Constitutional Originalism

July 1, 2011 Category: Domestic Politics
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AN ODD CASE OF IDOLATRY:

The U.S. Constitution is no idol—so it is unwise to treat it as such. It was written in a spirit of change; it was not written in stone. It was a point of departure—which is why Thomas Jefferson recommended re-writing it (i.e. updating it to reflect new insights and developments) every generation. It was meant not as a list of laws, but as a statement of broad principles. It was meant to endure by reflecting an evolving sense of civil rights and guiding novel applications unforeseeable in the future.

Treating any document—which is, by definition, man-made—as if it were Holy Writ invariably prompts a panoply of problems. This is no more clearly the case than it is with the U.S. Constitution—a document that is the embodiment of on-going progress. The spirit of this landmark document, then, is betrayed the moment it is treated as some magical terminus—a script to be written in stone for all eternity.

In a letter to Samuel Kercheval on July 12, 1816, Thomas Jefferson wrote:

"I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As [our society] becomes more developed, more enlightened, as new discoveries are made, new truths discovered, and manners and opinions change with the change of circumstances, institutions must advance also to keep pace with the times."

We have, indeed, become far more developed (and far more enlightened) since that time. Important new discoveries have been made since 1787 that could not have been foreseen at the time. Circumstances have changed in significant ways, as Jefferson foresaw three decades after that fateful summer in Philadelphia. Should we not fulfill the spirit of the Founders and thereby ensure that our institutions advance "to keep pace with the times"?

This is no minor quote, as designers saw fit to have it inscribed on the wall of the Jefferson Memorial for posterity. It is clear that when Jefferson saw the Constitution, he saw a provisional accomplishment—a document that reflected the best efforts of a group of men gathered in the summer of 1787. When he thought of that document, he was thinking of a blueprint that was not only *subject to* change, but inevitably ***called for*** judicious updating. Such updating would be necessary, he recognized, in order to reflect the impending advances in the wisdom of the age. Jefferson not only welcomed such advancement, but demanded it, and would have been gravely disappointed to see any progression in our wisdom not reflected in our most hallowed institutions.

In the same letter, Jefferson added: "We might as well require a man to wear still the coat which fitted him when a boy as [we would require] civilized society to remain ever under the regimen of their barbarous ancestors." Being tied to the regimen of a bygone era is precisely what the Founders sought to overcome. If the Constitution represents anything, it represents this guiding principle.

The Founding Fathers of the U.S.—including Jefferson himself—are now *our* ancestors. Barbarism is, of course, a relative quality; society even in that period was quite uncivil compared to the post-civil rights era in which we now live. Shall we force our society, then, to remain under the regimen prescribed 225 years

ago? Or would Jefferson encourage us to continue to progress?

The idea was expressed in Abraham Lincoln's 1863 address in Gettysburg: "It is for us the living…to be dedicated here to the unfinished work which [those to whom we pay tribute] have thus far so nobly advanced. It is…for us to be here dedicated to the great task remaining before us…" Even as the Civil War culminated, Lincoln recognized that there would still always be "more work to be done"—improvements to be made—in the cause to preserve our democratic government. This passage can be read myopically, as if it pertained exclusively to the war effort (from 1861 to 1865) to keep the Republic unified. Yet the idea being conveyed that day in Gettysburg pertained to the greater on-going project—a project that would never really end.

To constrain that project, then, to the particular wording of a historical artifact is, indeed, myopic. "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts," said the famous judge, Learned Hand, in New York City. "These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can do much to help it."

Hyper-traditionalism is antithetical to the spirit that spawned the Constitution. In his opinion in the 1819 Supreme Court case, ***McCulloch v. Maryland***, Chief Justice Marshall wrote that the Constitution was "intended to endure for ages to come, and **consequently to be adapted to the various crises of human affairs**." Adapt? Progress? Evolve? These things are anathema to the Originalist. Like the literalist religious zealot fetishizing every Bible passage, the Originalist sees only particular words on paper, not the broad principles underlying the exposition.

Trailblazing figures—Progressives like Franklin, Paine, Lincoln, Eleanor Roosevelt, and Martin Luther King Jr.—recognized that the Enlightenment of which they were a part was a process, not a terminus. We betray them if we treat the headway they made as a **final step**. (For more on this point, see my essay, "*Scalia World*".) The only things that are immutable and timeless are fundamental moral principles—***things that do not derive from a specific source***. Moreover, we must be able to justify a point independently of its issuing from a specific source.

Jack Rakove put it well in his preface to his landmark work, ***Original Meanings***: "Whatever else we might say about [the Founders'] intentions and understandings, this at least seems clear: They would not have denied themselves the benefit of testing their original ideas and hopes against the intervening experience that we have accrued since 1798."

