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A PROGRESSIVE DEFENSE OF ORIGINALISM

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In nominating Judge Neil M. Gorsuch to the Supreme Court, President Trump fulfilled a campaign pledge to nominate a person who followed in the tradition of "Originalism" espoused by Justice Antonin J. Scalia. In making this pledge, Mr. Trump affirmed the conventional association between an Originalist approach to legal interpretation and a well defined set of conservative political and social views. To be an Originalist, Trump implied and his supporters assumed, was to be anti-regulation, anti-abortion, anti-welfare, anti-immigrant, anti-minority rights; it was also to be pro-business, pro-"religious freedom," pro-traditional family, and pro-states' rights. The stated expectation was that an Originalist, while endorsing "judicial restraint" and what Scalia sometimes called the "original public meaning" of the Constitution, could be counted on to affirm *Citizens United*, strike down or weaken *Roe v. Wade*, support efforts to tighten the requirements for voting, and protect or expand gun rights. By the same token, judges who adopt the "Living Constitution" approach in which the text is available to contemporary reinterpretation could presumably be relied upon to take the opposite side on all those issues.

For all the certainty many people have on the subject, however, the connection between interpretive method and political orientation is hard to establish. Originalism in particular is not well understood despite a growing bibliography on the subject. For one thing, almost each Justice currently serving on the Court had, in the course of their confirmation hearings, professed a reverence for the Constitution and a pronounced reluctance to "legislate from the bench," both tenets of Originalism. Chief Justice John Roberts's statement during his confirmation hearing that the job of a jurist was "to call balls and strikes" stands as the definitive expression of the judicial attitude of self-nullification that has become required of nominees to the Court. And yet, despite unanimous commitment to what Alexander Hamilton described as the "steady, upright, and impartial administration of the

laws," the Court has divided sharply along partisan lines; indeed, even the conservative faction has occasionally fissured, as when Roberts, to general amazement, voted to sustain the Affordable Care Act in *King v. Burwell* (2015).

That case vividly demonstrates the complexity of the Originalist position. In his majority opinion, Roberts rejected the plaintiff's contention that the phrase "Exchanges established by the State" meant that only individual states, and not the federal government, could establish insurance exchanges. The plaintiffs insisted that this phrase meant that any state that did not establish an exchange could effectively opt out of Obamacare, thereby collapsing the entire program. Conceding some "inartful drafting" in the nine-hundred page Act, Roberts nevertheless determined that the deciding factor was the overall purpose or "intent" of the Act, which is, he contends, quite clear: Congress intended to establish a national system of health care. Scalia's bitter, contemptuous rebuttal, charging the majority with "rewriting the law under the pretense of interpreting it," represents a model of "Textualism," a form of Originalism that insists on the words of the legislation over and even against any speculations about the intention behind those words. For Scalia, judgments about artfulness—or indeed any foray into speculation about the mental states responsible for legislative language—lay outside the proper function of the Court, which is to read the words on the page. "States," he argued, means individual states, not the federal state; and the Court must interpret it this way even if the consequence is that Congress is judged to have eviscerated its own legislation in the act of passing it. The division between Roberts and Scalia in this case marks an internal distinction within Originalism so sharp that many Textualists do not regard themselves as Originalists at all, that term having been polluted by Intentionalists.

The simple procedural necessity Scalia claimed might have been more persuasive if his political commitments, including his general and fierce opposition to the Obama administration, were not so well known. It might have been further strengthened if Scalia had been able to avoid lapses in his Textualist commitments, as when he argued in his major statement on the method in *A Matter of Interpretation* (1997) that "context is everything" in determining the meaning and that context in the case of Constitutional law could be understood by studying the writings of delegates to the Constitutional Convention, which provide insight into "the political and intellectual atmosphere of the time." What is atmosphere but a generalized intentionality that governs the meaning of, but is not directly evident in, the text?

The case for Textualism would also have benefited if Scalia had been able to cite in support of it someone other than Chief Justice Roger Taney. In 1845, Taney established what Scalia regarded as the fundamental Textualist premise, writing that "the law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself," not in any private motives or reasons that the Court might divine. Twelve

years after writing these words, Taney would author the Dred Scott decision, often described as the most egregious decision in the entire history of the Supreme Court. In the court of history, Taney's interpretive scruples have proven to be no defense.

The Dred Scott decision demonstrates as well as any other the dependence of text on context. Described by Cass Sunstein as "one of the first self-consciously 'originalist' opinions from the Supreme Court" (and also as "an abomination"), that decision turned on whether Dred Scott, who escaped from slavery in Missouri and was now suing for his freedom as a citizen of New York, was entitled as a citizen to sue in a U.S. court. In the course of determining that Scott was not a citizen according to the Constitution, Taney, the founder of what would become Textualism, invoked the concept of intention over two dozen times. Slaves "were not intended to be included, under the word 'citizens'"; they were "not intended to be embraced in this new political family . . . but were intended to be excluded from it"; they were not "intended to be included in the general words used in that memorable instrument [the Constitution]," and so forth.

