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ARTICLE

**ORIGINALISM AND LEGITIMACY:
A REPLY TO PROFESSOR POWELL**

ROBERT J. DELAHUNTY*

Originalism, as Professor Powell has just shown, is an answer to a question. At its core, originalism is an answer to a question about *legitimacy*. As an answer to a question of this *constitutional* magnitude, it has two aspects—jurisprudential and political. Professor Powell has rightly focused us on the jurisprudential side of the legitimacy question. In my brief remarks, I would like to call attention to the political side as well.

The legitimacy question has a long history in American constitutional culture. It might be said to date back, in at least some form, to the early period of the Republic. To simplify, the question may first be posed as: how can constitutional review by the courts of actions by the political branches be shown to be consistent with American democracy? *Marbury v. Madison* can be read as an early answer to the question in this straightforward form.¹ *Marbury*'s answer is, very roughly, based on an analogy between the sovereign "People" and the federal government, and the principal-agent relationship. The People, as principal, has delegated the work of discharging its collective business (or much of it) to its agents, the three branches of the federal government. (This is broadly what it means for government to be "representative.") But the costs to a principal of monitoring the actions of its agents—the problem of agency costs—can be prohibitive. As a practical matter, the People cannot be unremittingly "engaged" in political activity—there would be no civil society if it were. Elections can only be episodic and intermittent; mass mobilization and activism must, of necessity, be rare. To surmount the problem of agency costs, therefore, the People, in its Constitution, has designated one of its agents—the federal courts—to monitor the activities of the other two, so as to ensure that they exercise only the limited powers that the People has assigned to them. In discharging that function, the courts do not frustrate

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1. 5 U.S. 137 (1803).

the popular will—or at least the deeper popular will embodied in the Constitution—but give it continuing effect. Such is the (or an) argument of *Marbury*.

The legitimacy question, as Professor Powell has argued, returned to center stage in the circumstances of the 1960s, 1970s, and 1980s: cases like *Eisenstadt v. Baird* posed the question in sharper and more urgent form.² The federal courts, charged with policing the political branches' observance of constitutional limits, seemed to many to be transgressing the limits the Constitution had imposed *on them*. Marshall's answer to the problem of agency costs had given rise to another problem: the difficulty of controlling the judicial agent. How was this agent to be policed, since it seemed beyond the power or will of the other branches to do so? (Judicial impeachments were not an available corrective.) The legitimacy question that originated in the 1960s had the two aspects—jurisprudential and political—mentioned above.

First, the doctrinal underpinnings of cases like *Eisenstadt* seemed extremely weak. They seemed to be driven entirely by a form, indeed a rather crude form, of the prevailing legal realism.³ For decades before the 1960s, legal realism had carried out a work of jurisprudential deconstruction. It had taught, in substance, that what had passed for legal reasoning was a sham. Judges did not base their decisions on legal doctrines, distilled from texts or precedents. Rather, they enacted policy preferences—preferences that were usually concealed, even from the judges themselves, by the façade of doctrinal formalism.⁴ As realism became more prevalent, it also became more unapologetic. Rather than purporting to reason their way to their conclusions from doctrinal premises, the courts more and more openly rested their decisions on naked policy choices.

Originalism was offered by exponents like Raoul Berger⁵ and Robert Bork⁶ as a jurisprudential alternative to legal realism. (It was also offered as

2. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); H. Jefferson Powell, *On Not Being “Not an Originalist,”* 7 U. ST. THOMAS L. J. 259, 268 (2010).

3. On the background of legal realism, see generally LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986).

4. There are many accounts of “formalism,” but in one formulation, the core of the idea is that law is autonomous, with its own distinctive principles, reasoning processes, and modes of establishing facts. See Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2114–18 (2003). In another view, the core of formalism is “the concept of decisionmaking according to *rule*.” Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

5. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

6. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

an alternative to the legal process teachings that were advocated by Justices like Felix Frankfurter⁷ and legal scholars like Alexander Bickel⁸—teachings that the early originalists considered ineffective in combating realism.⁹) Originalism (like legal process thought) was meant to affirm the critical, legitimizing distinction between legal reasoning (which courts do) and policy deliberation (which the elected branches do).¹⁰ Over and above that, however, originalism (in opposition to legal realism) was intended to provide the substantive premises from which the reasoning in constitutional cases should begin. Whatever the defects of originalism, it remains—as Professor Powell suggests at the end of his lecture¹¹—a powerful counter or antidote to realism.

Second, originalism had, and has, a political aspect. It is no accident that originalism is usually accompanied by belief in judicial “restraint” or

7. See, e.g., Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

8. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). For a marvelous appreciation of Bickel and the relationship of his thought to Frankfurter’s, see Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521 (1976).

9. For a survey of the work of the “legal process” school and its relationships to both realism and to originalism, see JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* 47–66 (2005).

10. Justice Frankfurter expressed this idea in a manner that originalists would certainly find congenial. See *Trop v. Dulles*, 356 U.S. 86, 119–20 (1958) (Frankfurter, J., dissenting).

