Winter 1988

In Praise of Woodenness

Gary S. Lawson
Boston University School of Law

PANEL I

IN PRAISE OF WOODENNESS

*Gary Lawson**

Not long ago, I was a stalwart champion of judicial terrorism on behalf of economic liberty. In recent years, however, I have become a meek, mild-mannered originalist whose favorite adjective is "wooden."[1] I still like economic liberty as much as the next person — in fact, more than at least one of the next two persons. Nonetheless, much as I would like to, I cannot agree that the Constitution requires a free market to the extent urged by, among others, Roger Pilon,[2] Bernard Siegan,[3] Steven Macedo,[4] Randy Barnett,[5] and Richard Epstein.[6] My aim here is not to criticize their particular argu-

---

* Assistant Professor of Law, Northwestern Universty Schoòl of Law. I am grateful to the Civil Liability Program at Yale Law School for support.

1. The term is often used as an epithet to describe stiff and formalistic methods of legal reasoning. *See, e.g.*, Library of Congress v. Shaw, 478 U.S. 310, 323 (1986) (Brennan, J., dissenting) ("The Court today applies the rules for construing waivers of sovereign immunity in a wooden and archaic fashion"); Board of Regents v. Roth, 408 U.S. 564, 571 (1972) ("the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' "). It is less often explained why stiffness and formalism are necessarily bad things when one is interpreting texts.

2. *See* Pilon, *Economic Liberty, the Constitution, and the Higher Law, infra* p. 27.

3. *See* B. Siegan, Economic Liberties and the Constitution (1980).

4. *See* S. Macedo, The New Right v. The Constitution (1986).

5. *See* Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 Harv. J.L. & Pub. Pol'y 273 (1987).

6. *See* R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985); Epstein, *Toward a Revitalization of the Contracts Clause*, 51 U. Chi. L. Rev. 703 (1984); Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987). In apparent contrast to these other scholars, all of whom place great weight on the so-called "open-ended" clauses of the Constitution — the due process clauses, the fourteenth amendment's privileges or immunities clause, and the ninth amendment, Professor Epstein relies principally on relatively wooden constructions of the takings, contracts, and commerce clauses. Methodologically, he would therefore seem to be friend more than foe, whether or not one accepts his substantive arguments. To a large extent this is true. *See* R. Epstein, *supra*, at 19-31. The problem, which Professor Epstein acknowledges, *see id.* at 18, is that his text-based takings clause and commerce clause arguments apply only to *federal* regulation of economic activity. To protect economic liberty from *state* regulation, one must either make the contracts clause bear a very heavy load or find some way to pull economic liberties out of the ninth or fourteenth Amendments (by incorporation or otherwise). I note in this regard that Professor Epstein has endorsed substantive due process on more than one occasion.

ments, but rather to draw attention to a more general methodological problem — really a meta-problem pertaining to interpretation as such — that largely determines the extent to which their arguments can peacefully coexist with a wooden originalist interpretation of the Constitution.

Before posing that problem, however, I want to clarify what it means to be a wooden originalist in light of Roger Pilon's discussion of the moral foundations of constitutionalism.[7] I use "wooden originalism" to describe an interpretative method in which one identifies the ordinary meanings that the Constitution's words, read in linguistic, structural, and historical context, had at the time of the document's origin — a method is often misleadingly labelled simply "originalism" or "interpretivism."[8] I offer no elaborate defense of this methodology, nor is one necessary. Given some fairly modest assumptions about linguistic determinacy that are hard to contest without self-contradiction, to say that it is the best method for discovering the meaning of an instruction manual like the Constitution[9] comes very close to being true by definition.

However, what is not so clear, and what does not logically follow from wooden originalism's interpretative primacy, is why judges and other public officials ought to use wooden originalism to decide constitutional questions

---

7. *See* Pilon, *supra* note 2.

