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Originalism: More Than Mere Foolishness or Fraud

Levi Durham
Western Michigan University, levi.durham@wmich.edu

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Abstract. Over the last few decades, the Supreme Court has become increasingly divided along ideological lines, and the outcomes of controversial issues are often entirely dependent on whether the conservative or the liberal justices have a majority. When deciding difficult cases, Supreme Court Justices seem to have little common ground to serve as the basis of their decisions. There is frequently no agreed upon method for deciding the Constitutionality of actions, statutes, and lower court rulings. One method that could be part of the answer is originalism: the doctrine that states that the meaning of the Constitution is unchanging. However, originalism has many critics, which include prominent figures such as Justice William Brennan and Eric Segall. The goal of this paper is to defend originalism from attacks by these two opponents, namely, that originalism is either foolish or fraudulent. I contend that original meaning theory is a legitimate and often illuminating method of interpretation that has been successfully used in the past. I do this by laying out the cases against originalism, explaining how original meaning theory does not fall prey to Brennan's attacks, and by directly responding Segall's argument. I do not claim that original meaning theory is the entire solution to the sectarian problem plaguing the Supreme Court or that it can determine every Supreme Court case. But I do think that original meaning theory can provide part of the answer, and that we should not dismiss it based on arguments like the ones Justice Brennan and Segall assert.

Key Words: philosophy of law, political philosophy, Constitutional interpretation, American judicial system, exegesis.

Introduction

In the upcoming year, the Supreme Court will hear numerous cases that have the potential to significantly impact life in the United States. From issues on abortion and religious freedom to the president's tax returns and the legitimacy of the Consumer Financial Protection Bureau, nine people in black robes will decide what the Constitution has to say on these matters. But for many, attempting to interpret the Constitution according to its original meaning is a dubious enterprise, if not outright absurd. In an address he gave at Georgetown University, Justice Brennan called originalism mere "arrogance cloaked as humility."[1] The exact form of originalism against which Justice Brennan railed was original intent, though there are others who think the same about all forms of the interpretive method. The aim of this paper is to respond to some of the ideas about originalism put forward by its opponents, namely, that those who purport to interpret the Constitution by any originalist methodology, which multiple sitting Supreme Court Justices currently do, are either foolish or dishonest. They claim to know more than is actually known or capable of being known about the intent of the framers and how to apply those intentions to contemporary problems, or they necessarily fail to interpret the Constitution by an originalist methodology. I will do this by first describing Justice Brennan's position, which is prototypical of most anti-originalist positions, and explain why he and Eric J. Segall claim originalism does not work. Second, I will exposit one form of originalism which avoids Justice Brennan's reasons for contending originalism fails. Third, I will directly respond to Segall's main arguments against original meaning theory. The goal of this paper is not to establish originalism as the proper method of constitutional interpretation per se; rather, it is to defend originalism from those who claim that the method is a mere pretense.

[1] Brennan 1985.

I. The Mislabeled Ruse

For Justice Brennan, the Constitution is not simply a statute passed in 1789, and it should not be interpreted as such. The purpose of the Constitution was to establish a "facilitative, pluralistic" society which would allow for the flourishing of individuals, so the document should always be interpreted through that lens.[2] If an imperfect society is to allow human flourishing, Justice Brennan thought that the rights and liberties of all people must be ensured, so he sought to interpret the Constitution in such a way that guaranteed those rights and liberties. For that reason, he saw the Constitution as a living document, one which needed to be interpreted in light of the contemporary ethos. In his mind, this was the only valid way to interpret the Constitution. But towards the end of his career on the Supreme Court, there began to be a revival of a method of interpretation which Justice Brennan loathed: originalism.

