

## Originalism

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First of all, the moment we speak of “the intentions of the framers”, we are already committed to some sort of idealization, as opposed to an empirical actuality. There were various different framers – Adams, Jefferson, Washington...These people had numerically and qualitatively different minds. Surely Jefferson’s intentions weren’t exactly the same as Washington’s. When we talk about the intentions that *they* had in connection with the future governance of the nation, we are already speaking in institutional, non-psychological terms (or, if you

prefer, we are speaking in terms of institutional rather than personal psychology).

Whenever it is part of an expression that is meant to denote a *collective* attitude, the word “they” is in the same category as “the average man” or “frictionless planes.” In other words, in such a context, the word “they” denotes an idealization, not an empirical reality. From a psychologist’s viewpoint, there is no *they*. There are only various individuals whose numerically and qualitatively distinct psychologies may converge in certain respects at certain junctures.

When we talk about “the intentions of the framers”, we obviously don’t mean the intentions of the framers taken severally. Originalism is thus exceedingly dubious if the term “intentions” is understood in purely individualistic, psychological terms.

So if originalism is to hold water, we must take the expression “the intentions of the framers” to refer to the intentions of some kind of collective entity. But how are the intentions of that entity to be understood? Since, as we have seen, we cannot understand those intentions strictly in terms of the psychologies of the framers, it seems not out of the question that those intentions must be understood in terms of their social, and perhaps even their historical, role. But the socio-historical role of those intentions is inseparable from the socio-historical role of the Constitution. This suggests (though, I admit, it hardly establishes) that the originalist’s position collapses into circularity (or, if you prefer, triviality): Constitutional interpretations are to be evaluated in terms of the intentions of the framers, but the intentions of the framers are to

be understood in terms of the historical and social role of Constitutional interpretation.

Here is a related argument. For the reasons noted a moment ago, the expression “the intentions of the framers” denotes an idealization. An idealization is, by definition, something that has no precise counterpart in the spatiotemporal world. So when we talk about “the intentions of the framers”, we are not talking about an empirical reality, but about some kind of theoretical construct. Of course, the theory embodied in one person’s use of that expression may be different from that embodied in some other person’s use of it. But it seems likely that, as a rule, the theories in question will *themselves* concern the role that the Constitution should have. If this is right, then it follows that originalism is guilty of vicious circularity or, if you prefer, of triviality.

A concrete example may help make it clear what this last argument amounts to. It is reasonable to predict that, at some point in the future, the Supreme Court will have to decide whether gay marriage (marriage between two people of the same gender) is protected by the Constitution. Suppose that, in connection with this issue, one of the members of the Court reasons thus:

(\*) If Jefferson had been asked whether the Constitution protected gay marriage, he would have said “no”; and the same is true of Washington and Adams...

(\*) is surely correct. I very much doubt that, during his lifetime, Jefferson would have condoned homosexual marriage. He might not

even have acknowledged the coherence of the concept of such a marriage. But this proves nothing that is of relevance to Constitutional interpretation. For if, during their life-times, we had asked Jefferson or Washington whether African Americans should be allowed to vote or hold higher office, those luminaries might well have given us answers that wouldn't correspond even remotely with later Supreme Court decisions – with decisions that even originalists regard as paradigms of sound jurisprudence. The same point holds in connection with the question whether the government should have the power to break monopolies, whether corporal punishment should be permitted in schools, and so on.

So when we talk about what Jefferson (or Adams or Washington...) *would* have said about such an issue, we are not talking about the

actual Jefferson – the person who lived at a time when there was slavery and when it would have been unheard of for women to hold higher office. We are talking about what would be said by some idealization of Jefferson -- by somebody who had Jefferson's *basic* values, but whose own interpretation of those values wasn't distorted by the temporal and cultural parochialism to which Jefferson, like all other mortals, was inevitably subject. So when legal theorists talk about "what Jefferson would have said", they are not making an empirical statement about what the *actual* Jefferson would have said, but rather an *a priori* proposition about what he *should* have said, given his values (or what we believe to be his values).

