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Originalism Without Obligation

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ORIGINALISM WITHOUT OBLIGATION

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INTRODUCTION

I am truly delighted that Boston University School of Law is hosting a conference on Abner Greene’s *Against Obligation*¹ and Michael Seidman’s *On Constitutional Disobedience*.² Both books launch powerful and much-needed broadsides against the idea of a political obligation to obey the U.S. Constitution, and more generally (whether or not the authors embrace these implications) against the very idea of a political obligation to obey state authorities. I fully agree with both authors that the arguments normally made in favor of a duty of obedience to the Constitution, and by extension to state authorities of any kind, are remarkably – and one might even say transparently – weak.³ I rather suspect that everyone knows this but prefers not to talk about it too much in polite company.

That weakness should not be surprising, especially in the context of obedience to alleged constitutional authority. It is perhaps conceivable that an objectively correct moral theory could somehow lead to the conclusion that lockstep adherence to the Constitution of the United States is the optimum moral strategy at some given point in time.⁴ But any such argument, as is true of any moral argument of any kind on any subject, must begin with an objectively correct moral theory or the argument goes nowhere. Normative arguments without such an objectively correct foundation might or might not be fun or interesting to ponder, and could be rhetorically effective against (as Obi-Wan might say) the weak-minded, but they are intellectually empty. It is fair to say that no defenders of adherence to the Constitution of whom I am

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¹ ABNER S. GREENE, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012).

² LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

³ See GREENE, *supra* note 1, at 2; SEIDMAN, *supra* note 2, at 15.

⁴ Indeed, outside the context of a scholarly discussion, where the standards of analytical rigor appropriate to the academic enterprise do not hold sway, I might even be tempted to make such an argument about fidelity to constitutional authority at the present moment in time, though it would be a very soft argument even if fully developed.

aware have successfully developed any such objectively true moral foundation for their normative claims,⁵ and accordingly those claims can appropriately be dismissed as hot gas. The same is true, of course, of legal academics who construct normative claims in defense of things other than adherence to the Constitution; without an objectively true moral theory to back them up, such claims must also be relegated to the upper atmosphere. The case against constitutional obligation – or more precisely against *demonstrated* constitutional obligation – is thus a particular application of the more general case against (demonstrated) political obligation. The moral of the story is simply that there is no good substitute for a foundationally sound argument, in normative political theory as in any other field.

Professor Abner Greene pulls back from the full breadth of this conclusion.⁶ He frames his attack on constitutional obligation as an attack on *deference to original meaning* rather than as an attack on *deference to the Constitution* as such. Professor Greene argues “against an obligation to interpret the Constitution on the basis of past sources of (purported) authority,”⁷ but he urges that his “position against diachronic commitmentarianism as a matter of constitutional interpretation does not extend to . . . an anti-constitutional position.”⁸ Rather, he argues, one can still have binding constitutional law “through understanding what the higher-law principles mean today, or during the current generation, rather than what they meant ages ago.”⁹

All of this is true: one could certainly choose, as politically binding norms, current understandings of the Constitution. By the same token, one could also choose, as politically binding norms, current (or past) understandings of the United Nations charter, the Constitution of the Confederate States of America, or the Libertarian Party Platform of 1980. All of these documents, and many more besides, can serve as anchors for legal meaning, can be interpreted in either original or modern terms, and underwent some kind of ratification

⁵ This certainly does not mean that it cannot be done. I am an objectivist – in both the small “o” and large “O” senses of that term – and believe quite firmly in foundationally grounded moral truths. It means only that no such development has yet been forthcoming in the relevant legal scholarship.

⁶ In focusing my attention on Professor Greene, I mean no slight to Professor Seidman. Quite to the contrary: I am not discussing Professor Seidman’s book because I agree with too much of it to offer any useful comments. Indeed, I have found more with which to disagree in many works that I have authored than I find in *On Constitutional Disobedience*. I do not necessarily agree with Professor Seidman that non-constitutional normative discourse is likely to be any better than constitutionally grounded normative discourse, see SEIDMAN, *supra* note 2, at 9; hot gas is hot gas whether or not it has the word “constitutional” somewhere nearby. But he is right that constitutional discourse, whenever it ventures beyond positive statements about meaning, is generally of little value. *See id.* at 141-42.

⁷ GREENE, *supra* note 1, at 206.

