LOS ANGELES
Daily Journal
www.dailyjournal.com
TUESDAY, SEPTEMBER 15, 2015
PERSPECTIVE

If we don't look to original meaning, what else is there?

By Eric C. Tung

Justice Antonin Scalia adheres to "originalism," which is a method of interpretation that looks to the commonly understood meaning of the Constitution's words at the time of adoption. Erwin Chemerinsky, dean of UC Irvine School of Law, rejects this view, urging that the "Constitution's meaning must evolve." ("Majority shuns Scalia's approach," Aug. 18). He exhorts that "the original understanding of a constitutional provision ... should not be controlling in deciding cases" because such a method is "restrictive" and "leads to unacceptable results."

But what understanding should be controlling if not the original understanding? Chemerinsky offers no principled alternative. Instead, his condemnation of results that are "unacceptable" reveals that he favors not a method of interpretation, but a regime that permits judges to enact their preferred policy preferences into law. But judges are not supposed to be policymakers.

If we embrace judges as policymakers, we would not have any neutral legal basis on which to criticize judges who adopt policy preferences different from our own. While today the political winds might favor what Chemerinsky considers "acceptable," someday they might blow in another direction. Imagine if five willful justices were to conclude that the laws permitting abortion are unconstitutional on the basis that fetuses have a substantive due process right to life. Those justices might say that the Constitution — in the dean's words — "must evolve" to require the protection of such a right. That decision and mode of reasoning would be incorrect on originalist principles. And many would have discomfort with this right being removed from democratic debate and enshrined in our Constitution. But, on his own terms, what neutral legal basis would Chemerinsky have to criticize that decision?

Originalism, on the other hand, provides that neutral basis. The objective meaning of a law can be derived only from its words as they were commonly understood at the time the law was promulgated. That view is not esoteric, but common sense. In areas outside of law, we have no problem seeking to understand the meaning of words by considering how the contemporary interpretive community understood those words. Take Shakespeare: when Hamlet pursues the Ghost but is hindered by guards, he exclaims, "By heaven, I'll make a ghost of him that lets me." That exclamation makes no sense if we resort to today's understanding of the words — why would Hamlet threaten someone who "lets" him follow the Ghost? But when Shakespeare wrote for his audience, the word "let" meant to "hinder"; it did not mean to "allow" as it does now (although in tennis, we retain the earlier meaning).

This commonsense principle of interpretation was once taken for granted in the law. As Justice Joseph Story stated in his "Commentaries on the Constitution," "the text was adopted by the people in its obvious, and general sense ... [and] the constitution itself must be expounded, as it stands; and not as that policy, or that interest may seem now to dictate." And in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice John Marshall stated that "[i]t is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense — in that sense which common usage justifies." Indeed, that is the only sense in which judicial review can be justified in the first place.

Chemerinsky quotes another passage from McCulloch, that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." But this sentiment only undermines the dean's theory of an evolving Constitution. The Constitution will only endure if judges refrain from rewriting its provisions to suit their own perception of what modern-day society prefers. As Justice Story stated, the Constitution "should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, *but the same yesterday, to-day, and for ever*."

No one is arguing that the Constitution can never be updated. But Chemerinsky fails to explain why it is the unelected judiciary — as opposed to the democratic branches — that should be updating the Constitution. Under the Constitution itself, amendments can be proposed by two-thirds of both houses or a convention of the states, and then ratified by three-fourths of the states. The very existence of that amendment process demonstrates that judges are not the authorized agents of the Constitution's "evolution."

The Founding Fathers also rejected the notion of a judiciary entrusted with updating the Constitution. James Madison wrote: "I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. *In that sense alone it is the legitimate Constitution*." Thomas Jefferson agreed: "[L]et us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."

Although today's majority on the Supreme Court does not embrace originalism, it is clear that when we survey the field more widely, Justice Scalia stands in excellent company.

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