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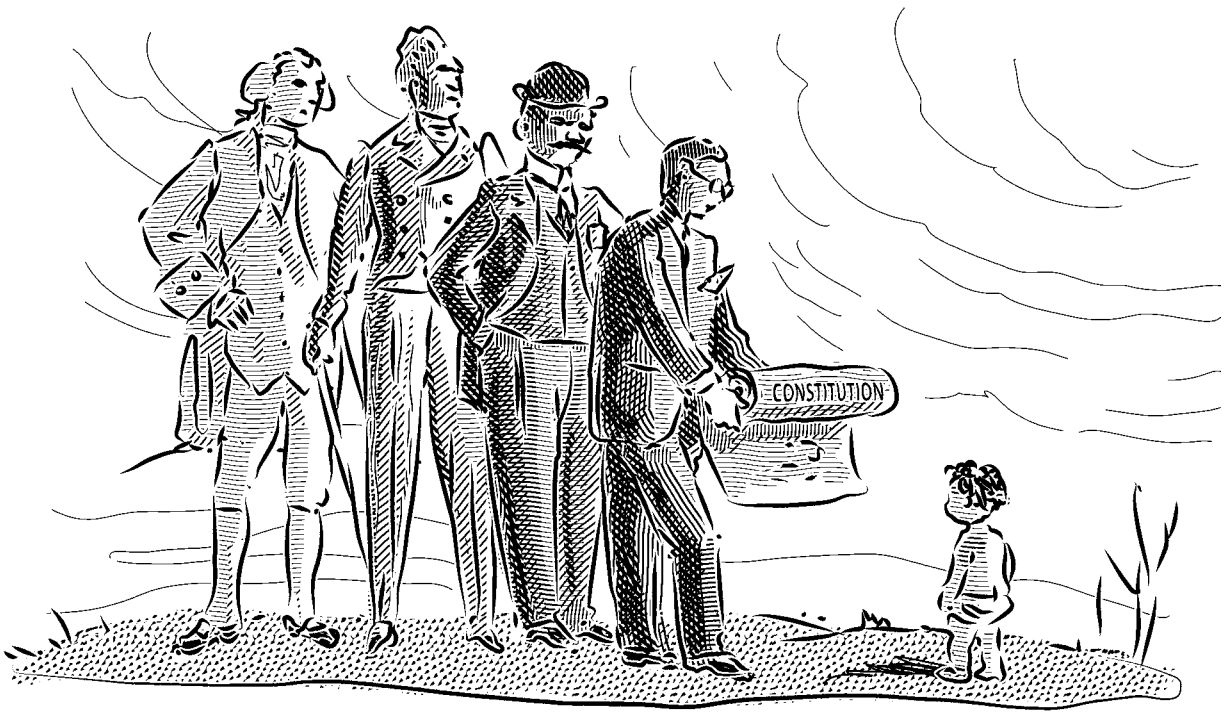
Book Review by Edward J. Erler

Originalist Sin

Originalism and the Good Constitution, by John O. McGinnis and Michael B. Rappaport.
Harvard University Press, 312 pages, $39.95



The place to begin understanding *Originalism and the Good Constitution* is its rejection of "thick theory." Authors John O. McGinnis and Michael B. Rappaport, law professors at Northwestern University and the University of San Diego, respectively, make clear that they do not gauge constitutional "desirability based simply on [their] own political philosophy." Rather, they take "a welfare consequentialist approach" defining it as "a modern version of utilitarianism, which holds that the morally correct act is the one that produces the greatest welfare for people." Consequentialism demands nothing more stringent than selecting "those rules and institutions that maximize the satisfaction of preferences." As a result, the authors do not "rely on a controversial view about good consequences," and go so far as to deliberately eschew reliance on any "contestable assertions of what constitutes goodness."

Whatever might be said for or against consequentialism as a way to organize a life or a country, it would appear difficult, at the very least, to establish that the Constitution of the United States is good, and that adhering to its original meaning is particularly good, without relying in some fashion on contestable assertions about what goodness entails. *Originalism and the Good Constitution* acknowledges but does not solve this problem. McGinnis and Rappaport believe it sufficient to "merely assume that good consequences are produced by a constitution that incorporates the core principles of the liberal tradition and has the support of the people." The liberal tradition, in turn, requires a constitution superior to ordinary law, and a structure of government that preserves democratic decision-making, protects individual rights, and advances "other beneficial goals."