⁸ *Id.*

⁹ *Id.* at 207.

process. If the goal is broadly to bind “the day-to-day lawmaking and execution of our agents through higher-law constitutional principles,”¹⁰ then even assuming (contra Professor Seidman) that one requires a text, or even a ratified text, for this task, there is nothing in Professor Greene’s book to explain why that text needs to be the Constitution of the United States.¹¹

Professor Greene knows all of this perfectly well. “There is a separate question,” he observes, “why this particular constitutional text should matter to anyone.”¹² His answer to this crucial question is twofold. First, he suggests that even if there is no general reason to pay attention to the Constitution, “[s]ome aspects of our Constitution . . . may be defensible as a retail matter.”¹³ But if true, that would only justify following those specifically defensible provisions, perhaps even by incorporating them into a new document. It says nothing about the normative merit of following the Constitution qua the Constitution. Indeed, those provisions’ presence in the Constitution would be utterly irrelevant to their justification: whether the provisions are justified on either moral or coordination-based grounds,¹⁴ those grounds operate independently of the existence, much less the authority, vel non of the Constitution as an integrated document. Provisions adopted retail might just as well be found in the Confederate Constitution (which actually contains most of the provisions also found in the U.S. Constitution), in a fortune cookie, or in Professor Greene’s scholarship.

But of course people, both in and out of the academy, seem as an empirical matter to be more interested in the U.S. Constitution than in the Confederate Constitution, fortune cookies, or (no slight at all intended and hopefully none taken) Professor Greene’s scholarship. That leads to Professor Greene’s final justification for paying attention to the Constitution: it is simply a brute fact that people talk a lot about the Constitution, and that is enough to make the document relevant, at least for some purposes. He writes that “[w]e can witness the sociological fact of acceptance and compliance with the secondary rules of the Constitution and the primary rules enacted thereunder We can see these textual limits as our limits, and . . . proceed to the (admittedly complex) task of determining the meaning of the often abstract text.”¹⁵

Here I think Professor Greene is on absolutely solid descriptive ground, but here is also where his argument against deference to originalism goes astray. Once one starts, for whatever reason, interpreting the Constitution (“determining the meaning of the often abstract text”), originalism takes over as the uniquely correct methodology. One can certainly reject originalism, but

¹⁰ *Id.*

¹¹ See Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1569-70 (2012).

¹² GREENE, *supra* note 1, at 208.

¹³ *Id.*

¹⁴ See *id.*

¹⁵ *Id.* at 208-09.

then one must also reject the enterprise of constitutional interpretation (which is not at all necessarily a bad thing to do).¹⁶ That does *not* mean that one must decide real-world cases in accordance with the Constitution's original meaning, because to say that originalism is the correct way to ascertain the Constitution's meaning says nothing about whether one ought, as a normative matter, to act in deference to the Constitution's meaning. Professor Greene is conflating questions of *interpretation* with questions of *adjudication*.

In this brief Essay, I will first clarify the distinction between *interpreting* the Constitution and *following* the Constitution – a distinction that has bedeviled originalists at least as much as it bedevils Professor Greene. Sound interpretation involves the ascertainment of objective meaning; sound following of some normative guide, whether the Constitution or anything else, involves the ascertainment of objective moral truth. Those are very different intellectual enterprises calling for very different methods and skills. Second, I will try to explain why sound interpretation *must* consist of a search for original meaning. That is, *if* you want to follow the Constitution's meaning, *then*, as a hypothetical imperative, you must follow the Constitution's original (hypothetical public) meaning. Throwing out the originalist bathwater necessarily carries the constitutional baby in its wake.

I. DISCOVERY AND DECISION

Originalists as a class are notoriously obscure about exactly what originalism involves.¹⁷ Most of the scholarly attention has focused on figuring out whether originalism involves reference to the Framers' intentions, the ratifiers' intentions, actual public understandings, hypothetical public understandings, or some combination thereof – in other words, figuring out what kind of evidence counts (and how much it counts) toward establishing constitutional meaning.¹⁸ There is, however, a much more basic ambiguity

¹⁶ Thus, I am among those referenced by Professor Greene who believe “that as a conceptual matter, the interpretation of legal text involves the unearthing of the purpose or intention of the framers/ratifiers of such text,” *id.* at 163, and that “[o]ne might engage in some other project in which one fleshes out (say) the Equal Protection Clause of the Fourteenth Amendment without adherence to original understanding, but that project would not properly be called constitutional interpretation.” *Id.* This is all correct, with the very important proviso that the relevant authors (“framers/ratifiers”) whose intentions must be uncovered might well be hypothetical rather than historically real authors, so that the search for purpose or intention need not be a search for concrete mental states of actual people. Specifically, the relevant “thoughts” for constitutional interpretation are the “thoughts” of the hypothetical reasonable person of 1788. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006).

