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ORIGINALISM AND INDETERMINACY

THOMAS B. MCAFFEE*

I. INTRODUCTION

Perhaps the most universal objection to originalism is that it is impossible; that is, the materials relied upon by originalists simply do not yield determinant answers to any worthwhile questions. This indeterminacy objection lacks significant force for at least three reasons. First, the claim that the interpretive materials are always indeterminate vastly overstates the extent and importance of the uncertainties involved; consequently, originalism's critics understate the importance of the originalist canon as a tool for reducing the degree of indeterminacy in constitutional interpretation. Once it becomes clear that originalist methodology can provide *some* definitive answers, even if significant indeterminacy remains, it becomes clear that the indeterminacy objection in fact trades on the assumption that originalism claims to be able to produce a highly significant degree of determinacy. Although some have tried to justify originalism primarily based on a perceived need for fixed and certain rules and the elimination of the judicial discretion, originalism does not stand on these sorts of claims; indeed, one can more plausibly defend originalism without resort to them.

Second, the alternative methods of constitutional decisionmaking are in general at least as indeterminate, if not more so, than is originalism. Although nonoriginalist methods well might be brought to bear in cases in which originalist methods fall short, originalism nevertheless provides a useful tool, and hence a net benefit. Paraphrasing Jefferson on the value of a Bill of Rights, if determinacy is a value at all, why not have at least half a loaf?

Finally, virtually no one contends that the original materials—text and relevant contextual materials—are completely irrelevant to the task of giving effect to the Constitution. The rejection of the view that originalist materials might yield some binding answers to important constitutional questions does not help to avoid the evil of the frequent indeterminacy of originalist materials: the tendency of interpreters to claim certainty when it does not exist. Whether or not we adopt originalism as a primary ca-

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non for constitutional interpretation, we should be careful, in the use of historical materials, to avoid overblown claims as to what we can know. I should add that, in my experience, non-originalists who reject the binding effect of originalist interpretation have abused the historical materials more consistently in offering a variety of claims (especially those concerning the Founders' commitment to the originalist canon) than have the originalists whom nonoriginalists criticize for naiveté in reliance on historical materials. Let me elaborate on these three points in a bit more detail.

II. ORIGINALIST ANSWERS

This is not the forum in which to try to provide a complete demonstration that originalist materials often provide definitive answers to at least a number of important questions. The proof is in the pudding, and my experience in doing historical research is that there are numerous examples where the historical materials are absolutely decisive. The only question is whether we want to be bound by them. I have attempted elsewhere to show, for example, that only reliance on originalist arguments demonstrates the validity of the nearly universal criticism of the Supreme Court's decision in the *Slaughter-House Cases*¹—that it gutted Section 1 of the Fourteenth Amendment² by wrongly reading out the Privileges or Immunities Clause.³ Similarly, the originalist materials are overwhelmingly persuasive as to the intended meaning of the clause granting Congress power to declare war.⁴ The originalist materials equally support the holding in *Barron v. Mayor of Baltimore*,⁵ which refused to apply the Bill of Rights against state governments.⁶ The original meaning of the Ninth Amendment⁷ as well is apparent in the historical materials, so long as we do not bring modern presuppositions to those materi-

1. 83 U.S. 36 (1872).

2. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

3. See Thomas B. McAfee, *Constitutional Interpretation—The Uses and Limitations of Original Intent*, 12 U. DAYTON L. REV. 275, 281-87 (1986).

4. U.S. CONST. art. I, § 8, cl. 11. On the war powers, see *infra* Part III.

5. 32 U.S. 243 (1833).

6. For a defense of *Barron*, and a critique of William Crosskey's conflicting analysis, see Thomas B. McAfee, *Reed Dickerson's Originalism—What It Contributes to Contemporary Constitutional Debate*, 16 S. ILL. U. L.J. 617, 651-57 (1992).

7. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

als.⁸ The importance of the issues that originalist methodology can resolve, of which these examples are but a few, should not be discounted, even if there are many issues which it cannot definitely resolve.⁹

There may be instances in which historical materials will be significantly underdeterminate as a means of resolving any number of questions in the application of constitutional norms. Many commentators—unfortunately, they include both rigid positivists as well as modern judicial activists—appear to assume that if legal and constitutional provisions do not embody concrete rules with clear-cut parameters, they must embody completely open-ended norms. But originalist materials often are determinate enough to provide a framework in which contemporary questions of application can be addressed—at least establishing outer boundaries of legitimate interpretation (assuming the arguments on behalf of originalism are otherwise persuasive). As an illustration, even if the text and history of the First Amendment does not yield a determinate answer as to whether “speech” might properly be construed to include symbolic expression, including some symbolic acts, the text and history together rather clearly seem to exclude acts which cannot be described fairly as communicative. Or, if there is room for debate whether the Establishment Clause’s original directive¹⁰ precludes the public funding of sectarian schools, there is virtually no room for debate that the modern idea that the religious grounding of public policy itself raises serious Establishment Clause issues lacks any originalist support.¹¹

There are also occasions in which the original constitutional materials suggest the appropriate answer in cases in which there might be a failure of proof rather than a clear and determinate answer about a specific question. As a very basic illustration, an inability to build an adequate case that there was a reasonable connection between powers expressly granted to the national government and proposed national action would suggest the ap-

8. See generally Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990) (offering an in-depth analysis of the Ninth Amendment).

9. Other illustrative examples are treated at some length in McAfee, *supra* note 3.

10. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

11. Cf. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153-66 (1991) (arguing that the modern position that public policy founded on religious-based political discourse raises serious Establishment Clause questions cannot be reconciled with the original understanding).

plication of the Tenth Amendment¹² even if there was an absence of specific evidence that the Framers intended that such a power not be exercised.

III. NONORIGINALISM'S INDETERMINACY

Nonoriginalist interpretive materials almost invariably are more indeterminate than originalist ones. Whether the question is framed in terms of tradition, consensus, functionalism, or moral philosophy, in the actual world of practice we are even less likely to find a conclusion to which assent seems dictated than those interpretations revealed by originalist methodology. This is an intensely practical point. Let me illustrate with a simple example. Just prior to the Persian Gulf War, constitutional law scholars filed an amicus curiae brief in *Dellums v. Bush*¹³ in support of the view that President Bush could not constitutionally commit American troops to combat in that war without congressional authorization.¹⁴ If you read this brief, which is signed by purported critics of originalism, you will find that there is not a truly non-originalist argument in it.¹⁵ Every argument advances a view of

12. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

13. 752 F. Supp. 1141 (D.D.C. 1990).

14. The friend of the court brief was filed by ten well-known law professors relying on original meaning of the War Clause of the Constitution to support the view that the Persian Gulf War required congressional authorization. Several of the scholars, especially Professors Tribe and Ackerman, are well-known critics of originalist constitutional jurisprudence. See Memorandum Amicus Curiae of Law Professors, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (No. 90-2866), reprinted in 27 STAN. J. INT'L L. 257 (1991).

15. Despite the charge that was made, Professor Koh, who organized the filing of the "memorandum," contends that the memorandum was not an example of "mindless originalism." See Harold H. Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 128 (1991). The key, he argues, is that the "recent war powers debate was really about constitutional structure, not text." *Id.* at 128 n.34. According to Koh, the debate was not about "the narrow meaning of the War Clause," or the proper "exegetics of particular textual snippets," but about the "broader inferences drawn from structural principles of shared governmental power and checks and balances." *Id.*

