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Bork v. Burke

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BORK V. BURKE

THOMAS W. MERRILL*

I would like to make the case for a conservative alternative to originalism. Much of the discussion that has taken place over the last two days has proceeded on the assumption that there are two choices. One is Robert Bork's originalism,[1] justified by various values near and dear to conservative hearts, such as the rule of law, continuity with the past, the principle of democratic accountability, and so forth. The other is to flee into the hands of the so-called nonoriginalists, and embrace, to quote Judge Easterbrook quoting Justice Brennan, the judge's "personal confrontation with the well-springs of our society."[2]

My thesis is that there is a third option, which I will call conventionalism.[3] Conventionalism draws much of its inspiration from the writings of a British politician and man of letters, Edmund Burke.[4] I will argue that there is a Burkean or conventionalist approach to interpretation that is distinct from both Borkean originalism and from the various types of nonoriginalism favored in the legal academy, which I will lump together under the label normativism. I will also argue that the conventionalist approach can be justified by the same conservative values—the rule of law, promotion of democracy, and so on—that

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1. *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

2. Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479, 479 (1996) (quoting Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11, 20 (Federalist Soc'y 1986)).

3. The term "conventionalism" has been appropriated by other commentators and, unfortunately, has considerable variability in meaning and connotation. *See* Peter M. Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U. L. REV. 573, 576 n.23 (1987) ("Aside from the customary capacity of labels to oversimplify, my particular label [conventionalism] suffers from the variability with which it is used in scholarship."). One especially notable (and hostile) treatment of conventionalism is found in RONALD DWORKIN, LAW'S EMPIRE 114-150 (1986). The interpretative theory of Stanley Fish has also been described as a form of conventionalism. *See* Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985). The conventionalism described in this Article does not directly correspond to these or other theories operating under that name.

4. For an especially insightful treatment of the implications of Burke's political philosophy for modern interpretational controversies, see Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N. CAR. L. REV. 619 (1994); *see also* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985) (describing Alexander Bickel's "prudential" jurisprudence, and noting that Bickel drew heavily on Burke).

are commonly invoked in support of originalism. Indeed, I will go further and maintain that conventionalism does even better than originalism when considered in light of these values. My thesis, in short, is that the choice is not just Bork v. Brennan. It is also Bork v. Burke. And, at least for someone who puts a lot of stock in conservative values, Burke beats Bork.

I. WHAT IS CONVENTIONALISM?

I start with a key premise: that not everything in the world of legal interpretation is up for grabs. If every written legal text, from the Constitution down to the latest set of EPA regulations, is a giant inkblot, to be read any way the reader sees fit, then the choice between Bork, Brennan, and Burke becomes largely irrelevant. I will assume, contrary to this radical indeterminacy thesis, that the meaning of a substantial chunk of written legal texts—at least recently enacted texts—is what lawyers call "plain."[5] By that I mean, if you assembled a diverse group of lawyers and asked them to give a legal opinion to a real client about the meaning of a written text, there typically would be substantial consensus about what the text means. Not every text of course—there will always be ambiguous and vague provisions and instances of application not anticipated by the text. But I will assume as my point of departure that, at least with respect to recent enactments, many and perhaps most texts have a plain meaning.

The question then becomes how judges should interpret enacted texts, like the Constitution or a statute, when the meaning is *not* plain. One answer is that given by Bork: we should seek out the original intent or meaning of the contested provision. I will not digress here to explore different variations on this theme that have been discussed the last two days: Do we seek the original subjective intentions of the authors, or the original public meaning of the text? Do we seek out the original meaning at a fairly high level of generality (Sunstein's soft originalism[6]), or do we ask how the enacting generation would have resolved specific cases of contested application (Sunstein's hard originalism[7])?, and so on. Notwithstanding these variations, there is a common

5. For a general defense of this proposition, see Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to* Alienikoff *and* Shaw, 45 VAND. L. REV. 715 (1992).

6. *See* Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 313 (1996).

7. *See id.* at 312-13.

core of understanding among originalists to the effect that when the meaning of a text is not plain, the interpreter should project herself backwards in time to the moment of enactment, and seek to resolve the meaning in the way the interpretative community existing at the moment of enactment would have resolved it.