Clearly, this characterization of the liberal tradition accommodates divergent and even conflicting understandings of what makes the Constitution good. Despite the authors' claim that "our view of the good constitution is not at base procedural, but substantive," they subsume all questions of principle to questions of process. For example, McGinnis and Rappaport reject the contemporary liberal claim that to rely on the framers' original intent is to be ruled by the dead hand of the past. Why, say such liberals, should we uphold decisions made by men who wore powdered wigs and died two centuries ago if their ideas, as *Originalism* puts it, "no longer reflect modern circumstances or modern values?" We should do so, the book argues, because Article V allows "each generation [to] amend the Constitution under the same rules as previous generations… and under rules similar to those employed by the Founding generation."

That equalizer, however, leaves a residual asymmetry—the founding generation, having fashioned the framework subsequent Americans can modify, remains disproportionately powerful by virtue of a "first-mover advantage." This problem *could* be met by allowing each generation to not merely amend the Constitution but supplant it with an entirely new one. But the new constitution might not be as good as the one it replaces, and even if it were, a new constitution every two or three decades might well destabilize and weaken the republic. Furthermore, McGinnis and Rappaport write, "the drafters of a new constitution might be more concerned with its substantive provisions than with creating the optimal process for ratification." And, according to *Originalism and the Good Constitution*'s main thesis, the merits possessed by our current Constitution result not from its principles and institutions but from the process by which it was ratified. Thus, we allow the framers their first-mover advantage because "we prefer the benefits of being constrained by the past."

In explicating why being constrained is, on balance, a benefit rather than a burden, Mc-

Ginnis and Rappaport make explicit on *Originalism*'s last page their reliance on Edmund Burke, which had been implicit throughout. Burke, readers are advised, argued that "a good society was a compact among the dead, the living, and the unborn as traditions of a past age become refined in the present with a view to additional developments in the future." The authors believe their version of constitutional originalism "translates Burke's great insight into the most effective legal mechanism for the enduring governance of a flourishing society."

It might seem strange that any case for originalism would rest on a constitution's adaptability, as opposed to the fundamental worth of the constitutional framework undergoing the adaptations. A more obviously compelling originalism would rest on the conviction that the Constitution embodies permanent principles, which a successful republic applies to changing political and social circumstances. Yet the authors are anxious to avoid contestable questions of "value" even as they premise their "defense of the Constitution on its desirability."

This approach works poorly, and *Originalism* offers little reason to believe it could ever be made to work well. Consider the road not taken by McGinnis, Rappaport, and many of their contemporaries who also regard themselves as originalists. That road begins with the acknowledgment that the Declaration of Independence is *not* an incremental adaptation of pre-existing standards to changing realities. Rather, it establishes a new regime based on entirely different—revolutionary—principles. It was America's founding document, the authoritative statement of its authoritative principles. In the Burkean universe, however, healthy regimes tend to evolve without ever having been founded. Thus, there are no founding principles, only constant modifications of what people have been doing for a long time to the changing circumstances in which they find themselves.

In *The Federalist*, James Madison wrote that it was necessary to recur "to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed." This passage clearly indicates that the Declaration informed Madison's reflections on the first principles of the Constitution. He also wrote that only a "strictly republican" form of government was "reconcilable… with the fundamental principles of the Revolution." A constitution "found to depart from the republican character," Madison declared, would be "no longer defensible."

Madison also claimed that the "partly federal and partly national" form of republican government proposed in 1787 was entirely novel, having no model in the annals of history. Furthermore, the "extended republic"; the innovations in the separation of powers and checks and balances; and the independent, permanent judiciary all made their debut in the debate over the new plan of government. These constitutional devices, constructed to meet the standards demanded by the "principles of the Revolution," were invented or definitively adapted by the framers and stand as a product of their political and theoretical genius. These were not, therefore, an inheritance from the past. Indeed, the framers frequently characterized their work as a great experiment.

