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Democracy Dies in Darkness

The framers of the Constitution didn't worry about 'originalism'

History shows that the text is far more complex than the legal doctrine might indicate.

By **Jack Rakove**

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Judge Amy Coney Barrett is a self-avowed originalist and textualist. Like most conservative jurists, she praises these modes of constitutional interpretation as effective constraints on judicial discretion. Adherents of these methods hold that they will interpret the Constitution as its original adopters understood it. They will not allow judges to make up new rights, even in response to their personal moral commitments. The text governs all, and those who interpret it must be faithful to the usage of past decades, not contemporary concerns.

So far so good, an impartial observer might say. But debates about originalism and how to perform it have been roiling the legal academy for several decades. Scores and scores of scholarly articles on the subject pour in annually from university law reviews; another baker's dozen books also address it. And there is no simple way to say how we know what the phrases of the Constitution originally meant.

The framers never worried about its future judicial interpretation, nor would they have thought of themselves as "originalists." They were, rather, the heirs to rich constitutional debates that began with the imperial quarrel with Britain in the mid-1760s and continued with the writing of new state constitutions in the mid-1770s and the "imbecility," as the Federalist papers put it, of the national government under the Articles of Confederation. They didn't consider how their decisions would hold up in court.

At first glance, questions of original intent seem like ideal problems for historians to solve. How can we determine what the Constitution truly meant except by examining why its clauses were proposed and how they were supported or criticized? The Constitution and its amendments were products of political debates; reconstructing those debates is how one would decipher its "original meaning."

But the main advocates for originalist theory are lawyers, not historians, and they act under different assumptions. Where historians would be content to describe a set of debates reflecting an array of perspectives, legal originalists want to "fix" the meaning of constitutional terms — to come up with the one best answer to the puzzles that jurists have to solve. They assume the words the framers used had settled meanings and that a conscientious reader — an informed public official, a learned jurist or just a responsible citizen — can understand those meanings without knowing anything about the debates that produced the text.

One problem with this idea is that the founding era was a period of intense conceptual change. Some of the key words and terms in our constitutional vocabulary were subject to pounding controversy and reconsideration. One has to engage these debates to understand how Americans were thinking about these issues at the time. For today's originalists, that complexity is part of the problem. The records of history are often messy, not neat; speakers argue past each other or engage in rhetorical excess; their fears are dated, their expectations of worst consequences exaggerated.

Rather than accept these aspects of the historical record, today's originalists prefer to regard the Constitution as a purely legal text, subject to ordinary rules of construction. Yet the linguistic sources they rely on will not provide the answers they seek. There is no adequate dictionary definition of "the executive power" that Article II vests in the president. Understanding what the "establishment of religion" invoked in the First Amendment meant to its framers requires examining the complex ways in which the states had supported the existing denominations of a very Protestant America. As Thomas Jefferson explained in his "Notes on the State of Virginia," the very word "constitution" had multiple meanings that were still evolving precisely because Americans were trying to figure out how to make written constitutions — their greatest innovation — the supreme law of the land.

The distinctive American practice of judicial review was one result of that innovation. But even after this practice was established, leading officials and jurists had to figure out how constitutions were to be interpreted — it was not evident to them that it should be about ascertaining what the original intent was. Constitutional law itself was also something that the founding generation had to create. The first debates on interpreting the Constitution took place not in the courts but in Congress, over questions like the removal power of the president, whether Congress had the authority to issue charters of incorporation, whether the president could unilaterally declare American neutrality in French revolutionary wars and whether the House of Representatives had a right to review presidential papers related to the negotiation of the Jay Treaty.

That last debate took place in the early spring of 1796, and it produced the first coherent statement of originalism. In a speech on April 6, James Madison argued that even though the treaty was part of the law of the land, the House still had a right to review papers to decide whether to fund its implementation. To sustain this tenuous claim, Madison used records of the ratification of the Constitution — though he relied on evidence from North Carolina, which joined the Union only after the Constitution had been ratified. In effect, Madison used a form of originalism to challenge a plain-textualist reading of the Constitution, which makes "treaties made . . . under the authority of the United States" part of the supremacy clause, and therefore something the House was already obliged to enforce.

This primitive form of originalism was clearly different from the "public meaning" version of the theory's current adherents. In a famous passage from Federalist 37, Madison doubted the capacity of language to produce the "perspicuity" — the linguistic precision — needed for such interpretation. Drawing on John Locke, he observed that "no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas."

That is why the context historians provide should remain an essential part of any inquiry into the original meaning of the Constitution. It is also why the best-known example of "public meaning" originalism, Justice

Antonin Scalia's opinion in the major Second Amendment case *D.C. v. Heller*, is such a travesty of historical unreason. Here, the court narrowly held that an individual right of self-defense within one's domicile was constitutionally protected. Far from being a decision logically derived from the original intentions behind the Second Amendment, Scalia's opinion in *Heller* is, ironically, a great tribute to the idea of a "living Constitution," one whose meaning evolves over time — in this case, recognizing how attached Americans had become to the use of firearms. (I was the main author of the "historians' brief" in *Heller*, as well as three other amicus curiae briefs submitted to the Supreme Court on questions of original intent.)

In the debates surrounding the Second Amendment, a handful of references did allude to an individual right to arms. But that was manifestly not the issue in dispute. The debate was about the militia, a state-governed institution whose future status was problematic because the Constitution gave Congress broad authority to oversee its "organizing, arming, and disciplining." No one then would have read the amendment to constrain the "internal police" powers of the states, meaning their broad authority to secure public health and safety.

Today, everyone observing Amy Coney Barrett's confirmation hearings expects her to be a reliable conservative justice, and one who is likely to enlarge the body of Second Amendment rights (in the plural) that conservatives favor. But what does it mean that she cites "originalism" as the source of her views? Only by examining the history does it become clear why these interpretive differences over originalism matter so much — and why the practice does not provide the constraints on judicial rulings that its advocates claim.

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