1 THE ORIGINS OF ORIGINALISM

> "Those who framed the Constitution chose their words carefully; they debated at great length the minutest points. The language they chose meant something."[1]
>
> *Attorney General Edwin Meese (1985)*

IN THE BEGINNING

Some of you might already be thinking: When was originalism ever not a thing? Originalism is quite a commonsensical idea, after all. It has many flavors, but we can define it broadly as the idea that the Constitution should be interpreted as its words were originally understood by the Framers who wrote the Constitution in 1787 and by the public that ratified it between 1787 and 1789. More broadly still, it is the idea that words have an original public meaning at the time they were spoken or written and presented to the world.

Don't we interpret all human communication like that? Doesn't that just, well, make sense? If we change the meaning of the words over time, aren't we just making things up as we go along? The short answer is yes. But not everyone always saw things this way.

Starting in the 1950s, America witnessed a revolution in its constitutional jurisprudence. The Supreme Court, ushered by Chief Justice Earl Warren, began discovering in the Constitution rights and powers no one had ever thought were there. The Court created whole new sets of rights for criminal defendants, including the *Miranda* rights popularized by television.[2] It required states to suppress evidence

as a remedy for unlawful police conduct.[3] Conservatives feared that criminal defendants for whom there was plenty of evidence to convict were let free based on judicially created rights nowhere found in the text of the Constitution. In 1971, they were given a powerful voice by San Francisco's renegade police officer, Harry ("Dirty Harry") Callahan, memorably played by Clint Eastwood. The district attorney refused to prosecute a serial killer because the evidence against him was obtained through a warrantless search and, shall we say, Dirty Harry's less than kosher interrogation tactics (outside the presence of a lawyer, no less!). The evidence was thus inadmissible, and the killer would walk. "I'm all broken up about that man's rights," Dirty Harry declares sarcastically. "It's the law," says the DA, defending the suppression of the gun and the confession. Dirty Harry retorts, "Well then the law is crazy!"

And then just two years after Dirty Harry enthralled his audiences, the Court in *Roe v. Wade* constitutionalized the right to an abortion in accordance with what the Justices labeled the "penumbras" of other constitutional rights. This revolution crystallized the opposition to what has become known in some quarters as judicial activism. The term "activism" suggests that the Supreme Court had been doing something wrong. Wasn't the Court simply making things up as it went along? Where in the text were all of these rights? That the Court had to invent "penumbras" in which to find them seemed to give away the whole game.

But what was the alternative? By what principles could those who opposed the Court's decisions claim that the Court was wrong? One answer is intuitive, almost obvious: What about just following what the text *says*? Surely the text doesn't answer *every* question, and perhaps the text can be ambiguous, but can't we all agree that at least nothing in the Constitution says anything about abortion? That nothing in the Constitution requires the suppression of evidence when officers commit constitutional violations? That nothing in the Constitution says a police officer can't ask a criminal suspect questions? (The Fifth Amendment protects a witness from being compelled to *testify* against himself in court, not necessarily from having to answer to police questioning.[4])

There is another possible answer. Can't we agree that the Constitution was never *intended* – by those who wrote it, or perhaps by those who ratified it in the state conventions – to have the effect given it by

the Warren Court? Did the Founders ever *intend* that the federal government grow as big as it has? That the Congress would delegate its legislative powers to unelected federal officials in a giant administrative bureaucracy?

Reagan's attorney general, Edwin Meese, suggested this answer in a renowned speech to the American Bar Association in 1985.[5] Reflecting on the end of the Supreme Court's latest term, he wrote, "The voting blocs, the arguments, all reveal a greater allegiance to what the Court thinks constitutes sound public policy than a deference to what the Constitution – its text and intention – may demand." What should replace this ad hoc, protean approach to constitutional law? "What, then, should a constitutional jurisprudence actually be?" Meese asked.

> It should be a jurisprudence of original intention. By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid both the charge of incoherence *and* the charge of being either too conservative or too liberal.
>
> A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection. This belief in a jurisprudence of original intention also reflects a deeply rooted commitment to the idea of democracy. The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is why it is the fundamental law. To allow the courts to govern simply by what it views at the time as fair and decent is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution has been weakened. A constitution that is viewed as only what the judges say it is no longer is a constitution in the true sense.
>
> Those who framed the Constitution chose their words carefully; they debated at great length the minutest points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was. This is not a shockingly new theory; nor is it arcane or archaic.

