

ORIGINALISM, PRECEDENT, AND CANDOR

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I

Some legal principles are purely conventional. Within a wide range of possible rules, it doesn't matter much what the rule is; we just have to have a rule. "Traffic keeps to the right" is a customary example. But other legal principles are not just conventional. Some alternatives are much better than others. If the question is whether religious minorities should be subject to persecution or whether battery should be a tort, it is not enough just to have a rule. Legal principles addressing questions of that kind are unavoidably based on judgments about morality, social policy, and similar matters. You can't have a system of tort law, or a system of religious freedom, or many other things that the law provides, without making such judgments.

The controversy arises over the question: who should make those judgments? When the issue is one of constitutional law, originalism, as I understand it at least, provides a clear answer: those judgments were authoritatively made by the Framers of the Constitution. Originalists have to say who counts as the Framers, and they have to have a way of ascertaining what judgments that group made, but for present purposes those are details, and I will assume that originalists have an adequate way of doing both those things. The point is that according to originalism, the interpreter does not make controversial judgments about morality and policy; his or her job is to implement the judgments made by someone else. There may be versions of originalism that are more equivocal on this point, but at least in its purest and most comprehensive form, originalism allows no room, at all, for the interpreter to make such judgments. Indeed

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that seems to be the source of much of the appeal, implicit and explicit, of originalism.

Precedent-based or common law approaches to constitutional interpretation are different because they allow for the interpreter, within a certain range, to be influenced by judgments about morality, policy, fairness, and similar concerns. No sensible common law approach denies this. Maybe Christopher Columbus Langdell thought that precedents constitute a closed axiomatic system from which legal outcomes could be deduced on every occasion, but no one else thinks that. Benjamin Cardozo's *The Nature of the Judicial Process*, as good a candidate as any for a canonical statement of the common law method, is explicit in recognizing the role that judgments of morality and policy play in a precedent-based system.¹ Unlike originalism, a precedent-based approach does not deny that the moral judgments of the interpreter—not just the judge, but the legislator, President, or citizen who takes a position on a constitutional issue—are sometimes a legitimate part of constitutional interpretation.

What a precedent-based system does is to define and limit the role that such judgments play. Originalists often criticize precedent-based approaches on the ground that they impose only a nominal limit, not a real limit, on the use of the judge's moral and policy judgments. I think that is manifestly incorrect: many constitutional principles that are morally appealing are simply off limits, because of precedent. No judge, however convinced of the immorality of, say, the war in Iraq, or the most recent set of tax cuts, would seriously consider holding them unconstitutional. Precedent sets the terms of debate in countless areas of constitutional law. Precedent limits judges in constitutional cases just as it has for a long time limited judges in cases about contracts, torts, and property.

The important point, though, is that an originalist must deny that he or she is moved *at all* by the moral attractiveness of a position. A common law constitutionalist can forthrightly acknowledge that part of the reason for adopting a certain view is that that view is morally right. The immorality of Jim Crow segregation may not be sufficient to sustain the lawfulness of *Brown v. Board of Education*,² but at least its relevance is not zero, no

1. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66–67 (1921).

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

matter what the original understanding was. An originalist cannot say that. Originalists must insist that all they are doing is implementing judgments made by someone else—the Framers, somehow defined.

In my view this contrast is a very strong point in favor of common law constitutionalism and against originalism. That is so for many reasons, but the reason I want to emphasize here is that the common law approach is more candid. Judgments about morality and social policy in fact play a role in originalist constitutional interpretation, too. One great advantage of a precedent-based approach to constitutional interpretation is that it is candid about those influences in a way originalism is not. A person committed to a common-law approach can forthrightly avow the moral and policy judgments underlying his or her views. Those judgments will then have to be defended on their own terms, as moral or policy judgments; and the interpreter will have to give an explanation of why he or she is not *simply* imposing a moral judgment but is acting lawfully.

An originalist cannot admit that his or her moral judgments are entering into the picture. As a result, those judgments, when they play a role in the originalist's interpretations—and they will play a role, sometimes—will do so covertly. The originalist will have to deny that he or she is making any moral judgments at all, and will therefore not have to defend them in terms, or explain why relying on those judgments is a legitimate thing to do in the particular case. The originalist has to say that all the judgments were made by someone else, by James Madison or John Bingham or the members of state ratifying conventions at some distant time in the past. And James Madison's judgments, according to originalists, are not to be challenged on grounds of morality or policy. That is, it seems to me, an unhealthy way of dealing with difficult constitutional issues.