The key difference between originalism and what I have called conventionalism is that conventionalism shifts the time frame for seeking the answer to contested issues of meaning from the past to the present. When the meaning of an enacted text is not plain, the conventionalist interpreter seeks out not the original meaning but the conventional meaning—the consensus view about the meaning in the legal community of today. Conventionalism therefore falls within a family of theories that can be called "presentist" rather than originalist.

The present-day conventional meaning can be embodied in a variety of sources. The most obvious is judicial precedent. From the perspective of the Supreme Court, for example, the Court's own postenactment decisions interpreting the contested provision or other analogous provisions would be the most obvious place to start in seeking out the conventional understanding. But this does not exhaust the possibilities. Decisions of lower federal courts or state courts could be consulted, especially if they reveal a consensus about the best meaning to ascribe to the contested provision. Interpretations of the executive branch should be relevant. I would include here not only exercises of delegated authority entitled to *Chevron* deference,[8] but also other recorded interpretations, especially if they have been consistently followed.[9] Similarly, postenactment legislation of Congress grounded in an understanding of the contested provision could be consulted.

Beyond these formal postenactment understandings of meaning, the evolved practice of different branches of governments is also relevant. Justice Scalia has outlined for us how such a method could be applied in giving content to the nonoriginalist idea of substantive due process,[10] and the technique can be gen-

8. *See* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

9. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent* 101 YALE L.J. 969, 1003-31 (1992) (arguing for general practice of treating executive interpretations as precedents).

10. *See, e.g.*, Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 24 (1991) (Scalia, J., concurring in judgment); Michael H. v. Gerald D., 491 U.S. 110 (1989) (Scalia, J., plurality opinion).

eralized to other contexts as well.[11] Finally, the Court might give weight to the practice of private citizens, insofar as these practices have been allowed by other branches of government to ripen into settled expectations or reliance interests.

By stressing these various postenactment sources of meaning, I do not mean to suggest that evidence of original meaning is wholly irrelevant to the conventional interpreter. Suppose there is a vague or ambiguous provision that has no evolved and settled meaning for today's legal community. In these circumstances, the conventional interpreter would no doubt look to the same type of evidence that an originalist interpreter would use: evidence about the meaning to the legal community that existed at the time of enactment. When there is no settled contemporary understanding of meaning, in other words, the conventional meaning is the original meaning. This is most likely to occur with respect to recently-enacted texts. When a text is brand new, almost by definition it has no conventional meaning other than the original meaning, and conventionalism collapses into originalism. Over time, however, the original meaning and the conventional meaning will often diverge, and when that happens the conventionalist of course follows the conventional meaning rather than the original meaning.

What happens if there is neither a settled meaning recognized by today's legal community nor a discernible original meaning? In these circumstances, the conventionalist interpreter does not just throw up his or her hands, and say, "Well, I guess I'll just have to make up a meaning in accordance with my own personal views about what would be best for the future."[12] Instead, the conventionalist tries to find the interpretation that has the best "fit" with existing legal conventions, including not only postenactment precedents, practices, and reliance interests, but also what we know about evidence of original understanding. The objective of interpretation in these circumstances is integrative:[13] to identify the interpretation that will provide the least disruption to settled understandings that can be discerned in the surround-

11. *See* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1530 (1995) (Scalia, J., dissenting) (First Amendment); Burnham v. Superior Court, 495 U.S. 604 (1990) (Scalia, J., plurality opinion) (procedural due process).

12. This is Ronald Dworkin's conception of how a conventionalist interpreter would proceed in situations where there is no recognized legal convention. *See* DWORKIN, *supra* note 3, at 115, 116-17.

13. *See* Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429.

ing legal landscape, which of course means today's legal landscape.

Although conventionalism differs from originalism in the time frame it adopts for answering interpretation questions, there is one important respect in which it is more like originalism than normativism. Notice that the various sources of conventional meaning—precedent, established practice, and so forth—are capable (at least in principle) of being identified using the traditional tools of legal inquiry. Thus, like originalism, conventionalism posits that the role of the interpreter is to *find* the meaning of the contested textual provision. The judge adopts the attitude that her role is to discover the meaning of a contested provision of law "out there"—in various conventional legal sources—not to make it up.[14] Normativist theory, in contrast—whether it be some kind of natural rights theory, feminist or critical race theory, Dworkin's integrity theory, public choice theory, or what is called "pragmatism" or "practical reason"—contemplates that the process of interpretation entails the judge giving effect to her own convictions about what is right, true, or good.

