WHEN ORIGINALISM FAILS

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I. INTRODUCTION

Judges, lawyers, and academics continue the debate over how, and whether, to interpret our Constitution in accordance with its original intent. It is an important debate because, as Bruce E. Fein has explained:

The argument over the original-intent standard for constitutional interpretation is at bottom a dispute over the magnitude of policymaking power that should be entrusted to an appointed, lifetenured federal judiciary under a Constitution in which government by elected representatives is the norm.1

Recently, Aileen Kavanagh declared that “[h]ardly any other approach to constitutional interpretation attracts as much critical attention in American constitutional theory, as that known as ‘originalism.’ ”2 Earlier, however, Jeremy Waldron opined that “one is surprised to find [originalism] appearing again in anything other than a trivial form in respectable academic jurisprudence.”3 Justice Scalia and Judge Easterbrook draw a distinction between a jurisprudence of “original intent” and a jurisprudence of “original meaning,” with both subscribing to the latter.4 Scott Fruehwald explains that “[a]uthors express their intentions through symbols—words—that have established meanings.”5 Argues Fruehwald: “Such symbols must be separable from intent; otherwise, they have no meaning. Because words are separable from intent, the text is autonomous; the text is the only proper ‘thing’ to be interpreted.”6 Fruehwald acknowledges, however, that history and context are important tools to the originalist.7

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4. Antonin Scalia, A Matter of Interpretation 38 (Princeton U. Press 1997); Frank H. Easterbrook, Statutes’ Domains, 50 U. Chi. L. Rev. 533, 535 n. 3, 547 (1983). Scalia asserts that a judge should look to “the original meaning of the text, not what the original draftsmen intended.” Scalia, A Matter of Interpretation at 38. According to Easterbrook, a judge’s role is to find the “‘m]eaning of the enactment,’ and not the ‘intent of its framers.’ ” Easterbrook, Statutes’ Domains at 535 n. 3 (emphasis added). See In re Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) (“The process [of interpretation] is objective; the search is not for the contents of the authors’ heads but for the rules of language they used.”). As Easterbrook pointed out in his article, the distinction he and Scalia draw has a fine pedigree. Easterbrook, Statutes’ Domains at 535 n. 3. Holmes wrote over 100 years ago that we do not inquire what the legislature meant; we ask only what the statute means. Id. (citing Oliver W. Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417-19 (1899)). Aileen Kavanagh has described the difference between “original meaning” and “original intent” as “the former refer[ing] to the way in which the text of the Constitution was originally understood, whereas the latter refers to what the lawmaker intended or meant when he drafted that text.” Kavanagh, supra n. 2, at 280. Kavanagh has also suggested that original meaning and original intent are different in theory more so than in practice. Id. at 280-83. See generally Randy Barnett, An Originalism for Nonoriginalists, 45 Loy. L. Rev. 611 (1999) (describing the difference between original intent and original meaning).


7. Id. at 854, 857.
Questions about the problems with originalism are raised continuously. For example, who counts as a Framers? If this question is answered, then “there is the notorious difficulty of eliciting [not only who, but] what the intentions of the Framers actually were—especially when we consider that in the American case, they form a collective body which [was] assembled 200 years ago.” Where does one find the Framers’ intent? What if the Framers’ intent is inconclusive? Such questions are not only of contemporary origin. They were also asked, for example, by those ratifying the Constitution. Further, originalism’s faults are not merely debated in the academy. They manifest themselves in the jurisprudence of the doctrine’s proponents. Yet, despite these real challenges, judges and lawyers still write in originalism’s favor. Even some academics agree that the Framers’ intent is germane to what the Constitution means. And, many commentators agree that one can find the Framers’ intent. When


9. Kavanagh, supra n. 2, at 255; see Stephen Macedo, The New Right v. the Constitution xii (Cato Institute 1987) (stating that the available record consists of “inconsistent, ambiguous, and unreflected intentions of the large group of independent persons who participated in drafting or ratifying the Constitution”); Paul Horwitz, The Past Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory, 61 Alb. L. Rev. 459, 474 (1997) (“The difficulties of recreating the intention of multi-member legislative bodies, let alone those located in the distant past, have been well described.”); Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 856 (1989) (“[W]hat is true is that it is often exceedingly difficult to plumb the original understanding of an ancient text.”).


11. See Easterbrook, supra n. 4, at 547 (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable.”); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Policy 61, 64-66 (1994); Horwitz, supra n. 9, at 476 (“A further problem is the degree to which originalism can actually provide reasonably determinable answers, a requirement which might be thought to be a sine qua non for originalism.”); Kavanagh, supra n. 2, at 256 (“There may be no such evidence [of the Framers’ intent], or it may not be clear.” Id. at 270.).

12. See The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification pt. 1, 897 (Bernard Bailyn ed., Library of Am. 1993) (“Mr. Bass, [an opponent of ratification, at the North Carolina Ratifying Convention] . . . observed that gentlemen of the law and men of learning did not concur in the explanation or meaning of this Constitution. For his part, he said, he could not understand it, although he took great pains to find out its meaning, and although he flattered himself with the possession of common sense and reason . . . . From the contrariety of opinions, he thought the thing was either uncommonly difficult, or absolutely unintelligible.”).


