Original Methods Originalism Is Already the Norm

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John McGinnis and Mike Rappaport have done yeoman's work of late in describing various kinds of "new" originalism, ultimately settling on "original methods" originalism as the best means of interpreting otherwise indeterminate provisions of the U.S. Constitution. This is a sort of originalism 3.0, following on "original intent" and "original public meaning" originalism, and is meant to seal the gaps that critics of originalism maintain makes the whole project no different from simply applying one's ideological priors to the hardest cases.

Their opening essay in this month's Liberty Forum alludes to other gap-filling theories—those offered by the likes of Will Baude and Stephen Sachs, Jeff Pojanowski and Kevin Walsh, and Randy Barnett and Evan Bernick—without closely evaluating "original methods" as against these competitors. Thankfully, that intramural skirmish is beyond the scope of this symposium, so I don't have to compare and contrast all those big brains here either. Instead, the lead authors posit that all these approaches are aligned in making a "legal turn" in constitutional interpretation, which is to say treating the Constitution as a legal document.

It's not that the Founding document is incomprehensible otherwise—the text is much clearer than typical statutes or foreign constitutions—but that plain meaning only gets you so far. And so you have to go into the "construction zone" and apply one or more of several proposed legal methods to get to that true original meaning. McGinnis and Rappaport write that "however one resolves" disagreements over which method(s) to use in the zone, "the turn is having an important effect on originalism, allowing it to more accurately and determinately render our fundamental law."

Well, yes, but is that really saying very much? Have any originalists of whatever kind ever not treated the Constitution as a legal document? I mean, the "legal turn" is essentially the implied corollary to the basic definition of originalism: Judges should interpret a constitutional provision as it was intended or according to its original public meaning (or perhaps understanding) *because*

it's a binding legal text. Indeed, the written-ness of a constitution contributes to its legitimacy because, if observed, it constitutes the rule of law rather than the rule of man.

To be sure, as the coauthors note early on, even originalism's highest-profile expositor, the late Justice Antonin Scalia, liked to say that the Constitution should be read as if it were any ordinary text, not necessarily a legal one. But, as they immediately concede, in his judicial and other professional writings, Scalia used a range of legal analysis techniques. How could a judge, particularly a self-professed originalist judge, do otherwise?

McGinnis and Rappaport themselves show why this is so two paragraphs later, using the example of the Due Process Clause. In both the Fifth and Fourteenth Amendments, this clause specifies that people can't be deprived of life, liberty, or property without "due process of law." That sounds great, but it doesn't convey much to the layperson other than a vague notion of fairness, which is why jurisprudence and scholarship have built up around each component of the phrase: "due," "process," and "of law." (Not to mention the modern notion of substantive due process—but that debate is irrelevant to the question of whether the Due Process Clause is a lay or a legal text.)

Let's say you strongly believe that the Constitution should be "wholly transparent to laypeople," as McGinnis and Rappaport characterize a view opposing the "legal turn." "Due process of law" is indeterminate, but wouldn't the layperson consider it to have legal meaning? Stated differently, wouldn't the layperson want to know what specifically it means when applied to the life of this nation, regardless of the method he'd use to get there? He certainly wouldn't just throw up his hands and say, well, that's just symbolic, with no precise or legally binding meaning at all. He also wouldn't want judges—or anyone else—to define the phrase as "whatever process I feel is okay," again as if there's no legal standard that an expositor should seek. (Or maybe he would, if his preferred interpretive methodology is to have interpreters follow their own sense of justice/policy/whim/what they had for breakfast.)

None of this is to suggest that those without legal training shouldn't bother to read or attempt to understand the Constitution, at least beyond those phrases that are unambiguous (like the age qualifications for federal elected office). I merely make what seems to be a rather obvious point: Unless you think that constitutional text doesn't matter or shouldn't be enforced—ahem, Nancy Pelosi—it's a legal text that legal training can help explicate. For example, schoolchildren should study the Constitution not because they'll have the best explanation of what it means, but so they can begin to understand their country's governing structure and ideas.

But maybe the authors' distinction between ordinary and legal language is meant to signify something else: Maybe it means that when good originalists seek the public meaning of "due process of law," they shouldn't look to the *Federalist Papers* (in construing the Fifth Amendment) or floor statements during the 39th Congress (in construing the Fourteenth Amendment), but to how lawyers and judges applied those provisions immediately after ratification. If so, that would seem odd. While contemporaneous legal authorities may often be persuasive—because they were swimming in the legal and political arguments surrounding ratification—they are less persuasive than, say, contemporaneous dictionaries. And as far as

dictionaries go, are there any constitutional terms to be found in the lay and legal dictionaries of that earlier time, but whose meaning is substantially different between the one and the other?

To give an example, and sticking with the Fourteenth Amendment, let's take the issue of same-sex marriage. During oral argument in the case of California's Proposition 8, *Hollingsworth v. Perry* (2013), Ted Olson represented those challenging that state constitutional amendment. Justice Scalia asked Olson just when it became "unconstitutional to exclude homosexual couples from marriage." The former solicitor general hemmed and hawed and ultimately said that it was "when we—as a culture determined that sexual orientation is a characteristic of individuals that they cannot control . . . . There's no specific date in time. This is an evolutionary cycle."

That was clearly not an originalist answer. The originalist answer would either be that 1) nothing in the Fourteenth Amendment stops states from recognizing marriages only between one man and one woman (which is what Chuck Cooper argued on behalf of Proposition 8's defenders) or 2) that the exclusion became unconstitutional upon ratification. Now, quite obviously nobody in 1868 either intended or understood the Fourteenth Amendment to protect the right of gay couples to marry, but if that's what any part of it did, a good originalist would say it had to have done so back then rather than whenever society's evolving standards managed to change constitutional meaning. That's in fact what Cato's amicus brief contended regarding the Equal Protection Clause, elaborating on the point two years later in *Obergefell v. Hodges* (2015).

Now, I don't expect all originalists to agree with my legal arguments in the marriage cases, but whichever way one answers the question, would the originalist analysis be based on the lay reading or the legal reading of "equal protection" (or "due process" or "privileges or immunities")? I don't see how it can be anything but the legal one. The task, after all, is to search the Constitution for an answer to a legal question.

For another example, take the dueling originalist analyses in *District of Columbia v. Heller*(2008). Both Justice Scalia for the majority and Justice John Paul Stevens for the dissent try to discern the original meaning of the Second Amendment by looking to everything from the common law to historical practice. Were the sources the two consulted lay or legal? Who cares? The text they were interpreting was being used to answer the legal question of whether the Constitution prohibits banning from the home every kind of handgun and functional long gun.

Stepping back from specific controversies, and putting a finer point on it, it might be said that one makes the legal turn in constitutional interpretation whenever the ordinary meaning of a word or phrase fails to give a precise enough meaning for a given case. You don't need lexicological or jurisprudential exegesis of the aforementioned Presidential Age Clause (though perhaps you would if you were the ultimate living constitutionalist, and indexed constitutionally specified age to life expectancy). But you surely do for "unreasonable searches and seizures," "cruel and unusual punishment," and a host of other important provisions.

So in the end, I have no quibble with John McGinnis and Mike Rappaport about anything in their essay—except the idea that they're describing something new, special, and somewhat controversial. Then again, as a still-not-too-old lawyer (about to celebrate my 15th law school reunion), perhaps I came of age after the legal turn and so, like a fish that's always been

surrounded by water, cannot register how remarkable this development really is as a matter of applied constitutional law.

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