8. I have not cast aside these more familiar labels lightly. A viable theory of textual interpretation must both identify a set of factors to be used in interpretation and give those factors a temporal dimension. Interpretivism does the former but not the latter, declaring that one should look for meaning only to the Constitution's text, structure, and history, but not specifying the point in time at which the meanings of the document's words or structure must be fixed. Originalism does the latter but not the former, directing attention to the text's time of origin, but not prescribing which interpretative factors are relevant. Originalism need not be interpretivist, and interpretivism need not be originalist. For example, a nonoriginalist interpretivist might give the words of the Constitution their present-day ordinary meanings, rather than the meanings they would have had to an eighteenth-or nineteenth-century audience. Similarly, a noninterpretivist originalist might read into the Constitution eighteenth-or nineteenth-century, rather than current or evolving, fundamental values or transcendent moral principles. My method is thus a species of interpretivist originalism. That label, however, is broad enough to include theories that treat certain historical data, such as the purposes or subjective intentions of the Framers or ratifiers, as more than merely pieces of evidence concerning the ordinary meanings of the Constitution's words — a view I reject. Hence, "wooden originalism," which is more compact (if less elegant) than, for example, "jurisprudence of original semantic meaning."

9. This characterization of the Constitution is not uncontroversial. *See, e.g.*, Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. Cal. L. Rev. 551, 564 (1985) ("For the American polity, the constitutional text is not (simply) a book of answers to particular questions . . . . It is, rather, a principal symbol of, perhaps *the* principal symbol of, the aspirations of the tradition.") (footnotes omitted). Without meaning to downplay the importance and complexity of this problem of characterization, I can only say here that the Constitution *looks* very much like an instruction manual and very little like anything else.

— that is, why they should follow the manual once they know what it says. As Roger Pilon and others[10] have persuasively argued, any claim that they should is a normative statement about human conduct that requires a normative justification. It is not sufficient to say that public officials must treat the Constitution as a first principle.[11] That is true for wooden originalism as a positive theory of interpretation but not for wooden originalism as a prescriptive theory of decision-making.

Having acknowledged that troublesome fact, I am going to avoid it by the simple expedient of addressing the rest of my comments only to those who are indeed interested in knowing what instructions the Constitution gives. In particular, I speak to those who concede the interpretative primacy of wooden originalism but think they can reconcile it with a Pilonesque view of the Constitution's role in safeguarding economic liberties. I seek to expose an oft-used but seldom acknowledged methodological gambit of theirs that can make constitutionalism and libertarianism seem more harmonious than they are.

I hasten to add that I will only be talking about constitutional constraints, or the relative lack thereof, on *state* economic regulation. Most *federal* interference with economic activity is in fact an inviting target for a wooden originalist broadside. Woodenness should not be confused with judicial restraint. Restraint is a conclusion, not a premise. If a proper reading of the commerce clause dictates that large portions of the federal government come crashing down,[12] the wooden originalist will obediently go play in the rubble. But if the ghost of *Lochner*[13] should not haunt a wooden reading of the commerce clause, neither should the ghost of *Filburn*[14] haunt a wooden reading of the ninth and fourteenth amendments. And there's those who pledge allegiance both to the Constitution and to freedom from state regulation often resort, if only tacitly, to what might be called selective woodenness. They are solid oak when it comes to the commerce clause or separation of powers, but rotting bark when it comes to the due process clause, the privileges or immunities clause, or the ninth amendment, where moral, political, and economic theory suddenly hold sway — much as Justice Brennan stands as a mighty sequoia when the eleventh amendment is invoked, only to wilt thereafter. This familiar selective or dualistic interpretative approach finds support in the following simple but powerful

---

10. *See, e.g.*, Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. Cal. L. Rev. 603, 606-07, 613-19 (1985).

11. *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 383 (1981).

12. *See* Epstein, *The Mistakes of 1937*, *supra* p. 5.

13. Lochner v. New York, 198 U.S. 45 (1905).

14. Wickard v. Filburn, 317 U.S. 111 (1942).

argument: Any text-based theory of interpretation assumes a measure of linguistic determinacy. The assumption is correct, but only over a certain range. At some point, even the most precise language will generate ambiguity. Wooden originalism can therefore only be a first-cut interpretative method. If it yields an answer, that answer must be respected. But, cautions the dualist, one can be sure that particular constitutional provisions will, at varying points, prove unyielding to wooden analysis. One must then employ subsidiary or second-order interpretative principles that are not logically derivable from wooden originalism. In these cases, where wooden originalism has had its chance and failed, there can by definition be no objection to, for example, a second-order presumption in favor of whatever interpretation best protects economic liberty. And, the dualist will continue, it just so happens that the Constitution's "open-ended" clauses are especially in need of second-order supplementation. Thus, he will conclude, while pro-liberty interpretations of these provisions can perhaps be *justified* only by moral or economic reasoning, they are nonetheless *consistent* with a wooden originalist methodology.