16. E.g. Easterbrook, supra n. 4, at 551 (“Most statutes contain a substantial core of understandable commands.”); Horwitz, supra n. 9, at 491-92 (“To be sure, many questions of small-scale factual accuracy, debates about who said what and when, will be capable of fairly definitive resolution.”); Kavanagh, supra n. 2, at 258-59 (“There is no reason, in principle, why one would not be able to find out what the Framers intended, at least in some cases. It may be difficult and involve much time and effort,
one does not, these commentators at least concede that originalism narrows the scope of a judge’s search.\textsuperscript{17}

But, as Judge J. Harvie Wilkinson has written, “[m]any in the legal profession have abandoned the great questions of legal process,” and “process [after all] is our collective answer to the time-honored question, ‘Who decides?’.”\textsuperscript{18} Should nine unelected, unaccountable lawyers decide the great issues of our time? Should the President or Congress? Or, should the states? Do they have a role to play? Steven G. Calabresi explains that it is just these structural questions—and not personal liberty as such—that were the principal focus of constitutional law until the 1950s.\textsuperscript{19} The Supreme Court “police[d] the lines of jurisdictional competence set out in the constitutional text so that the sophisticated Madisonian system for sampling the popular will over time could be made to work effectively.”\textsuperscript{\textsuperscript{20}} Issues such as federalism and separation of powers were thus “core concerns of American constitutional law.”\textsuperscript{21} Then, the Court turned to, in Calabresi’s phrase, “nationalist rights creation,” first in connection with incorporating the Bill of Rights and then in connection with the Fourteenth Amendment’s Due Process Clause.\textsuperscript{22} By the 1960s and 1970s, constitutional debate became “obsessive[ly] focus[ed] on nationalist judicial rights creation.”\textsuperscript{\textsuperscript{23}} Thus, commentators, including judges, lament the political nature taken on by the law and courts.\textsuperscript{24}

In this article, I explore the relation between originalism, the critiques of originalism described briefly above, and the question of who decides. I argue that in the relationship between these issues lies the path to a coherent, democratic, constitutional jurisprudence. I argue that originalism is fundamentally about who decides. And, if originalism fails (that is, the answer to a constitutional question cannot be found in the Constitution’s text as originally understood by the Framers), then the courts should simply not decide the issue. Rather, they should leave it to the private arrangements of citizens or to other

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\textsuperscript{17} Horwitz, supra n. 9, at 476 (asserting that “[e]ven where the historical record is fairly complete . . . difficult problems of interpretation remain”); id. at 477 n. 103 (agreeing with Jack N. Rakove “that historians can narrow the available range of plausible interpretations of the original understanding of Constitutional provisions and reject some outright”); see Jack N. Rakove, Fidelity Through History (or to It), 65 Fordham L. Rev. 1587, 1589 (1997) (stating that not “all interpretations of the past [are] equally plausible or valid”).


\textsuperscript{20} Id. at 1375.

\textsuperscript{21} Id. (citing Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918)).

\textsuperscript{22} Calabresi, supra n. 19, at 1377; see generally Adamson v. Cal., 332 U.S. 46 (1947), rev’d in part, Malloy v. Hogan, 378 U.S. 1 (1964) (exemplifying the nature of the debate over incorporation).

\textsuperscript{23} Calabresi, supra n. 19, at 1377-78.

\textsuperscript{24} E.g. Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 998-1000 (1992) (Scalia, J., dissenting) (“In truth, I am as distressed as the Court is . . . about the ‘political pressure’ directed to the Court: [T]he marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens . . . think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the fact of this distressing phenomenon, and more attention to the cause of it.”); Jane S. Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 Stan. L. Rev. 1, 47 (1998) (describing the “‘vigorous, extensive, and continuing effort on the part of interest groups to lobby the courts’ ” (quoting Gregory A. Caldeira & John R. Wright, Organized Interests in Agenda Setting in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 1109, 1110 (1982))); Wilkinson, supra n. 18, at 1389 (“Intriguing social insights and dazzling empirical demonstrations do little to displace the sense that judges are being addressed as legislators and lobbied for a particular result.”); id. (stating that amicus “briefs are not by ‘friends of the court,’ but rather by friends of the cause”); id. at 1391-92 (“Whether the subject is abortion, school prayer, sexual harassment, gay rights or single-sex schooling, lawyers of all persuasions have indulged endlessly the rightness or wrongness of matters to the exclusion of process questions.”). Some interest groups do not try to hide the fact that they lobby the court to achieve political ends. E.g. Lee Epstein & Joseph F. Kobylda, The Supreme Court and Legal Change: Abortion and the Death Penalty 273 (U. of N.C. Press 1992) (quoting Faye Wattleton, President of Planned Parenthood, as saying: “The court is not sequestered on another planet. It does hear the voices of the American people’ ”).
branches or levels of government. This is the only outcome consistent with the structure of our government and the democratic principles on which it was founded.

Part II of this article describes the role of the federal courts in our democracy. Part III of this article describes what a court should do if it cannot answer a constitutional question based on originalism. Next, part IV of this article demonstrates that federal courts were intended to have a limited role in deciding issues of importance to this country, and, in contrast, that democratic processes and private arrangements were intended to play a larger role in resolving issues. Finally, in Part V of this article, I provide examples of how constitutional issues may be decided based on the jurisprudence described here.