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THOUGHTS ON ORIGINALISM

The Honorable J. Daniel Mahoney*

It is axiomatic that our Federal Constitution is the law, indeed the supreme law, of the land. The Constitution itself says so, in those very words, in its Sixth Article. The Constitution, furthermore, founded, constituted, this nation. Its hallowed status in our national culture cannot be gainsaid.

The Federalist Society has emphasized, from its inception, the centrality of the Federal Constitution in American life and law. It has published two monographs—The Great Debate: Interpreting Our Written Constitution, and Who Speaks for the Constitution? The Debate over Interpretive Authority—that present an intriguing array of views on the issues of constitutional interpretation and interpretive authority.

The view most generally accepted in federalist circles, and the one to which I subscribe, is originalism. Its foremost contemporary exponent is Robert Bork, whose rejection for appointment to the Supreme Court by the United States Senate almost a decade ago is a very sad chapter in our national history. In his book The Tempting of America: The Political Seduction of the Law, Judge Bork described originalism as "once the dominant view of constitutional law—that a judge is to apply the Constitution according to the principles intended by those who ratified the document." He immediately added the important qualification that this original intention was "the meaning understood at the time of the law's enactment." In other words,

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* The Honorable J. Daniel Mahoney served on the United States Court of Appeals for the Second Circuit from 1986 until his death in October, 1996. Judge Mahoney was to deliver this lecture to the Notre Dame Federalist Society on October 30, 1996.

1 U.S. CONST. art. VI.
5 Id. at 143.
6 Id. at 144.
as he put it, "the understanding of the ratifiers of the Constitution . . . is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean."  

This clarification is crucial. One of the objections posed to the originalist interpretation of the Constitution is the relatively scanty body of what we now call "legislative history" with respect to the ratifying bodies, as well as (to a lesser degree) with respect to the preceding convention that formulated the document that was presented for ratification. It is hardly the case, however, that a vast historical inquiry is required every time a court (or a legislative or executive authority) addresses a constitutional issue.

The common sense of the situation very much parallels the task that is posed when interpreting any other written document, such as a statute or a contract. One first looks to the plain, obvious, or clear meaning of the document. If such a meaning is apparent, that is the end of the matter. If it is not, any available evidence of the drafters' intent may be consulted as an aid to interpretation. If no such aid is available, you do the best you can with the language. You certainly don't discard or disregard it, and fashion a rule from some other source. For it is the intention of the parties, in the case of a contract, or of the legislature, in the case of a statute (and also the executive, it might be added, except when an executive veto is overridden), and of the ratifiers, in the case of a constitution, as that intent is expressed in the common meaning of the language in the document whose interpretation is at issue—that provides the only legitimate authority for investing the document with legal consequences.

It is rather difficult to quarrel with these observations at the level of fundamental theory. In an address at Georgetown University in October 1985 that is included in the federalist monograph on constitutional interpretation, for example, then-Justice Brennan asserted that "[t]he encounter with the constitutional text has been, in many senses, my life's work." 8 He went on to assert toward the conclusion of that speech, however, that as he "interpret[ed] the Constitution, capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments." 9

Of course, the Fourteenth Amendment to which he alludes prohibits any state from "depriv[ing] any person of life . . . without due

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7 Id.
9 Id. at 443.
process of law." The Fifth Amendment, adopted simultaneously with the Eighth Amendment to which Justice Brennan also alludes, imposes the identical prohibition upon the national government. Note also that the Fifth Amendment unmistakably assumes the legitimacy of capital punishment in its requirement of a grand jury indictment for a "capital or otherwise infamous crime," and in its ban against putting a criminal defendant "twice . . . in jeopardy of life or limb" for the same offense. If constitutional text means anything, then, it is clear that in at least some circumstances, our national and state governments may deprive persons of life—that is, inflict capital punishment upon them—provided that due process of law is afforded in doing so. In sum, Justice Brennan's "encounter" with the constitutional text turns out to be a quite selective, indeed hostile, engagement.

Justice Brennan said on the same occasion that "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections." On the issue of capital punishment, however, Justice Brennan may fairly be said to have adopted the platonic guardian role that he had condemned a few minutes earlier.

Although Justice Brennan can be accused of adopting that role despite his disclaimers, he cannot be accused of betraying any commitment to originalism. His concept of an "encounter" with the constitutional text is rather different. Indeed, his Georgetown address excoriated originalism as a "facile historicism" propounded by "persons who have no familiarity with the historical record." Further, originalism is, in his view, "arrogance cloaked as humility," because "it is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." Instead, Justice Brennan urged, we must ascertain "what . . . the words of the [constitutional] text mean in our time," and this translates into a judge's assessment of "the demands of human dignity," which "will never cease to evolve."