What is always basic when the power of Congress to enact legislation is challenged is the appropriate approach to judicial review of congressional legislation. All power is, in Madison’s phrase, “of an encroaching nature.” *Federalist*, No. 48 (Earle ed. 1937), at 321. Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint. When the power of Congress to pass a statute is challenged, the function of this Court is to determine whether legislative action lies clearly outside the constitutional grant of power to which it has been, or may fairly be, referred. In making this determination, the Court sits in judgment on the action of a coordinate branch of the Government while keeping unto itself—as it must under our constitutional system—the final determination of its own power to act. No wonder such a function is deemed “the gravest and most delicate duty that this Court is called on to perform.” Holmes, J., in *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S.Ct. 105, 107, 72 L.Ed. 206 (separate opinion). This is not a lip-serving platitude.

Rigorous observance of the difference between limits of power and wise exercise of power—between questions of authority and questions of prudence—requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one’s own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court’s giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.

Id. at 119–20.

11. Powell, *supra* note 2, at 280.

opposition to judicial interventionism or “activism.” As a doctrine with a political aspect, originalism intends to reinvigorate the democratic political process. Originalism seeks to remit or restore decision-making to the electoral and legislative processes across a wide spectrum of cases—especially in the area of social policy—in which law since the 1960s has been made by the federal courts. Much of the force and attractiveness of originalism, as I see it, derives from its tacit belief in the supremacy of politics over law in American constitutional democracy.

Nonetheless, even if one acknowledges the interest and seriousness of originalism as a jurisprudential answer to legal realism (as Professor Powell does¹²) or finds it attractive for its potentially restorative effects on democratic politics (as I do), one might well decide (as Professor Powell has,¹³ and as I am inclined to do) to be, merely, *not* a non-originalist. Professor Powell has outlined a compelling jurisprudential case against pure originalism—a tendency that he, as a “conservative” American constitutionalist, regards as aberrant, impoverishing, utopian, and “radical.”¹⁴ I hope Professor Powell will not be in the least offended if I compare his view of the American Constitution to Jane Jacobs’ view of the American city.¹⁵ Just as Jacobs argued eloquently on behalf of teeming, vital, unplanned, and human-friendly urban spaces over the radical, simplified, and anti-humanist architecture of Le Corbusier, so Professor Powell embraces the eclectic, rich, complex, and polyphonous tradition of American constitutional and common law over the stark simplicities of the originalist project.

But I think that merely *not* being a non-originalist will fail, in the end, to be a stable, defensible position. For one thing, the role of constitutional review in American public life has surely become far more pervasive than it was at the beginning of the Republic, or indeed at any time up to the 1960s. The federal courts have absorbed more and more of the responsibilities of general governance than was ever true in the past. Our courts manage prisons, set war policy, monitor public school curricula, and determine how confidential the relations between parents and their pregnant teenage daughters are to be. Were any of these ever counted among the courts’ traditional functions? I think that Professor Powell’s emphasis on the continuities of the American constitutional tradition¹⁶ tends to discount the

12. *Id.*

13. *Id.* at 259.

14. *Id.* at 272.

15. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961). This enormously influential book is a critique of twentieth century “modernist” urban planning. Jacobs scathingly attacked reliance on deductive reasoning to find principles on which cities could be planned. One of her leading targets was the French planner Le Corbusier and his vision of a “Radiant City.” *Id.* at 21–24 (describing Le Corbusier’s “Radiant City”).

16. Powell, *supra* note 2, at 274.

importance of this vast expansion of the judicial role. Even in the *longue durée*, there can be profound change.

Further, the problem is not merely the courts' assumption of untraditional roles that draw them deep into the sphere of the political: at a deeper level, the question is whether the tradition to which legal process theory appealed even *survives*. According to Robert Bork—Alexander Bickel's close friend and colleague—Bickel himself was inclined to conclude that it had not:

[Bickel] counted on a judicial tradition of modesty, intellectual coherence, the morality of process, to make judicial supremacy possible. Those traits have often been lacking on the Court and [Bickel] felt they may have been damaged beyond repair by the Warren Court. We have never had a rigorous theory of judicial restraint; for a time we had a tradition; now that is almost gone.¹⁷

Where does that leave us, if we are neither originalists nor, altogether, non-originalists? That would be a proper theme for a law review article of a thousand footnotes. But let me at least indicate where I would go.

In the *Carolene Products* footnote, Chief Justice Stone planted a seed whose full growth, I believe, has still to be seen.¹⁸ The New Deal Court had broken decisively (or so the legend has it¹⁹) with the Old Court: a youthful legal realism had displaced a worn-out legal formalism, and the democratic energies released by Franklin Roosevelt had swept away the constitutional structures in which the “Four Horsemen of the Apocalypse”²⁰ on the Court had barricaded themselves. But as Stone shrewdly saw, the Court could not confine itself to rubber-stamping the outcomes of the political process. It had a vital, in fact indispensable, role to play in American public life. It could at least help to ensure that the political process worked honestly and efficiently. It could protect robust speech; it could shelter disenfranchised or permanently outvoted minorities; it could purify and vitalize democracy in ways that the political branches could not. (Seen in this light, *Brown v. Board* is not a doubtful decision—as it must be for originalists²¹—but a

17. ROBERT H. BORK, *The Legacy of Alexander M. Bickel*, in A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 684, 690 (2008).