Most modern originalists, even well-known conservative ones like McGinnis and Rappaport, believe the framers' political philosophy impedes rather than facilitates a defense of the Constitution. Present-day originalists, by and large, believe that the ideas the framers relied on—the "laws of nature and of nature's God" and other elements of 18th-century "ideology"—have been rendered obsolete by the progress of history. If the ideas of one historical epoch are merely the expression of the predominant opinions of the time, and have no relevance to circumstances of any other historical epoch, the idea that there's any such thing as a permanent human nature—or principles derived from human nature—must be discarded. Thus, any theoretical defense of originalism will require some new justification to replace the widely discredited natural right theories prevalent at the time of the founding.

An originalism predicated upon the absence, irrelevance, or indeterminacy of the Constitution's substantive virtues naturally reverts to the advantages conferred by the procedures that created and perpetuate it. McGinnis and Rappaport argue that the "supermajoritarian genesis of the Constitution," rather than any of its intrinsic merits, makes it desirable and also mandates adhering to its original purposes. (The authors are aware of, but largely ignore, the fact that the Constitution's adoption required the *unanimous* consent of at least nine states—not a supermajoritarian nine out of thirteen, because the four non-ratifying states would not be part of the new Union. The principle, proclaimed in the Declaration of Independence, that governments derive their just powers from the *consent of the governed* explains this requirement better than *Originalism*'s precept that a "strong consensus" should be sufficient to legitimize a Constitution.)

Why will "an appropriate supermajoritarian process" be "extremely likely" to "result in a good constitution?" Supermajority rules foster consensus, McGinnis and Rappaport argue, which "allows a nation to develop a widespread and stable allegiance to its framework of government" and "encourages bipartisanship." Both of these, in turn, contribute to long-term political stability. In addition, the supermajoritarian process protects minority rights, by establishing a "limited veil of ignorance" which assures that, in the long run, no one knows whether he will be in the majority or minority and therefore is forced to take an enlarged view of the common good. Having done so, even a simple majority is less likely to abuse minorities and violate their rights. (*Originalism*'s frequent reliance on the language of liberal political theorist John Rawls is consistent with its welfare consequentialism.)

Even though America's Constitution is good, the supermajoritarian process accommodated two glaring defects—the exclusion of African-Americans and women. Supermajoritarianism's validity, we learn from *Originalism*, is co-extensive with full inclusion of all interested parties behind the Rawlsian veil of ignorance. The Constitution is vindicated, however, because the supermajoritarian amendment process remedied these defects. It's as if the veil of ignorance periodically descended to cover the nation, causing it to come to its senses by passing amendments that corrected the mistakes of 1789. *Originalism* never mentions the great political struggles of the 1850s over the *morality* of slavery, or Abraham Lincoln's opposition to slavery based on the principles of the Declaration, nor does it discuss the Civil War. McGinnis and Rappaport's argument makes no room for the profound political fact that the Reconstruction amendments would have been impossible without victory in a war that brought about the deaths of some 3% of the population, equivalent to a war in 2014 with 9.5 million American casualties. To attribute the worth of the Reconstruction amendments to the superiority of the supermajoritarian process trivializes and misrepresents the historical record.

McGinnis and Rappaport claim that their theory of originalism is new: they are not original-intent originalists or original-meaning originalists, but original-*method* originalists. They differ from original-meaning originalists by insisting that the Constitution must be read to include "the interpretive rules and methods that were deemed applicable to the Constitution at the time it was enacted." If the "supermajority" that ratified the Constitution "employed those interpretive rules, then giving effect to the docu-

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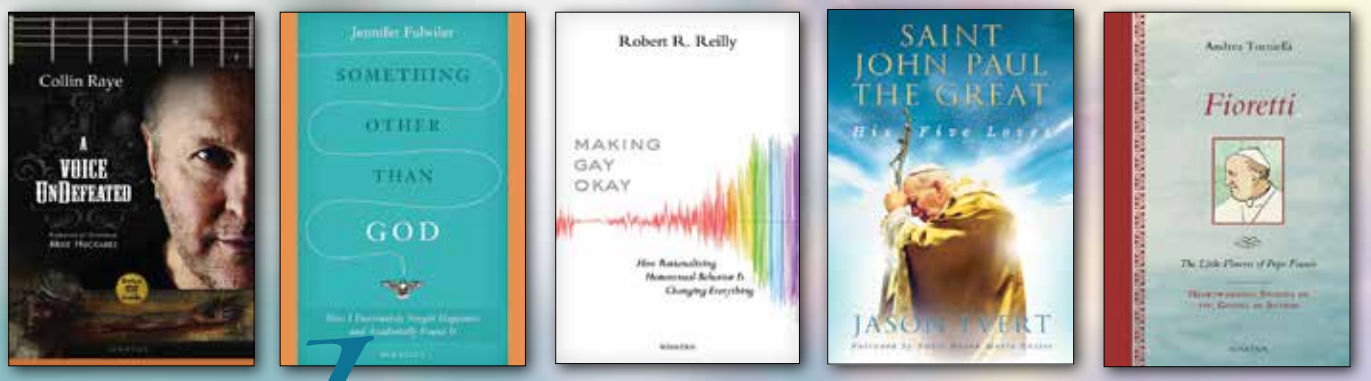

