

Introduction to Original Intent: Originalism v. Moderate Interpretivism

In the context of United States legal jurisprudence, both conservatives and liberals alike lay claim to some form of original intent whether manifest in a "written" or "living" constitution. The difference of opinion between conservative and liberal constitutional scholars is not over whether original intent should be used as a guide to interpretation. Instead, the conflict is over how much weight original intent should carry in the process of judicial decision-making. Consequently, the original intent controversy has been best expressed by two schools of constitutional hermeneutics known as "Originalism" and "Moderate Interpretivism."¹

Originalism is a family of legal theories which hold that the Constitution is a static document with a fixed and knowable meaning which is established at the time of passage or ratification. This school of thought is popular among political conservatives and is most prominently associated with several members of the United States Supreme Court including Justices Antonin Scalia, Clarence Thomas, and the late Chief Justice William Rehnquist.²

"Moderate Interpretivism" is a school of constitutional interpretation that argues that the Constitution is, to a certain extent, dynamic. This school includes the popular theory of a "living" Constitution which suggests that America's founding document remains interdependent with an evolving society. Under this theory, judges are not confined to the Constitution's text or preratification history but may instead look at evolving social norms and values to help illumine the text and give its meaning more

¹ James McBride, "Religion and the First Amendment: An Inquiry into the Presuppositions of the 'Jurisprudence of Original Intention,'" *Journal of Law and Religion* 6, no. 1 (1988): 2-3.

² Ronald Flowers, *That Godless Court? Supreme Court Decisions on Church-State Relationships* (Louisville: Westminster John Knox Press, 2005), 164-169.

clarity. Notable proponents of this school include former Supreme Court Justice William Brennan and John Paul Stevens.³

While scholars from the school of moderate interpretivism have often invoked “original intent” and cited Thomas Jefferson’s wall of separation metaphor to justify their separationist perspective, originalists have invoked “original intent” to discredit the use of the Jeffersonian metaphor as antithetical to the intent of the Founding Fathers. The latter group has done this in order to promote a “return” to the “original” accommodationist understanding of religious freedom.⁴ Most originalists argue that states have the right to deal with the freedoms found in the First Amendment as they see fit. Nondiscriminatory governmental aid to religion is the goal. On the other hand, moderate interpretivists reject the broad and sweeping historical assertions espoused by the originalists. They rightly accuse the originalists of cherry-picking facts and thus revising history to suit their own agenda.⁵ Nonetheless, according to James McBride, both originalists and moderate interpretivists “believe that judicial decisions are legitimated by the sovereign text as the locus of original intentions or substantive values.” These original intentions or substantive values “drawn from the text” are the intentions or values looked for by the reader.⁶

Edwin Meese: A Jurisprudence of Original Intent

During the Reagan presidency, Attorney General Edwin Meese, III was perhaps the most outspoken advocate of originalism. In 1985, Meese became the subject of deep

³ McBride, 5-9.

⁴ Ibid. According to McBride, originalism leads inexorably to an accommodationist position on church and state. Originalists reject the moderate interpretivist view of church-state separation on two grounds: 1) originalists reject the doctrine of incorporation, and 2) originalists reject the “appropriation of the Jeffersonian metaphor under the rubric of an ‘unwritten’ or ‘living’ constitution.”

⁵ Ibid.

⁶ McBride, 19.

controversy after calling for a “jurisprudence of original intent.” He accused the Supreme Court of straying from the original intention of the United States Constitution.

Meese explained that the purpose of a jurisprudence of original intent was to:

Explicate not simply what is old, but what is basic, what is true. It is a means of accommodating the political changes wrought by time within the safe framework of fundamental principles that are permanent – unchangeable. It is a jurisprudence that takes seriously the belief that the Constitution – our written Constitution – means something, something that can be and must be discerned and applied to our modern circumstances. The Framers’ object was not to keep the Constitution in tune with the times but rather to keep the times in tune with the Constitution.⁷

According to Meese, a jurisprudence of original intention strives to determine the meaning of the text by understanding the true intentions of those who framed, proposed, and ratified the Constitution. The original intent of the Framers and Founders supply the original principles of the United States. These original principles can be applied to all circumstances even situations unforeseen by the Founders.⁸

Applying his jurisprudence of original intention, Meese concluded that the Bill of Rights should only apply to the federal government.⁹ Thus, the Establishment Clause of the First Amendment was intended only to prohibit Congress from establishing a national church. Meese holds the controversial belief that the protections of the Free Exercise and Establishment clauses of the First Amendment should never have been extended to the states. According to Meese, the doctrine of incorporation was built on an “intellectually shaky foundation.”¹⁰ In his view, the purpose of the First Amendment was simply to prevent Congress from designating a particular religion or sect as politically above the rest. Meese found bizarre the popular argument that the First Amendment demands strict

⁷ Edwin Meese, III, “The Supreme Court of the United States: Bulwark of a Limited Constitution, *South Texas Law Review* 27 (1986): 455-466.