Another way to make the point is to say that the conventionalist interpreter would adopt a posture roughly the opposite of that advocated by Cass Sunstein. Sunstein has repeatedly admonished judges to be alert for, and to resist bias in favor of, the status quo.[15] The conventionalist interpreter would be alert for, and would always exhibit a bias *in favor of*, the status quo—understood here to mean the existing consensus view about legal meaning in the contemporary legal community.[16]

Just as I do not wish to overstate the differences between originalism and conventionalism, I do not want to overstate the difference between conventionalism and other forms of nonoriginalism. I am not suggesting, for example, that a conventionalist judge will always find ready-made answers to questions of inter-

14. Justice Scalia has underscored the importance of this basic orientation. *See* American Trucking Ass'n v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) ("[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be.").

15. *See, e.g.*, CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION v (1993); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 903-04 (1987).

16. In the words of Professors Eskridge and Frickey, erstwhile proponents of practical reasoning as a method of interpretation, the conventionalist judge would seek always to identify the "stable equilibrium" in the law, and to maintain that equilibrium. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

pretation "out there," or that the process of sorting through conventional materials to ascertain meaning is some kind of mechanical exercise. Oftentimes different sources of conventional meaning will send off conflicting signals. A Supreme Court precedent, read broadly, will suggest one answer; longstanding institutional practice another answer. An executive branch interpretation may be pitted against established reliance interests, and so forth. And as previously noted, there will be cases in which neither conventional sources nor originalist sources supply any kind of clear answer at all. In these circumstances, a court or other interpreter will have to exercise judgment and even imagination in deciding which source most accurately reflects the conventional understanding of the interpretative community.[17]

Still, there is an important difference in the attitude or subjective orientation of the conventionalist interpreter compared to the normativist interpreter. The conventionalist judge exercises judgment or imagination in trying to figure out what the law *is*. The normativist judge exercises judgment or imagination in trying to figure out what the law *should be* in order to produce a world that the judge regards as more right, just, or simply better.[18]

So to sum up to this point, there are not two choices about legal interpretation—originalism and nonoriginalism—but in fact three choices. First there is Borkean originalism, which takes a historical view of meaning and seeks that meaning in an objective source—the understanding that existed within the community of actors at the time of enactment. Second, and at the opposite extreme, stands normativism, which adopts a presentist or contemporary view of meaning, and posits that the judge plays an active or creative role in constructing the meaning that she regards as "the best" under some normative standard. Third, and in the middle, there is conventionalism. Conventionalism is allied with normativism insofar as it adopts the perspective of today's community of interpreters rather than the community that

17. Thus, it does not necessarily follow that a conventionalist would never agree to the overruling of a Supreme Court precedent. A conventionalist might overrule a precedent that violates well established conventions, for example a precedent "that is relatively recent and has not met widespread acceptance—especially if the precedent itself overturned a widespread practice." David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1706 (1991). Nevertheless, such overrulings would be relatively rare, at least compared to what would happen in a pure originalist or normativist regime.

18. For an endorsement of the latter attitude from a judge still regarded by some as conservative, see RICHARD A. POSNER, OVERCOMING LAW 4-15 (1995).

existed at the time of enactment. But conventionalism is allied with originalism insofar as it seeks a source for interpretation of the law that is objective in the sense that it exists independently of the judge's own convictions about what answer will have certain preferred normative consequences.

II. Why Good Conservatives Should Prefer Conventionalism

Let me turn then to the second part of my brief: given a choice between originalism, normativism, and conventionalism, that is, between Bork and Brennan and Burke, which is to be preferred? This is a very complex inquiry. To simplify the discussion, and to focus on matters that are likely to be of greatest interest to this audience, I will consider only the two alternatives that are most likely to appeal to conservatives—originalism and conventionalism. And I will posit the following question of comparative evaluation: as between originalism and conventionalism, which has the greatest claim to further the values that conservatives commonly embrace? Specifically, I will ask which of these two alternatives is most likely to: (1) protect rule of law values; (2) preserve continuity with the past; (3) comport with a general skepticism about the power of human reason to reorder society; and (4) encourage policymaking by democratically accountable actors.