But the originalist's intention in running counterfactuals like (\*) is to *derive* or expose Jefferson's values, so as to generate an appropriate conception of Constitutionality. The

originalist is thus caught in a vicious circle. He must use a counterfactual to identify the values on which his conception of Constitutionality is based. At the same time, he cannot run the counterfactual in question *until* he has identified those values.

### An objection to this argument

As you point out, the idiosyncrasies of Jefferson's psyche are irrelevant to issues relating to Constitutional interpretation. For this reason, I agree with you that, when discussing Constitutional issues, we must idealize away from those idiosyncrasies and must therefore speak of what Jefferson *should* have said, given his values, as opposed to what he actually might have said, given his peculiarities and limitations as a human being. But I disagree with your point that this exposes some kind of circularity in the originalist's



position. Jefferson's values are definable *independently* of any views of Constitutional interpretation. Jefferson believed in certain things. For example, he believed that, with some obvious qualifications, people should be allowed to do as they wish and that, consequently, government should have a minimal regulatory role. While such views have obvious consequences as regards Constitutional interpretation, they can (and probably must) be understood *independently* of any such views. After all, the concept of small government is one that a person can fully grasp even if she has never heard of the U.S. Constitution. So your charge of circularity is under-argued.

### Why this objection fails

This line of thought simply displaces the problem onto an analogous problem. This, I will

now argue, is because the expression “Jefferson’s values” *itself* denotes an idealization, as opposed to a psychological reality. Consequently, talk of “Jefferson’s values” in this context involves a circularity parallel to that discussed a moment ago.

Some science fiction will make this clear. We go back in time and ask Jefferson: “Should women be allowed to vote?” Jefferson says “no.” Being creatures of the 21<sup>st</sup> century, we disagree with Jefferson. At the same time, we are (let us suppose) originalists; so we wish to reconcile his response with our belief that the Constitution should be interpreted in light of his intentions (along with those of Washington, Adams...who, we may suppose, gave the same answer as Jefferson in response to our question). We effect this reconciliation by telling ourselves that, in answering that way, Jefferson

was not being true to his core values. It wasn't the *true* Jefferson speaking. Rather, it was a Jefferson whose inner goodness was marred by cultural baggage that was extrinsic to his character. (Compare: "The Smith I know wouldn't ever say such a thing -- that was the bottle talking.")

But, like many complex human beings, Jefferson had many values; and while some of them may well have been fair-minded and egalitarian, others may have been retrograde and misogynist. So when we say that, in answering as he did, Jefferson was not being "true to his values", the word "his" doesn't denote the Thomas Jefferson the human being. Sadly, Jefferson's answer may have reflected who he really was. Rather, the word "his" denotes a Thomas Jefferson who has been purged of his ugly 18<sup>th</sup> century prejudices. But in that case, we are using the term "Jefferson" not to refer to the

actual Jefferson, but to some idealization of Jefferson that corresponds to a certain conception of how the country should be run and therefore, presumably, of how Constitutional issues are to be settled. For analogues of the reasons given a moment ago, this entails that the originalist's position collapses into a vicious circularity (or an innocuous tautology).

Let us sum up. In discussions of Constitutional interpretation, one often hears claims about what Jefferson (or Adams or Washington...) *would* have said about such and such, e.g. the issue of gay marriage. But it is irrelevant what Jefferson *the actual person* would have said. Even the finest minds are marred by ugly biases. For all we know, Jefferson might have thought that any expression of homosexuality should be illegal or, on the contrary, he might have secretly thought that men should be legally

required to abstain from relations with women and to marry other men. So when we talk about what Jefferson *would* have said, we are talking about what some kind of idealization of Jefferson would have said – some Jefferson who didn't suffer from the cultural limitations and random neuroses<sup>[1]</sup> that mar even the best of minds, including his. But it is more likely than not that the relevant idealization is going to incorporate a certain conception of Constitutionality, and this condemns to vicious circularity any attempt to derive a correct conception of Constitutionality from such counterfactuals. Once we start dealing with an idealization of Jefferson's psyche, as opposed to his actual psyche, we have replaced empirical propositions about the Jefferson's psychology with *a priori* propositions about values. The result is, at least plausibly, that such counterfactuals presuppose certain conceptions

of Constitutionality, and thus cannot substantiate any such conception.