⁸ Meese, 464-466.

⁹ *Ibid*, 463.

¹⁰ *Ibid*, 462-463.

neutrality between religion and non-religion. “The purpose was to prohibit religious tyranny, not to undermine religion generally.”¹¹

Meese claims that many of the Supreme Court’s opinions concerning the religion clauses of the First Amendment have been “mere policy choices rather than articulations of constitutional principle.” According to Meese, such opinions “reveal a greater allegiance to what the Court thinks constitutes sound public policy rather than a deference to what the Constitution, its text and intention may demand.” Meese’s solution to these serious allegations is the adoption of a “coherent jurisprudential stance” (i.e. a jurisprudence of original intention).¹²

As the “faithful guardians of the Constitution,” Meese argues that judges must follow his literalistic hermeneutic when interpreting the Constitution.¹³ Any other interpretive standard will ultimately give new meaning to old words which will consequently create new rights contrary to the “original intent” of those who framed, proposed, and ratified the Constitution.¹⁴

Antonin Scalia: Originalism As ‘The Lesser Evil’

Throughout the 1990s and into the 21st century, Supreme Court Associate Justice Antonin Scalia has become perhaps the most well-known proponent of originalism which he dubs “The Lesser Evil.” Scalia has readily acknowledged that not all originalists are in complete agreement as to the nature of their methodology. Unlike fellow originalist Edwin Meese, Scalia does not find “original intent” to be authoritative. He notes that it is often “exceedingly difficult to plumb the original intent behind an ancient text.”¹⁵

¹¹ Ibid, 464.

¹² Ibid.

¹³ Ibid, 456.

¹⁴ Ibid, 466.

¹⁵ Scalia, 858-860.

Instead, Scalia searches for “original meaning” which he defines as the original understanding of the text at the time it was drafted and ratified. Known as textualism, Scalia’s judicial philosophy starts with the text and then attempts to give that text the meaning it held when it was adopted by the people. With this approach, Scalia examines the same historical sources as a proponent of original intent like Meese. However, instead of attempting to determine the original intent, Scalia looks for evidence as to what the Framers, Founders, and other informed people of that era understood the words of the Constitution to mean.¹⁶

Scalia’s dissent in *McCreary County v. ACLU of Kentucky*, 545 U.S. 845 (2005), provides his fullest discussion of how he would apply his textualist “original meaning” approach to Establishment Clause jurisprudence. According to his dissent in *McCreary*, Ten Commandments monuments are constitutional because the Establishment Clause permits the government to favor religion over nonreligion (but not vice versa), and, in the context of governmental religious expression to favor Judeo-Christian monotheism over all other religion (but not vice versa).¹⁷

In the *McCreary* dissent, Scalia offers selective evidence from the historical record to demonstrate that his new rule for Establishment Clause cases is mandated by history. According to Scalia, one can determine the meaning of the Establishment Clause by looking to historical practice to determine what the Framers and Founders understood the clause to permit and to prohibit. Unfortunately, in the process of determining the “original meaning” of the Establishment Clause, Scalia ignores a copious amount of evidence that clearly shows, as the Supreme Court has long held, that the clause was

¹⁶ Ibid.

¹⁷ *McCreary County v. ACLU of Kentucky*, 545 U.S. 845 (2005) (Scalia, J., dissenting)

intended and originally understood to preclude government preference for particular religions or for religion over nonreligion.¹⁸ Over a decade prior to Scalia's *McCreary* dissent, Justice David Souter explained in *Lee v. Weisman*, 505 U.S. 577 (1992) that the often ambiguous historical record proves that at best, no common understanding of the Establishment Clause existed among the Framers, and, at worst, they like many other politicians failed to practice what they preached.¹⁹

William J. Brennan: A Critique of Original Intent

Appointed by President Dwight Eisenhower in 1956, Justice William J. Brennan is considered among the Supreme Court's most influential members. Known for his liberal views, Brennan has been one of the most outspoken advocates from the school of "moderate interpretivism" for the theory of a "living constitution." According to Brennan, Supreme Court Justices "read the Constitution in the only way that we can: as twentieth-century Americans." Brennan believed that the framers had breathed into the Constitution a conception of liberty and equality, so that with changing lifestyles and evolving social norms, the Constitution itself would change to meet the current circumstances. These changes could never have been contemplated by the framers.²⁰ He declared that "the genius of the Constitution rests not in any static meaning it might have

¹⁸ Thomas Colby, "A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause," *Northwestern University Law Review* 100, no. 3 (2006): 30-33.