But the memorandum in question does not contain a single functional argument nor any response to claims that the originally-contemplated design makes no sense in the modern era. It proceeds on the assumption that the design we are interested in, the structures about which we are concerned, are the ones put in place by the Framers to prevent us from hastily involving ourselves in war. The relevance of the distinction between textual and structural analysis is not immediately apparent because virtually all originalists recognize that originalism encompasses structural arguments. Moreover, Professor Koh does not explain why structural analysis, especially when it focuses on the original design of the Framers rather than on more functional considerations, is less mindless than textual forms of originalist analysis. The real issue, of course, is whose "mind" we are interested in—our own minds or the minds of those responsible for adopting the Constitution or one of its amendments. However we resolve that issue, I have difficulty

the intended meaning of the Declaration of War Clause,¹⁶ supported by original materials and confirmed by case law and practice that relied on the original understanding. There is nothing about function or consensus, except by reference to the original reasons for the allocation actually set forth in the text of the Constitution, read in historical context.

Why is this? The reason is obvious. The textual materials are absolutely decisive when read in a historical context; there is no question that the Constitution intended to put Congress in the driver's seat when it came to committing the nation to war under such circumstances as these.¹⁷ There may be doubt at the margins,¹⁸ but there is no room for doubt about the implications of the Constitution's language, read in context, for the kind of operation actually conducted in the Gulf War.¹⁹ Are the normative and functional arguments nearly so decisive in a world in which the Presidency has grown in power in so many other ways beyond the parameters contemplated by the Framers? Even if I happen

conceiving why we should feel bound by the Framers' structural preferences but not by the value choices they embodied in particular textual provisions. For the view that commentators who insist that we are bound by text or structure, devoid of concern with the underlying intent, are the ones who posit law without mind, see Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989).

16. See U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War . . .").

17. See McAfee, *supra* note 3, at 288 & n.79 (citing additional authorities and providing a brief discussion).

18. Professor Tribe long ago observed that the Framer-contemplated Presidential right to "repel sudden attacks" might arguably "embrace a right to respond without congressional approval to sudden attacks upon our allies," especially in the context of our Cold War-era commitment to securing Western Europe against the threat of Soviet invasion. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 174 (1977). Although acknowledging that the Framers well might have been thinking largely about attacks on the United States itself, Tribe argued that if the Framers "bestowed martial authority upon the President grudgingly, they did so in proportion to the military need of their day." *Id.* Thus, "[i]n the 18th century, a direct attack upon the United States was probably the only contingency that truly demanded instantaneous action; in the 20th, an attack on a strategically important ally might require similar dispatch." *Id.* Although some might contend that Tribe's rationale unduly stretches Presidential authority, see, e.g., 7 DIG. INT'L L. 163-64 (J. Moore ed., 1906) (stating that Daniel Webster, Secretary of State, contended that "no power is given to the Executive to oppose an attack by one independent nation on . . . another"), there is much to be said for Professor Tribe's criterion that "the key question should be whether waiting for congressional action would do irreparable harm to the vital interests that executive intervention is designed to serve." TRIBE, *supra*, at 174 n.13. When confronted with integrity, these sorts of questions can involve difficult judgments in bringing the constitutional design forward to the era in which we live.

19. There is no room for debate that Congress enjoyed months of opportunity to deliberate about the necessity and justification for Operation Desert Storm. To fold this situation into the President's acknowledged emergency authority to repel sudden attack would be to obliterate the notion of congressional primacy in decisionmaking about the policy of going to war; perhaps there is a way to justify this departure, but not in originalist terms.

to believe that the original reasons for granting this awesome authority to Congress still apply today (which I do), any good lawyer (and all these scholars clearly are that) would recognize that a judge is far more likely to find the original materials decisive, and within his competence, than the various functional arguments that could be advanced on both sides. To rely centrally on nonoriginalist arguments before the district court in the *Dellums* case—as the espoused philosophy of a number of these scholars should have dictated—would have enhanced greatly the possibility of a political question ruling by the court, precisely on the ground that the questions raised are so complex and doubtful that the other branches should address them rather than the court.²⁰

