NATIONAL AFFAIRS

The Founders' Originalism

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Originalism is a theory that has been "working itself pure" for more than 40 years. Yet conservatives and libertarian advocates of originalism still find themselves on the defensive when confronted with rather obvious questions concerning not only originalism, but also constitutional legitimacy as such. Why should we obey a constitution written by men, especially white men, long dead and gone? Doesn't the earth and its politics belong, to quote Thomas Jefferson, "to the living and not to the dead"? Or, to put it more affirmatively: Why *is* the Constitution, with all its imperfections, legitimate?

To prevail in constitutional arguments and also to persuade the American people of the values and ideals of the Constitution, conservatives and libertarians must be able to answer such questions. They must be able to articulate why the Constitution is a legitimate document worthy of our obedience. Once they can do that, another set of questions emerges: Even if we should obey the Constitution, does that mean we have to be originalists? What if the Constitution is itself a non-originalist document? What if originalism cannot offer answers to actual constitutional questions? Indeed, what does the original Constitution even say?

Conservatives, libertarians, and even some progressives of the originalist persuasion have thought through these essential questions and have developed their own peculiar brands of originalism. Each theory tends to depend on a different understanding of what makes the Constitution legitimate. Libertarians value protection of natural rights. Progressives emphasize responsiveness to the popular will. Conservatives tend to look to whether the people themselves have consented in a kind

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of social contract. From these starting points, each then also comes to understand the meaning of the original Constitution differently.

The founders themselves, however, defended the legitimacy of the Constitution on grounds that included elements of each of the three current originalist lines of thought, but transcended all of them. The Constitution cannot be reduced just to the "presumption of liberty"; it is not strictly a "living, breathing document"; and it cannot be justified simply through a "presumption of constitutionality." The real meaning of the Constitution combines all three. And we are bound to it not necessarily because we philosophize that it adheres to some criterion of legitimacy, but because of a prudent judgment that, whatever its faults, the Constitution merits being preserved and conserved. This crucial insight steers us away from the ideologically inflected originalisms and leads us back to originalism simply.

THREE ORIGINALISMS

In contemporary legal thinking, there have been broadly speaking three schools of originalism — libertarian, progressive, and conservative. Many originalists in the legal academy today no longer fit neatly into one of these, and there are disagreements within the schools, but these three approaches have attained real influence — especially in the popular mind — and can sufficiently stand in for many others that have added important insights.

Libertarian originalism's most important champions are law professors Randy Barnett and Richard Epstein. Progressive originalism is synonymous with another law professor, Jack Balkin. Conservative originalism — the oldest version of originalism — is most prominently associated with the jurisprudence of Justice Antonin Scalia and the academic work of Judge Robert Bork.

In his 2004 book, *Restoring the Lost Constitution: The Presumption of Liberty*, Barnett argues that only a constitution that "contains adequate procedures" to protect natural rights can lay claim to legitimacy and our obedience. Mere popular sovereignty is therefore an inadequate basis for loyalty to the Constitution. Barnett challenges the validity of several consent-based or popular-sovereignty arguments for legitimacy: that we consent when we choose to vote, when we choose to reside in this country, when we decline to revolt, or when we fail to amend the Constitution. Because Barnett sets popular sovereignty aside, the fact

that the Constitution was ratified by popular assemblies in the late 1780s makes no difference. Even if the Constitution were formally abolished today and re-ratified with exactly the same text, it would not provide any better reason for non-consenting parties to adhere to its commands.

Epstein articulated essentially this same view on constitutional legitimacy in his 1985 book, *Takings*, and also in his 2013 book, *The Classical Liberal Constitution*. He begins by arguing that consent (or popular sovereignty) does not justify obedience to the state. "[T]acit consent," according to Epstein, "becomes the thin edge of the wedge that grants legislators the lion's share of the surplus that Lockean institutions wish to keep out of their hands." Instead, obligation to the state must come from a contract whereby, when the state takes liberty or private property away, an individual gains "some equivalent or greater benefit as part of the same transaction."