¹⁷ As with virtually all class-wide generalizations, this one has its exceptions. Mike Paulsen and Steve Calabresi, among others, can consider themselves absolved.

¹⁸ I have elsewhere argued to tedium that this investigation, while crucial, is radically incomplete, because any theory of interpretation must also prescribe a standard of proof that identifies how much evidence is necessary to support a truth claim about documentary

about originalism that is too often unrecognized even by originalists: is originalism a theory of *interpretation* or a theory of *adjudication* (or perhaps both)? The two can be, but need not be, contingently related, but they are quite different kinds of theories and involve quite different intellectual operations to develop properly.¹⁹

Originalism-as-interpretation is a theory of *meaning*; originalism-as-adjudication is a theory of *action*. Theories of meaning are evaluated by reference to positive criteria of accuracy in discerning communicative signals; theories of action are evaluated by reference to normative criteria of justice. Evidence for a conclusion under one of these kinds of originalism could, but certainly need not, constitute evidence for a conclusion under the other kind. And similarly, valid critiques of one kind of originalist operation could, but certainly need not, constitute valid critiques of the other.

Professor Greene has ably pointed out that the standard normative arguments for originalism-as-adjudication – that is, for the proposition that real-world decisions should be made on the basis of attempts to discern the Constitution’s original public meaning – lack sound foundations.²⁰ To be sure, those arguments are no worse than the arguments for anything-else-as-adjudication that the legal academy has to offer, which also lack demonstrably sound foundations, but they are no better. What Professor Greene leaves out, however, is the crucial fact that much of the case for originalism-as-adjudication is based upon normative claims about the appropriate roles of various decisionmaking institutions (usually, but not invariably, courts) rather than on deep theories of meaning or interpretation. Those normative claims could be advanced with utter confidence by someone who believes that originalism-as-interpretation is completely wrong as a theory of meaning, so criticizing those normative theories says nothing about the value of originalism as an interpretative method.

Simply put, one need not believe that originalism is the best way to ascertain the Constitution’s meaning to believe that originalism is the best way to make normative operational decisions about governance under the Constitution, and vice versa. Indeed, given that all real-world normative decisions are made under quite serious constraints of time and resources, it would be surprising if the “best” adjudicative theory, however “best” is defined, involved straightforward application of any fully specified, analytically precise theory of interpretation rather than some stylized, simplified model that trades off some measure of interpretative accuracy (even by its own lights) for some measure of savings in decision costs. Accordingly, originalism-as-adjudication is very unlikely to replicate precisely the results from rigorous application of

meaning. See Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411 (1996); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992).

¹⁹ The same confusions plague non-originalist theories as well, but they are not my concern.

²⁰ GREENE, *supra* note 1, at 162.

originalism-as-interpretation, even for those who subscribe to both kinds of theories. Interpreters in principle have unlimited time and resources to explore problems of meaning, and any given interpreter can always put off an ultimate decision or simply clear a path for future interpreters to pursue. Adjudicators have no such luxury. They have to decide, and they have to decide given strictly limited time and resources. Even a decision not to decide leaves the status quo in place and therefore amounts to a loss for the party seeking positive action from the adjudicator. Adjudicative theories therefore need decisionmaking tools as part of their arsenal that interpreters do not require. The task of devising a normatively sound adjudicative theory may or may not involve application of any particular interpretative theory, but it is virtually certain that it will not *exclusively* involve application of any particular interpretative theory, unless that interpretative theory completely specifies all of the normatively appropriate decision tools and explains how to trade them off against interpretative accuracy.²¹