II

In saying that originalism is less than candid, I am not—at all—attributing bad faith to originalists. The problem is not with the people practicing originalism; the problem is a structural feature of the originalist approach to interpretation. I also am not claiming that accounts of the original understanding of constitutional provisions are always or necessarily influenced by moral and policy judgments. Sometimes the original understandings will be so clear that there can be only one possible outcome of a

conscientious effort to uncover them, or at least so I will assume. But sometimes they will not be so clear. This can happen for a variety of well-known reasons:³ as a practical matter, the historical materials may be sparse, vague, conflicting, or simply unenlightening; even when those difficulties do not arise, if the constitutional provision in issue was adopted long ago, there is the problem of coming to grips with a culture that is very different from ours; there is then the related problem of characterizing the original understanding in a way that bears on current issues; and, related to that, the notorious difficulty of determining the level of generality at which to characterize the original understanding.

When problems like these occur, the original understandings will not be so clear. In such instances, it will be difficult even for good-faith interpreters to keep their moral and policy views on the sidelines. In fact there is a useful parallel, on this score, between originalism and the common law approach. Sometimes there is only one fair reading of the precedents; a good faith effort to follow precedent can yield only one result. Sometimes the precedents are not completely clear, but, on balance, one reading is certainly better; the same might be true of original understandings. But sometimes the precedents—or the evidence of the original understandings—simply does not admit of a single good-faith interpretation. In those circumstances, the common law approach says that the interpreter's moral and policy judgments can play a role. But an originalist (in the versions I am considering) cannot say that. In those circumstances, the tendency to see in history what one wants to see may be unconscious but will be very strong.

This happens, frequently, even with historians, whose debates usually have relatively low stakes as a practical matter. Take, for example, the question of Thomas Jefferson's attitude toward slavery, surely one of the more thoroughly examined questions in American historiography. Was Jefferson basically a critic of slavery, who made limited compromises with the political and economic reality of his time, or was he basically an apologist for slavery who voiced the occasional high-sounding sentiment against it? Or did his views change over the course of his life? Distinguished historians can be found on every side of this question. And, not surprisingly, those whose antecedent dis-

3. These are admirably recounted in Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005).

position toward Jefferson was generally favorable tend to portray him as an opponent of slavery; those whose disposition was initially more critical tend toward the opposite view.⁴ There is no reason to believe this is in any way the product of bad faith or of anything less than a conscientious effort to understand the historical materials. But there is a tendency—not inexorable, not present in every instance, but an undeniable tendency—to see in history what one would like to see.

In the law, one of the most prominent examples of this comes from what is, to my mind, one of the greatest judicial opinions, Justice Brandeis's concurrence in *Whitney v. California*.⁵ That opinion, better than any other, "captures why the freedom of speech might be considered the linchpin of the American constitutional regime."⁶ It is an eloquent and in some ways brilliant account of the value of free expression. But Brandeis attributed the central ideas to "[t]hose who won our independence."⁷ The problem is that it is not at all clear that "those who won our independence" shared Justice Brandeis's views, or our views, about freedom of expression (leaving aside the question whether "those who won our independence" are the relevant Framers of the Constitution). There is actually a lot of controversy, and uncertainty, about the Framers' views on even the basic question of whether the government could punish dissent on the ground that it undermined civic cohesion.⁸ Brandeis (and the historians on whom he relied) saw in history what they wanted to see.⁹

4. For various views of Jefferson, see, e.g., Paul Finkelman, *Jefferson and Slavery: Treason Against the Hopes of the World*, in Peter S. Onuf, ed., *Jeffersonian Legacies* 181–221 (1993) (critical of Jefferson); Douglas L. Wilson, *Thomas Jefferson and the Character Issue*, CCLXX *Atlantic Monthly* 61 (1992) (defending Jefferson); JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 171–80, 313–26 (1997) (describing evolution in Jefferson's views). See generally JOHN CHESTER MILLER, *THE WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY* (1977).

5. 274 U.S. 357, 375–76 (1927).

6. Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 60, 73 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

7. *Whitney*, 274 U.S. at 375.

8. See, e.g., LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960); LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 *COLUM. L. REV.* 91 (1984); David M. Rabban: *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 *STAN. L. REV.* 795 (1985).

