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# Rethinking "Original Intent"

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## I

Although *Dred Scott* v. *Sandford*[1] is one of the Supreme Court's most controversial decisions, it is not often taught or read. But its approach to constitutional interpretation is by no means outdated, and its historical importance has not diminished. So it seems a good example to consider.

Dred Scott was owned as a slave in Missouri by Dr. John Emerson. In 1833 Emerson took Scott with him when he moved, first to the free state of Illinois, later to the free part of the Louisiana Territory. After five years they returned to Missouri, Scott meanwhile having married Harriet Robinson, also a slave, and Emerson having married Irene Sanford.

After Emerson died, in 1843, Scott tried to purchase his family's[2] freedom from Emerson's widow, but she refused the offer. Missouri courts held that slaves were emancipated if they had been taken to live in states or territories that forbade slavery, as the Scotts had been, so in 1846 the Scotts began to seek their freedom through the courts.

A decision for them was rendered in 1850, but Irene Emerson appealed. In 1852 the Missouri Supreme Court renounced its own precedents and reversed the lower court decision. Scott then sued in federal court but received a negative verdict in 1854. His appeal came before the U.S. Supreme Court during a period of increasing, sometimes violent, conflict over the spread of slavery.

Chief Justice Taney's opinion for the Court had two principal parts. Declaring that Congress lacked authority to prohibit slavery, the Court opened vast territories to its expansion. Before reaching out to decide that issue, the Court also held that under the Constitution African-Americans "had no rights which the white man was bound to respect." As most rights recognized by the Constitution are not limited to citizens, Taney's assertion meant that African-Americans, free or enslaved, were not even people. It was not an implausible reading of the law. I shall focus on that aspect of Taney's opinion.

Although the Declaration of Independence said that "all men are created equal" and have "unalienable rights," that spirit did not dominate the Constitution of 1789, even after the Bill of Rights was added. The Constitution secured the slave trade for some years, extended slave law into free states to retrieve alleged fugitives, and enhanced slave state representation considerably. Nor was that an isolated deviation from an institutionalized commitment to equality and human rights. To mention only the most obvious examples: without constitutional impediment, the states denied women basic rights, and national policy toward Native Americans amounted to eviction and eradication.

So Taney's assertion that under the Constitution African-Americans "had no rights which the white man was bound to respect" was credible.

## II

In the Scotts' Missouri suits, the defendant was Irene Emerson. In Dred Scott's federal suit, the defendant was her brother, John Sanford, to whom the Scotts had presumably been sold. As Sanford resided in New York, Scott sued under the Constitution's "diversity" clause, which gives federal courts jurisdiction over cases involving citizens of different states.

Sanford responded by challenging the court's jurisdiction. He argued that Scott "was not a citizen of the State of Missouri, . . . being a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as slaves." The lower court rejected that argument, treating residence and the capacity to own property as sufficient for citizenship. But the Supreme Court accepted Sanford's argument, holding that federal courts could not hear Scott's complaint because an African-American could not be a citizen.

Taney drew a distinction between citizenship that a state can confer and citizenship under the Constitution. Otherwise the Constitution would guarantee to African-

Americans who were citizens of some state all the "privileges and immunities" of white men in slave states. Those states would not have agreed to allow free African-Americans "the full liberty of speech in public and in private upon all subjects upon which [the state's] own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the state." That specter haunted Taney.

## III

Legal practice gave some support to Taney's position. Some states restricted African-Americans more than their own citizens. Judicial tolerance of those practices suggested that African-Americans were not counted as citizens under the privileges and immunities clause. If, as seems plausible, identical criteria determine citizenship under the diversity clause, then African-Americans could not be parties in diversity cases.