Originalism did not originate with Attorney General Ed Meese. Robert Bork – whose Supreme Court nomination was infamously derailed – is credited with having first advanced the theory in the modern age in

a 1971 law review article in which he similarly remarked that "[a] persistently disturbing aspect of constitutional law is its lack of theory." The courts, he wrote, "are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes."[6]

New Justices pour their own particular values into the Constitution, Bork wrote. But if the constitutional text itself does not specify which value is to be preferred, how can the Justices decide that their particular values are what should govern? One principled way to decide is to "take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules."[7]

It is somewhat odd to have to credit Bork with originating originalism. We've already hinted at why: Isn't originalism just obvious? Perhaps we shouldn't go that far, but originalism is certainly intuitive. And, indeed, most lawyers and judges until the early twentieth century interpreted all legal texts, including the Constitution, in much this same way: by looking at the intention of a law's authors. Or more specifically, by looking at their intentions as evidenced by the words they used and normal conventions of usage, grammar, syntax, and other conventional legal tools of interpretation.

But we had mostly forgotten about this way of doing things in the era of progressivism and legal "realism." Law professors began teaching in the early 1900s that judges by necessity *make* law, rather than discern or interpret law, based on their own, unconscious sociological predispositions. Judges, the realist will say, cannot divorce their own values from the law, and so they have no choice but to pour those values into the law. So the judges *have* to make things up as they go along – or at least, judges have always done so, and they always will.

Robert Bork was the first to intuit that we had strayed from a rather obvious path of believing that words have meaning and judges can discern those meanings. Judges will always have predispositions and background assumptions, of course, but surely that can't mean that *anything* goes. Attorney General Meese made it the purpose of Reagan's Justice Department to return to this rather commonsense path of legal interpretation.

THE PROGRESSIVE COUNTERATTACK

Then came the progressive counterattack. Supreme Court Justice William Brennan responded a few months after Meese's speech with one of his own at Georgetown University.[8] He ascribed arrogance to a judicial philosophy of original intention. How can we possibly discern what the Founders thought about the particular cases that come before the Court today? "We current Justices read the Constitution in the only way that we can: as twentieth century Americans," Brennan claimed. Yes, we often look to the history of the framing, he continued,

> [b]ut the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

That's fair enough. There's no doubt that there is much compelling about Justice Brennan's account. How could the Founders have known about peculiarly modern-day problems? Shouldn't we adapt their principles to cope with current conditions? But as we shall see throughout this book, Brennan's response assumes many untrue things about originalism. Surely the great principles have to be adapted to current needs – but doesn't the text of the Constitution already permit such adapting? And doesn't it do so in a way that also maintains certain limits? The First Amendment applies to the Internet, no one can seriously disagree with that; but does that mean that Supreme Court Justices get to decide that capital punishment is cruel and unusual in violation of the Eighth Amendment – or perhaps more accurately in violation of the "evolving standards of decency that mark the progress of a maturing society" – even though capital crimes are explicitly contemplated in other parts of the Constitution?[9]

We must be fair to Justice Brennan, of course. The originalism to which he was responding was in an incipient stage. Its advocates had not yet perfected the theory (and they still haven't today, I might add, as we shall see throughout this book). But Brennan nicely sets up the impetus, the motivation behind the competition to originalism that we shall take up in the final chapter: Isn't originalism too rigid?

Why do we care about what the Founders really thought since their world is "dead and gone"?

Paul Brest, who would later become the dean of Stanford Law School, wrote a few years earlier what has come to be considered a fatal attack on originalism at least in its early form. In his famous article, "The Misconceived Quest for the Original Understanding,"[10] Brest sought to undermine the notion that there is such a thing as the Founders' collective "intent" vis-à-vis any particular constitutional provision. How do you determine a collective intent for a body like the Constitutional Convention? What if various Framers thought different things about the same provision? What if they did not even think about how the text they were writing would be applied to particular problems? Whose intent counts?