Both Epstein and Barnett adhere to originalism because they believe the very idea of a written constitution requires it. Analogizing to contract law, Barnett argues that interpreting written instruments requires adherence to original meaning; otherwise, parties could contradict the explicit provisions of the contract, and interpretation would require the difficult enterprise of reading the minds of the parties. Epstein argues the case more simply: "[T]he idea that constitutions must evolve to meet changing circumstances is an invitation to destroy the rule of law. If the next generation can do what it wants, why bother with a constitution to begin with, when it is only an invitation for perpetual revision?"

Having established what makes the Constitution legitimate and why originalism is independently justified, they both make claims about what the original Constitution actually means. Barnett argues that, if the text of the various constitutional provisions is properly understood, interpretations of that text will suggest an underlying presumption of liberty. More specifically, he argues that, when properly understood, the commerce clause, the necessary and proper clause, the Ninth Amendment, and the privileges or immunities clause of the 14th Amendment all provide justification for this presumption. This interpretive method places the burden on the government to show why its interference with liberty is both necessary and constitutionally proper; if the question is a close one, our presumption is that the people's liberties should remain unimpeded.

In *The Classical Liberal Constitution*, Epstein admits that the constitutional text is vague and insists that we must therefore interpret it

with particular background principles. He claims that Lockean classical liberalism (which he takes to be essentially consistent with modern libertarianism) is the proper choice for an interpretative framework because it was the most significant moral theory at work during the founding era. By this interpretation, Epstein and Barnett are not trying to impose the presumption of liberty or classical liberalism upon the Constitution to ensure it supports their own theories. Instead, they believe that a reading of the Constitution with classical liberal principles in mind yields an understanding more consistent with the text's original meaning, which happens to be more just according to libertarian standards. Read this way, the Constitution and its original meaning form a complete whole: just, legitimate, and worthy of our obedience.

As originalism has gained popularity among libertarians, it has also won favor with some progressives. Instead of reading the Constitution with the presumption of liberty, however, these progressives approach the text with a "progressive presumption." Jack Balkin is perhaps the most prominent contemporary progressive-presumption theorist, and he lays out his theory in his 2011 book, *Living Originalism*. He argues that, if one properly understands the framers' intent and the language and structure of the Constitution, then an originalist understanding of the Constitution necessarily leads to what others have described as "living constitutionalism." To Balkin, the living-constitutionalist approach is the true originalism. His fundamental argument is that the Constitution is written in three different kinds of clauses — rules, standards, and principles — and that, while the constitutional rules are fixed (such as the requirement that the president be at least 35 years of age), the framers left the text's standards and especially its principles to be interpreted by future generations. Balkin argues that, as a consequence, the framers intended the Constitution to *enable* politics.

Balkin starts on the same ground as the libertarian originalists, insisting that we must aim for an originalist understanding of the text. And, like the libertarians, he also defends this proposition on the ground of the text's writtenness. His explanation is less complicated than Barnett's; for instance, Balkin writes that, to maintain the framework of the Constitution over time, "we must preserve the meaning of the words that constitute the framework."

But Balkin breaks from the Barnett-Epstein school over the question of where the Constitution derives its legitimacy, since we do not

officially renew our consent. He argues that each generation confirms its consent by debating constitutional construction. In their perpetual debates, Americans try to convince each other of what the constitutional text means for the changing realities of American politics. Arguments framed in this way "help generate Americans' investment in the Constitution as their Constitution, even if they never officially consented to it." Balkin furthers this idea with an aphorism: "In every generation, We the People of the United States make the Constitution our own by calling upon its text and its principles and arguing about what they mean in our own time."

The continuing debate does not just provide a kind of consent; it causes constitutional meaning to evolve. Each generation makes the Constitution its own. This flexibility is crucial: For progressives, the Constitution is legitimated not by mere consent but by the document's responsiveness to changes in democratic politics over time. In short, the Constitution is legitimate because it is democratic.