Similarly, signing onto originalism-as-interpretation does not, by itself, say anything at all about the normative desirability of signing onto originalism-as-adjudication. To say that the Constitution means *X* does not entail that actors making decisions in the real world should act on the basis of *X* (or claim to be acting on the basis of *X* while really acting on the basis of *Y*). By the same token, one could think that originalism-as-interpretation is completely wrong as an interpretative theory but believe that adjudicative actors should behave *as though* it were true. Perhaps originalism-as-adjudication reaches better results, or has a better results-to-decision-costs ratio, than other theories that are interpretatively superior. As I have said elsewhere:

One could perfectly well believe that originalism is the interpretatively correct way to understand the United States Constitution, but doubt whether decision makers (such as courts) should make real-world decisions based on that understanding. Similarly, one might believe that originalism is inferior to some other methodology as a tool for ascertaining constitutional meaning, but believe, for institutional and normative reasons, that it is the best tool for resolving real-world disputes in which the Constitution is invoked. And, of course, one might believe that originalism is both a sound interpretative methodology and an appropriate decision making tool – albeit for very different reasons.²²

And to complete the picture, one could, as I have already said here, believe that originalism-as-interpretation is correct and that originalism-as-adjudication is also correct, but believe that the enterprise of adjudication

²¹ I have argued elsewhere that originalism actually comes close to meeting this standard by interpretatively prescribing allocations of burdens of proof for adjudication, but does not quite close the deal because it cannot prescribe a standard of proof for interpretative claims. See Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225 (2012); Lawson, *Legal Indeterminacy*, *supra* note 18. Nothing in my analysis here depends on that conclusion.

²² Lawson, *supra* note 11, at 1155-56.

requires use of a modified rather than pure version of originalist interpretative theory if securing answers from the pure version of the theory is too costly.

All of this means that Professor Greene's critique of originalism-as-adjudication says nothing whatsoever about whether originalism is the right way to interpret the Constitution. It says that advocates of originalism-as-adjudication have not made their normative case, and that is true as far as it goes, but it is *only* true as far as it goes. Note that all of the arguments for an interpretative obligation to originalism that are addressed and rejected by Professor Greene – democratic legitimacy, citizen duty, and stability through settlement²³ – are arguments for originalism-as-adjudication. And when Professor Greene challenges the notion – which I defend below – that interpretation *must* be originalist by definition, his challenge is grounded solely in normative concerns about adjudication.²⁴

In sum, Professor Greene has presented a powerful case against the arguments for originalism-as-adjudication that defenders of such a theory have put forward. But this is just a special case of the more general observation that normative arguments put forward by legal scholars are quite likely to be really lousy arguments.²⁵ It leaves open whether constitutional interpretation, to be done well, must be originalist.

II. WAS HUMPTY RIGHT ALL ALONG?

Suppose that someone has written a document – let us say an agency agreement authorizing an agent to contract for the purchase of 10,000 computer chips – in a foreign language, and we want to know what the document says. One solution is to summon a skilled interpreter. If that interpreter is doing his or her job well, he or she will attempt to discern the communicative intentions of the writing. The good interpreter will *not* attempt to reconstruct those intentions in light of modern problems or concerns, identify the highest aspirations that can be drawn from the writing, or try to integrate the document into a hypothetical chain novel over the course of generations. An interpreter who tried that kind of stunt would be fired on the spot.

The fact that the document appears to be an agency instrument will establish certain background conventions and assumptions that presumptively frame the

²³ See GREENE, *supra* note 1, at 161-62.

²⁴ See *id.* at 163 (“One can’t simply posit that constitutional interpretation must be intentionalist in this way; one needs an argument, e.g., democratic theory requires interpreters, as agents, to adhere to framers’/ratifiers’, as principals, understanding, or, e.g., we must tether current interpreters to original understanding or else they will run riot with their own subjective conceptions of political justice.”).

²⁵ “It is conceivable that the ethical, epistemological, and metaphysical problems of the ages will be solved by an article in a[n] . . . English-language law journal. But I rather doubt it.” Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL’Y 727, 778 (1988).

specific communications in the instrument. Agency instruments are typically written in a different style and with some different standard word usages than poems or shopping lists. Moreover, because the instrument is designed to inform people other than the author of the instructions given to the agent (it is not simply a memo to self or a diary entry), the natural assumption is that the communicative intention of the author is to employ the *public* meaning of the words used in the instrument. Perhaps the author of the document is an inept communicator and has failed utterly at this task, but that conclusion can only be reached after attempting to fit the document within the ordinary communicative conventions associated with agency instruments. And finally, if the “author” of the agency instrument is in fact a group of people rather than a single person, the conceptual problems associated with the idea of a “group mind” require that the instrument be read *as though* it was authored by a hypothetical single individual.²⁶