The call for perpetual progress—of perpetually unfinished work—is anathema to the hyper-traditionalism indicative of contemporary Originalism. Jefferson's clarion call for on-going advancement is antithetical to the Originalists' treatment of the Constitution. For the staunch Originalist, a strictly-enforced stasis (not the challenge of continued evolution) is the sine qua non of governance. Such people make an idol of the parchment from 18th Century Philadelphia, seeing it not as a mere historical artifact—a byproduct of the circumstances of a particular time and place—but instead as Holy Writ: never to be tampered with. Jefferson, along with Paine and Franklin, would surely have scoffed at such a treatment. Nevertheless, the progenitor of Originalism, Edmund Burke, represented precisely what the likes of Thomas and Scalia champion: hyper-traditionalism.

The United States happened because the Founders decided to listen to Thomas Paine instead of Edmund Burke. That is to say, they opted to partake in the Enlightenment rather than succumb to the trappings of the counter-Enlightenment. (Indeed, the infant U.S. had the shortcomings that it *did* have largely because the Founders didn't listen to Thomas Paine ***enough***.) The difference between a Stephen Breyer and an

Antonin Scalia is well illustrated by the difference between Thomas Paine and Edmund Burke: The emancipating spirit of the Enlightenment pitted against the rigid, reactionary mindset of hyper-traditionalism. The story continues even today: The impetus of progress versus its backward-looking antagonist, hell-bent on retaining the sacrosanct "old ways".

For the Originalist, the Constitution is no more a work in progress than the Koran is to a Salafist. What neither person realizes is that there is no "god's plan" or cut-in-stone blueprint; there are only the provisional plans that humans make at any given time given the insights at their disposal. Attributing plans to anything other than fallible men is to delude oneself. Literalism is the flagship of anti-intellectualism. The sanctimonious fealty to imagined "original intents" are the province of religious fanatics.

Strict Interpretation-ism is the surest road to foolhardy exegeses. Coyly customizing excerpts of a sacred text to suit ones own purposes is invariably the game to which such an approach leads—**even as the culprits often miss the entire point of the document**. We see such exegetical shenanigans with Biblical literalists. The treatment of the Constitution by the Strict Interpretation-ist is no less asinine than the Hassidic Jew who refuses to push elevator buttons on Saturday. (For more on this point, see my essays on the "Refer To Page 11" Syndrome.)

Institutions, like people, are always works in progress. Originalists would rather make an idol of a particular piece of text than engage in an on-going process of critical analysis. The key, after all, is to infer the broad, underlying principles on which the document is based—what Laurence Tribe calls "the invisible Constitution". Such a task is anathema to those who fetishize "strict interpretation". It is no surprise, then, that Originalists find it so difficult to grasp that (for example) a civilian militia no longer being necessary to the security of a free State, the 2nd Amendment is now obsolete. Go figure.

To the Strict Interpretation-ist, historical context is patently irrelevant. Such myopia is a recipe for chronic dysfunction—as has been tragically demonstrated with Salifism in Islam, with ultra-orthodoxy / Hassidism in Judaism, with fundamentalism in Christianity, and with the Scalian approach to juris prudence. Whether the sanctity is attributed to a deity (as with the Koran, the Torah, the Canonical Gospels) or to deified writers (as with the Haddith, the Talmud, the Pauline letters, the U.S. Constitution…or the fraudulent ramblings of Joseph Smith and L. Ron Hubbard), the phenomenon is the same.

Rationalizations are infinite when citing a particular parcel of text that has been deemed sacrosanct. Judges like Scalia, for example, simply rule however they personally see fit, then invoke specious (sometimes preposterous) rationalizations via so-called "original intent" to imbue the decision with a veneer of credence. That such exegeses involve importing one's own agenda, ascribing one's intentions, to the text-in-question, is quite obvious. Mr. Scalia's track record provides flagrant examples of such a maneuver—attributing his blatant promotion of corporate interests and fundamentalist Christianity to an allegedly "strict reading" of certain excerpts (taken completely out of context). Such an m.o. makes Scalia no different than, say, the Salifist imams who mindlessly recite excerpts from the Koran in an attempt to justify their own deranged pathologies. Different context, same gimmick.

(That the U.S. Constitution is a praiseworthy document representing a noble leap in human progress, while the Koran is utterly worthless drivel void of any useful insight, is beside the point at hand. The qualities inherent to the source material don't have necessary bearing on the credence of the method employed to interpret it. In fact, it is only by abstaining from Originalism that we can see this crucial distinction—and independently assess the merit of the source.)

At the end of the day, a text is only a text: a stage in the process of human development—a snap-shot that has been captured in ink on paper at a particular time and place. Any text must always be seen as

such—whether the writers had been noble statesmen producing an admirable document (as in the U.S. Constitution) or charlatans producing balderdash. In any event, a text is generally written in the prevailing idiom of the time and place; this must be factored in when inferring what the underlying principles at work may have been.