Like his libertarian-originalist counterparts, Balkin begins with a particular understanding of what the Constitution must allow in order for it to be legitimate — and he finds it through a particular interpretation of the Constitution's original meaning. He differs substantially from the libertarian originalists, however, in arguing that the framers *intended* for us continually to change how we interpret the standards and principles in the text — a sharp contrast from Barnett's theory that the Constitution protects individuals by enshrining their rights (and thus the presumption of liberty) into the constitutional text. For Barnett and the libertarian originalists, the Constitution's open-endedness indicates its enduring Lockean character; for Balkin, that very open-endedness is intended to be a warrant for continuing democratic evolution.

Long before Barnett and Balkin developed their theories, however, there were conservative theories of originalism. The conservative originalists are also called "judicial minimalists," meaning they believe in "judicial restraint" and the "presumption of constitutionality" — the presumption that courts should generally be hesitant to strike down democratically enacted pieces of legislation unless they involve actions specifically prohibited by the Constitution's text.

Originalists of this stripe argue that the legitimacy of the Constitution comes from popular sovereignty; in other words, we owe obedience to the Constitution and adherence to its constraints because it was the

people themselves who imposed these constraints in the first place. Justice Antonin Scalia is the most prominent advocate of this view. Another adherent of it, Michael McConnell, summarizes the conservative-originalist interpretation as holding that "[t]he people's representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves, as reflected directly through text and history, or indirectly through longstanding [practice] and precedent."

According to some conservative originalists, however, the Constitution's legitimacy is not solely based on the will of the sovereign people. It is also equally important that, in the words of Princeton's Keith Whittington, it "preserves the possibility of similar higher-order decision making by the present and future generations of citizenry." Whittington, like Barnett and Epstein, rejects the notion of tacit consent, but he claims that we give *real* consent each time we amend the Constitution, just as the founding generation gave its real consent when it ratified the Constitution. Originalism is therefore also proper since, if we obey the text because it is the *will* of the people themselves, then surely we should adhere to their will—that is, their original intentions.

As noted above, however, conservative originalists are not simply distinguished by their reliance on popular-sovereignty arguments; they also tend to abide by judicial minimalism. Such minimalism—or the presumption of constitutionality—is a byproduct of a commitment to popular sovereignty. This is best explained by Robert Bork, who appropriated the presumption of constitutionality to originalism in a 1971 article that some claim to be originalism's intellectual foundation: "In *Lochner*, Justice Peckham, defending liberty from what he conceived as a mere meddlesome interference, asked, '[A]re we all . . . at the mercy of legislative majorities?' The correct answer, where the Constitution does not speak, must be 'yes.'" Where the Constitution speaks, the people rule through the Constitution; where it does not speak, the people rule through the everyday political process.

Bork also expressed this position with his (in)famous characterization of the Ninth Amendment as a provision obscured by an "ink blot." The bottom line for him (and judicial conservatives thereafter) was that Congress or the states may be restricted from legislating freely *only* where the Constitution explicitly reserves a substantive right. While Bork is the most famous expositor of judicial minimalism, more

contemporary scholars, including McConnell, Lino Graglia, and Kurt Lash, also adhere to some variant of this position.

From these arguments we see how judicial minimalists differ from libertarian originalists: The former want to see even *fewer* democratically enacted laws struck down so as to respect the authority of the people, whereas the latter want to see even *more* struck down so as to protect natural rights. And the difference of emphasis seems to derive from different views of constitutional legitimacy: Do we prefer our right to self-government or the security of our natural rights? The answer, for those who believe the Constitution is legitimate because of the initial act of popular sovereignty, is the former. To put the point more explicitly, judicial minimalists are committed to a kind of democratic legitimacy whereby the people must have the power of self-government except where the people themselves have explicitly decided to withhold that power.

THE FOUNDERS ON FOUNDING

Barnett, Balkin, and Bork are not the first Americans to ask what makes a constitution legitimate and its original meaning worthy of obedience. Indeed, these questions were ever-present in the writings of the founding fathers. All originalisms encourage us to look back, and, when we look back at the founding, we find opinions about legitimacy that combine and transcend the libertarian originalist's focus on natural rights, the progressive originalist's focus on democratic responsiveness, and the conservative originalist's focus on popular sovereignty.