9. Brandeis is commonly thought to have been influenced by Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 *HARV. L. REV.* 932 (1919). For a characterization of Chafee's article as "disingenuous," see Rabban, *supra* note 8, 37 *STAN. L. REV.* at 796

Finally, there are the ingenious and intellectually adept efforts to find an originalist justification for *Brown v. Board of Education*.¹⁰ For a long time, the nearly unanimous view has been that *Brown* is inconsistent with the original understandings of the Fourteenth Amendment. The evidence—from debates over the Fourteenth Amendment and the Civil Rights Act of 1866, which it constitutionalized; from the practices in states that ratified the Amendment, as well as the legislation and practices of the Congress that proposed it; and from judicial decisions interpreting the Amendment in the period after it was ratified—seems conclusive.¹¹

Today, a half-century after the decision, some originalists claim to have found an originalist defense of *Brown*. It would be one thing if these new originalist defenders of *Brown* claimed simply that the original understanding was vague and inconclusive, and not unequivocally opposed to *Brown*. That was, in fact, the view taken by many of *Brown*'s defenders at the time of the decision.¹² But if the original understanding is inconclusive, then there is no originalist justification for *Brown*; something besides the original understanding is needed to condemn school segregation. The originalists who would justify *Brown* claim, if I understand them correctly, that *Brown* is not just reconcilable with but dictated by the original understanding—that the text and the historical materials, uninfluenced by any moral judgments about Jim Crow, require the conclusion that school segregation is unconstitutional.¹³

As an aside, even if this conclusion were right—perhaps especially if it is right—what it would actually demonstrate is that originalism, even if sound in theory, is terrible in practice. In June 1953, after hearing argument in *Brown* for the first time,

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10. I have in mind principally Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). The defense offered by Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 60–65 (2000), seems to rely on the text of the Constitution, rather than the original understandings, and arguably on (certainly correct) moral judgments about the nature of racial segregation as well.

11. Among the leading accounts are Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Alfred Avins, *De Facto and De Jure School Segregation: Some Reflected Light On the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 MISS. L.J. 179 (1967); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 117–33 (1977).

12. See Bickel, *supra* note 11.

13. See, e.g., McConnell, *supra* note 10, 81 VA. L. REV. at 1140 (“[S]chool segregation was understood during Reconstruction to violate the principles of equality of the Fourteenth Amendment.”).

the Supreme Court called for rebriefing and reargument on, among other things, the question whether the original understanding of the Fourteenth Amendment was that the Amendment “would abolish segregation in public schools.” That summer, many of the best lawyers and the best historians in the nation worked feverishly to try to prove that the answer to that question was “yes.” They had every incentive to find that answer. More important, the Court, when it ultimately wrote its opinion in *Brown*, in May, 1954, had every incentive to claim that it had found a favorable answer, if that conclusion could possibly be supported by the evidence. The Court knew that its decision would be met with hostility, and if there was a way to claim the authority of the Framers of the Fourteenth Amendment, the Court would surely have claimed it.

But the Court made no such claim; famously, its opinion essentially conceded that the original understanding of the Fourteenth Amendment did not support the conclusion it reached in *Brown*. In other words, with every incentive, and substantial resources, the best lawyers and best historians of the time could not identify an originalist argument for *Brown* that was plausible enough to be used even by a Court with every incentive to use such an argument.

The originalist defenders of *Brown* are, therefore, saying that on the most important constitutional issue of the twentieth century, the Supreme Court, aided by the best lawyers and historians in the country, failed to uncover the original understanding—even though there was every possible incentive to uncover it. It took another half-century, and some brilliant historical analysis, finally to get the original understanding correct. If it was that hard to arrive at the right originalist answer in *Brown*, then what hope is there for judges and advocates in more ordinary cases dealing with one among many issues on a busy docket? No one has suggested that the original understandings about school segregation are more difficult to uncover than the original understandings about most other constitutional issues. If the originalist defenders of *Brown* are right, it is, evidently, very hard—very, very hard—to do originalism correctly, and very easy to be mistaken about the original understandings. Any interpretive method that is that difficult to apply, and that mistake-prone, merits rejection for that reason alone.

But my principal point here is different. I do not think it is plausible to say that the original understandings compel the conclusion that *Brown* is correct. There is too much evidence to the

contrary, including the fact that the Court was unable to come up with a plausible originalist defense when it desperately needed one. The original understandings about school segregation may have been confused or equivocal—that is certainly very plausible. Or—and this is the real point—it might be possible to sift through the textual and historical evidence and make a case for *Brown*. But that, I believe, is what the originalist defenders of *Brown* have done. They have made a case. They have shown (at most) that, if you need to find some not-totally-implausible way to square *Brown* with the textual and historical evidence, you can. If you minimize the evidence against *Brown*, and make the most of the favorable evidence—in the manner of an expert brief-writer—you can come up with a defense of *Brown* that a Justice who wanted to hold school segregation unlawful could adopt without embarrassment. But that is quite different from showing that the original understandings dictate *Brown*. The difference is, precisely, whether the interpreter's moral condemnation of school segregation is playing a role in describing the original understandings.