Taney acknowledged that the Declaration of Independence, which had acquired a legal status almost comparable to the Constitution, did seem to suggest that all men were created equal, but he noted that many of the Framers—not to mention twelve of the first fifteen presidents—were themselves slaveholders. Grotesquely, he asserted that they were, moreover, "great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting"—and so they must have intended to frame a document that countenanced chattel slavery for "the unhappy black race." On Taney's reading, the Declaration's fine words about equality were—uncharacteristically for these honorable and eloquent men—inartful, and had to be interpreted away. To his credit, Taney did suggest that the Framers' views on race were by enlightened contemporary standards regressive, and even asserted that the same words about freedom and equality, written in 1857, would have a different meaning. But he insisted that the law as it passed reflected the Framers' intentions, and that the Court was bound by those intentions. Such appeals to the supposed personal intentions of the Framers were common among Southern States' rights advocates. Jefferson Davis, for example, claimed that the Confederate Constitution differed from the "Constitution formed by our fathers" only "insofar as it is explanatory of their well-known intent."

Perhaps Taney would have escaped the harsh judgment of posterity if he had adopted the "Living Constitution" approach. But it is worth noting that this was not actually the way the Dred Scott decision, and chattel slavery as a whole, were overturned. Of course, the Civil War and the Emancipation Proclamation were directly responsible, but the arguments informing the abolitionist movement that preceded those events undoubtedly played a major role in legitimating the final decision before it happened.

The most effective of those arguments were Originalist. In his 1860 Cooper Union speech Abraham Lincoln raised the issue of whether the federal government had the authority to prohibit slavery in federal territories. The Constitution is silent on this point, but Lincoln combed over the historical record of the words and deeds of the Framers, naming names including George Washington's, and drawing conclusions about what they would have thought from their behavior. The Cooper Union speech is celebrated primarily for the conclusion, in which Lincoln directly addresses "the Southern people," but that passage is preceded by and predicated on a series of painstakingly historical and legalistic accounts in which he argues that the meaning of the Constitution must be inferred from the intentions of the founders, and that an account of intention must begin with a holistic understanding of actual persons.

If Lincoln's analysis more closely resembles the intentionalism of Chief Justice Roberts, that of Frederick Douglass (whose contributions were recently recognized by President Trump) takes the Textualist course favored by Scalia. Considering the question of slavery and the Constitution, Douglass actually agreed with Taney that the Framers were men of transcendent gifts for whom inconsistency was inconceivable. In a gesture Scalia would have endorsed, Douglass rejected any appeal to subjective intention, arguing that it would "be the wildest of absurdities, and lead to endless confusion and mischiefs, if, instead of looking to the written paper itself, for its meaning, it were attempted to make us search it out, in the secret motives, and dishonest intentions, of some of the men who took part in writing it." But in a move Scalia might not have approved, Douglass claimed that it was precisely the intention of the Framers to produce a document that transcended its genesis in fractious committee meetings, one that could be endorsed by an entire nation as an expression of their own collective beliefs and commitments. The Framers, in Douglass's view, intended that their subjective states should count for nothing, and that the text should stand on its own. And on its own, Douglass argued, the Constitution was a "glorious liberty document."

At the time Douglass made this claim, very few even among the abolitionists believed it. Far more common was the conviction that the Constitution was a slave document written by slave owners and their Northern enablers. But as Douglass recognized, a rejection of the Constitution put abolitionists on the wrong side of the law, with no recourse other than revolution. Instead, Douglass determined to claim the Constitution for his own arguments by pointing out that the Constitution never rejects the Declaration's assertion of equality, and never mentions the words slave, slavery, or slaveholding. (It did, of course, mention that slaves should count as three fifths of a free person for the purposes of determining representation, a fact Douglass chose not to emphasize.) In a speech delivered at Glasgow in March, 1860, at virtually the same moment as the Cooper Union speech, Douglass described the Constitution in Textualist terms as "a written instrument full and complete in itself," a document to which "no Court in America, no Congress, no President, can add a single word thereto, or take a single word therefrom." The "mere text and

only the text" is, he said, the only legitimate authority, not any "commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading." No slavery in the text meant no slavery in the land. "I am," Douglass said, "for strict construction."