The first great document articulating an idea of constitutional legitimacy was not the U.S. Constitution but the Declaration of Independence. The Declaration, in liberating the colonies from obedience to the unwritten British constitution, set forth what makes a government legitimate or illegitimate with cutting precision. The ideas behind the three schools of originalism today can be found in the three-fold explanation the Declaration offers. For a government to be legitimate, Jefferson tells us, it must derive its powers from the "consent of the governed"; it must secure unalienable rights like life, liberty, and the pursuit of happiness; and it must create a representative or democratic form of government.

Readers of the Declaration will recognize the appeals to both natural rights and consent almost immediately. Those are the truths we hold to be self-evident. The Declaration argues that when a government has failed to protect liberty and win consent — "whenever any Form of

Government becomes destructive of these ends" — the people have the right to create a new government with a new constitution.

But the Declaration does not stop there. The new, legitimate government must take a democratic or republican form. In the long chain of usurpations and abuses that Jefferson cites to legitimate the Americans' separation from Great Britain, there are several complaints against unrepresentative government. King George III had "refused to pass . . . Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only[;] . . . called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records[;] . . . [and] dissolved Representative Houses repeatedly." After neglecting, harassing, and disbanding these representative institutions, the King had refused to cause other legislatures to be elected, and thus, according to Jefferson, the legislative powers "have returned to the People at large for their exercise." Jefferson's argument clearly resembles the progressive-originalist contention that responsive, elected, republican government is also a source of legitimacy, and its absence a cause of illegitimacy.

As Hillsdale College's Larry Arnn eloquently explained in his 2012 book *The Founders' Key*, the historical literature too often ignores the connection between the Declaration and the Constitution. Many scholars have argued that the Constitution of 1787 was a repudiation of the principles of 1776. Nevertheless, in the Declaration the founders felt that they must "declare the causes which impel them to the separation" from the political bands that had previously connected them, and thus the document manifestly provides insight into general notions of political legitimacy at the time of the founding. When the founders debated the Constitution at the 1787 convention, and when the people debated it in the throes of ratification, these same themes were frequently repeated.

There was no doubt that the Constitution had to be republican; to be legitimate, it had to "enable" self-government. As James Madison wrote in Federalist No. 39,

> The first question that offers itself is whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary

> of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

John Adams, in his *Thoughts on Government*, likewise declared that "principles and reasonings" "will convince any candid mind, that there is no good government but what is republican." The founders thought they had inducted a new order — one of republican politics and of a necessarily elective system of government.

At the same time, the framers knew that total self-government would not work either. From the first instance at the Convention, they rejected the idea of pure democracy — that is, democracy not with representative, deliberative bodies but answering simply to majority rule. Even those who eventually opposed the Constitution agreed on this point. Elbridge Gerry, one of the most radical delegates, still sought to reform the overly democratic Articles of Confederation, arguing early in the Convention that "[t]he evils we experience flow from the excess of democracy." George Mason, another radical, agreed and admitted that the status quo was "too democratic," though he worried the framers might "incautiously run into the opposite extreme." These are telling statements from two delegates who would come to oppose the Constitution on the ground that it did not adequately safeguard the rights of the people. They were less concerned with democratic responsiveness than they were with protecting natural rights.

To combat the problem of democracy's excess, the framers adopted a solution famously laid out in Madison's Federalist No. 10. A large commercial republic ruled by representative institutions would effectively lessen the danger of vengeful, passionate, and unrestrained populism. First, it would carve out a sphere for virtue because the select men to whom the people delegate authority would "refine and enlarge" the public views. Second, the republic could extend over a large and diverse territory, and thus a single factional impulse would be less likely to constitute a ruling majority. These two principles go together. As Madison's criticism of the *state* legislatures' factional politics made clear, representation isn't enough if the territory is not sufficiently diverse.