Adding to this attack was H. Jefferson Powell's famous article in 1985, "The Original Understanding of Original Intent,"[11] which argued that the Founders themselves did not intend for their intentions to govern the future. How then can a jurisprudence of original intentions be internally consistent? If you want to abide by the Founders' intent but they intended that you *not* do just that, one can't really be an original-intent originalist.

There is much wisdom in what Brest and Powell said, and so originalism adapted to accommodate their arguments. Although both Powell and Brest described more plausible versions of originalism – those that looked to high-level purposes rather than to the specific intent of any particular Framer and that sought original meaning through words, grammar, context, and legal interpretive conventions – most originalists up to that time had focused on the original "intent" of the Framers. After the Brest-Powell onslaught, they quickly adopted a new version of originalism: the original public understanding.

The original public understanding version maintains that the meaning of a constitutional provision is the meaning the public that ratified the Constitution would have understood it to have. It does not depend on the secret intentions of the Founding Fathers. It does not even depend on the collective intentions of the various ratifying conventions. It asks, how would the people have understood the written words of the Constitution they were adopting? What would they have understood it to be accomplishing? That means we have to understand not

only the way words were used but also the purpose for which the words were deployed, the social context, and so on.

Many problems were thus solved, but the debate over originalism has continued. Originalism, I mentioned earlier, is often described as a theory that is still "working itself pure" – an expression Lord Mansfield used to describe the common law and its piecemeal, precedential, evolutionary progression.[12] Some would say that the theory of originalism evolved from an "original public understanding" version to an "original public meaning" version. I'm not sure I see a difference. Surely the ratifying public (or at least its informed readers) would have "understood" the Constitution by the "meaning" of its words. Either label clarifies what is going on: the meaning of the Constitution is best discerned by its words in the linguistic, historical, and social context, and those words and that context are public and not secret.

Original public understanding or meaning might still have some problems. What if different segments of the public did or would have understood the text differently? What if most people were politically ignorant and really didn't know much about the constitutional text at all? Leading originalists today have thus suggested that the original public understanding should aim at what a *hypothetical reasonable observer*, someone fully informed about the history and context of various constitutional provisions and skilled in linguistic conventions, would have understood.[13] Even this method might still reveal disagreements over meaning, of course, but that merely suggests we need ways to resolve indeterminacies, which we shall discuss a bit later in this book. It hardly suggests that no meaning exists at all, or that there aren't tools for deciding which meaning we go with when there are plausible alternative understandings.

We need not get more bogged down than this. We see clearly enough that, although originalism is not a settled theory, it has been and continues to be refined by legal thinkers. When someone says – as even some law professors still do – that "originalism refutes originalism"[14] because the Founders themselves weren't originalist (citing H. Jefferson Powell's article), you can respond that original *intentions* originalism has been severely challenged but that original public understanding originalism has survived the unrelenting counteroffensive.

NO MORE INTENT?

The history just described raises some interesting questions. Although we will touch on some of them elsewhere in the book, we may benefit from introducing them now. First, what is the role of intent, now that "original intentions" or "original intent" are some kind of dirty words? With few exceptions, almost no one today defends original intent originalism.[15] Many originalists even suggest we should not look at James Madison's convention notes because they only tell us the specific intent of a few Framers.[16]

Is it really true that intent does not matter at all? Surely it matters somewhat. Now, we have to be clear about just what we mean by intent. Do we have to count up the "intention votes" of all the delegates to the Constitutional Convention and ask whether more thought *X* about a particular part of the text than thought *Y* about that text? No. But surely we can look at the overarching *purposes* of the Constitution to get at some kind of collective intent. Surely it helps us to know that the purpose of the Constitution was both to enable democracy as well as to serve as a check on the excesses of democracy. Surely it helps us to know that the Framers were overwhelmingly concerned with giving energy to the executive, but only as far as republican principles would admit. It helps us to know the *general* intent of the Founding Fathers.

Historians seek this kind of "intent" all the time. What were Caesar's motives when he crossed the Rubicon? What was the Roman Senate thinking when it declared him perpetual dictator? What was Lincoln hoping to accomplish by fighting the civil war – saving the Union, abolishing slavery, abetting northern industrial interests? What was the Athenian assembly hoping to accomplish by initially sentencing the citizens of Mytilene to death? We ask questions about historical and collective intent all the time.