Originalism is a position which says that the meaning of the Constitution is fixed, so it means the same thing today that it did at its ratification. Justice Brennan disliked the doctrine for numerous reasons, but his disdain primarily stemmed from his belief that its proponents are feigning humility in order to push a political agenda. According to Brennan, Justices who hold to originalism are acting as if they can channel the framers' purposes when deciding a case only to cloak their own ideology.[3] The Constitution is too ambiguous and far-removed from contemporary life to be accurately interpreted like this. Justice Brennan maintained that certain parts of the Constitution are quite clear, for they "embody certain values;" for instance, the meanings of the separation of powers, ex post facto laws, and bill of attainder, are self-evident.[4] And occasionally

[2] Marion 1995, p. 418.
[3] Brennan 1985.
[4] Id.

the framers' intentions did play a role in his interpretation like in the case Loving v. Virginia (1967).[5] But for the most part, when it comes to applying the law to contemporary problems, he thought judges can derive little more from the Constitution than the values which shaped its framing. To pretend that more can be drawn from the Constitution is dubious.

Another contemporary scholar, Eric J. Segall, makes similar statements about those who purport to interpret the Constitution according to its original meaning without referencing the framers' intentions. He claims that the Constitution in its original form is simply too vague to shed any light on contemporary problems, and originalists are forced to rely on clear principles just like everyone else.[6] All an originalist can do to make themselves special is claim a kind of moral superiority, but that is just a facade.

Opponents of originalism dismiss it as either a fool's errand or a charlatan's game. They create dichotomy of possible ways to interpret the Constitution. On one hand, there is Justice Brennan's view of the Constitution: the document is living and only being properly interpreted if the exegete is attempting to maximize individual liberty. On the other hand, there are those who believe the Constitution is dead and claim to be perfectly able to understand its original meaning and how to apply that meaning to contemporary issues. Since originalism does not align with Brennan's standard, the doctrine is invalid. And not only because it does not align with this standard, but also because originalism requires the exegete to extract things from the text that simply are not there. Effectively, non-originalists claim that if one maintains the doctrine of originalism, then they are claiming to know more than is known or can be known about the original meaning of the Constitution and how to apply that meaning to contemporary issues. If this were true, anyone who

[5] 388 U.S. 1.
[6] Segall 1998, p. 433.

claimed to be interpreting by an originalist methodology would either be deceived or attempting to deceive others. I do not intend to address all attacks against originalism is a valid method of interpretation, but I do intend to argue that it is not necessarily the case that all forms of originalism are foolish or dishonest.

II. Original Meaning Theory

The charge against originalists is that they claim to be capable of understanding the exact meaning of the Constitution and how to apply it to specific, contemporary issues.[7] But some originalists do not claim to be able to do this. Take, for instance, those who hold to original meaning theory, which says that it is the "objective indication of the words, rather than the intention of the legislature" which gives the law its meaning.[8] The Constitution, the highest law of the land, thereby gets its meaning not from the framers' intentions but from the words they put down. Like all other originalists, original meaning theorists say the Constitution means the same thing today as it did at its ratification. However, the framers' intentions mean nothing when it comes to interpretation. If this position does not heavily rely on the intentions of the framers, it would appear to be a counterexample to at least the sort of claim that Justice Brennan made against originalism.

Original meaning theorists, such as Justice Scalia, do not claim to know the entirety of the original meaning of the Constitution. They claim to have a reasonable idea of what the words meant when the document was ratified. This does not mean applying the Constitution to contemporary issues is easy. In fact, Justice Scalia acknowledges that sometimes the Constitution

[7] Brennan 1985.
[8] Scalia 1997, p. 29.

seems silent about certain problems, but to him and many other original meaning theorists, the methodology does not have to be perfect. It simply must be the best one available.

Until quite recently, originalism was also called "constitutional orthodoxy," for most thought it was the standard method of interpretation.[9] Even Justice Holmes' famous labeling of the Constitution as a "living organism" in 1920 did not give rise to the notion of a living Constitution as it is understood today.[10] Justice Holmes meant the Constitution must be able to apply to contemporary problems, but he did not specify exactly how that is to be done. But as Chief Justice Rehnquist points out, what a living Constitution means today, or at least in 1976 when he wrote, is a document that must always be construed to protect minority rights.[11] That understanding of a living Constitution is the same one proposed by Justice Brennan. Under this view, Scalia shows how the Constitution "means, not what it says or what it was understood to mean, but what it *should* mean."[12] But original meaning theorists agree with Chief Justice Marshall when he says: "It is emphatically the province and duty of the judicial department to say what the law is."[13] That is, under original meaning theory, the job of the exegete is not to say what the law should mean but what it does mean.

