The Pretense of Necessity in Constitutional Theory

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Andrew B. Coan, The Irrelevance of Writtenness in Constitutional Interpretation, 158 **U. Pa. L. Rev.** 1025 (2010).

Good legal advocacy often involves characterizing hard cases as if they were easy, and describing indeterminate precedents or statutory provisions so as to imply that they clearly point in the direction of the advocate's preferred outcome. And because the great majority of normative or prescriptive legal scholarship is committed by individuals trained and proficient as legal advocates, much of the scholarly output of the legal academy shares the same characteristic. Outcomes that are chosen are claimed to be compelled, and prescriptions that are desired are treated as inevitable. And because advocates whose favored outcomes rest on debated moral or political premises are reluctant to acknowledge the contested nature of the assumptions that drive their outcomes, it is common to see outcomes that are thought to be normatively desirable couched in the language of inevitability, and outcomes thought to be normatively undesirable described as impossible or simply logically flawed.

These pathologies are nowhere more apparent than in the domain of normative constitutional theory, where normative arguments and premises are frequently concealed in the language of linguistic, legal, or institutional necessity. A useful corrective has been provided by Andrew Coan, who attempts, with considerable success, to show that masking morally and politically normative theories of constitutional interpretation in the supposed nature of language itself, or in the inescapable implications of having a written constitution, is largely flawed.

Much, but not all, of Coan's target is the recent spate of attempts to claim that interpreting the Constitution (or any constitution) according to some version of originalism is the logical entailment of the very commitment to a written constitution in the first place. Coan thus challenges a range of originalists spanning the political and ideological spectrum, questioning the views of Justice Scalia, Jack Balkin, Keith Whittington, and others, all of whom have argued that simply *having* a written constitution necessitates interpreting its language according to some version of original meaning. But Coan, with an admirably careful and analytically precise argument, shows how such arguments depend on normative assumptions that are not necessary parts of the nature of language or of the decision to write a constitution. Thus, using as an example an approach discussed briefly, but not featured by Coan, we can see that it would be far from impossible to understand and interpret a written constitution by reference to the current conventional meaning of its language. Such an approach may or may not be wise, and its problems might well outweigh its virtues. But as soon as we recognize that such an approach is at least possible, we are compelled to recognize as well that the argument for its alternatives—originalism, for example—involves a political, moral, and institutional choice. Originalism in one form or another might indeed be desirable, but because it is compelled neither by the nature of language or the very idea of a written constitution, it must be argued for on normative grounds. However, this is precisely what Coan argues many originalists seem loath to do.

Much of Coan's attention is focused on originalism, perhaps because of its contemporary ubiquity and seeming political catholicism. But the same problem of thinking that too much follows from the writtenness of a constitution, he argues, besets non-originalist perspectives as well. Just as originalism does not in any form inevitably arise out of the commitment to a written constitution, neither does

common law constitutional interpretation, nor the idea of a living constitution, nor any other non-originalist approach to constitutional interpretation. Such approaches, no less than originalism, rest on normative values, values which Coan argues need to be justified explicitly and on their own terms rather than being treated as the inevitable implications of having a written constitution.

Coan is by no means the first to point out the normative moral and political groundings of various theories of interpretation. Mitchell Berman's tendentiously titled "Originalism is Bunk," 84 N.Y.U. L. Rev. 1 (2009), for example, castigates a gaggle of originalists for denying the political and moral underpinnings of their approach. But Coan goes further than many of his forebears, partly because his target is as much non-originalism as it is originalism, and partly because his focus is so much on the idea of a written constitution itself. Ever since John Marshall proclaimed in *McCulloch v. Maryland* that "we must never forget that it is a constitution we are expounding," constitutional advocates have insisted that all sorts of interpretive and substantive approaches follow inexorably from the very fact of there being a written constitution. A careful reading of Coan's article will show why Justice Marshall was mistaken in believing this to be so in 1819, and why a host of theorists of all stripes are mistaken in believing this to be so now.

Coan's arguments are supported by analytic precision, careful argument, useful distinctions, and just the right amount of philosophy. He does not use the philosophy of language to display his erudition, and he recognizes that philosophy is useful in legal scholarship when it illuminates legal issues and legal problems. It may be useful for philosophy to use legal examples and legal problems to sharpen philosophical analysis, but legal scholarship that seeks simply to put legal issues into philosophical categories misses a valuable opportunity to use philosophy in the service of legal analysis. It is to Coan's credit that he does this so well.

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