1. *Protecting Rule of Law Values.* In a well-known article in the *University of Chicago Law Review*,[19] Justice Scalia listed a number of rule of law values. For present purposes, I will single out two as being especially important.[20] One is equal treatment: we speak of a legal regime as partaking of the rule of law when similarly-situated persons are treated similarly. The other is predictability: a regime governed by the rule of law allows persons to predict what the law will require of them in the future, and thus permits them to plan their activities so as to stay within the law.

19. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

20. Justice Scalia in fact enumerated five values. They are: (1) maintaining "the appearance of equal treatment" among similarly situated litigants; (2) enhancing the Supreme Court's ability to maintain a uniform system of law; (3) reducing uncertainty and improving the predictability of law; (4) reducing judicial discretion; and (5) reinforcing the capacity of judges to enforce the law against popular opposition. *Id.* at 1178-80. Justice Scalia advanced these values to make the case for a rule-based rather than a standards-based or all-things-considered jurisprudence. Nevertheless, his account is adaptable to the present inquiry. Although I am prepared to argue that all five values would be better served by conventionalism than by originalism, given limited space I will here concentrate on the two that seem most fundamental.

The conventionalist approach to interpretation fares quite well when measured against these ideals. The conventionalist seeks to enforce the current consensus view about the meaning of legal provisions, as reflected in precedent, the views of other branches, existing practice, and so forth. Every interpreter, in effect, tries to interpret the law to mean what a well-schooled lawyer hired by a paying client would advise that the law means. Very little retroactive change in the law comes about on this approach, and what change does occur will generally be gradual and incremental. As a result, equality among similarly-situated parties is maximized: individuals are treated under the law in the same way other individuals have been treated in the immediate past. For similar reasons, predictability about the future course of the law is maximized: the law is interpreted today to mean what it has been understood to mean in the immediate past.

Originalism, in contrast, entails the potential for radical discontinuities in interpretation—and hence unequal treatment and unpredictability. One problem is the normative and historical uncertainty about originalism, discussed earlier today.[21] If the originalist materials are "thin," as they often will be, and yet judges plunge ahead trying to ascertain as best they can the original understanding, then outcomes may vary widely from one court to the next. Of course, problems of uncertainty plague any method of interpretation, including conventionalism. But it is my sense that the sources of the conventionalist interpreter (precedent, governmental practice, established reliance interests, and so on) are typically "thicker" and hence offer a more promising basis for equality of outcomes and predictability than are the sources of originalism. This would especially be the case if courts open themselves up to a wider range of conventional sources, including consensus views reached by lower courts, executive and legislative precedent, and the like.

Another and more fundamental problem is that originalism never operates as a pure system. In practice, all originalist judges combine originalism with elements of conventionalism such as the practice of following precedent. This renders outcomes more unequal and unpredictable, for one never knows until all the votes are counted whether an originalist court is going to stick

21. *See* Panel IV, *Is Originalism Possible? Normative Indeterminacy and the Judicial Role*, 19 HARV. J.L. & PUB. POL'Y 347 (1996); Panel V, *Is Originalism Possible? Historical Indeterminacy*, 19 HARV. J.L. & PUB. POL'Y 401 (1996).

with precedent or overrule precedent in favor of the original understanding.[22]

Let me offer an illustration of how conventionalism can do better than originalism in terms of promoting equal treatment and predictability. In *Central Bank of Denver v. First Interstate Bank*[23] the Supreme Court confronted the question whether a cause of action for aider and abettor liability should be recognized under Section 10(b) of the Securities Exchange Act of 1934[24] or Rule 10b-5[25] of the Securities and Exchange Commission (SEC). The majority, applying techniques of textualist originalism, said no, it is not plausible to read the Act as authorizing such liability.

In his dissent, Justice Stevens pointed out that hundreds of lower courts, including eleven courts of appeals, had held that there was aider and abettor liability.[26] Aiding and abetting liability had a "long pedigree in civil proceedings brought by the SEC,"[27] and the agency was a strong supporter of retaining it. Adopting what amounts to a conventionalist approach to interpretation, Justice Stevens argued that this strong consensus among the lower courts and the agency responsible for enforcing the Act counseled in favor of retaining this form of liability.

