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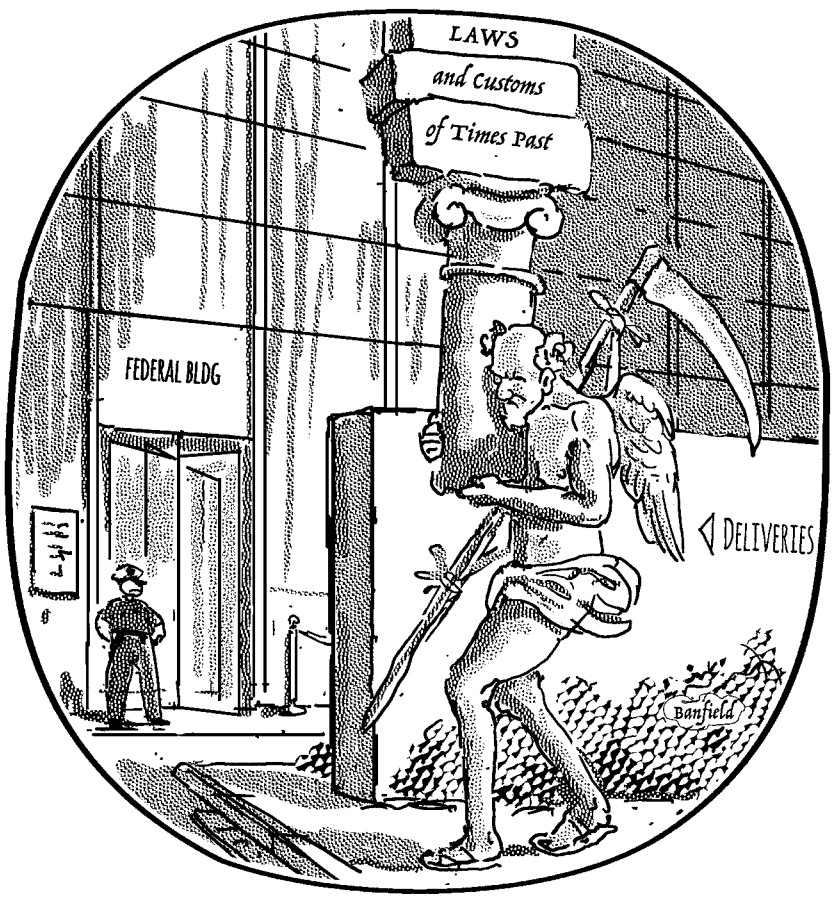
Book Review by Jeremy Rabkin

Big Tent Originalism

A Debt Against the Living: An Introduction to Originalism, by Ilan Wurman, Cambridge University Press, 168 pages, $64.99 (cloth), $19.99 (paper)



Ilan Wurman's valuable new book, *A Debt Against the Living*, lives up to its subtitle: it offers an "introduction." Wurman wants to persuade readers that "originalism"—the effort to read the Constitution in accord with its original meaning—is a serious project. And he wants to show that it is, in fact, a much more reasonable approach than alternatives that leave judges free to improvise new meanings based on contemporary fads or priorities, thus defeating the point of a written constitution.

At the same time, Wurman advocates for a kind of "big tent" originalism. He touts advances made in the 1990s—most prominently by Justice Antonin Scalia, who emphasized the "public meaning" of constitutional terms at the time of ratification rather than the private "intent" of the drafters—but finds no important differences between Scalia's "textual" approach and other scholars' recourse to historical materials in order to illuminate the relevant terms. So long, that is, as textualism is not (as with some scholars) a license to impose contemporary interpretations that wouldn't have been embraced by earlier writers and ratifiers. To rely on "*contemporary* textual meaning," Wurman protests, "implies that our law is determined by *accidental* changes in language over time."

Avoiding unnecessary squabbles makes sense if you want to sustain a coalition, rather than highlight your own distinctive theory. Wurman sounds like he has an eye on elections, or confirmation battles. Before joining the faculty at Arizona State's Sandra Day O'Connor Law School, he was, in fact, an aide to speechwriters in George W. Bush's White House and subsequently did legal work for the Ted Cruz presidential campaign. One result is that this book is vastly more readable than a law review article. Wurman keeps a conversational tone and a brisk pace and gets the reader to the last line in just 135 pages.

It's a distinctive merit of his presentation that he never strays far from the political question in the background: why should we keep to the Constitution as it was originally meant to be, rather than steering it in the ways we might now like it to be? Wurman doesn't try to duck this concern with abstract theories based on self-referential legal premises (variants of, "by definition," law must be authoritative to be law).

One answer is encapsulated in the book's title. The phrase, as the author explains, appears in a letter from James Madison to his friend Thomas Jefferson in 1790, when the latter led the U.S. diplomatic delegation in revolutionary Paris. Jefferson had argued for letting every constitution expire after 20 years or so, reasoning that one generation can't bind its successor, because "the earth belongs to the living." Madison reminded Jefferson that "the

living" do not inherit the earth in its natural state: "The improvements made by the dead form a debt against the living, who take the benefit of them." Wurman takes Madison's side. As he says in his conclusion, there is self-interest as well as gratitude involved: we shouldn't assume we get all the benefits that have been bequeathed to us if we toss away the structures that helped generate and sustain those benefits.