Yet the people's rights still had to be protected even from the temporary passions expressed in national, republican majorities. To do so, the framers intended to restrain republican institutions with checks and

balances, federalism, and the separation of powers, as well as by extending the size of the republic itself. These protections were meant to check republican decision-making as much as republicanism itself would be a check on faction; they were meant to create a version of republicanism that would remedy the vices of popular government.

The framers believed that the Constitution needed to both establish a republican form of government and protect natural rights; but they also believed that, to be legitimate, the Constitution itself needed to be rooted firmly in the consent of the governed. This notion of popular sovereignty has very different implications than the notions of self-government, representation, or rule by the general will of the people. These latter notions all apply to the realm of everyday politics and policymaking and are the principles we look to when we decide how responsive the government should be to the trends and the whims of the electorate. But popular sovereignty has to do with the *foundations* of political order and the question of whether or not the people have consented to the character of their regime. Popular sovereignty is a principle that is at once more fundamental and less frequently relevant than self-government, representation, and rule by the general will.

Dozens of prominent figures in the revolutionary period, from New England Federalists like John Adams to radicals like Thomas Paine, expressed the fundamental idea that all legitimate government must rest on the initial consent of the people. Alexander Hamilton relies on the ultimate legitimacy of popular sovereignty when he famously declares in Federalist No. 1 that "it seems to have been reserved to the people of this country . . . to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitution on accident and force." Madison also reminds us in Federalist No. 49 that "the people are the only legitimate fountain of power, and it is from them that the constitutional charter . . . is derived."

Ratification is consonant with this view of popular sovereignty. The proposed Constitution, Madison wrote, is "of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed." The Convention bore in mind that the "plan to be framed and proposed was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities."

bound by prudence

Thus far, we have seen that the founders provide an account of constitutional legitimacy that combines those of the libertarian, progressive, and conservative originalists. But might *all* of these grounds for legitimacy be flawed if seriously applied to the U.S. Constitution, even when taken together?

The arguments against each are quite serious. Critics of libertarian originalism might argue that the Constitution still permits tremendous government power and that the Bill of Rights did not originally even apply to the *state* governments, so it is hard to see how the defense of natural rights is the document's foremost purpose. Critics of progressive originalism might argue that key elements of the Constitution do not seem geared toward truly democratic decision-making at all, pointing for instance to the extremely disproportionate power of the small states in the Senate. Most fundamentally, critics of conservative popular-sovereignty originalism could point out that women, slaves, and many others were excluded from political activity when the Constitution was ratified and were therefore unable to offer their consent.

Each of the major arguments for originalism, therefore, has some flaws. But, more importantly, if the Constitution and its ratification were flawed, why *does* one generation, long dead and gone, have a right to bind another? Thomas Jefferson made this argument pointedly in a 1789 letter to James Madison. "I set out on this ground which I suppose to be self evident," Jefferson wrote from revolutionary Paris, "'*that the earth belongs in usufruct to the living*;' that the dead have neither powers nor rights over it." Furthermore, he continued, "by the law of nature, one generation is to another as one independent nation to another." As a solution to this problem, Jefferson urged more frequent constitutional conventions to release each future generation from the constraints of the past.

Madison's response to Jefferson makes two core points in defense of a lasting constitution. First, Jefferson is wrong to compare generations to independent nations. Every generation is necessarily dependent on the previous generations that have cultivated its inheritance. He responded to Jefferson in a letter:

> If the earth be the gift of *nature* to the living, their title can extend to the earth in its *natural* state only. The *improvements* made by the

> dead form a debt against the living, who take the benefit of them. This debt cannot be otherwise discharged than by a proportionate obedience to the will of the Authors of the improvements.

Most of what any generation inherits is not natural but is rather the artifice of past generations who have improved upon their inheritance. The present generation therefore owes a great debt to its ancestors. Madison specifically uses the example of an older generation's repelling conquest, "the evils of which descend through many generations," as forming a debt against the living. Indeed, why should men sacrifice their lives — or their fortunes or sacred honor — for any cause if posterity did not maintain the fruits of such sacrifices?