Justice Brennan seemed to have the idea that understanding how the Constitution ought to be applied to contemporary problems is the same as understanding the meaning of the Constitution; interpreting the law is identical to applying the law. However, that is no originalists' understanding. For them, to understand the meaning of the Constitution is one thing, and how the law ought to be applied to contemporary problems is another. By separating these two problems,

[9] Scalia 1996.
[10] 252 U.S. 416.
[11] Rehnquist 1976, p. 694.
[12] Scalia 1997, p. 46.
[13] 5 U.S. 137.

they do not have to claim to precisely know the exact original meaning of the Constitution. They must have only a reasonable idea of the meaning of a given part of the Constitution at its ratification and a reasonable idea of how that applies to current problems.

As American jurisprudence has demonstrated, this can be quite difficult. Simply put, the Constitution can be vague and uninformative. It is often unclear what the original meanings of certain parts have to say about contemporary problems, such as what the 4th Amendment has to say about police using thermal cameras or what exact power is granted to Congress by the Commerce Clause. Many, including Justice Scalia, also maintain the Constitution is not sufficiently comprehensive to answer every contemporary problem. Fortunately, original meaning theorists are not bound to relying exclusively on the text of the Constitution itself. They are able include various kinds of background information such as precedent, writings from framers, and common law practices to assist their decision making.[14] No case exists in a vacuum, and few issues come up where there is no precedent from which to pull. I will say more about this in the subsequent section, but what is important to note now is that original meaning theorists are bound to deciding constitutionality in congruence with the Constitution's original meaning. But there is a sharp distinction between that and deciding constitutionality based on whatever ethos a judge happens to find themselves in.

Is original meaning theory foolish or dishonest like Justice Brennan and Segall seem to think must be the case for originalism? To reiterate, Justice Brennan addressed original intent, but original meaning theory is not concerned with intent. So, it avoids his claims of foolishness or arrogance. But there is still an open challenge from Segall: the constitution is too vague to interpret

[14] Ramsey 2017, ps. 1947-1949.

according to original meaning, so original meaning theorists interpret according to overarching principles just like everyone else. This is a potentially devastating attack. If he is right, then all original meaning theorists would be part of something which is "at best misleading and at worst a sham."[15] Originalists would be in the same boat as non-originalists, so if they claim to be different, they are delusional or lying. Addressing this claim is the goal of the rest of this paper.

III. An Equivalent Position?

Segall claims original meaning theorists are in the same position as all other constitutional exegetes; both sets of people read a vague, archaic document and must determine what the law has to say about contemporary issues by relying on the broad principles which formed the Constitution.[16] That is to say, the evolving principles which gave rise to the words in the first place are what guide decisions on constitutionality. The words are important, but they play a small role in guiding thorough decision making. Originalists only put a stamp on their interpretation, but there is no added legitimacy. To Segall, that is key. The primary issues in constitutional law revolve around making difficult decisions, and "it is time that we face them without the baggage of an old and unhelpful debate about the relationship between original meaning and constitutional interpretation."[17] There are at least two embedded assumptions in Segall's claims. First, he assumes values derived from an original meaning interpretation put an exegete in a similar position compared to relying on values derived from another methodology. Second, he assumes that if original meaning theory is insufficient to determine how the exegete ought to decide difficult cases, then it is neither necessary nor helpful.

[15] Segall 2017.
[16] Segall 1998, p. 433.
[17] Id. p. 439.