The debates about whether the text or the intention behind it should have primacy troubled the Framers themselves. James Madison, the "Father of the Constitution," wrote in an 1821 letter that he and his colleagues at the Constitutional Convention had tried to write a document that was so lucid and unambiguous that its meaning could be "derived from the text itself"; but as he later realized, changing circumstances revealed points where the implications of the text were unclear. Understanding these points required what Madison called a "key," which he located in the intention behind the text: the import of the words could not be determined unless they were considered as the expression of someone's deliberate will. But whose? Madison rejected in the most emphatic terms the notion that the relevant intentions were those of the Framers such as himself. For Madison, the Constitution was to be considered as the expression of "the people in their respective State Conventions where it recd. all the authority which it possesses." Madison could not be referring only to those who voted to ratify, a number that included many "no" votes; he must have been referring to "the people" in the aggregate, whose will was expressed through their duly elected representatives. For Madison, the text was self-sufficient in most cases, and when it was not, some determination of intention had to be made—the only problem being that intention must be decoupled from any actual person.

Such quibbles might seem irrelevant to the great issues of the day, but they bring into focus a rich national history of reflection on matters of great importance. The Constitution, as Hannah Arendt pointed out, lacked Constitutional warrant. The drafting and ratification of a meta-law that would set parameters and conditions for all subsequent laws was an astonishing act of self-authorization—liberty granting itself authority rather than, as with Magna Carta, authority granting liberty—that was as unprecedented as the assertion in the Declaration that all men were created equal. The bootstrapping result of years of military, and then intellectual and political dispute, the Constitution in its magisterial simplicity absorbed and annulled the turbulence that preceded and even attended the inscription of its pristine sentences. This history, the glory of the nation, provided the context for the original public meaning of the Constitution. So while the words reposing on the page constitute a constraint on futurity, they bear within themselves the gathered energies of a mighty act of self-emancipation founded on the radical premise of equality and including a list of individual rights—leaving to futurity the question of what all that might mean.

Having just passed through a war of colonial insurrection, the Framers surely did not intend that social, intellectual, or political progress or experimentation should cease at the point of ratification in 1787. Nor did they wish to set themselves up as the sole or final authority on questions of justice. Everything about the Constitution—

the checks and balances; the division of powers; the distinction between state, local, and federal governments—has the effect of distributing responsibility and authority as widely as possible, ensuring that the processes of democratic deliberation that produced the Constitution would continue after its ratification. In every detail, the document suggests ongoingness, beginning with the simplicity of its language. As Douglass said, "I hold that every American citizen has a right to form an opinion of the Constitution, and to propagate that opinion, and to use all honorable means to make his opinion the prevailing one. . . the Constitution, in its words, is plain and intelligible, and is meant for the home-bred, unsophisticated understandings of our fellow-citizens. . . . I take it, therefore, that it is not presumption in a private citizen to form an opinion of that instrument." The citizen's right to construal was surely part of the Constitution's original public meaning. Why else submit it to a popular vote for ratification?

No method will free anyone, much less a Justice of the Supreme Court, from the hard task of interpreting the law, which is both the most commonplace and the highest function of citizenship. At the same time, no party or cause is the inevitable beneficiary of any method. The problem for Originalists, Living Constitutionalists, and everyone else is always the same: what does the text mean for us today, in this circumstance? We cannot escape the text any more than we can absent ourselves from the here and now, which provides the occasion for reading it. All texts, on being read, are both "dead," as Scalia sometimes put it, and "living," as his opponents often insisted. This paradox may seem to condemn the nation to perpetual uncertainty and dispute, but it has also contributed to the character of the nation as a society both anchored in its origin and yet always in search of itself.

As an Originalist, Judge Gorsuch must, of course, know all this.

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Geoffrey Harpham is a Visiting Scholar and Senior Fellow at the Kenan Institute for Ethics. He was trained as a literary scholar, but has worked in a wide range of fields within the humanities. His abiding concerns have been ethics and literary study, the concept of language, the work of Joseph Conrad, and, more recently, a variety of issues relating to educational theory and practice, especially the humanities. His more recent books are *Language Alone: The Critical Fetish of Modernity*, *The Character of Criticism*, and *The Humanities and the Dream of America*. He is the co-author, with M. H. Abrams, of *A Glossary of Literary Terms*. From 2003-15, he was the director of the National Humanities Center in Research Triangle Park.

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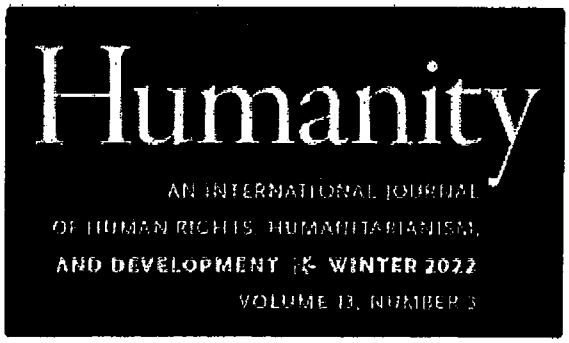

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