¹⁹ *Lee v. Weisman*, 505 U.S. 577, 626, (1992) (Souter, J., concurring). In addition to Meese and Scalia, former Supreme Court nominee Robert Bork and former Chief Justice William Rehnquist are two of the most well-known originalists in America. Just two years before being nominated to the United States Supreme Court by President Ronald Reagan in 1987, Judge Robert Bork declared in a speech at the University of San Diego Law School: "Original intent is the only legitimate basis for constitutional decision... The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed and ratified its provisions and various amendments."¹⁹ In his dissenting opinion to *Wallace v. Jaffree*, 472 U.S. 38 (1985), Rehnquist lamented that the Establishment clause had been weighted down by the "unwarranted burden" of Jefferson's "misleading metaphor." Using originalist analysis, Rehnquist argued that no "historical foundation" existed for the separationist perspective since it is substantiated by a "less than ideal source" (i.e. Thomas Jefferson).

²⁰ William J. Brennan, "The Constitution of the United States: Contemporary Ratification," *South Texas Law Review* 27 (1985-1986): 433-445. At the turn of the 20th century, liberals such as Supreme Court Justice Oliver Wendell Holmes began to argue that the Constitution "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." Holmes advocated that the law was not a matter of absolutes but of the "felt necessities of the time," to be justified by how it contributes "toward reaching a social end."

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.”²¹

Brennan was a sharp critic of originalism particularly the “jurisprudence of original intent” pushed by Attorney General Edwin Meese. In a speech delivered at Georgetown University on October 12, 1985, Brennan attacked the theory of “original intent” as “arrogance cloaked as humility.” He declared:

It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality.²²

Moderate interpretivists like Brennan ascribe to the ideal which “seeks to draw meaning from the text in order to resolve public controversies. Meanwhile, they conclude that Meese’s “jurisprudence of original intent” is “fatally flawed” and completely untenable. Brennan argues that the extra-textual interpretive standard should be based on “substantive value choices” which are shared by the Framers and Founding Fathers. Interestingly, Brennan claims to “interpret the Constitution plainly to embody those fundamental values.” Ultimately, “moderate interpretivists” like Brennan pick and choose their preferred “substantive values” while originalists like Meese pick and choose the original intentions they would like to discover.²³

Concluding Thoughts

Discovering the “original intent” behind the religion clauses of the First Amendment is much more difficult than Edwin Meese, Antonin Scalia or any other

²¹ Ibid, 433-435.

²² Ibid, 435-436.

²³ Ibid, 435-438.

originalist wants to admit. Contrary to the revisionist history being pushed by originalists who desire extensive government accommodation of religion, the founders did not always agree with one another. We simply can not determine with sufficient accuracy the collective intent of the Founding Fathers and the Framers of the Free Exercise Clause and the Establishment Clause of the First Amendment. Those scholars in search of “original intent” have returned with strikingly inconsistent accounts of original intent.

Thus, the originalism of Scalia, Meese, and Rehnquist is ambiguous at best and downright dishonest at worst. We do not know nor can we be expected to accurately determine the intent or understanding of what the First Amendment meant to each person who cast their vote. After all, delegates to the Constitutional Convention were voting on the text of the First Amendment, not Madison’s writings or the private correspondence of the Framers.

The text of the First Amendment reigns supreme. Authorial intent must take a backseat to the actual text. Justices should examine the text first and scour it for as much meaning as it will generate before turning to extrinsic evidence of intent. However, original intent is hardly irrelevant but simply subordinate to the text. Extrinsic evidence does not control the text. The text controls the text.

After examining the text, extrinsic evidence can and should be evaluated. Some extrinsic evidence must be considered more valuable than other evidence. If an intent is widely known it is more important than the random quote found buried in a letter. For example, history teaches us that religious conflict and persecution was fresh on the minds of the Founding Fathers. Based on history and their experiences, we can reasonably infer that the founders intended all Americans to be protected from all religious persecution.

Such a general principle has correctly been applied to protect all minority groups such as Jehovah's Witnesses, Scientologists, Mormons and even conscientious objectors. Other general principles gleaned from the founders' debate over disestablishment during the years of 1789-1791 can be used to support the separationist drive of the Warren Court and other recent Establishment Clause decisions.

Whether Justice William Brennan's theory of a "Living Constitution" offers a coherent philosophy for Free Exercise and Establishment jurisprudence, I am unsure. However, I am in complete agreement with his argument against this proposed "jurisprudence of original intent." Original intent may offer a coherent judicial philosophy, but it is a fatally flawed philosophy that if implemented would wreak havoc on the Constitution's greatest gift – the First Amendment.