Consider also a classic case of statutory interpretation. The great William Blackstone described a Bolognian law declaring "that whoever drew blood in the streets should be punished with the utmost severity."[17] A surgeon comes to the aid of a man who has fallen in a fit, and cuts open his veins. (Let us assume that this was the standard of care in medieval Bologna.) Has the surgeon violated the prohibition? Well, it would *seem* that he has: he has quite literally "drawn blood in the

streets." But don't we know what the lawgivers really intended here? Don't we know that they meant to prevent fighting on the street, not to prevent doctors from saving lives? The jurists concluded that the surgeon had not violated the prohibition.

So intent at a high level of generality, perhaps better described as purpose, tells us a lot. Purpose or intent helps us choose between two possible interpretations of a statute: we should quite obviously choose the interpretation consistent with the general purpose behind the law. But someone might object that in the above example there really weren't two plausible interpretations. The law was clear. The question rather was whether the statute, which literally applied to the situation, should be construed not to apply anyway because it is inconsistent with purpose. Put another way, can purpose sometimes override plain statutory text?

Many would say yes, but only where the application of the literal meaning would be "absurd." Usually the argument goes something like this: "The legislature couldn't possibly have intended that outcome, for it would be absurd, and so we shouldn't apply the rule." This is usually called the absurdity doctrine. But why have one at all? Precisely because words only have meaning in context, and the context includes the intent with which the words are communicated.

There is a neat schema in the academic literature, called the *funnel of abstraction*, that helps crystallize the point. Think of a reverse pyramid (i.e., a funnel), where at the point we have the text. That is the most concrete – the least abstract – datum to which we look to discern meaning. One rung higher on the funnel is the slightly more abstract notion of the specific intent of particular lawgivers, and even more abstract is the general intent or perhaps purpose for which the legislation was passed. If we go even higher, we might have some background principles of law that we look to. These constitute the most abstract rung on the funnel of abstraction.[18]

As one goes up and down the funnel of abstraction, the textual meaning becomes clearer. Suppose we can know the meaning of a word to within a five-degree angle of certainty. One might then look at linguistic conventions, or legislative intent, or statutory purpose, and so forth to see if there are any clues that sharpen our degree of certainty. An analysis of context or purpose might reduce our uncertainty to but

a one-degree angle. We are pretty sure we know what "draw blood on the streets" means, but as we go up higher and higher and then back down along the funnel of abstraction, we better understand what the words mean.

INTERPRETATION AND CONSTRUCTION

To be sure, perhaps this approach makes "meaning" do too much work. After all, can we really say the no-blood-on-the-streets statute "means" there is an exception for doctors? Maybe not. Another way to look at this issue, which is probably a bit more precise, is to recognize that sometimes we can know everything about the "meaning" of a text and it *still doesn't answer our legal question.* For example, a statute might say, "killing another human being is a crime." Does that mean there is no exception for self-defense? That there is no insanity defense? Does it tell us anything about attempts or conspiracy to commit murder? Our statute "means" one thing, but its *legal effect* might go beyond that meaning because of other legal rules that already exist in the legal system – such as rules for self-defense, insanity, attempt, and conspiracy. It may be that there is a valid existing rule providing for exceptions to statutes in emergency situations – and hence our doctor can draw blood on the streets.[19] Thus, it can be consistent with originalism to override the clear meaning of any one legal text in light of other preexisting legal rules in the legal system, such as those providing for exceptions in emergency or absurd situations.

Now, what if we've looked at text, history, purpose, and so on, as well as the effect of the other legal rules in the system, and the answer still isn't clear? What if we have done all the *interpretation* we can do, and the answer is that this piece of legislation *might* be unconstitutional, but it is just as likely that it's constitutional? In the academic lingo, what happens when interpretation "runs out"?

Many originalists would say that we must then enter the realm of *construction.* Originalism may permit a range of plausible meanings. What we do within that range might have to be external to the text. Perhaps at this point we throw up our hands and say we presume the legislation to be constitutional. Or maybe we say if the government