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WHY CONSERVATIVES SHOULDN'T BE ORIGINALISTS

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The revival of originalism in the last generation has been, for the most part, the work of conservatives. That makes it easy to think that originalism and legal conservatism are natural allies. But in fact the alliance is an alliance of convenience, and, before too much longer, it is going to outlive its usefulness. Or at least so I will argue in this Essay. The cause of legal conservatives would be much better served if conservatives would abandon their allegiance to originalism and instead adopt an approach to constitutional interpretation that is based in precedent—an approach that seems to me vastly more sound in any event.

Any theory of interpretation, including originalism, can produce sharply different results, depending on who is using the theory. Of course any theory might be used in bad faith, but that is not what I mean. The point is that even good-faith interpreters can reach different results with the same theory. That is why one quick way to test the soundness of a theory of interpretation is to ask the question: What theory would you want your opponents to use, if you could assign a theory to them? If your political opponents were, say, appointing Justices to the Supreme Court, would you want those appointees to believe in originalism, or in some other view, such as one based on precedent? It seems to me that once you ask that question, you are going to conclude that a precedent-based approach is superior to originalism, even if you have conservative inclinations.¹ The reason is twofold: originalism makes it too easy for people to find, in the law, the

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1. See, e.g., Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 277–82 (2005) (discussing reasons why “a strong theory of precedent” leads to judicial restraint).

answers they are looking for; and originalism causes people to hide the ball, to avoid admitting, perhaps even to themselves, what is really affecting their decisions.

There are at least three reasons why originalism, contrary to appearances, in fact imposes only a very uncertain limit on judges and leaves them a great deal of latitude to find, in the original understandings, the outcomes they want to find—something that, as I said, may be fine if you want those same outcomes, but is not fine if your opponents are running the show. The first is what might be called the problem of ascertainability. At least when you are dealing with old constitutional provisions, which nearly all the controversial provisions of our Constitution are, it will be very hard to do the historical work needed to determine what the original understandings were. Partly this is just a technical problem of becoming conversant with all the relevant materials. But the greater problem is knowing what inferences to draw from those historical materials. Especially in dealing with highly controversial issues, ascertaining the original understandings will routinely require a thorough immersion not just in the context of the specific debate but in the culture of the time. It is a lot to expect a busy judge to do that competently, and it will be all too easy to seize on any evidence that supports the view of the Constitution that the interpreter himself prefers.

Let me give an example of just how intractable this basic problem of ascertainability is. In a terrifically interesting law review article, Judge Michael McConnell has argued that, contrary to the conventional wisdom that was entrenched for a generation, *Brown v. Board of Education*² was consistent with original understandings.³ I'm not sure Judge McConnell is correct, but let's assume he is. Now consider the following: In 1953, the Supreme Court asked the lawyers in *Brown* to brief the question of what the framers of the Fourteenth Amendment understood it to say about school segregation.⁴ The best lawyers and historians in the country were engaged in the project of trying to find an originalist justification for the outcome they desired,

2. 347 U.S. 483 (1954).

3. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

4. Miscellaneous Orders, 345 U.S. 972, 972 (1953).

which was the unconstitutionality of segregation. They spectacularly failed. The opinion in *Brown* begins with what can only be read as a concession that the original understandings do not support the conclusion the Court reached, that the Fourteenth Amendment forbids racial segregation.⁵

If Judge McConnell is right, and the original understanding actually does condemn school segregation, that means that the best lawyers and historians in the country, as well as the Supreme Court Justices and their clerks, with all the resources available to them and with every incentive to discover the original understanding, did not succeed in recovering that original understanding. This really should give originalists pause. Everyone is familiar with the argument that originalism is unacceptable because it would lead to a different result in *Brown*. But if Judge McConnell is right, and originalism actually supports the holding in *Brown*, that may be an even bigger problem for originalists. It means that, even in close to ideal circumstances—when all the resources and incentives were in place to figure out the original understandings—everyone still got the original understandings wrong.⁶

Even if you can solve the problem of ascertainability, there is a second problem, the problem of indeterminacy, that may be just as severe. The original understandings might—quite clearly—*not* resolve the issue at hand. This problem is familiar in the ordinary legislative process. The people involved in drafting and adopting a provision might not have foreseen a particular issue that later arises under that provision. Or they might agree on a form of words but disagree on what the form of words is going to mean; indeed the words might have been chosen precisely because they can accommodate diverging understandings. Here, again, there is a real risk that an interpreter, although acting in good faith, will see what he or she wants to see in the original understandings.