The bottom line is that when one is interpreting a document that appears to be an externally directed communicative instrument, the enterprise of interpretation entails discerning the public meaning of the document, where the idea of “public meaning” may call into play certain conventions appropriate to certain kinds of documents. To interpret a communicative instrument is to seek to ascertain its meaning. Otherwise, one simply is not engaged in the enterprise of interpretation. (There are many other enterprises beyond the ascertainment of meaning in which one can engage when confronted with a document, but they are not interpretation.) This seems uncontroversial in the case of virtually every document, including law review articles, which everyone in the legal academy ever encounters. Just imagine how one would “interpret” the Rhode Island corporate charter of 1663 if one wanted to write a research paper on the subject. *That* is how one interprets the U.S. Constitution of 1788. One employs a methodology of original public meaning. One can argue about various details of that methodology, and one can raise interesting (and perhaps difficult) empirical questions about the kinds of conventions that underlie various kinds of documents, but those arguments all take place within a broad framework of a search for the original public meaning. Of course, it is possible for the original public meaning of a document to instruct readers to apply some methodology *other* than original public meaning (“construe this agency instrument in light of whatever problems and concerns happen to exist at the moment of interpretation in order to achieve the broad purpose of securing the purchase of 10,000 computer chips”),²⁷ but one would reach that conclusion by applying an original public meaning methodology in the first instance.

²⁶ For a more elaborate discussion of these basic principles of communication through the jointly authored written word, see Lawson & Seidman, *supra* note 16.

²⁷ See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009).

All of this is in the form of a hypothetical imperative: *if* you want to know what an agency instrument (which the U.S. Constitution gives every indication of being²⁸) means, *then* you employ a methodology of original public meaning. If you are doing something other than ascertaining meaning, perhaps other methods will serve those tasks better. But then one needs to identify those tasks.

To be sure, sometimes interpreters are quite clearly called upon to employ methodologies other than the search for original public meaning to perform important tasks. When Pharaoh pulled Joseph from prison to interpret dreams, Pharaoh was not looking for someone to explain what kind of animal was represented by a mental image of suddenly cannibalistic bovines. The act of interpretation in that case was something quite different from the ascertainment of original public meaning. Agency instruments, though, are not dreams, and neither is the Constitution of the United States. If you want to know what instruments of that kind say, you must determine their original public meaning.

Is this cheating? Am I just *defining* interpretation of a certain kind of document to be a search for original public meaning? I suppose so, though to be precise, I am defining *good* interpretation of a certain kind of document to be a search for original public meaning. One can always use the word “interpretation” to mean anything that one likes, including something other than a search for original public meaning, as long as the definition is made clear. My claim is only that if one is not searching for original public meaning, one will not accurately ascertain the meaning of the document. One will fail to participate successfully in the act of communication that the document is attempting to perform. It cannot be emphasized too often (I have learned) that there is no normative conclusion lurking in this simple observation. One can always choose to reject a document’s offer of communication, with no consequence more dramatic than an indication of a hint of rudeness to the author. But if one is not communicating, one is not ascertaining meaning. Here is the acid test of whether I am simply making up a fiat definition of meaning: if someone truly believes that the right way to ascertain the meaning of the Rhode Island corporate charter of 1663 is something other than the discovery of original public meaning, and would be willing to have their child turn in a research paper in a history class based on that other methodology, I will certainly listen to the argument.

For Professor Greene, this means that *if* he wants constitutional meaning to be part of his project, he cannot dispense with originalism – not because we owe some cosmic moral debt to the past, but simply because that is how you

²⁸ I am profoundly indebted to Robert Natelson for this basic and crushingly powerful insight. The Constitution is not a statute, a treaty, a compact, or a chain novel. It is a power of attorney. For an introduction to the agency law understanding of the Constitution, see Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 84 (2010).

ascertain the meaning of a communicative instrument such as the Constitution. Without originalism, Professor Greene can perform many activities other than interpretation upon the Constitution (such as construction), or he can perform the activity of interpretation upon something other than the Constitution (such as some set of social practices). But the Constitution will still mean what it means.