Rather than leave it at the level of abstraction, however, where it might come across as a mere platitude, Wurman summarizes a variety of scholarly claims about the underlying goods the Constitution might have been designed to secure. Libertarians like Randy Barnett and Richard Epstein, for example, have highlighted the ways the overall structure restrains government in the interest of protecting personal liberty and private property. Progressives, like Jack Balkin, have stressed the Constitution's openness to democratic adaptation. Others, notably Princeton political scientist Keith Whittington, have emphasized the Constitution as a guarantor of popular sovereignty—the right of the people to determine the ultimate ground rules of political life. The Constitution allows for popular revision of the basic rules, but only through a deliberately onerous process, which guards against confusing ultimate sovereign authority with mere transient impulses. Wurman calls this a "conservative" view of the Constitution.

It's characteristic of his approach that after offering respectful summaries of these competing scholarly perspectives, he declines to endorse any one over the others. (It may also be characteristic of his harmonizing approach that he doesn't discuss the late Harry Jaffa's relentlessly argued objections to other approaches.) Wurman is happy to acknowledge that all the theories he does discuss have some claim to respect, and all might contribute to a sense that the Constitution deserves our loyalty: "If the Constitution protects natural rights, creates a republican form of government, and is rooted in an act of popular sovereignty, then prudence demands that we obey it today, whatever its imperfections." Perhaps it is not coincidence that scholars associated with each of these different approaches agreed to provide blurbs on the back cover. Wurman seems to retain a keen sense of how to pitch his positions.

Although his harmonizing instincts might work well enough when he talks about the appeal of the Constitution in general terms, they're much less helpful when the question is how we should understand or interpret particular provisions. The libertarians often take a quite different view than the progressives or the conservatives. If the Constitution has competing claims, and more than one might be seen as motivating a particular provision or guarantee, which view should take priority? The problem doesn't get much attention from Wurman amidst his soothing assurances on the Constitution's overall merits.

Take the case of *Brown v. Board of Education* (1954). Wurman concedes that if an originalist approach did not support school desegregation, it ought to be rejected. Fortunately, he argues, there is evidence that the generation which adopted the 14th Amendment did see it as imposing a ban on public school segregation. Drawing on the scholarship of Michael McConnell, he notes that Republicans in Congress tried to write this requirement into statute law only a few years later. But the record is at least equivocal, since the Congress that actually drafted the 14th Amendment's "Equal Protection" guarantee also provided support for public schools in the District of Columbia, while allowing them to remain racially segregated.

To get around this awkwardness, Wurman (again following the lead of other scholars) insists on the importance of distinguishing the "sense" or "reasoning" of the Equal Protection clause—by which he means something like the underlying principle—from the particular "facts" or circumstances to which it was originally applied. Perhaps that supports the conclusion that "separate but equal is inherently unequal" in the circumstances of the 1950s (as Chief Justice Earl Warren argued in *Brown*).

But it might also support a lot of other contentious conclusions in later cases. Wurman rejects the claim that the 6th Amendment's "right of counsel" means a right to a state-funded lawyer, not merely (as the Congress and state legislatures of 1789 seem to have thought) the right to hire a lawyer oneself. He doesn't explain very convincingly why the "reasoning" behind the original guarantee wouldn't justify the conclusion given it by the Warren Court.

But that opens a worrisome prospect. Distinctions between enduring core ideas and changing historical applications might generate a lot of "applications" that would have startled the Constitution's original ratifiers. If originalism is an anchor against judicial activism, as Wurman maintains throughout his book, it might prove to be an anchor with a very long chain.

When calls for a return to "original intent" were first voiced in the 1970s, they were spurred by complaints that the Warren and Burger Courts had strayed far from the actual intentions of the constitutional framers. In particular, Robert Bork and William Rehnquist did not hesitate to say that the Court's announcement of a right to abortion in *Roe v. Wade* (1973) could not be justified by any legitimate interpretation of the Constitution. Wurman doesn't say how we should now think about such rulings.

It's not just a question of whether nonoriginalist rulings were correct readings of the Constitution at the time they were rendered. For nearly a century now, courts have relied on very broad readings of the congressional power "to regulate commerce among the states." It might well be that an originalist interpretation would require courts to overturn a vast amount of federal regulation which is now—for good or ill—woven into the fabric of national life. Do mistaken precedents get grandfathered into the Constitution after some lapse of time? It's an obvious but very difficult question. Wurman simply sidesteps it.

Nevertheless, for an introduction to the arguments for originalism, *A Debt Against the Living* offers a highly readable, engaging presentation for newcomers while prompting more seasoned readers to think harder. It is a light-footed, clever, and timely counter to cynicism about law.

Jeremy Rabkin is a professor at George Mason University's Antonin Scalia Law School.