Textualism and Originalism in Constitutional Interpretation

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Mailbag

Man of the people?

If President Donald Trump is a man of the people, as he claimed in his inaugural address, why is he getting rid of Dodd-Frank banking regulations?

Dodd-Frank was enacted after the horrendous banking debacle of 2007-08 when banks made too many dubious loans. It requires banks to maintain a bigger cushion of cash in the event that more loans go worse than they anticipated. Also banks have stricter reporting requirements and are subject to audits to determine their ability to withstand adverse financial events. So what is wrong with that? Do we want a repeat of the near-collapse of the whole economy caused by bad lending? Do we think large banks have learned what can happen to our entire financial system due to over-leveraging? Do we think large banks are looking out for our best interests and our country's best interest?

I don't think removal of Dodd-Frank regulations is in the best interest of the people and the country. Also, President Trump issued a directive removing the requirement that financial advisers look out for the best interests of their clients. What is going on here? I can only think that the financial interests are dominant here. Do you want your financial adviser looking out for his or her best interests rather than your best interests? I certainly don't.

CRAIG FOURNIER
Webster

Textualism and originalism in constitutional interpretation

In 2016 lecture at the Case Western Reserve University School of Law, Judge Neil Gorsuch warmly praised former Supreme Court Justice Antonin Scalia's approach to constitutional interpretation. Because President Trump has nominated him to serve on the Supreme Court, it is important to understand the approach Judge Gorsuch favors.

Justice Scalia maintained that, when a judge interprets a democratically enacted legal text such as a provision of the United States Constitution, the judge should use "textualism" and "originalism" as interpretive guides.

A textualist-originalist judge in the mold of Justice Scalia seeks to apply the "original public meaning" of a constitutional provision. The original public meaning is how a reasonable and reasonably well-informed member of the public alive at the time the provision was enacted.

A Little Perspective

CHRIS CILLIZZA, WRITING IN THE WASHINGTON POST: "To Trump, it was an open-and-shut case: He was the president. The president is tasked with keeping the country safe. This ban would keep the country safe. The appeals court didn't see it that way, leaving Trump with the very real possibility that even an appeal to the Supreme Court will change nothing. Remember that the Supreme Court is divided between four more-liberal justices and four more-conservative ones. The ninth seat is open as a result of the death of Antonin Scalia and the blockade Republicans put up on then-President Barack Obama's nomination of Merrick Garland. Trump court nominee Neil Gorsuch is in the very early stages of the process and wouldn't be seated - even if he is eventually confirmed - in time to break the tie. And a tie would mean the ruling of the appeals court would hold - and Trump's travel ban would be no more. That's a big deal for a man who promised during the 2016 campaign that he could change everything that people hated about Washington, bringing his business savvy to its bloated bureaucracy. What Trump is learning - or should learn - from this latest court ruling is that the government isn't like a business in one critical way: There are checks and balances built into the system. The judiciary is not something he can control or cajole. He is, quite literally, not the boss of the federal court system."

NHsnapshot

Tailgating, an Ivy League custom that is spreading, becomes the gathering place for family and friends before the football game at Dartmouth College in Hanover on Nov. 10, 1970.
Textualism-originalism comes in more than one form and flavor

CONSTITUTION FROM D1

would have understood it to apply in circumstances like those facing the judge. A judge applying this method understands the institution of judicial review—our accepted practice of giving judges final say on constitutional meaning—to confer only a backward-looking interpretive power on constitutional provisions are time-dated; they mean today nothing more or less than what they meant when they became the law of the land.

Proponents of this textualist-originalistic approach say that it reinforces our constitutional separation of powers. In Article III of the Constitution, the Founders created a federal judiciary that would pronounce what the law is by ascertaining what the law means when enacted. And in Article I, the Founders created a legislative body (Congress) to prescribe what the law will be in the future. These roles are to be kept separate and distinct.

Proponents also say that this approach reinforces the democratic foundations of our constitutional order. When judges find some law or practice unconstitutional, they halt or delegitimize the work of a politically accountable branch. This is acceptable in a democracy where judges are elected. But it is not acceptable in an overall account of the judicial intervention is a superior source of democratically-constituted law (i.e., the Constitution) understood by its enactors to mean what the judges say that it means.