At the culmination of any document—including the U.S. Constitution—it should implicitly read: "Subject to alteration, pending future insights and further developments." For there will always be future insights and further developments—new variables warranting modifications to incumbent prognoses. NEW factors often arise in the future—salient factors that must be taken into account pursuant to their emergence. That this will always occur makes any scripture a record of merely one point in a larger work-in-progress.

Yet-to-be-realized contingencies can't be taken into account when our operating principles are constrained to the specific semantic idiosyncrasies of statements made prior to them. In the pre-civil rights, pre-internet, pre-WMD, pre-automatic weapons, pre-Pentagon, pre-lobbyist, pre-corporation era that was oblivious of the civic and scientific developments of the last two centuries, we'd be well advised to keep this in mind. The intervening time has brought us much that could not be accommodated in the thoughts of a few men in 1787.

Ronald Dworkin has made the important point that democracy isn't about rules per se; it is about a set of enduring values. That is to say, democracy is more about a frame of mind than about obeying decrees—more about recognizing broad principles, not complying with particular laws. Understanding this, it is clear that the Constitution is the embodiment of an abiding dedication to universal principles, not some sacred scripture. It is a document that represents an idea—not something to be treated as holy writ, set in stone for all eternity. The U.S. Constitution is not the ultimate basis of our democratic principles; our democratic principles are the ultimate basis of our constitution. The document composed in 1787 serves the citizenry; the citizenry does not serve the document. (See also Laurence H. Tribe's, ***The Invisible Constitution***.)

We should recall the fallibility of *ALL* men—of ourselves now and of those statesmen in Philadelphia 224 years ago. When black people were 3/5 of a man; when only white, land-owning males could vote; and when civilians were deemed unfit to elect Senators: we know that the document reflected the flawed thinking typical of that era—in *many* ways. When even a scientific genius like Ben Franklin was still using leeches to cure ailments, we know that those men didn't understand everything there was to understand about the world. Franklin would not have wanted us to remain stuck with only the insights available during his time. He would have been appalled at Originalism. "Shame on you, Scalia," Jefferson would have surely said. With Clarence Thomas, he would have asked: "Where are your standards?" Where, indeed.

Alas, the Originalist demands that—for all eternity—we restrict ourselves to interpreting each sentence ONLY as the drafters understood it at the time. Oh, really? Then "arms" only pertains to muskets, and the electoral college will make sense forever? "Only as the drafters understood it" entails "only as a handful of fallible men with limited knowledge happened to construe each word in an 18th century context". Jefferson was an amazing man, but if we limited our view of black people to his understanding of "negro", we'd have much to be ashamed of.

The Supreme Court is the steward of the dynamic nature of the Constitution. It is dedicated to the on-going realization of the nascent capacity to respond to the evolving needs of the society—and our evolving sense of civil liberties. The relevant factors that emerge as time goes by will always inform the manner in which the principles shall apply. Here, timeless principles can transcend the perpetual flux of new developments. As society progresses, so too must the reading of its founding maxims.

Originalism as strict-interpretation-ism gave us the (morally repugnant) 1857 ***Dred Scott*** and 1896 ***Plessy v. Ferguson*** decisions–thereby enabling the Jim Crow era. A la carte exegesis gave us the (unforgivable) 2000 ***Bush v. Gore*** and (reprehensible) 2010 ***Citizens United*** decisions. All these were shameful decisions–each despicable in its own way.

By contrast, intelligent readings of the U.S. Constitution gave us the 1954 ***Brown v. Board of Education*** and 1965 ***Griswold v. Connecticut*** decisions. The issue isn't merely THAT the latter were "good" decisions; it is WHY they were "good" decisions. In the future, we may look forward to the demise of Originalism…and subsequently cases that will enshrine the recognition that abortions and gay marriage aren't immoral, that fire-arms *can* be outlawed, that healthcare is a civil right, that publicly-funded elections are Constitutional, and that corporations aren't humans.

Every document must recognize itself to be man-made—and thus eminently fallible—and consequently eternally provisional. The moment we lose sight of the fact that any text—no matter how noble—is merely a social construct (not some divinely ordained proclamation), we will consign ourselves to the very stasis Jefferson urged us to avoid.

(The two best books on the U.S. Constitution are Jack Rakove's Pulitzer Prize-winning *Original Meanings* from 1996 and Bernard Bailyn's *The Ideological Origins of the American Revolution* from 1967. A moderately right-wing approach that is worthwhile is Forrest McDonald's *Novus Ordo Seclorum*: a thought-provoking perspective. *The Invisible Constitution* by Lawrence Tribe and *The Living Constitution* by David Strauss are both great books about the treatment of the Constitution since its creation. Also helpful is a nything written by the great scholars on the topic: Ronald Dworkin, Richard Posner, Charles Fried, Stephen Breyer, or Gordon Wood.)