At first glance, the dualist's argument appears to raise only mechanical rather than methodological issues. Any distinctively methodological problems seem to be assumed away by the stipulation that meanings genuinely fixed by wooden originalism must be accepted, leaving only the straightforward, if often difficult, question whether one can in fact fix the meanings. However, unfortunately for interpretative theory, this is only the tip of the iceberg. If the wooden originalist wishes fully to refute the dualist's argument, he must at some point address the fundamental methodological question to which this discussion has been leading: Taking its own substantive rules of interpretation as given, when can one say that wooden originalism, or any other interpretative method, has or has not fixed a provision's meaning? My remaining comments will try to explain this question and to persuade you to worry about it as much as I have.

Language is only determinate over a certain range; one inevitably encounters ambiguity at the margins. This is not a phenomenon unique to textualism. Even the most elaborate moral or political theory will surely have marginal areas where clear answers are not found. The critical question for interpretative theory is where the margins must be drawn. As long as they are far from the core, the overwhelming majority of cases can be decided by the first-order interpretative method, and the choice of subsidiary or second-order rules becomes relatively insignificant.

The integrity of an interpretative theory thus depends in large measure on the location of the margins that mark out its sphere of competence. The placement of the margins, in turn, depends both upon the theory's substan-

tive rules of interpretation *and upon how much information one requires those rules to produce.* Wooden originalism, and I suspect interpretative theories generally, specify the first but not the second. That is, a theory of interpretation necessarily tells you the kinds of things that count as evidence for and against a particular answer, but it does not necessarily tell you how much of that evidence you must have before you can judge an answer correct or incorrect. Thus, the effectiveness of an interpretative theory will be profoundly affected by the independent selection of a proper evidentiary standard. To illustrate, if an interpretation of the Constitution is correct only when all other interpretations can be ruled out beyond a reasonable doubt, then I think it clear that wooden originalism cannot fix the meaning of, for example, the privileges or immunities clause; surely there is more than one interpretation that can be advanced with a straight face. Accordingly, if the beyond-a-reasonable-doubt standard is appropriate, the wooden originalist cannot object to, even if he is not compelled to endorse, selection of whatever linguistically defensible interpretation of the privileges or immunities clause best protects economic freedom. If one lowers the evidentiary threshold and allows interpretations to be validated or invalidated by clear and convincing evidence or a preponderance of the evidence, the extent to which wooden originalism is indeterminate, and therefore the need for second-order principles and presumptions, narrows considerably, though it is possible that no single interpretation of the privileges or immunities clause will satisfy even this standard. And I submit without demonstrating that if the evidentiary threshold is simply that an interpretation must be better than its available alternatives, the zone of indeterminacy of a woodenly construed Constitution gets very close to zero — as does the probability of finding broad founts of economic liberty in the privileges or immunities clause.[15]

The puzzling methodological problem, which interpretative theorists of all stripes seem pointedly to have ignored, is how to justify the selection of any particular evidentiary threshold. I do not have a complete or even a good answer, but the better-than-available-alternatives test seems to be the best choice on general epistemological grounds. Very little human knowledge meets the rigorous standards of arithmetic, and it makes no epistemological sense to prescribe a standard that the human mind cannot satisfy. Our judgments are always made in particular contexts, and they are correct in those contexts if they are the best integrations of the broadest array of evidence available to us at the time. The level of confidence we can have in

15. *See generally* United States Department of Justice, Office of Legal Policy, Wrong Turns on the Road to Judicial Activism: The Ninth Amendment and the Privileges or Immunities Clause 28-98 (1987).

our judgments has to vary along a continuum with the strength and breadth of the evidence, but once we have made the best call possible, it is irrational to criticize the best for failing to be the unattainably perfect. In other words, close counts in horseshoes, hand grenades, Ronnie Garvin's hands of stone,[16] and unfortunately, interpreting the economic liberties provisions of the Constitution.

16. Ronnie Garvin, "the man with the hands of stone," is a professional wrestler noted for his ability to flatten opponents with blows that visibly miss by several inches.