If the italicized qualification in the previous sentence is disregarded, proponents say, the practice of judicial review results in judges prescribing new limitations on government power that have not been authorized by the people. What's more, these new limitations are beyond the power of the people's representatives to change because they are (supposedly) rooted in the Constitution.

This is judicial tyranny, proponents say. The Constitution does not authorize judges to create new constitutional law through the practice of judicial review. Rather, the Constitution authorizes the people to create new constitutional law through the strict amendment processes specified in Article V. The Constitution should not be easy to amend.

Consider, for example, the Eighth Amendment’s ban on cruel and unusual punishments. Why, Dworkin asked, should we understand the Founders to have banned only punishments thought cruel and unusual in 1791 (when the Eighth Amendment was ratified)? Isn’t it more plausible to think that the Founders, who believed in self-governance and abhorred distant and hierarchical power structures, would have wanted future generations to infuse this vague provision with contemporary understandings?

Crucially, Dworkin rejected Justice Scalia’s assertion that the original public meaning of a constitutional provision must be construed in a time-dated manner. In Dworkin’s view, the people of the founding generation would have expected future generations to reinterpret the constitutional meaning—what he terms textualist-originalist interpretive and unusual.

So construed, the Eighth Amendment’s ban on cruel and unusual punishments does not merely prohibit punishments thought cruel and unusual in 1791; it prohibits punishments thought cruel and unusual today. Thus, a principled textualist-originalist judge could plausibly conclude (as the Supreme Court has concluded) that administration of the death penalty for crimes other than murder is now unconstitutional even though, in 1791, the death penalty was regularly imposed for lesser crimes.

Proponents of this type of textualism-originalism say that it is superior to Justice Scalia’s approach for at least two reasons.

First, as just explained, it is more faithful to the (likely) original understanding that the Constitution should reflect the American people’s contemporary values. Second, and relatedly, it makes the Constitution a “living” Constitution that is more likely to function well in a pluralistic and rapidly changing world.

If not, then Dworkin’s approach (when the Eighth Amendment was ratified) was not the constitutional meaning—what he terms textualist-originalist interpretive and unusual. Proponents say. The Constitution should not be easy to amend.

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In a 2015 lecture at Harvard Law School, Supreme Court Justice Elena Kagan paid homage to Justice Scalia by saying “we’re all textualists now.” As this statement shows, Justice Scalia’s textualist-originalist interpretive approach has had a profound impact on American law. And it appears that Judge Gorsuch is prepared to pick up the torch and carry it forward. But it is important to understand that textualism-originalism comes in more than one form and flavor.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)

All Trump stands for is his own self-promotion and wealth

FAME FROM D1

they are on TV or in movies, or play music or sports. As a TV star for years and as someone who worked hard at staying in the public eye, Trump had no problem with name recognition. He had been a character in Doonesbury for 30 years. For many candidates, just becoming known is a major challenge.

Trump knew that being a celebrity was also a way to sell his brand. Celebrity is fundamentally a marketing tool. Doubters should check out the massive literature on celebrity branding.

Association of stars with a brand is a primary way to make the brand more popular and sometimes edgy. In Trump’s case, he used his celebrity to sell himself like a commodity. Moreover, the campaign was his selling of Trump steaks, wines, golf courses and hotels.

ing and benevolence. By 2007, fame came in at first, followed by achievement, image, popularity and financial success. By 2007, in the aspirational rankings, community feeling fell to 11th place and benevolence was 12th out of the 16 values ranked. In 1997, fame had been 15th out of 16.

A 2006 survey from the Pew Research Center aimed at 18- to 25-year-olds found that 51 percent cited being famous as either the first or second most important life goal for their generation.

In citing this study and survey, I certainly do not intend to single out young people as the only ones enamored of fame and celebrity. This trend includes all age groups.

The writer George Monbiot has written that the principal qualities in a celebrity are vanity, vacuity and physical beauty.

Trump embodies the vacuous nature of celebrity. His ca-