On the other hand, it seemed necessary to recognize *degrees* of federal citizenship. White women, children, and men without property were citizens with fewer rights than propertied white men. African-Americans might similarly qualify for citizenship even though they too enjoyed fewer rights. And the Court had already shown that citizenship under one clause could be different from citizenship under another, by according corporations rights under the diversity clause while denying them citizenship under the privileges and immunities clause.[3]

Taney appealed to original intent. Consider his reading of the privileges and immunities clause, which says, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[4] He denied that "the Citizens of each State" refers to those who are recognized as citizens of the several states *by* those states. Taney rejected the most natural reading of the provision because, he argued, the founders regarded African-Americans "as a subordinate and inferior class of beings, who . . . had no rights or privileges but such as those who held the power and the Government might choose to give them." He claimed that African-Americans "had for more than a century before been regarded as beings . . . so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . .

*This portrait of Dred Scott was published in 1857.*

This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion." Taney's reasoning assumed that original intent determined the meaning of the constitutional text.

One need not minimize the depth or prevalence of racism during the revolutionary period to regard the picture that he drew as exaggerated. But Taney's factual claims were more extreme than his argument required. All he needed to show was that *most* of those who gave us the Constitution meant to exclude African-Americans from constitutional guarantees.

But his argument was implausible. He claimed that the law and opinion of 1789 precluded any relevant distinction between free and enslaved African-Americans. He cited the slave trade, constitutional support for slavery, and racist state laws as if they somehow proved the point. And

he simply ignored antislavery sentiment in the revolutionary period.

I shall not belabor those criticisms, for I want to suggest that the original intent approach, as conceived by both Taney and its current champions, involves fundamental difficulties, but that the idea can be reconstructed to accord with respected judicial practice.

## IV

Theorists of original intent call on judges to follow the intentions that some people had some time ago. All appreciate that we can lack relevant historical information. My misgivings go deeper.[5]

As a theory of text meaning, the criterion is implausible. The words we use have meanings determined by linguistic conventions, and the corresponding public meaning of a text that we produce by speaking or writing can accordingly differ from what we had in mind. Someone who wants to interpret the Constitution primarily by reference to what some people once had in mind needs to explain why.

Furthermore, the idea is ambiguous. We frequently cannot follow original intent until we first determine whose intentions count. In a constitutional context, framers' intent is usually meant, but that seems arbitrary. Why should we follow the intentions of those who *drafted* a law instead of those who *made* it law? If the intentions of the framers differed from the intentions of the ratifiers, we wouldn't be able to follow both, and we would need good reason to follow one instead of the other. The bare notion of original intent does not tell us whose intentions should be followed.

Any serious attempt to follow original intent must also determine which states of mind to count. Some theorists assume that we should be guided only by specific applications that the founders contemplated, but that too seems arbitrary. One who favors a new piece of law most likely intends it to solve some problem or achieve some other end. The point becomes important when such a general intent is frustrated by specific intended applications.

Here is an example. Raoul Berger[6] objects to the Court's decision in *Brown* v. *Board of Education*.[7] He argues that the fourteenth amendment did not outlaw racial segregation in public schools, because its originators had no such intention. Berger agrees, however, that the amendment was intended to secure basic civil rights for African-Americans. Now, it is arguable that the Supreme Court in *Plessy* v. *Ferguson*[8] held, in effect, that those two intentions were compatible, but that when deciding *Brown* the Court finally acknowledged that equal protection could not be secured while the government officially sanctioned racism.