The evolving demands of human dignity, of course, require a correspondingly evolving, or "living," constitution. In the broad, sum-

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10 U.S. CONST. amend. XIV, § 1.
11 U.S. CONST. amend. V.
12 Id.
13 Id.
14 Brennan, supra note 8, at 434-35.
15 Id. at 435-36.
16 Id. at 435.
17 Id. at 438.
18 Id. at 443.
mary terms appropriate to this brief address, the "living constitution" rubric may fairly be used to label the school of constitutional interpretation that is both the primary antagonist of originalism and the dominant theory in today's legal academy. Its thesis is that originalism is a quixotic undertaking; that because of limitations in the historical record, the problems of divining the intentions of multi-member bodies, and the indeterminacy of language, we simply cannot ascertain any meaning in the constitutional text that is an authoritative guide to the decision of contemporary cases.

The alternatives that are proposed are considered rather extensively in Judge Bork's book, and more summarily in an address that Justice Scalia delivered at the University of Cincinnati on September 16, 1988. As Justice Scalia notes, we are offered by Professor Laurence Tribe as the touchstone of constitutional adjudication "a collaborative inquiry, involving both the Court and the country, into the contemporary content[ ] . . . of freedom, fairness, and fraternity." Stanford Dean Paul Brest opts for enforcement of "those . . . values that are fundamental to our society," to whose ascertainment such aspects as constitutional text and original understanding may significantly contribute, but not if they fail to correspond to "changing public values." There is more of the same, in, for example, Professor Ronald Dworkin's call for "a fusion of constitutional law and moral theory."

Two interesting questions emerge from these speculations: first, precisely what conceptions of "freedom, fairness, and fraternity," "public values," or "moral theory" are to be imposed in the name of the Constitution? Second, what institutions are to impose them, and by what authority?

The first question is rather easily answered, and gets us right to the nub of the entire controversy. The values to be imposed are those of the intellectual elites. The "public values" that are to be given constitutional status, that is, the status of supreme and governing law, have little or nothing to do with the views and aspirations of anything like the general public.

19 BORK, supra note 4, at 187–221.
23 Id. at 229.
That this is so becomes clear when we proceed to the second question, as to the institutions that will impose these values, and their authority for doing so. The institutions are the federal courts, and in particular the Supreme Court. Why is this so? As Judge Bork put the matter in a recent article in *National Review*, excerpted from his new book, *Slouching Towards Gomorrah*, "[m]odern liberalism is fundamentally at odds with democratic government because it demands results that ordinary people would not freely choose. Liberals must govern, therefore, through institutions that are largely insulated from the popular will."25

Of course, the organ of our national government most insulated from the popular will is the federal judiciary, peopled by lifetime appointees whose salaries may not be reduced. Thus, we see continuing resort to the federal judiciary over and against popularly elected organs of national, and especially local, government, in behalf, for example, of unrestricted or minimally restricted abortion, assisted suicide, or expanded rights for homosexuals.

We do not face this issue for the first time. As Abraham Lincoln said in his first inaugural address, with particular reference to the *Dred Scott* decision, "[t]he candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."27

Of course, there are a number of questions that, under our constitutional arrangements, are appropriately decided by that eminent tribunal, or even less eminent ones like the Second Circuit Court of Appeals. But the rather vaporous theories that collect under the banner of a "living constitution" are not interested in our existing and traditional constitutional arrangements. The whole point of the exercise is to use an expanded notion of constitutional rights to impose new social arrangements that cannot achieve enactment via our normal political processes.

This is a considerable step beyond the decisions for which the Warren Court was most noted, which had primarily to do with the rights of criminal defendants under the Bill of Rights and the applica-


tion of those initially federal guarantees to state systems of criminal justice via the Fourteenth Amendment. Whatever view one may take of those decisions, singly or in the aggregate, they relate to the administration of criminal justice, a matter traditionally of special concern to courts and jurists, and did not have the broad impact upon social arrangements of decisions like *Dred Scott* or *Roe v. Wade.*

In any event, what is the authority of federal judges to decree revised social arrangements that are hotly disputed in the political arena? We begin with Article Three of the Constitution. Federal judges are authorized to decide cases or controversies. This empowerment corresponds to the normal judicial role—to act as a neutral, authoritative resolver of disputes, in accordance with an objective rule of decision, as a preferable social alternative to having the disputants resort unilaterally to force. In this basic function, judges are akin to umpires at baseball games, or referees at football and basketball games.

Let us pursue that analogy a bit. Baseball players and teams consent to allow umpires to call balls and strikes within the parameters of fixed standards—a strike if it is over the plate and between the knees and the letters; otherwise a ball. Were an umpire to announce, however, that he rejected the authority of the dead white male Abner Doubleday, and would henceforth call balls and strikes in accordance with his evolving conception of the human dignity of pitchers and batters and without reference to the location of a thrown pitch vis-à-vis home plate, one can envision a swift erosion of his professional standing.