18. The claim that the *Carolene Products* footnote might still provide new directions for constitutional jurisprudence was expounded by Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718 (1985). Ackerman argued, correctly in my view, that the core ideas of the footnote would need to be rethought to fit contemporary circumstances.

19. For a revisionist perspective, see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998). For a post-revisionist view, see Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).

20. For further information on the “Four Horsemen,” see THE SUPREME COURT: THE PURSUIT OF JUSTICE 246–48 (Christopher Tomlins ed., 2005).

21. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A*

necessary and ineluctable one.) I do not think that either the committed originalists on today's Supreme Court, or the committed non-originalists (possibly excepting Justice Breyer) see the judicial role in this light. But I think that it may be time to close the debate on originalism, and turn the constitutional conversation in this direction instead.

I can give here only the briefest sketch of how a *Carolene Products*-based theory could change the ways in which constitutional cases are argued and decided. Let me give two recent examples. This Term's major campaign finance case, *Citizens United v. Federal Election Commission*,²² featured a skirmish between Justice Stevens and Justice Scalia over the "original understanding" of the First Amendment with regard to corporate speech. Justice Stevens sought to show that the Framers "took it as a given that corporations could be comprehensively regulated in the service of the public welfare."²³ He did, however, hedge his conclusions, saying that "[t]o the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position."²⁴ Justice Scalia responded that "modern corporations might not qualify for exclusion [from First Amendment protection]. Most of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed."²⁵ While both Justices seemed to think that the discussion of the Framers' views of corporations was something of a distraction, they both devoted a substantial part of their opinions to considering those views—the effect, no doubt, of originalism. But the question of what the Framers would make of the speech rights of the modern business corporation—even if one could give a plausible answer to it—is of little use in deciding a case such as this. On the *Carolene Products* approach, however, the central issues would be framed in a more direct and probing way: Does the Congressional ban on the use of corporate or union general treasury funds to make certain "electioneering communications" within set periods before a primary or an election protect the political process from the distorting effects of corporate wealth? Or is the statute instead a device for sheltering incumbent office-holders from vigorous electoral competition, or for tilting the field in favor of the major *media* corporations as against other corporate entities? The central focus of the Court's review would thus be on whether the statute tends to open up or constrict the political process.

The pending litigation over California's "Proposition 8" provides

Response to Professor McConnell, 81 VA. L. REV. 1881 (1995); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

22. 130 S. Ct. 876 (2010).

23. *Id.* at 949–50 (Stevens, J., concurring in part and dissenting in part).

24. *Id.* at 948 (emphasis added).

25. *Id.* at 926 (Scalia, J., concurring).

another example. Did California voters violate the federal Constitution by adopting a State constitutional amendment recognizing only marriages between a man and a woman?²⁶ Viewing the issue through the *Carolene Products* prism, the resolution of the case would largely turn on whether the class of homosexuals constitutes something similar to a “discrete and insular minority”? More exactly, the question would become whether that group suffers from some kind of inherent liability in the political process that marginalizes or isolates it, thus disabling it from forming part of an electoral coalition that has a fair chance of winning victories in matters of concern to that group?²⁷ (The Supreme Court may have assumed so in its otherwise opaque decision in the *Romer* case.²⁸) In answering that question, the Court could evaluate such matters as the amount and sources of the expenditures on both sides of the issue in the California ballot initiative.²⁹ It could also consider the views of some public choice theorists that small, homogeneous groups may be disproportionately *powerful* in political campaigns.³⁰ Once again, the focus of constitutional review would be on eliminating structural flaws in the democratic process. I leave with the question: Is this not a better answer to the problem of legitimacy than either originalism or legal process theory?

26. See Wikipedia.org, California Proposition 8 (2008), http://en.wikipedia.org/wiki/California_Prop_8 (last visited March 23, 2010).

27. See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1015 (1985) (Brennan, J., dissenting from denial of certiorari) (“[H]omosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena.”). For an argument that homosexuality should be a suspect class, but not because of political powerlessness, see MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 117–18 (2010).

28. *Romer v. Evans*, 517 U.S. 620, 636 (1996).

29. The campaigns for and against Proposition 8 raised \$39.9 million and \$43.3 million, respectively. Contributions totaled over \$83 million from over 64,000 people in all fifty states and more than twenty foreign countries, setting a new record nationally for a social policy initiative and trumping every other race in the country in spending except the presidential contest. Wikipedia.org, California Proposition 8 (2008), *supra* note 26.

30. See, e.g., MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 127 (2d ed. 1971).