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ment they approved requires using those same rules." The interpretive rules are thus as much a part of the Constitution as the original text.

The most radical part of "original methods originalism" is the authority it ascribes to precedent.

> The key ground for preferring the compatibility of originalism and precedent is historical. Precedent was an important part of Anglo-American law for centuries before the enactment of the Constitution, and the Founding generation expected precedent to apply to, and continue after, the Constitution.

McGinnis and Rappaport contend the "judicial power" of Article III incorporates "a minimal concept of precedent" and judges are required to "give some weight to a string of judicial decisions on an issue over a substantial period of time," even if adhering to precedent means "authorizing decisions that depart from [the Constitution's] original meaning." As *Originalism* explains,

> there is nothing strange about the Constitution authorizing decisions that depart from its original meaning.… The Constitution establishes this rule presumably because it sometimes regards other values as taking priority over following the original meaning…such as predictability, clarity, and stability.

Originalism argues that the minimal precedent rule is an intrinsic part of the Constitution because it was part of the history of Anglo-American law well known to the founding generation. What the authors fail to realize, however, is how unprecedented the principles of the American Revolution were and how unprecedented the Constitution was as the fruit of that Revolution. *Originalism*'s deliberate omission of the Declaration's principles undermines its entire argument.

As a result both of what it emphasizes and omits, *Originalism and the Good Constitution* represents a dead end for conservative constitutionalism. The Constitution is good, not because of any inherent virtues, but because its *chances* of being good were enhanced through being adopted by a supermajoritarian political process (unanimity being super-duper-majoritarian). Each generation can keep it current by loading its own values onto the wagon through a supermajoritarian amendment process that mimics the original ratification. There is, then, a kind of "continuing constitutional convention" to keep the Constitution abreast of current values. As we learned in 1985 from William J. Brennan, one of the most activist Supreme Court Justices, "the demands of human dignity will never cease to evolve."

McGinnis and Rappaport scarcely differ from liberal commentators, except that liberal jurisprudence asserts that the *Supreme Court* should serve as the continuing constitutional convention. Yale Law School's Bruce Ackerman, for example, says that it is up to the Supreme Court to insinuate the New Deal revolution into the Constitution since, in effect, the overwhelming consensus that produced the election of 1936 was tantamount to an amendment of the Constitution and was recognized as such by the so-called "switch in time." The consensus that formed to support the New Deal Revolution represents the highest authority in American politics—it is representative of the genuine "higher law."

John mcginnis and michael rappaport argue that amendments would produce a stronger and more stable consensus than judicial activism, and note that the "lack of formality…creates uncertainty about its status and content that makes it impossible to function as higher law." The quarrel here is about form, not substance: both sides agree about the necessity of evolutionary constitutional change, but disagree about how it is best effected. In the larger view, these are trivial differences: liberal and conservative jurisprudence each rejects founding principles and seeks to justify a constitution of changing values. In agreeing on what they accept, they agree on what they reject: the framers' belief that they had grounded the Constitution in enduring principles. Such sentiments are dismissed as antiquated in the age of historicism and value-free relativism, an age that proudly rejects "thick theory" in favor of thin delusions.

What we really owe to the framers as first movers is to sustain the government, limited *and* energetic, they created. "[T]he beneficence of the Constitution," McGinnis and Rappaport insist to the contrary," did "not merely, or even primarily" result from "the greatness of men such as Hamilton [and] Madison." Rather, "we see the greatness of the Constitution as largely the result of the supermajoritarian process that enacted it." It is fortunate for America, however, that the founders did not elevate process over substance. More importantly, they derived the principles of the founding from "the laws of nature and of nature's God." This is the genuine ground of the Constitution's goodness.

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