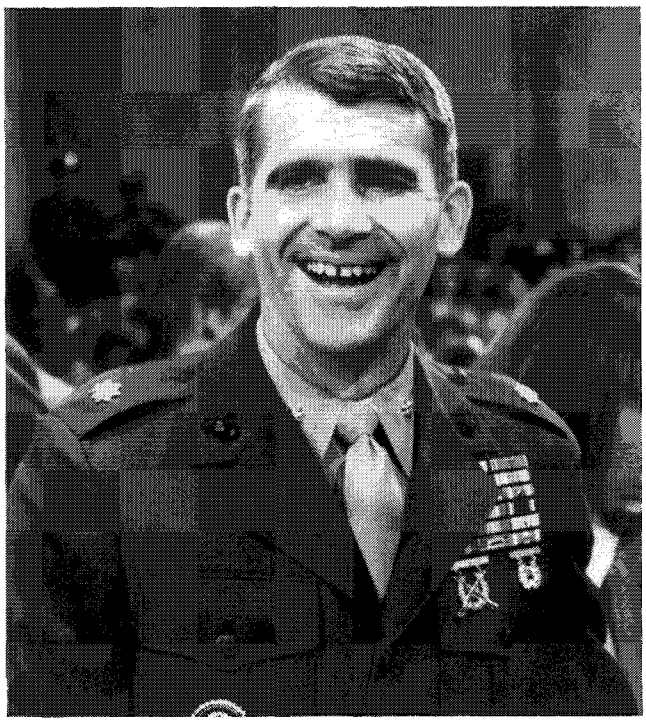
It is said that courts should follow original intent so as to implement the will of those who made the law. But that begs the question. That courts have a duty to implement what has been ratified into law does not imply that some further, private intent takes priority over the public meaning of the ratified text.

Some want judges to follow original intent so as to keep them from making "value choices."[9] Those theorists assume that following original intent involves a purely factual, value-free inquiry into what was going on in some persons' minds at a certain past time. They equate lawmaking with "value choices," or in other words with the exercise of moral or political judgment, and assume that such judgment need not be exercised in the process of legal interpretation. Those assumptions seem false.

To see that, we must ignore the fact that the Constitution has already been subjected to judicial interpretation, and that courts commonly rely on interpretive precedent.[10] We can then observe that application of the just compensation clause, for example, fundamentally requires a court to identify criteria of justice in compensation for private property that is taken for public use. It is difficult to see how that can be done—how the Constitution, which mandates "just compensation," can *strictly* be followed—without providing reasons for regarding some conception of compensatory justice as superior to others. I believe such judgments can rationally be defended, but they would presumably count as "value choices" nonetheless.

## V

As it is usually conceived by theorists and applied in some opinions, original intent is burdened by fundamental difficulties, with no prospect of solution. But the standard theory does not square with standard arguments referring to original intent. A purely historical claim about the founders' intentions assumes that there was a consensus on the point at issue. But that essential element is almost always missing from original intent arguments, even though we generally have good reason to suppose that the various founders had differing intentions. Such arguments rarely try to show, for example, that a given intention



*Marine Lt. Col. Oliver North in 1987*

regarding a particular aspect of the Constitution was in fact shared by a supporting majority within the Constitutional Convention or by a supporting supermajority within a proposing Congress or among the ratifying states.

There are two possible explanations for that gap between standard theory and standard practice. Either references to original intent have the character described by the theory but are frequently unsubstantiated or they must be understood differently. I suggest the latter.

Original intent arguments often cite a piece of reasoning by respected figures, such as Madison or Hamilton.[11] Such slim grounds might be adequate if the argument is *not* meant to show that there was probably an intentional consensus among the founders—that is, if the argument has a slightly different character. What the standard arguments often seem to do, instead, is to recall a political insight that offers a plausible justifying rationale for the constitutional arrangement in question.[12] Given a rationale, we can often decide the interpretive issue.

Consider a recent case. The Ethics in Government Act of 1978[13] provides for judicial appointment of an independent counsel to investigate misconduct in the executive branch of the federal government. While under investigation by a counsel so appointed, Lt. Col. Oliver North challenged that provision as a violation of the constitutionally mandated "separation of powers."

That is a plausible argument. The first three articles of the Constitution divide up governmental authority. As only the president is specifically instructed to "take Care that the Laws be faithfully executed," it is reasonable to infer that enforcement of federal law is an executive branch responsibility. It then seems plausible to suppose that federal prosecutors should be appointed by and answerable to the president, which would rule out independent counsels.

But the constitutional challenge is problematic, for the constitutional separation of powers is complex. The three branches of the federal government are given some linked as well as some separate powers. For example, the president has a role in the legislative process, Congress participates in presidential appointments, and it also performs judicial functions. Any separation of powers principle that we could infer from the constitutional text alone would be incapable of answering the specific question raised by North's challenge to the independent counsel provision of the Ethics in Government Act. If a separation of powers challenge is to be decided on its merits, further interpretation of the Constitution would seem necessary.

