The Three Fault Lines of Contemporary Originalism

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by John O. McGinnis | 5 Comments May 30, 2019

As a jurisprudential theory becomes dominant, it tends to fracture. One reason is that academics are naturally both fractious and enterprising. They gain justified renown by recognizing subtle frailties as well as important difficulties in a major theory and by trying to improve both its content and articulation. Because there is so much at stake in these matters practically, litigants and politicians also try to reorient the theory to serve their own interests.

So it has been with originalism. Originalism began in opposition to the free form jurisprudence of the Warren Court and largely defined itself as a theory of judicial restraint with that restraint being the anchor of original intent of the Framers and subsequently the original meaning of the Constitution's text. But with the disappearance of its original opponent, originalism had to offer a positive defense and definition of itself. Currently originalists address fundamental questions about originalism, such as normative ones like why one ought to be an originalist, and positive ones like how to find the original meaning. Three issues currently being debated represent fundamental fault lines in contemporary originalism, the resolution of which may shape the future of constitutional jurisprudence.

Size of the Construction Zone

The so-called New Originalists introduced the distinction between interpretation and construction as a way to parry academic critics of originalism. Interpretation is the process of discovering the meaning of the Constitution. Construction is the process of giving the Constitution legal effect.

Critics had argued that much of the meaning of the Constitution was vague or ambiguous. An indeterminate Constitution cannot constrain legal decision making. But the New Originalists contended that this criticism did not apply to the parts of the Constitution that had a clear meaning. These provisions were subject to determinate interpretation and thus the enterprise of originalism was both coherent and useful when interpretation was possible. Originalist interpretation did not rely on normative judgments about a provision, but rather about empirical facts concerning language. On the other hand, the New Originalists conceded that there was a "construction zone" where the Constitution was vague or ambiguous and the meaning ran out. There different normative theories may be needed to fill it in.

The size of this construction zone is crucial to the salience and future of originalism. If the constitution's meaning is thin with only a few relatively determinate provisions, like that authorizing two senators from each state, originalism will not figure much in actual decisions. The action will instead take place in the construction zone instead and, depending one's normative views, forms of living constitutionalism will be candidates to fill it. But if the Constitution's meaning is thick, as Michael Rappaport and I have suggested, and the construction zone is of more limited size, originalism will offer a more comprehensive theory of constitutional decision making. And these are but the polarities of the possible views. Some theorists, like Larry Solum and Randy Barnett, seem to hold intermediate positions on the size of the construction zone.

The resolution of the size of the construction zone will turn on three matters, two theoretical and one practical. Theoretically, the first question is what degree of uncertainty moves a question from interpretation to construction. The second and related question is whether methods exist to resolve interpretation of many provisions that are thought ambiguous or vague. Rappaport and I have suggested that the language of the law does have such methods through its use of thick legal terms and through the surrounding legal context of interpretive rules.

But reducing the size of the construction zone is ultimately a practical issue, the proof of which lies in the pudding that interpreters make. Will the growing number of originalist experts in the various provisions of the Constitution be able to use their knowledge to reduce the size of the construction zone? The answers so far look promising. For, instance, Nathan Chapman and Michael McConnell interpret the often thought to be vague term "due process" in the Fifth and Fourteenth Amendments as placing into the Constitution certain common law understandings. As a result, they provide a much more determinate meaning to the phrase by showing it is limited to preventing the legislature from exercising judicial power or violating common law procedural protections.

Judicial Restraint v. Judicial Engagement

The most contentious fault line among originalists is that between those advocating judicial restraint and those advocating judicial engagement. The judicial restraint camp argues that judiciary should defer to any reasonable interpretation of the Constitution by the political branches. It hearkens back to the beginnings of modern originalism as a *restraint* on the power of the judiciary. The judicial engagement camp argues against any deference to the judgments of the political branches. It emphasizes constitutional *constraint*—that the meaning of the Constitution is a constraint on all the branches and the judiciary has the last word in enforcing that meaning in cases and controversies. Some advocates of engagement bolster the case for judicial engagement on an empirical claim about the Constitution—that it reflects a presumption of liberty.

As with the issue of the construction, there are positions in the middle like my own put forward in "The Duty of Clarity." There I have suggested that the original meaning of judicial power requires that judges follow what I call a duty of clarity: the Constitution contemplates that the judiciary ought to exercise the power of judicial review only if the legislation at issue proved to be in manifest contradiction of a constitutional provision. But judges were also expected to use the ample legal methods of clarification available to pin down the Constitution's precise meaning, thus narrowing the range of what lay legislators might believe reasonable.

This issue is not unconnected to the size of the construction zone. Insofar as a question is in the construction zone, it is more difficult to discern a mandate in the judiciary to invalidate legislation so long as it predicated on

an interpretation within that zone. But insofar as the question is one of interpretation, the judiciary has the duty to invalidate legislation contrary to the meaning of the Constitution.

How to Approach Precedent

The final fault line for originalism is precedent. The Supreme Court reporters contains thousands of decisions on the Constitution, some of them no doubt contrary to the original meaning. Should they be overruled? This issue is likely the most important pressing issue for modern originalism and originalists are sorely divided on it. Some like Gary Lawson believe that the Constitution does not permit following precedent at the expense of the originalist meaning. His view is that the Supremacy Clause only refers to the Constitution, not Supreme Court cases and thus the Constitution must always trump erroneous precedent. I doubt this position as an interpretative matter for reasons discussed here, but whatever its merits as a theory, it is wildly impractical because the Supreme Court is not going to overrule every case that did not reflect the best original interpretation of the Constitution.

Some originalists like Randy Barnett have suggested that precedent might be respected in the construction zone, but otherwise overruled. I am not sure this is much more practical suggestion than Lawson's. There are still a lot of cases that plausibly wrong as matter of original meaning, not construction, like the Legal Tender Cases, that the Court will never overrule.

The real action here will come in trying to construct rules of precedent that mediate between the value of following the original meaning and the value of constitutional settlement. That question in turn may make the question of why one ought to be an originalist relevant. For instance, if one is originalist because originalism generally produces clear rules (not my view), the clarity of the line of precedent may be very salient. Mike and I have tried to begin to generate originalist rules for precedent based on our welfare-enhancing view of originalism. In my view, the debate over precedent is likely to become the most vibrant field of originalist theory in the next half decade.