Madison made a second point as well: Founding is an extremely difficult and dangerous undertaking that should not be too often repeated. "The history of almost all the great councils and consultations held among mankind for reconciling their discordant opinions, assuaging their mutual jealousies and adjusting their respective interests," as Madison observes in Federalist No. 37, "is a history of factions, contentions, and disappointments, and may be classed among the most dark and degrading pictures which display the infirmities and depravities of the human character." A plan to redo periodically the work of the constitutional convention would be an invitation to tremendous discord.

In Federalist No. 38, Madison looks not just at conventions but at foundings themselves and finds much the same danger. Attempts throughout history to establish new nations and governments have been plagued by false starts and catastrophes. These failures should teach us "to admire the improvement made by America on the ancient mode of preparing and establishing regular plans of government," while also instructing us in "the hazards and difficulties incident to such experiments, and of the great imprudence of unnecessarily multiplying them." Here Madison fuses both points: Future generations should be afraid of how fraught with risk any re-founding might be, and they should also be grateful for the unique innovations of the founding generation and its amazing improvement on the ancient examples.

Madison suggests in Federalist No. 49 that the founding owed its success to unique circumstances that may never come again. The revolution had "repressed the passions most unfriendly to order and concord." Rivalry and the "spirit of party" were momentarily tamed. The founders

themselves enjoyed "an enthusiastic confidence of the people . . . which stifled the ordinary diversity of opinions on great national questions." The spirit of the times had a certain philosophic unity, "a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government." In all these ways, the founding could well be an achievement that a succeeding generation would fail to match if it were to tear down the constitutional order and start anew.

It is thus the judgment of *prudence* that justifies, for Madison, maintaining the American constitutional order despite its imperfections. We are indebted to the founders for the impressive innovations they made, and we have little reason to believe we would improve on their work if we were to start over as they did. Prudence itself thus lends support to the proposition that the Constitution is a legitimate document worthy of obedience, even if it is imperfect with respect to the legitimacy rationales of the three schools of originalism. The Constitution may not sufficiently protect natural rights, may not be sufficiently republican, and may not be sufficiently rooted in popular sovereignty for the adherents of any particular school of thought on legitimacy, but prudence — the understanding that we would not do better — justifies adherence to the whole.

Original Meaning

Libertarian, progressive, and conservative originalism all rely on notions of constitutional legitimacy that have some element of truth. The framers intended the Constitution to be republican, to protect our natural rights, and to be obeyed simply because the people consented initially. But they also knew that the act of founding would be extremely difficult — if not impossible — to repeat. We do not have to subscribe to one of the theories of constitutional legitimacy to justify obedience to the Constitution. We can decide, just as the founders did, that the Constitution is worthy of our obedience because it is mostly legitimate in all three ways, so prudence justifies our upholding it.

The three schools of originalism are, therefore, incomplete at best. The framers did not intend to enable democracy simply through the Constitution's open-ended rights provisions, nor did they mean to constrain it just through those provisions; both Balkin and his libertarian-originalist counterparts simplify their claims too much. Rather, the

framers wanted to enable democracy, but they wanted to enable it specifically by constraining its excesses — and thus the presumption-of-constitutionality originalists also oversimplify the political theory of the Constitution. No construction like a "presumption of liberty" or a "presumption of constitutionality" can reliably be used in determining original meaning because the framers had to make compromises among the ends of government and the three grounds of legitimacy.

Instead of reading the Constitution through the lens of a single theory of original meaning, we should simply read it with an awareness of its compromises and philosophic inconsistencies. This may actually be what a more complete and true originalism would entail — that we interpret the Constitution without resort to any modern construction, be it a presumption of liberty, of democracy, or of constitutionality.

Indeed, the founding generation had its own way of interpreting legal texts. If we tried to follow those conventions, the ambiguity in the constitutional text might prove more manageable. It might even allow us to approach constitutional interpretation from an originalist perspective that can take into account all three grounds of constitutional legitimacy and still be a feasible enterprise.