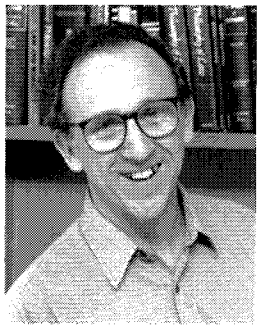
If we were to seek out the original intent behind the constitutional separation of powers, we would not find evidence of a relevant historical consensus but would be referred to some prominent framers' sensible expressions of concern about the importance of preventing dangerous concentrations of power. Given that, we can address North's challenge by asking which interpretation of the Constitution would better serve that justifying rationale—one that allows or one that disallows an independent counsel.[14] The obvious answer seems confirmed by experience. A dangerous concentration of power is reduced by limiting executive branch control over those who are given the job of investigating possible misconduct in it. North's preferred arrangement would invite abuse. That gives us good reason to regard the statutory provision as constitutionally permissible.[15]

## VI

I want now to suggest why constitutional interpretation *should* be guided by justifying rationales. A judge's job is not an intellectual exercise. It is a matter of helping to decide real controversies involving human beings. What is typically done by the courts in the name of the law affects significant human interests most directly. Many of those who come before the courts do not do so voluntarily. We cannot assume that they approve of the law that determines their fate or even have a say about it. What is typically done by courts to people in the name of the law requires substantive moral justification, which it does not automatically receive by virtue of its being authorized by law.[16] Justification requires either that the laws that are applied be morally defensible, despite regrettable applications, or that there be adequate justification from another source for applying laws that are themselves unjust.

Here is where the Constitution becomes directly relevant. Those who try to justify what is done to people in the name of the law by reference to the Constitution assume, in effect, not only that respect for the constitutional system requires the decision that is rendered but also that the virtues of the system as a whole compensate for moral deficiencies in the laws that are applied and thereby render morally regrettable judgments morally defensible. That is typically taken for granted by legal theorists and officials.

As *Dred Scott* shows, that assumption can be problematical. When it is, serious problems face those who are committed to respect for law, especially those serving on the bench. Perhaps because they can be excruciatingly painful, those problems are rarely discussed. But they deserve our most careful and conscientious attention.



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1. 60 U.S. (90 How.) 393 (1857).
2. They had one daughter in 1838 and would have a second before litigation began.
3. In Bank of Augusta v. Earle, 13 Peters 519, 585–87 (1839), and Louisville, Cincinnati and Charleston R.R. v. Letson, 2 Howard 497, 555 (1844), respectively, cited by D. E. Fehrenbacher, *The Dred Scott Case* 72 n.85 (1978).
4. U.S. Const. art. IV, § 2, ¶ 1.
5. I discuss those problems in "Constitutional Interpretation and Original Meaning," 4 *Soc. Phil. & Pol'y* 75 (1986).
6. In *Government by Judiciary* (1977).
7. 347 U.S. 483 (1954).
8. 163 U.S. 537 (1896).
9. *See, e.g.*, Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L.J.* 1 (1971).
10. Original intent theory cannot accommodate the commonplace notion that courts should respect their own prior interpretations of the Constitution (as well as higher courts' interpretations).
11. Note how often the *Federalist Papers* are relied on for guidance, although we lack reason to believe that they represent a historical consensus.
12. A similar point can be made about legislative intent.
13. 28 U.S.C. §§ 591–98.
14. I ignore complications from limiting rationales and the like.
15. North v. Walsh, 656 F.Supp. 414 (D.D.C. 1987), held that North raised the challenge prematurely. In Morrison v. Olson, 108 S.Ct. 2597 (1988), a similar challenge was rejected. The Court relied heavily, of course, on its own interpretive precedent.
16. I discuss that point in "Derivability, Defensibility, and the Justification of Judicial Decisions," 68 *Monist* 325 (1985).