There may be nothing intrinsically wrong with using history in this way—showing that a particular outcome, preferable on moral grounds, can be reconciled with history even if it is not compelled by history. In fact, this form of originalism is parallel to (it may even be a variety of) common law interpretation. It amounts to using the history of the framing in the way that common lawyers use precedent. Common lawyers allow for the possibility that precedent can sometimes be read in different ways; when it can, they choose one way because of its superiority as a matter of morality or policy. Similarly, the originalist defenders of *Brown* (and of the central principles of modern First Amendment law, and of much else) are choosing one among many possible readings of history because of the moral attractiveness of that reading. But common law approaches (of any sophistication) admit that that is what they are doing; originalists insist that they are just unearthing someone else's moral judgments, not making their own.

III

Why, it might finally be asked, can't originalism be defined to permit moral judgments to play a role? Two such accounts of originalism seem to be available. On one account, originalism just requires that clear original understandings be honored; to

the extent the original understanding is unclear, originalism has nothing to say.¹⁴ That conception of originalism certainly reduces the likelihood that the analysis of original understandings will be influenced by the interpreter's moral or policy views. But it does not reduce the likelihood to zero; there will still be a temptation to find that the original understandings are clear, when in fact they are not. And this conception of originalism, if practiced faithfully, would, of course, give away a lot. Exactly how much would depend on how clear is clear. But it seems likely that most controversial constitutional issues would, according to this view, require non-originalist answers.

Alternatively, originalism might be conceived as a kind of alloy of historical materials and moral or policy judgments. Justice Antonin Scalia, who considers himself an originalist, acknowledges that "originalism is strong medicine, and . . . one cannot realistically expect judges (probably myself included) to apply it without a trace of constitutional perfectionism."¹⁵ But, he suggests, this may even be a virtue:

[T]he main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely. . . .

Originalism [unlike nonoriginalism] does not aggravate th[is] principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself. And the principal defect of that approach—that historical research is always difficult and sometimes inconclusive—will, unlike nonoriginalism, lead to a more moderate rather than a more extreme result. The inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of project-

14. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005), appears to take this position, but for two reasons I am reluctant to attribute it to him unequivocally. First, Professor Barnett speaks of "original meaning" rather than original understandings, and, given the problematic nature of the notion of "meaning," that may be an important difference. Second, while it is clear that Professor Barnett would permit precedent to play a role if the original meaning were unclear, I am not certain about the role he would assign to judgments of morality and policy.

15. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

ing upon the age of 1789 current, modern values—so that as applied, even as applied in the best of faith, originalism will (as the historical record shows) end up as something of a compromise. Perhaps not a bad characteristic for a constitutional theory.¹⁶

At least two things about this passage are notable. First, it is an admission, from perhaps the most prominent originalist of all, that originalists inevitably meld their historical inquiries with their own moral judgments (and that one need not attribute bad faith to originalists in saying that). In fact Justice Scalia thinks “the historical record shows” that originalists do this. Second, Justice Scalia does not suggest that, in particular cases, this “inevitable” tendency should be acknowledged so that it can be weighed against and made coherent with the historical investigation of original understandings. Instead, he seems to be saying that, despite his admission, in particular controversies originalists will claim simply to be following the original understandings, even though they know that they are, to some degree, actually being influenced by their own moral and policy judgments. At the same time, some originalists at least will be lacerating their opponents for doing openly what they are doing covertly.

The idea that judges and other interpreters of the Constitution should not simply follow their own judgments, and should instead seek guidance from the wisdom of others—that is an excellent idea, a counsel of humility. It is also the core of the common law approach. Of course, the common law approach looks to a wider variety of sources of wisdom—not just the Framers, but subsequent generations who wrestled with the same problems. To me that seems sensible; why should one think that the Framers (however defined) had all the answers? But that is not the present point; the present point is the simply the greater candor of the common law approach. Rather than purporting simply to implement the original understandings, all the while knowing that in fact one is skewing them toward one’s own views, why not acknowledge openly that one’s own views play a role, and then give an account of just what role they should play?

There is one final point. Humility and candor go hand in hand, and originalism is, too often, an unhumble way of trying to claim the high ground. We originalists are following the true constitution, while non-originalist judges essentially just do what they want—that is often the motif. Of course not all originalists

16. *Id.* at 863–64.

engage in this kind of rhetoric—far from it—and devotees of other methods certainly have their own forms of annoying self-congratulation. But originalists have been known, on occasion, to pose as the present-day vicars of the Founding generation, and that pose would not be available to them if there were a greater degree of candor about the aspects of their approach—such as the influence of the interpreter’s moral and policy judgments—that originalists, covertly, share with common law constitutionalists.