LAW & LIBERTY

We Can Do Worse Than the Framers' Constitution

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April 17, 2020

"We Can Do Better Than the Framers' Constitution," argued Frank Buckley in this space, once again pressing his well-known preference for parliamentary systems over America's constitutional arrangements. Had my good friend's Canadian origins and early life under that country's parliamentary system not rendered him such an agreeable chap, I would find it easier to take the gloves off concerning his latest scribblings along those lines. But his argument this time rests on a faulty premise, and so a brief critique is in order.

Conservatives, he writes, not only should but must reject originalism "if they wish to advance a morally compelling argument." For originalism is simply another form of legal positivism, a judicial methodology indifferent to the moral character of the Constitution or the laws properly promulgated under it. Given that, "it makes no sense to say that courts should follow originalist principles, unless the alternative is expected to make things worse."

At that point, I half expected Buckley's "should" to mean that originalists were in a kind of internal contradiction: seemingly indifferent to the morality of the law, that is, what sense does it make for them to say that judges should follow originalist principles? But that's not what he means. Rather, having associated originalists not only with John Austin's legal positivism but, implicitly, with Austin's moral theory, utilitarianism, Buckley's "should" takes its force from that moral theory: not following originalist principles would likely make things worse, originalists seem to believe, which no utilitarian would want to do. Thus Buckley writes that originalism's "plausibility as a rule that deserves to be followed rests on a rejection of its principal alternative—the left-liberal egalitarianism and libertarianism that informs much of our constitutional law."

Not so. In fact, the premise on which originalism rests is straightforward and simple: judges should follow originalist principles—they should interpret and apply the law as written—because otherwise they're not applying law, but something else, like their own "corrections" of the law. Thus when Buckley goes on to write that "originalism is necessarily a political creed that seeks to hide its politics," he's got it rather backwards. It's a legal creed that makes no effort to hide—or reveal—any politics, including the politics that brought the law into being. Again, it aims

simply to read and apply that law as written. And that is true whether judges are applying the American, the Canadian, or the old Soviet constitutions.

Buckley's confusion rests, then, not with his contention that originalism is a form of legal positivism. He's right on that. It is such a form, for originalism takes it as given that the duty of a judge is to apply the law to the case at hand. But to do that he must determine what the law is, as distinct from what it might or should be; and to do that he must read the words of that law consistent with their original public meaning. Otherwise, again, he's not applying the law or fulfilling his duty as a judge. If the result of applying the law as written and properly read is morally unsatisfying, then change the law. But that's for a lawgiver to do, not for a judge. Buckley would have the judge be a legislator. That is the end of the rule of law.

Failing to draw these distinctions, it is not surprising that Buckley argues next that if originalism commends itself, "it must be because the Framers' Constitution is morally superior to today's Constitution." Again, that's not what commends originalism, whatever its adherents' constitutional assessments. He goes on, however, to question the moral superiority of the Constitution and to disparage "the temptation amongst some originalists to discover natural law principles" in the document, adding that "you'll mostly search in vain" to find such principles in the Framers' debates, their sometime conflicting views, and their practices, to say nothing of the original Constitution itself.

The road on this point is well-traveled. Suffice it here to say simply that whatever the various views, differences, or practices of the Framers, what matters for law—and originalism—is what the Framers wrote, especially, here, the Reconstruction Framers. Most of what they wrote concerned structural and procedural matters, of course. But the substantive law they wrote—the moral vision implicit in the document, especially after corrected by the Civil War Amendments—comes straight out of the natural rights vision that the Declaration of Independence adumbrated. From the Preamble to the doctrine of enumerated powers, the Bill of Rights (especially the Ninth Amendment), the Civil War Amendments, and the structural limits on power, the Constitution stands for individual liberty secured by limited government. That is an additional reason to be an originalist—because, eventually, the Framers got it right—but again, it's not the main reason.

Toward the end of his essay, however, when he speaks of originalism as "a radical creed" and "anything but conservative," Buckley reveals the mind of a true parliamentarian. To be sure, many of us in the originalist fold are unabashedly "radical" in the sense that we believe that the substantive elements of our Constitution, especially and in particular as amended following the Civil War, reflect fundamental, immutable moral principles. Such principles constitute that additional reason why we are originalists and legal positivists who believe that the thus amended document should be interpreted and applied as written.

But against that position, Buckley offers this: "The conservative has a sense of human frailty and distrusts laws cast in stone, including constitutions." Pointing to the great problem with our Constitution and laws today, their "want of reversibility," and invoking Hayek's "fatal conceit" as an organizing principle, the conservative, he continues, is "apt to prefer ex post reversibility under a parliamentary system to ex ante screening under the separation of powers." Given the barriers to formal amendments, he concludes, "change must come incrementally, from the bench," from "wise jurists" who will "identify the [laws] that need revision, and correct them."

We still have no sense of the change Buckley has in mind, of course, much less why change is needed, apart from the "want of reversibility." The most he has said on that score is an off-hand mention of "left-liberal egalitarianism and libertarianism" and a claim that "the evidence today is that parliamentary regimes are freer than presidential ones," the truth of which is hardly self-evident.

But the narrower change Buckley does clearly urge—seeming to accept that we are not about to move to a parliamentary system—concerns the judiciary. In effect, he would have unelected judges act more like legislators. That might address the irreversibility problem, for sure, but in what direction? Originalism came to the fore a few decades ago precisely because judges were legislating from the bench.

Indeed, beginning in 1937, we had a good dose of "judicial revisionism," albeit not the incremental kind, after Franklin Roosevelt threatened to pack the Supreme Court with six additional members. Since the ex ante screening afforded by the separation of powers had failed, shortly before that, to preserve the constitutional design for limited government—had failed to preserve the law—Roosevelt "nudged" the Court to do what the "old Court" had refused to do, allow Congress and the president to rewrite the Constitution other than through constitutional methods. So the chastened justices did it themselves. In short order, they eviscerated the enumerated powers doctrine, bifurcated the Bill of Rights and judicial methodology, and jettisoned the non-delegation doctrine, turning the Constitution on its head. As a result, we now have something of a parliamentary system, with an "open sesame" Constitution that has been a playground for political mischief ever since, and judges largely unwilling, until very recently, to check it.

Those recent judicial checks are not to be seen, however, as "judicial revisions" of the kind that Buckley seems to be urging, much less as those the New Deal Court executed. Rather, they are efforts to restore the Constitution as written, albeit still only haltingly and, so far, only at the margins. To rule otherwise would be to rule unlawfully, and that—on Buckley's own utilitarian grounds—would make things worse.

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