the audience were now living constitutionalists.

How did we arrive at the point where the originalism label has no core meaning? Consider where our story left off and compare it with where it began. Bork's article set out to answer the question "when is authority legitimate?" Both his question and his answer were rooted in a theory of popular sovereignty, yet by the close of the 20th century theories of originalism had sprung up that did not depend on the popular sovereignty narrative. Bork's essay argued vigorously for a humble judiciary that acted only when it had a clear mandate to do so, but by the end of the century, some of originalism's foremost scholars had rejected judicial restraint. And while some originalists stuck to the original intentions of the Founders, others moved on to various shades of original meaning. The internal consistency of modern originalism had begun to unravel.

This loosening of the theoretical bounds of originalism created a vacuum into which stepped Barnett and others. These theorists have advanced theories under the banner of originalism that bear little resemblance to Bork's 1971 article, or indeed to any of the other originalist theories advocated since 1971.

Barnett's libertarian vision of the Constitution begins with a categorical rejection of popular sovereignty as a means of legitimating the Constitution. He argues that laws are owed obedience only to the extent that they are "(1) necessary to protect the rights of others and (2) proper insofar as they do not violate the preexisting rights of the persons on whom they are imposed." Barnett contends that the Constitution as originally understood enshrined lawmaking procedures that are likely to produce laws that meet these two criteria. But if constitutional interpreters can essentially revise those procedures via living constitutionalism, then the citizenry has no confidence that the criteria will be met under the new procedures, and the legitimacy of the Constitution is thrown into doubt. For Barnett, originalism is a means to achieving the preservation of sound lawmaking procedures.

Originalism is no longer "a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord . . ."

Central to Barnett's theory is the idea of unenumerated rights embodied in the Ninth Amendment. To protect these rights, Barnett creates a "presumption of liberty," by which he means that laws will no longer be presumed constitutional. Rather, the burden would fall to the government to prove that any given law meets the two criteria Barnett identifies as necessary for legitimate government.

Consider the ocean that exists between Barnett's theory and Bork's. First, Barnett rejects popular sovereignty where Bork made it central to his theory. Second, Barnett prizes unenumerated rights and designs his theory to protect them. Bork, who once referred to the Ninth Amendment as an "inkblot," was very skeptical of having courts enforce unenumerated rights. Finally, Barnett's "presumption of liberty" could not be further removed from the judicial restraint of Bork's "Neutral Principles." Whereas Bork placed a heavy burden on judges to show that a law was clearly unconstitutional before striking it down, Barnett would presume a law is unconstitutional unless it could be proven otherwise. To call both men originalists makes one wonder what originalism could possibly mean.

Others share responsibility for bringing about this crisis within originalism, Professor Jack Balkin being the most notable among them for his use of the interpretation/construction distinction to argue that originalism and living constitutionalism are "two sides of the same coin." But we need not explore the full extent of modern originalism's present indeterminacy. Suffice it to say that as modern originalism enters its fifth decade of existence, its coherence is now severely compromised, and only a reassessment of the

boundaries and core commitments of originalism can restore its solid foundation. The work of solving this indeterminacy crisis will likely play a major role in originalism's future.

But just as modern originalism faces a great theoretical threat, it is presented with a real conceptual opportunity to which Senator Lee's lecture calls attention. Since Bork, originalism has focused almost exclusively on the role of the judiciary in constitutional interpretation. Whittington has accurately explained that "originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts; originalism was largely developed as a mode of criticism of those actions." Indeed, a real flaw of Bork's article was its uncritical acceptance of judicial supremacy, the idea that the Supreme Court is the final arbiter of the Constitution's meaning. As Senator Lee pointed out in his remarks, Congress has a responsibility, as a branch of government coequal with the judiciary, to evaluate the constitutionality of legislation before passing it. His pledge to abide by originalism when conducting this evaluation speaks to fertile theoretical ground that has yet to be tilled: the application of originalism to congressional and presidential constitutional interpretation.

The originalism of Bork, for instance, can provide no good reason why Congress should not also be originalist.

Professors Neal Katyal and Michael Ramsey have made tentative forays into this field. "Originalism and the Legislature" and "An Originalist Congress," both written by this author, take the topic on directly and argue that the internal logic of various schools of originalism would require Congress to be originalist when it interprets the Constitution. But a good deal is left to be done in this area, and the interest in originalism among members of the political branches ought to inspire scholars to apply originalism extrajudicially.

Bork's originalism, for instance, can provide no good reason why Congress should not also be originalist. Why is it any more acceptable for Congress to favor majority or minority tyranny by substituting its value choices for those in the Constitution? Why should Congress not have to derive neutral principles when it evaluates the constitutionality of legislation? Bork's response may be that the Supreme Court can correct for unconstitutional acts of Congress, but there are a whole range of procedural reasons why the Court might not get a chance to review the constitutionality of a particular statute. It might also be said that the legislature, as the people's representatives, have a right to make such value choices, but this position constitutes methodological suicide for an originalist. If the will of today's electorate can trump the original meaning of the Constitution, then whatever Congress does is constitutionally legitimate and it would be an usurpation of authority for the Court to invalidate statutes by appealing to the

Constitution's original meaning. Bork's originalism necessarily entails an originalist Congress.

The primary drivers of the effort to consider whether and how originalism applies outside of the judiciary have been public officials, a rarity in the development of constitutional theory. The reemergence of a vigorous brand of constitutional conservatism has been widely commented on, from *National Review* to the *New York Times*. The Tea Party movement no doubt has had much to do with this, and the unprecedented assertions of federal power during the Obama administration have likewise contributed to a constitutional backlash. Senator Lee's speech to the Federalist Society is by far the most articulate version of legislative originalism provided by a public official, but the principles he espoused are shared by a growing faction within the conservative movement. There is reason to think that the rise of lawmakers who take constitutional interpretation seriously will continue, and originalism will have to confront the theoretical implications of this development in American constitutionalism.

Originalist scholars have failed to grapple with the emerging realities of legislative originalism and the crisis of indeterminacy within originalism, but the coming decade will no doubt provide ample opportunities to do so. As originalists look forward to marking half a century of modern originalism, building a more comprehensive theory that accounts for the political branches and reestablishes originalism's core principles would be a worthy project. For those seeking to take up this task, Bork's "Neutral Principles and Some First Amendment Problems" is not a bad place to start.