ORIGINALISM'S RACE PROBLEM

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I was surprised to learn recently, from Ron Chernow's illuminating biography, that George Washington's teeth might have been pulled from the mouths of his slaves.[1] I suppose I should not have been surprised. I certainly knew that Washington kept slaves. I even knew that he was capable of uncommon barbarity with respect to his slaves, forcing them, for example, to clear swamps in the bitterest of winter chill.[2] But even as a relatively sophisticated consumer of American legal and political history, I have been partly captured by the romantic myth around Washington. He paid for the teeth, it seems,[3] but the fact that he bought them from someone from whom he was extracting free labor on pain of lash (or worse) cannot help but lower Washington another notch in my imagination.

I recount this inner intellectual conflict as an entrée into a question that I have been puzzling with for some time, and that this brief essay can better identify than resolve. The question is whether, and if so to what degree, a tension exists between African-American identity and originalism. I do not mean to ask whether it is possible for someone who identifies as African-American to hold originalist views about constitutional interpretation. It is of course possible, as Justice Thomas might attest.[4] I also do not mean to ask whether someone who identifies as African-American *should* be an originalist. I reject the illiberal notion that my own views should have much to say about the relationship between another's race and her political or intellectual commitments. The question, rather, is whether African-Americans have especially good reason to reject originalism, such that selling African-Americans on originalism carries, and reasonably should carry, an unusually high burden of persuasion.

I suspect that for many this sounds like an easy question, but I doubt that everyone who thinks it is easy agrees on the answer. On one hand, if we believe that we can identify interpretive methodologies with constitutional outcomes, and if we believe that originalism in particular is identified with outcomes that African-Americans tend not to support, then we have a simple explanation for why many African-Americans might not

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1. RON CHERNOW, WASHINGTON: A LIFE 438 (2010).
2. *See id*. at 496.
3. *Id*. at 438.
4. *See* Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6–7 (1996).

have warm feelings toward originalism. This explanation, though, is contingent on a set of assumptions about African-American political views and about the actual or perceived substantive outcomes originalism entails. Those assumptions might go some way toward explaining why so few African-Americans in fact identify as originalists,[5] but it does not answer the more fundamental question of whether the methodology itself is or is not, for lack of a better term, racially sensitive.

One potential answer, in the negative, relies on a version of what is often called the "dead hand"[6] argument, and it feels especially urgent when it comes to matters of race. A familiar formulation goes something like this: Accepting the authority of the original understanding of the Constitution requires one to accept that the ratifying process has significant democratic purchase.[7] The reason we do not accept the constitutions of France or Zimbabwe or Utah as binding the rest of us is that those constitutions were enacted through processes in which we had no say. The Constitution of 1787 was submitted to ratifying conventions intended to be representative of relevant members of the population, but, as we all know, those conventions were not in fact representative. Voting for delegates to the state conventions largely excluded women, Indians, blacks, and those who did not own property.[8] The Constitution is as to those marginalized persons as the Zimbabwe Constitution is to the rest of us, and so its authority must follow not from its democratic pedigree but from some other, more inclusive account.[9]

If we accept that argument, it applies not only to racial minorities but also to women and even, perhaps, to many poor people. But the special urgency on issues of race derives from the institution of slavery and its associated badges and incidents. It is not just that people of African

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5. In a recent study, my co-authors and I found that only four percent of African-American survey respondents (compared to 29 percent of whites and 32 percent of Hispanics) are originalists, where originalists were identified as those falling within the top quartile along a continuous index of several different measures of originalist affinity. Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 406 (2011).

6. *See generally* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

7. I acknowledge that one might distinguish between originalism as purely a question of textual exegesis—divining the meaning of a text—and originalism as an authoritative guide to judicial or political decision-making. This dichotomy sometimes goes under the label "interpretation" versus "construction." *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 99 (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: ORIGINAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7–11 (1999); Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 144 (2010). In my experience this distinction has currency only for specialists; most participants in methodological discourse, including legal scholars, hold a conception of originalism that relies on an account of the political authority of the framers' original intent or the original understanding of members of the ratifying generation. *See generally* Samaha, *supra* note 6, at 636–37.

8. *See* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 240–42 (1913); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 7 (2005).

9. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

descent were not represented at Philadelphia or at the state ratifying conventions, but that the Constitution that emerged from those conventions preserved and protected both slavery itself and slavery's institutional infrastructure. Start with the three-fifths clause, which counted slaves as three-fifths of a person for purposes of representation and direct taxation.[10] Slaves obviously could not vote in southern states, and so bringing slaves into a state would increase a state's congressional representation without giving blacks any additional political power. This is a bad incentive.[11] The three-fifths compromise also affected the Electoral College, since a state's number of electors is based on its congressional representation. It is no coincidence that all but two elected Presidents before Lincoln—the exceptions being one-termers John Adams and John Quincy Adams—were slaveholders or expressed deep and open sympathy with slaveholding interests.[12]

The Constitution included two other direct accommodations for slavery: the Fugitive Slave Clause, which required states to return any escaped slaves and which, as interpreted by the Supreme Court, prevented states from affording due process to their black citizens who were accused of being fugitive slaves;[13] and the importation clause, which prevented Congress from withdrawing from the international slave trade prior to 1808.[14] The importation clause was one of only three expressly unamendable provisions in the 1787 Constitution, along with the prohibition on disproportionate capitation taxes (designed to prevent arbitrary taxation of slaves) and equal state suffrage in the U.S. Senate.[15] All three were concessions to states' rights, the constitutional terms through which much of the nation's institutionalized racism has been defended.

There are answers to this charge. The most persuasive is the simplest: slavery was abolished by the Thirteenth Amendment, and the Constitution's most obvious slavery-protecting provisions have been excised. The process of constitutional design was unrepresentative along racial lines in 1787, but the Constitution that emerged from that process has been amended so as to be more inclusive. The Fourteenth Amendment was drafted expressly to guarantee civil equality, and six of the last thir-

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10. U.S. CONST. art. I, § 2, cl. 3.

11. Of course, the three-fifths compromise also increased the tax base of southern states beyond what it would have been if slaves counted neither for representation nor for direct taxation, but it is worth noting that the Constitution also provides that all revenue bills must originate in the arguably perversely malapportioned House of Representatives. U.S. CONST. art. I, § 7, cl. 1. Moreover, per capita tax revenue represented a small share of federal-tax income in antebellum America. *See* AMAR, *supra* note 8, at 93–94.

12. Paul Finkelman, *Thomas R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U.L. REV. 75, 89 (1999).

13. U.S. CONST. art. IV § 2 cl. 3, *repealed by* U.S. CONST. amend. XIII; Prigg v. Pennsylvania, 41 U.S. 539, 622–23 (1842).

14. U.S. CONST. art. I § 9 cl. 1.

15. U.S. CONST. art. V. The prohibition on disproportionate capitation taxes, like the importation clause, could be amended after 1808.

teen constitutional amendments have related to voting rights, with every one of them expanding the franchise.[16] Correctly practiced, originalism fixes on the whole Constitution, as amended, and it is to that Constitution we should look in assessing originalism's democratic provenance.[17]

More generally, to the extent the dead hand problem as I have articulated it is a problem, it is not a "race" problem. The challenge to the democratic representativeness of the Philadelphia Convention and the state ratifying conventions is one we all share, regardless of race. It is indeed the central challenge of constitutionalism more generally: How can any political document retain democratic authority across successive generations? Many able scholars have offered answers to that question, but the important point here is that it looms so large that it overwhelms considerations of the representativeness of the founders along racial lines. Put another way, all successful strategies for overcoming the problem of intertemporal constitutional authority accommodate the problem of racial representation at the founding. If originalism can surmount the intertemporal hurdle, as many believe it can, whatever remaining defects it might have as a mode of constitutional interpretation would not derive from the fact that the constitutional conventions were not racially inclusive.

This response might be adequate to one especially narrow version of the dead hand argument, but for at least two reasons it is not adequate to my original question. First, the most persuasive originalist response to the problem of intertemporal authority raises additional, less easily dismissed race-related complications. One common originalist answer to the problem seeks to identify some way in which current generations have consented to constitutional provisions that justifies preserving the original understandings of those provisions.[18] For reasons I have elaborated elsewhere, consent is not a persuasive justification for relying on original understanding to answer current constitutional questions, not least because few Americans have a defensible understanding of what originalism would entail for constitutional law in practice.[19] A better, more interesting originalist response to the intertemporal problem is to argue that the authority of the ratifying generation derives from its *normative* continuity with our own. On this argument, we are a complicated, multifaceted "people" constituted across time and in constant search of our better

16. U.S. CONST. amends. XIV, XV, XVII, XIX, XXIII, XXIV, XXVI.

17. *See* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1697, 1757–64 (2010) (defending originalism in part on the ground that constitutional provisions marginalizing women and blacks have been amended or excised).

18. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3–4 (1971) (suggesting that the American people have consented to an originalist reading of the Constitution).

19. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 668–70 (2009).

selves.[20] The originalist claim is that we locate our true values by looking backward rather than laterally or forward. On this account, originalism is best defended as a persuasive form of ethical argument; it is a normative account of national identity.[21]

So understood, the divide between originalists and living constitutionalists is between those who believe we are at our best when we are who we have been and those who believe we are at our best when we are who we might become. Jack Balkin has expressed this divide through the competing aspirational narratives of constitutional "restoration" and constitutional "redemption."[22] For Balkin, originalism may accommodate both narratives—one might faithfully work out the meaning of broad constitutional text either by fixing it in the past or by reimagining it in the service of subsequent social and political agendas[23]—but for most everyone else, originalism is centrally committed to and indeed fixated on a narrative of restoration. As Justice Scalia has written, the purpose of constitutionalism from an originalist perspective is to "obstruct modernity," and to prevent current majorities from diluting or altering the values of the past.[24] On this understanding, the potential for a race problem becomes more transparent. For me, as an African-American, a narrative of restoration is deeply alienating; what America *has been* is hostile to my personhood and denies my membership in its political community. The only way I can call this Constitution my own is to view it through a lens of redemption, the lens that originalism rejects.

Accounts of the authority of original understanding that do not rely on a narrative of restoration might avoid this problem, but few can avoid a second, related but more trenchant race-based critique. Originalism need not in theory, but in practice almost always assumes that the meaning of any particular constitutional provision is fixed at some historical moment.[25] Indeed, I would argue that its claim as to the determinacy of constitutional meaning is the single most consistent distinguishing fea-

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20. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 145 (2001) ("Commitmentarian democracy holds that a people, understood as an agent existing over time, across generations, is the proper subject of democratic self-government.").

21. *See* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 82–85 (2009). Some strategies for addressing the intertemporal problem consist in ignoring it—that is, defending originalism on prudential or pragmatic grounds. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 116–17 (2004) (arguing that originalism cannot be justified based on consent, but is normatively appropriate because it best preserves individual liberty); John O. McGinnis & Michael Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U.L. REV. 383, 385 (2007) (defending originalism on the ground that supermajoritarian processes produce superior political rules). My argument does not turn on whether these defenses are persuasive.

22. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 301, 308–09 (2007).

23. *Id*. at 295–303.

24. *See* Antonin Scalia, *Modernity and the Constitution*, *in* CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 313, 315 (Eivind Smith ed., 1995).

25. Again, Balkin is a lonely dissenter on this point. *See supra* note 22, at 295–303.

ture of originalism, whose definition can otherwise be elusive.[26] Insisting that the meaning of the Constitution is fixed is an especially unsympathetic response to the challenge Robert Cover posed nearly three decades ago in his essay *Nomos and Narrative*.[27] Cover criticized hyper-positivist modes of interpretation as being, in his term, "jurispathic."[28] On this conception the judge who understands herself to be promulgating the uniquely correct application of a legal norm is engaged in an act of violence, insofar as she is destroying the alternative conceptions advanced by dissenting normative communities.[29] Cover urged instead that judges "stop circumscribing the *nomos*" and recognize the possibility of plurality within legal interpretation.[30]

African-Americans constitute a nomic (not to say monophonic) community, if not generally, then around particular constitutional issues likely to affect them. The role of the jurispathic judge in a case implicating our *nomos* is either to adopt it or to suppress it in favor of a competing one. This binary is not one any minority community likely wishes to face, but it is especially daunting for one whose relative discreteness and insularity leads and has historically led it both to be excluded from and to resist normative assimilation. A jurispathic approach to legal interpretation wishes to deny that unassimilated norms hold legitimate claims to legal authority. Yet, the possibility of indeterminacy, of plurality, within law is precisely the mischief for which originalism is often promoted as an especially effective remedy.[31] Originalism treats *nomoi* that diverge from the one blessed by the originalist judge as a scourge that it is the function of law to eradicate.

Constitutional methodology translates, between word and deed, hope and reality, authority and violence. To choose a methodology is to choose the connective tissue between Constitution and subject. It is to adopt a narrative that enables a people not merely to submit to the state but to experience the Constitution as theirs. For that choice to be right, it needs to *feel* right; it must resonate with how one in fact experiences one's relationship with the nation and its commitments. A racially-sensitive constitutionalism must always, therefore, hold out the possibility of legitimate dissent from history. Originalism denies that possibility, and so for me, as I suspect for many African-Americans, it speaks in a foreign tongue.

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26. *See* Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 326–27 (2009).
27. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).
28. *Id*. at 40.
29. *See id*.
30. *Id*. at 68.
31. Greene, *supra* note 21, at 74.