In order to respond to Segall's first assumption, it is important to note the extremity of his claim, that the reliance of originalists on principles derived from the Constitution "eliminates any meaningful distinction between originalism and non-originalism."[18] Suppose, for the sake of argument, that he is right in saying originalists are forced to rely on principles derived from the Constitution, it does not follow that there will be no meaningful distinction between originalists and non-originalists. As we established earlier, if an exegete is interpreting according to original meaning theory, their interpretation is legitimate only if it is in congruence with the Constitution's original meaning. An originalist could make an interpretation that is derived from a legitimate principle, yet that principle's application could be incongruous with the statute's original meaning.

There are principles and there is original meaning; often those two overlap, but that is not necessarily always the case. By having an original meaning standard, the number of possible interpretations is considerably more constrained for originalists than non-originalists, the latter of whom only look to the principles for determining constitutionality. If the contemporary idea of a principle, such as due process, came to include the right to free college education, then it would be permissible for a non-originalist to declare the right to a free college education a constitutional right. But an originalist would not be permitted to say that such a right can ever be derived from the principle of due process. Originalists are bound to decide constitutionality in a much narrower framework than non-originalists. This constraint on possible legitimate interpretations certainly seems like a meaningful distinction.

We can build on this distinction to address Segall's second assumption. He claims that since original meaning is not sufficient for interpretation and originalists must refer to principles like

[18] Id. p. 432.

everyone else, original meaning is neither necessary nor helpful. But if original meaning theorists are forced to rely on principles like everyone else, it does not follow that original meaning is neither necessary nor helpful. The constraint on possible interpretations which mandates congruence with original meaning means an interpretation which fails this standard is invalid. Thus, original meaning acts as a necessary condition for interpreters to satisfy even if it is insufficient to satisfy all the conditions placed on interpreters who must apply the law to contemporary issues.

By "unhelpful," Segall seems to mean that the original meaning of the Constitution has nothing to say about contemporary issues. He is correct in that the Constitution is silent or vague in certain cases. However, relying on precedent to decide difficult cases and interpret the fine details of the law has been a substantial part of the common law tradition long before the Constitution was ratified. That much is undisputed. What Segall does dispute is that this is sufficient for interpreting the constitutionality of contemporary issues to the extent he thinks they should be able to. But this does not appear to be an issue with original meaning theory as much as with the structure of the government itself. As the system is set up: "It is emphatically the province and duty of the judicial department to say what the law is."[19] If the judiciary is in a rare place where they have nothing to say, then they have nothing to say, and it is up to the legislature to step in and pass new legislation. But Segall seems to want the judicial department to move beyond that and step into an activist role where it rationally reconstructs the Constitution to say what the contemporary ethos thinks it should.

This means the fundamental disagreement between Segall and originalists is similar to the one between Justice Brennan and originalists; it is about the role of the judicial department. Whether

[19] 5 U.S. 137.

the judiciary should take Justice Brennan's and Segall's route is beyond the scope of this paper. However, simply saying that originalists do not satisfy the standard Segall thinks they should does not mean they cannot satisfy the standard they think they should. A difference in understanding does not constitute moral or intellectual superiority on one side or the other, and it does not mean that originalism is unilluminating, foolish or fraudulent..

IV. Conclusion

The goal of this paper is to first understand Justice Brennan's view on what constitutes valid Constitutional interpretation and what the rationale is for him and Segall claiming originalism is foolish or dishonest; second, to present a kind of originalism that does not appear to necessarily be foolish or dishonest for the reasons Justice Brennan claimed; and third, to respond to Segall's arguments against original meaning theory. I have not claimed in any way that originalism is the singular, proper method of interpreting the Constitution. I have only attempted to demonstrate that there are good reasons to believe that some forms of originalism are informative, and neither foolish nor dishonest. There are certainly difficulties originalists must overcome, but the deck is not as stacked against them as some suggest. All interpreters are forced at some point to rely on something beyond the text, and to a certain extent Segall is right in saying that originalists and non-originalists alike must draw from the same resources. But "[t]ext matters."[20] And originalism can be helpful to create a consensus on how to interpret the text despite one's ideological background. I see nothing foolish or fraudulent in that.

[20] Kavanaugh 2014, p. 1925.

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