Assuming that the majority was right about the correct originalist construction of the Act, and that Justice Stevens was right about the correct conventionalist construction, it is instructive to compare the two results in light of rule of law values. In terms of equal treatment, the majority's approach creates two

22. Consider, for example, Justice Clarence Thomas, the Supreme Court's foremost originalist. On April 19, 1995, the Court handed down two First Amendment decisions. In the first, McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995), the Court held that a state ban on anonymous leafletting violated the First Amendment. Justice Thomas refused to join the majority opinion, which was grounded in general free speech precedents, and filed a concurring opinion that reached the same conclusion based on an analysis of originalist sources. *See id.* at 1525-30 (Thomas, J., concurring in the judgment). In the second case, Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995), Justice Thomas wrote for the Court, holding that a federal statute that prohibited displaying the alcoholic content on beer labels violates the First Amendment. Justice Thomas relied on precedent extending the First Amendment to commercial advertising, and made no attempt to explain why the original meaning of the First Amendment was not controlling. In fact, the original understanding of the First Amendment almost surely was that it did not extend to commercial advertising. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (stating, in the Court's first confrontation with issue, that the First Amendment is not implicated by restrictions on commercial advertising).

23. 114 S. Ct. 1439 (1994).

24. Securities and Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j (1988).

25. 17 C.F.R. § 240.10b-5 (1995).

26. *See Central Bank*, 114 S. Ct. at 1456 (Stevens, J., dissenting).

27. *Id.* at 1460.

classes of otherwise similarly-situated plaintiffs. Those whose cases went to judgment before *Central Bank of Denver* were able to take advantage of the aider and abettor theory; those who sue after the decision cannot. The conventionalist approach, in contrast, results in all plaintiffs being treated the same. Also, very few securities lawyers would have predicted prior to *Central Bank of Denver* that the Supreme Court was going to eliminate aider and abettor liability. Rather, the well-informed securities lawyer would almost certainly have advised a client that aider and abettor liability was well established under the law.[28] Thus, the conventionalist approach to this question also promotes predictability in the law.

2. *Preserving Continuity With the Past.* Conservatives, almost by definition, want to conserve the past—at least those elements of the past that have not be demonstrated to be in need of (gradualist) reform. This means, among other things, that a conservative should prefer a legal theory that coheres with the existing practice of our legal system. Conventionalism offers a theory that has a strong degree of coherence with established practice. Originalism offers a theory that is radically inconsistent with that practice.

The most concise way to make the point is to note that originalists have no theory of precedent.[29] Why is that a problem? Because as noted previously, every judge who has ever donned a robe in this country—including Justice Thomas and Judge Bork and Judge Easterbrook—regularly follows precedent. From the perspective of conventionalism, this is what one would expect. But a thoroughgoing originalist has no explanation for why she follows precedent except to shrug and say, "That's what judges are supposed to do I guess." A theory that leaves such a huge unexplained gulf with practice is suspect.

Consider in this regard the originalist notion that the Dormant Commerce Clause has no foundation in the text or the original understanding of the Constitution.[30] Justice Scalia appeared to

28. The petitioners, in fact, did not even seek certiorari on this issue, implicitly treating it as settled. *See id.* at 1457.

29. Indeed, a thoroughgoing originalist theory may require that precedent be rejected altogether. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

30. *See, e.g.*, Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569.

endorse this conclusion shortly after he joined the Court.[31] But then he was confronted with the question whether to overrule 170 years of precedent.[32] Not surprisingly, he was unwilling to take the drastic step of repudiating such a vital prop to our federal system of government. But the "compromise" position that he reached (only state laws that discriminate against interstate commerce violate the Dormant Commerce Clause[33]) is based on neither an originalist understanding nor on precedent; it is thus unlikely to commend itself to a majority of the Justices, unless they think free trade among the States is a pernicious idea that needs to be reigned in—which I doubt.

If we adopt a theory of conventionalism, there are no similar glaring anomalies. Conventionalism provides a perfectly coherent explanation for following precedent—precedent is followed because it reflects the established, conventional understanding of the meaning of a contested provision. It is true that in cases of first impression, conventionalism reduces in practice to something very similar to originalism. But this fall-back position does not provide any theoretical difficulty for the conventionalist the way following precedent creates a problem for originalists. The conventionalist seeks the conventional understanding anywhere it can be found; if no conventional understanding has emerged since the enactment of the provision in question, then the understanding of the enacting legislature has a better claim to being the conventional understanding than anything else.