IV. OBJECTIVITY IN HISTORICAL ANALYSIS—THE REAL ISSUE

The amicus brief in the *Dellums* case powerfully illustrates my final point as well. So long as originalist arguments are around and continue to be employed, the really important problem is the overstating of the clarity of the historical materials. In *Dellums*, effective lawyers recognized that a district court would perceive itself as standing on firmer ground if the original materials dictated a particular outcome. The court's legal conclusion, moreover, relied on those decisive historical materials in ruling that the President lacked inherent authority to wage war.²¹ Proponents of the indeterminacy thesis perform a grave disservice in providing fodder to the party that would come into court in such a case and argue that history never can be decisive as to the meaning of a constitutional provision. *Dellums* thus illustrates that even proponents of the radical indeterminacy thesis cannot live with their own thesis.

20. In *Goldwater v. Carter*, 444 U.S. 996 (1979), then-Justice Rehnquist, writing on behalf of himself and three other Justices, justified his conclusion that the issue of treaty termination constituted a political question both because the text of the Constitution did not clearly address the issue and because resolution of the issue required the use of "political standards rather than standards easily characterized as judicially manageable." *Id.* at 1003 (Rehnquist, J., concurring in the judgment) (internal quotation marks omitted) (quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975) (three-judge court)). If we begin with nonoriginalism as our central premise, it would follow that the text of the Constitution does not clearly address the war-power allocation issue (especially because that text is clear only when read in historical context), and it is difficult to imagine an issue presenting less manageable standards than the original question whether the President *should* be empowered to commit the nation's forces to military conflict according to his best judgment of vital national interests.

21. See *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990).

It is sometimes observed that originalists arrogantly assume that they can divine the past and that this leads to misleading and overblown claims. But if we assume that originalist arguments will be around for a long time to come, should not the real question concern the uses and abuses of historical materials rather than critiquing reliance on history whenever it is claimed to have decisive weight? After all, reliance on history does not seem to be waning. To illustrate, one of originalism's harshest critics (and an advocate of the radical indeterminacy thesis), Professor Tribe, often relies on historical materials in his many scholarly works on the Constitution. Though he does not typically see history as having the last word, Tribe is typical of originalism's critics in that his skepticism about historical determinacy in general does not prevent him from advancing a great many specific historical claims in the course of analyzing our constitutional development. The reader can judge for herself whether Tribe's historical work tends toward confident assertion about questions which appear to be doubtful or runs afoul of the criticisms often launched at originalist scholars.

In at least one case worth noting because of its irony, however, Professor Tribe relied on both text and history in contending to the Senate Judiciary Committee that Judge Robert Bork's views about constitutional interpretation were belied by both the text and history of the Ninth Amendment. I elsewhere have attempted to demonstrate how misleading and unhelpful a presentation this was,²² but suffice it to say that the Senate would have been served better had Professor Tribe simply restated his view as to the inevitable indeterminacy of the historical materials rather than offering controversial views of history as though they were incontestable scholarly conclusions.²³ Given that his general skepticism did not discourage Tribe from relying upon originalist arguments to criticize Bork, this incident is suggestive that the dangers from abuse of historical materials are not likely to go away, regardless of whether we adopt originalism as our canon of

22. See Thomas B. McAfee, *The Role of Legal Scholars in the Confirmation Hearings for Supreme Court Nominees—Some Reflections*, 7 ST. JOHN'S J. LEGAL COMMENT. 211, 228-33 (1991).

23. This sort of tendency is hardly unique to Professor Tribe. For example, one of traditional originalism's harshest critics, Professor David A.J. Richards, insisted before the Senate that nothing could be clearer than the Framers' intentions to provide for unenumerated rights. See *id.* at 229. But if anything is clear, it is that the evidence upon which Professor Richards relied is hardly unequivocal on the issue of the original meaning of the Ninth Amendment. See *id.* at 229-33.

interpretation. The problem of simplistic historical analysis should be taken on directly rather than being used as an excuse for regularly ignoring the original meaning of the Constitution.