The third problem, related to the problem of indeterminacy, might be called the problem of translation. Suppose you've successfully figured out what the original understandings were. And suppose that, providentially, those understandings

5. *Brown*, 347 U.S. at 489–90.

6. See David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 304–06 (2005).

would have given a definitive answer to the question you're interested in, had that question arisen when the constitutional provision was adopted. Even then, if the provision is an old one, it is routinely not going to be clear what those understandings say about that issue today. Unless the original understanding was "here is how we are going to answer this question now and forever," it will be difficult to respond to the argument that the original understanding dealt with the problems people were confronting at the time, in the society in which they lived, with the technology they had, and with the population they had. The question remains: what was their understanding about how those problems should be confronted in a wholly different world, like the one in which we live today?

It is theoretically possible that the original understanding will be that a particular constitutional provision settled a specific issue for all time. For example, the original understanding of a provision could be that the federal government should never regulate some particular kind of activity, no matter what. But as a practical matter, it is very unlikely that the original understanding of a constitutional principle would have that character, or that a judge could, with confidence, determine that it did. The original understanding is much more likely to be focused on contemporary times, rather than on other circumstances that might have been literally unimaginable to the people who adopted the provision. The difficult follow-up question then becomes: how do we translate that original understanding for our time? And that question virtually invites the present-day decisionmaker to impose his or her own solution, in the guise of channeling the original understandings.

At the root of these difficulties with originalism is the lack of any generally accepted justification for following the original understandings across the board. There is no real answer to Thomas Jefferson's famous question of why we should allow the dead to rule the living.⁷ In fact, although some originalists do try to grapple with that question, most don't. The appeal of originalism to most originalists, I believe, is not some sense of fealty to past generations. Rather, originalism is appealing be-

7. For a discussion, see David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003).

cause there does not seem to be a plausible competitor.⁸ The idea is that if judges don't follow the original understandings, they will be free to do whatever they want.

But if that is the concern—unfettered judicial discretion—a precedent-based theory is far better than originalism. Professors Calabresi and Amar have argued very powerfully that precedent is manipulable, and of course they are right. Judges pick and choose among precedents, often overrule precedents, and follow precedent uncertainly.⁹ But it seems to me that originalism is much more manipulable. As a practical matter, precedent closes off many options. This is an everyday and, I think, incontrovertible fact for lower court judges, and Supreme Court Justices differ only in kind, not in degree. The options open to them are sharply limited by, and substantially structured by, precedent.

Some opponents of a precedent-based approach to constitutional interpretation say that there is really no theory of precedent. But that is not correct, either. I don't think the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁰ gives a particularly good account of the theory, but the theory has, in fact, been around for centuries. It was developed, over time, by common law lawyers, and it finds its most famous expression in Burke's great work.¹¹ The theory is one of humility; of respecting the limits of human reason; and of making judgments about morality, fairness, and justice, but making them only within the narrow confines left open by tradition. It is not an algorithm; it does not dictate results. It does not preclude judges from making judgments about what is right and wrong, and from allowing those judgments to influence their view of what the law is, but it limits the scope within which those judgments can influence legal conclusions.

The evil of school segregation ought to have been part of the reason for the outcome of *Brown v. Board of Education*, emphasis equally on the words "ought" and "part." If you think abortion

8. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

9. See Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000); Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635 (2006).

10. 505 U.S. 833 (1992).

11. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1793).

is evil, that ought to be part of the reason for calling for the overruling of *Roe v. Wade*;¹² again, emphasis on the word "part." A common law approach insists that judges are sharply limited by precedent, but it does not suggest that precedent always determines the outcome of a case—obviously not—and, more important, a common law approach to constitutional interpretation allows judges and other interpreters to say that part of the reason for a result is that that result is more fair or is better policy. Sometimes precedent fairly read will foreclose every result but one. But sometimes it will only narrow the range of acceptable results. In such instances, if one outcome—authorized although not dictated by precedent—seems to be much more sensible or more just, the judge may openly rule that way.¹³

The great virtue of the common law approach is that while it does substantially limit the acceptable results in a case, it also—within those limits—allows for a kind of candor that originalism tends to suppress. The temptation, for an originalist, is to "discover" that the original understanding about some controversial issue is, conveniently, identical to one's own views. They were so wise back then! The originalist can then present the outcome of a case as simply a matter of following the will of the Framers and avoid admitting, perhaps even to himself, that he is reaching a result in part because he thinks it is right as a matter of policy.

A common law approach, by contrast, acknowledges that precedent sometimes takes a judge only so far and leaves the judge with a degree of flexibility; the rest is a judgment based on other normative grounds. A common law approach does not suppress the basis of disagreements by insisting that constitutional law is only about what the original understanding was and that the decisionmaker's own views play no role at all. In a word, then, both originalism and a precedent-based, common law approach leave a range of issues unresolved. My own view is that originalism, for the reasons I listed earlier, leaves a much wider range of issues unresolved. But whether or not that is so, the common law approach has the virtue of acknowledging its own indeterminacy and encouraging candor to a greater degree than originalism does.

12. 410 U.S. 113 (1973).

13. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 900-03 (1996).

But why should conservatives, in particular, shun originalism? The reason is that originalism's characteristic features—ersatz determinacy, coupled with an appeal to foundational sources, all concealing an unexpressed normative agenda—makes it a decidedly non-conservative rhetorical weapon. Originalism, precisely because of these features, provides a set of arguments that can be used by people who are unhappy with the *status quo*. If a judge thinks that what has been built up over time is corrupt and wants to sweep it away, one excellent rhetorical strategy is to claim to go back to first principles and get rid of everything that has happened since.

This is apparent in the career of the Supreme Court Justice who was by far the most successful originalist of the last century—and who was not a conservative at all. Justice Hugo Black used originalism in just the way I describe, to attack what was, in his view, a corrupt tradition. For Justice Black, it was the tradition of the pre-New Deal Court. Justice Black attributed to the Framers of the Constitution the New Deal consensus on judicial review of economic legislation and what came to be regarded as the Warren Court views on civil rights and civil liberties. Present-day conservative originalists are attacking what they see as a different, corrupt judicial tradition.¹⁴ They, too, turn to originalism. The original understandings are available as a weapon to those who want to attack a corrupt tradition, but they are available to almost anyone, just because originalism is so flexible and open-ended, and because it conceals what is really going on.

Increasingly, though, our constitutional order is becoming something that conservatives like. The tradition is a conservative one. When the next generation of liberals wants to attack what the current generation of conservatives has accomplished, those liberals, some of them anyway, will, I'm betting, invoke the original understandings. They will, in good faith and with some degree of accuracy, find material in the original understandings that will support their cause—precisely because originalism is such an indeterminate, open-ended approach.

14. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741–42 (2007) (describing the efforts of “movement-Republicans” to change the *status quo* by promoting originalist judges).

Conservatives could do themselves a tactical, rhetorical favor—and, more important, refocus the constitutional debate on the real bases of disagreement—if they stopped embracing originalism now. The debate should not be over who has best captured the original understandings. That debate just invites manipulation and intellectual disingenuousness, and—Jefferson’s point—it is not clear why it’s relevant anyway. The debate should instead be conducted in fully candid terms, in which judges and others acknowledge that the law is determined in part but not entirely by precedent; and in which people avow and defend the normative commitments that are influencing their decisions, instead of attributing their views to the founding generations.