3. *Comporting with a General Skepticism about the Powers of Human Reason.* We also think of conservatives as being skeptical about the power of human reason to reorder society in accordance with some overarching rational plan. This is most prominently revealed in the reaction of conservatives to socialism and economic planning. Most conservatives believe, with Hayek, that a mature industrial economy is simply too complicated to be comprehended and directed by an agency of government.[34] This skepticism also lies at the heart of Burke's attack on the philosophes who brought on the French Revolution: they had a false and in-

31. *See* American Trucking Ass'n v. Scheiner, 483 U.S. 266, 304 (1987) (Scalia, J., dissenting); Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part).

32. The doctrine can be traced back to Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

33. *See* New Energy Co. v. Limbach, 486 U.S. 269, 273-74 (1988).

34. *See, e.g.*, FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

flated notion of the power of human reason to rearrange society in accordance with abstract rational principles.[35]

As compared to normativism, both originalism and conventionalism fare reasonably well in the eyes of the skeptic about human reason. Normativism requires truly heroic assumptions about the powers of judges to reorder society in accordance with precepts like natural law, the interests of traditionally subordinated groups, public choice theory, or what is "best" for the future. As between originalism and conventionalism, however, there is reason to believe that originalism requires a greater commitment to the prospect of rationally directed social ordering than does conventionalism.

One reason for this is that originalists tend to adopt an implicit operating assumption that the Constitution (or a statute) reflects a single, integrated, internally coherent plan.[36] Interpretation on this assumption becomes an "exercise in judicial ingenuity,"[37] as the interpreter must first figure out the plan, and then derive through logical analysis the implications of the plan for the issue at hand. Figuring out the plan requires identifying subtle parallelisms in the structure of the document, comparing the usages of similar words in different parts of the document, and so forth. Deducing the implication of the plan for present controversies requires further intellectual dexterity. Needless to say, this is not an exercise for dummies.[38]

Another reason is that originalism by its very nature requires that the interpreter comprehend and adopt the values, aspirations, and linguistic conventions of a society several steps removed in time from our own. This exercise in historical recreation also involves a rather Herculean feat—one that requires both extensive historical knowledge and severe intellec-

35. *See* Young, *supra* note 4, at 644-47.

36. The implicit assumption that the Constitution (or a statute) reflects a coherent plan is itself a reflection of a highly rationalist temperment. *See* Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 662-63 (1994). That this assumption is almost certainly contrary to fact does not seem to deter modern originalists.

37. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994).

38. The foregoing rationalist features are fully evident in Justice Thomas's prominent originalist opinions from last Term. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1875 (1995) (Thomas, J. dissenting); United States v. Lopez, 115 S. Ct. 1624, 1642-51 (1995) (Thomas, J. concurring); McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1525-30 (1995) (Thomas, J., concurring in the result). I would also refer the reader to the writings of many contemporary academic originalists, including Akhil Amar, Steven Calabresi, John Harrison, Gary Lawson, Michael McConnell, and Michael Paulson.

tual discipline. One can fairly question whether the average judge or lawyer—a member of a profession notorious for its obsession with the bottom line and with tendentious renditions of history—is capable of carrying off this kind of inquiry.

Conventionalism of course can be done well or badly, and with more or less subtlety and insight. But as a rule, it requires a more mundane set of intellectual skills than does originalism. Conventionalism is essentially the stuff of the law office memorandum. One collects the most directly applicable precedents, first of the Supreme Court, then of the lower courts. Then one looks for executive interpretations, or interpretations reflected in subsequent statutes. In a pinch, one can do a survey of state laws, or examine other evidence of established practice or reliance interests. There is of course often room for debate: for example, does one look to conventions at a high level of generality, or at a much more specific level?[39] But at least there is no implicit assumption that the conventions one identifies will add up to anything like a coherent plan. And the skills required to engage in conventionalist interpretation are generally well within the ken of the average lawyer and judge.

4. *Encouraging Democratically Accountable Decisionmaking.* Originalism is often supported on the ground that it is more compatible with political democracy than other types of interpretation, by which the speaker invariably means normativism. However, if the relevant comparison is not between originalism and normativism, but between originalism and conventionalism, then an argument can be made that conventionalism also dominates originalism in terms of compatibility with democracy.