Of course, the analogy to federal judges is not a perfect fit. For one thing, the strike zone is a somewhat less amorphous concept than due process or equal protection. Nonetheless, the analogy is not entirely without force. The respect that is accorded to judges rests in good measure upon the perception that they decide cases and controversies in accordance with an objective standard that is provided by the law, rather than some personal whim or predilection. If the original meaning of the Constitution is deemed to be unknowable, or not authoritative because outdated, what warrant can there be for a judge to impose a decision based upon his personal view of contemporary standards of freedom, fairness, and fraternity, or fundamental values, or moral theory, in negation or contradiction of a contrary determination by a popularly elected legislature? I perceive no defensible warrant for such an exercise, and no way to reconcile judicial behavior of this sort with any coherent theory of democratic governance.

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28 410 U.S. 113 (1972).
Rather, as Justice Scalia observed in his speech at the University of Cincinnati:

The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes. That power is, however, reasonably implicit because, as Marshall said in *Marbury v. Madison*, (1) "[i]t is emphatically the province and duty of the judicial department to say what the law is," (2) "[i]f two laws conflict with each other, the courts must decide on the operation of each," and (3) "the constitution is to be considered, in court, as a paramount law." Central to that analysis, it seems to me, is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of "law" that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a "law," but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? One simply cannot say, regarding that sort of novel enactment, that "[i]t is emphatically the province and duty of the judicial department" to determine its content. Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and its determination that a statute is compatible with the Constitution should, as in England, prevail.29

Judge Bork notes that the Constitution provides only major premises, or core values, that must be adapted and applied to modern conditions that could not possibly have been foreseen by the founders. He correctly distinguishes between the improper pronouncement of new constitutional principles and the appropriate application of venerable constitutional principles to new situations.

Of course, the precise definition or articulation of the principle that is embodied in a particular constitutional provision is a matter of judgment, and therefore subject to disagreement and, for that matter, manipulation. As I mentioned earlier, for example, Justice Brennan defends his position on capital punishment essentially by collapsing the entire Constitution, or at least the Bill of Rights, into a central and evolving concept of human dignity, and then pronouncing the death penalty incompatible with that concept, disregarding the numerous

29 Scalia, *supra* note 20, at 854 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
provisions of the Fifth and Fourteenth Amendments that explicitly assume the legitimacy of capital punishment.

Indeed, this is the central tactic by which jurists and academics wrench the Constitution from its linguistic and historical moorings and employ it to advance an antimajoritarian liberal agenda. The idea is to extract from the constitutional "text" a core concept, such as human dignity, freedom, fairness and fraternity, or in the famous Bob Dole formulation, "whatever," yoke it to the emerging liberal Zeitgeist, and gallop off to the announcement of a new constitutional "right" that has no legitimate basis in constitutional text or history. Perhaps the apogee of this technique was reached in the concurring opinion of Justices O'Connor, Kennedy, and Souter in Planned Parenthood v. Casey, which entrenched Roe v. Wade for the foreseeable future, advised abortion opponents of their constitutional and civic duty to get lost, and articulated as "the heart of liberty" "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." The two subsequent circuit court opinions that recognized a constitutional right to assisted suicide drew heavily on this mystery passage. All in all, a great day at the office of constitutional mythology.

Sober attention to constitutional text and original meaning is surely preferable to judicial rule via such open-ended rhetoric. The discovery of original meaning is a daunting but not impossible task. As Judge Bork explained in The Tempting of America:

We have . . . the constitutional text, records of the Philadelphia convention, records of ratifying conventions, the newspaper accounts of the day, the Federalist Papers, the Anti-Federalist Papers, the constructions put upon the Constitution by early Congresses in which men who were familiar with its framing and ratification sat, the constructions put upon the document by executive branch officials similarly familiar with the Constitution's origins, and decisions of the early courts, as well as treatises by men who, like Joseph Story, were thoroughly familiar with the thought of the time. Judges can also seek enlightenment from the structure of the document and the government it created.

Justice Scalia has frequently observed, in a similar vein, that the historical practices of this republic cast light on the meaning of the Constitution that founded our national institutions.

When all is said and done, there will always be occasions when the application of a very general constitutional concept or principle to a

31 Bork, supra note 4, at 165.
concrete case will prove difficult. The great virtue of originalism for judges that are required to decide constitutional cases is that it leads them in the direction of objectivity and away from the imposition of a personal agenda in the name of the law. A recent symposium in First Things addressed "an entrenched pattern of government by judges that is nothing less than the usurpation of politics." In Slouching Towards Gomorrah, Judge Bork charges that "traditional values" are the object of an "onslaught" by the nation's "intellectual class," and that the cutting edge of this onslaught is a Supreme Court that has "increasingly usurped the power to make our cultural decisions for us."

These are valid concerns. We hear a great deal today concerning the need to protect the independence of the judiciary from political attacks. This is a two-way street. There is a considerably greater need, in my view, to protect the political institutions of our democracy from an overweening judiciary. Given the institution of judicial review, this can only be accomplished by the exercise of judicial restraint. An originalist approach to constitutional interpretation is the indispensable handmaiden of judicial restraint.

The Federalist Society has labored valiantly in this cause. Its redoubled efforts will be sorely needed in the days ahead.

My thanks for the opportunity to share these thoughts with you.