To be sure, originalism has a strong claim to democratic legitimacy because of the originalist's posture as the faithful agent of the legislature and the people. Originalism reflects the familiar transmission belt metaphor of democracy:[40] the people select as their agents representatives to Constitutional Conventions or the legislature. These prime agents translate the wishes of the people into legal texts. The originalist judge, acting as a kind of second-tier agent, then faithfully seeks to discern the instructions of the

39. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion); *id.* at 141-42 (Brennan J. dissenting).

40. The "transmission belt" metaphor was coined by Professor Richard Stewart to describe the relationship between administrative agencies and legislatures. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975).

prime agents reflected in these legal texts, which in turn reflects the will of the people. This metaphor is a powerful one, and I do not wish to deny it all force and legitimacy. Originalism in effect provides an answer to a crucial problem of democracy—how the people can project their will over time.

But there is another perspective on the democracy problem, which is to ask: which system of interpretation does most to preserve the right of the people of today to effectuate their will through the political process of today? From this perspective, conventionalism arguably has a superior claim to compatibility with democracy, for two reasons.

First, conventionalism provides a stationary target so that the people have a clear sense of what they want to preserve and what they want to change. David Shapiro made the point very nicely in a recent article about the need for canons of interpretation that promote continuity in the law:

> [I]n a society in which revolution is not the order of the day, and in which all legislation occurs against a background of customs and understandings of the way things are done, it disserves the drafters of legislation to take a casual or even a wholly 'neutral' attitude towards change. . . . [A] speaker who is issuing an order or prohibition is likely to focus on what is being changed and expect the listener to understand that, so far as this communication is concerned, all else remains the same.[41]

Conventionalism therefore establishes a background understanding that allows legislatures (as agents of the people) to be more effective in pinpointing what changes they want to effect.

Second, conventionalism basically shuts off the courts as an avenue for social change. We tend to think of activist judges as the great antithesis of democratic governance, and a judiciary controlled by conventionalist judges would be a very inhospitable place for judicial activism. Just think of what stodgy and boring places courts would become under conventionalism, what with judges thumbing through precedents of lower courts and surveying state statutes and other uninspiring sources! Those intent on social engineering through litigation will obtain a very low return on their investment in this environment. Far better to hire a lobbyist and see if you can get a law enacted by Congress.

41. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 942 (1992).

In contrast, a world dominated by originalist judges is not necessarily an inhospitable place for at least some types of judicial activism and social change through litigation. Do you not like the New Deal or the Great Society? John McGinnis says these things violate the original understanding of the Framers,[42] so let us file a lawsuit and get the whole social welfare state declared unconstitutional. Do you not like wetlands regulations or habitat protection under the Endangered Species Act? Well, take a little of Cass Sunstein's soft originalism here,[43] add a little of Richard Epstein's views about the "general theory" of the Takings Clause there,[44] and you have got yourself a lawsuit. I agree with Michael Perry that there is no necessary connection between originalism and judicial restraint.[45] If you like judicial restraint and are a democrat (with a small d) then you would be advised to join up with the forces of conventionalism.

To sum up the second half of my argument: originalism may be a more conservative theory of interpretation than many versions of normativism. But, in fact, there is another choice that has a better claim to respect rule of law values, to promote continuity with the past, to reflect a healthy skepticism about rational planning of society, and to preserve democracy: conventionalism. Indeed, from a Burkean perspective, Borkean originalism does not seem very conservative at all. It is more akin to the radical philosophy of the Seventeenth Century puritan revolutionaries, who argued for throwing off the "Norman Yoke" by returning to the purity of the original Anglo-Saxon constitution.[46] Like other forms of radicalism, originalism is no doubt far more exciting than conventionalism. But then if you are a true conservative, revolutionary excitement should not be the summum bonum. If you need further proof of this assertion, I recommend you read Burke's account of the French Revolution.[47]

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42. *See* John O. McGinnis, *The Original Constitution and Our Origins*, 19 HARV. J.L. & PUB. POL'Y 251 (1996).

43. *See* Sunstein, *supra* note 6, at 313.

44. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

45. *See* MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS (1994).

46. *See* CHRISTOPHER HILL, PURITANISM AND REVOLUTION 50-122 (1958).

47. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Pocock ed. 1987, originally published in 1790).