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Assessments of Erwin Chemerinsky's Worse than Nothing: The Dangerous Fallacy of Originalism

Originalism and Its Discontents

Leslie F. Goldstein

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Edwin Chemerinsky's book is as much an attack on the defenses of originalism as it is an attack on the theory itself. People who call themselves "originalists" defend it with the simple argument that the Constitution is meant to be a law adopted by "the people" of the United States that not only establishes their government but restrains it. Like other laws, the Constitution can be amended. But until it is, say originalists, it must mean what it always meant. Otherwise, if subsequent officials, such as Supreme Court Justices, willfully alter its meaning on their own, then they are ruling by personal fiat rather than following law. And such rule is wrong; it violates the sovereignty of the people, which the Constitution was meant to establish.

Chemerinsky begins his treatment by observing that originalism itself has evolved. The initial version, propounded by Judge Robert Bork and Constitutional scholar Raoul Berger publishing in the 1970s and by Attorney General Ed Meese speaking in 1985, was that of the "original intent" of the Framers.Footnote[1] Originalists of more recent decades, led by Justice Antonin Scalia, have turned to an originalism of original meaning or original understanding.

To explain the evolution, Chemerinsky focuses on the problem of multiplicity: how can one choose among the intent of hundreds of different framers in various ratifying states as well as the dozens at the Constitutional Convention and in early Congresses?

In fact, the devastating scholarship on original intent came not from contemporary theorists trying to fix problems of discerning original intent, but rather from historical research by H. Jefferson Powell, a law professor at Duke. He demonstrated in a 1985 Harvard Law Review article that the original understanding of law at the time of the framing of the Constitution was that the text itself was the

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guide to interpreting or applying law, **not** the intent of the authors of the text.Footnote[2] Legislators or Framers holding a variety of intentions likely had to compromise with each other to produce what finally became the governing text. This text is what governs.

Shortly after Powell's essay appeared, Justice Scalia began defending his own, different version of originalism, which focused on original public meaning or understanding of the text, rather than the intent behind it.Footnote[3] This so-called "new originalism" remains the dominant version.

Chemerinsky identifies three justices on the Court who endorse and follow this originalism: Scalia, Thomas and Gorsuch. Later he adds Amy Coney Barrett, but of course then has to subtract Scalia. So the current Court has three originalists.

According to Chemerinsky, at the core of originalism lies a two-part "dangerous fallacy":

- (Part 1): "It is simply wrong to ***assume*** that [every] constitutional provision has an 'original meaning' that can be discerned [to decide the case at hand]."
- (Part 2): When one can find an applicable original meaning, it would produce outcomes befitting 1791, not 2023. In both these situations, justices perforce must look for a broader originalist, underlying principle, appropriate for our times. As to this practice, Chemerinsky says, "There is no middle ground: either originalism constrains at the price of unacceptable outcomes (such as the idea that the punishment of cutting off part of someone's ear does not violate the Eighth Amendment), or else it offers no [real] constraints, and so is not really originalism at all (11).

With this last sentence, Chemerinsky is conflating the defense of originalism (its constraining power) with its definition. In other words, if a justice cannot find a specifically applicable original meaning in the Constitution's clauses, and consequently selects some broad principle implied by the Constitution to govern the situation, that justice is "legislating" no less than the justice who openly announces that this is the situation. The first is pretending to be constrained by something original, but the latter is being more honest in acknowledging that creative judgment is being applied. Because there exist a variety of broad principles that might be selected, each Justice is in fact choosing the rule that applies.

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Chemerinsky provides an example of a case with no discernible, clearly applicable, originalist understanding. He says, "When the Court considered whether the police can take a DNA sample from a person arrested for [one] … crime to see if it matches DNA from a[] different, unsolved crime in the [national] police database [and concluded that they could,]…. [t]here obviously was no original understanding regarding the reasonableness of [such] DNA testing" (71).

In that 2013 case *Maryland v. King*, Justice Scalia dissents along with the Court's most liberal three justices. He begins his originalist dissent by stating the broad principle that he considers implicit in the Fourth Amendment: "The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. …Whenever this Court has allowed a suspicionless search [i.e. he's now looking to precedent for a principle], it has insisted upon a justifying motive apart from the investigation of crime."

On the other hand, Justice Thomas, also a self-proclaimed originalist voted with the majority in the other direction. *Maryland v. King* offers a slam-dunk example that even as among self-proclaimed originalists, originalism does not offer what its advocates promise—a way to rein in judicial policy preferences to produce rule by the law that the people adopted when they voted for representatives to ratifying conventions. Those people did not foresee either DNA testing or DNA data banks.

Nor did the framing and ratifying generation foresee, one might add, legislators who would attempt to restrict a woman's reproductive freedom long before she experiences the arguably social interaction that takes place between a kicking fetus and its mother and her friends and relatives that starts with "quickening." It was only after this point of a pregnancy that American common law up until well into the nineteenth century outlawed abortion (around the 1860s–1870s).Footnote[4]

Nor did the framing and ratifying generation foresee a national economy so tightly interwoven that the failure of a couple of factories in a couple of states could threaten the lives of babies needing formula all over the United States. In brief, times change.

In light of this fact, Chemerinsky suggests that, instead of originalism, jurists follow the guidance of John Marshall from cases like *McCulloch v. Maryland* (1819) and *Dartmouth College v. Woodward* (1819): Find in the Constitution its original "great purposes" meant to be adapted to changing circumstances and then adapt them appropriately. In discerning how to adapt them, take into account the usual

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suspects: text, constitutional structure, precedent, tradition, history, societal change (169–178). It strikes me that a close look at the originalist justices reveals that they sometimes do all of these things. I return to this at the end.

Chemerinsky details several aspects of the overarching problem of determining the single, guiding original meaning:

1. The multiplicity problem afflicts original meaning just as it did original intention. Different folks had different understandings of any given clause. He uses his own experience as a member of a multi-person drafting commission for a charter of the city of Los Angeles—i.e. a framer—where he saw first-hand that Constitution's Framers differ in what they believed a clause should mean. He also cites James Madison vs. Alexander Hamilton—two Framers who disagreed publicly and thoughtfully about the meaning of the tax and spend power.

2. Also, numerous contemporary issues confront total Constitutional silence; the Framers simply never thought about them. Besides his DNA example, he discusses at some length a case involving a law keeping violent video games from children (*Brown v. Entertainment Merchants Association*, 564 U.S. 786 [2011]). After Justice Scalia had been grilling the attorney for some minutes, Justice Alito cut him off by quipping to the attorney, "Justice Scalia wants to know what James Madison thought of violent video games" (115–116).

3. Chemerinsky provides several concrete case examples where the search for original meaning does nothing to constrain the policy preferences or constitutional understandings of the justices. For instance, in the Second Amendment case, *D.C. v. Heller* (2008), Justice Scalia wrote for the majority and Justice Stevens for the dissent. Both wrote historically grounded, "original meaning" opinions with opposite conclusions. Early Establishment Clause debates, an area that Chemerinsky has researched, are offered as a second example where there simply <u>is</u> no singularly correct, original meaning to be found (58–62).

4. Use of contemporaneous practice to identify original meaning is also problematic. Practices generally varied from one state to another, and justices may present only a partial picture of them. For instance,

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absolute immunity from civil suit for state judges was established by the Supreme Court in 1978 (*Stump v. Sparkman*), based on its understanding of common law as of 1871. But two years after the decision, an article in *Duke Law Journal* pointed out that in fact this had been common law in only a minority of the states back in 1871.Footnote[5] Did the Court then alter its judgment in cases decided later? Answer: No. Having used originalist reasoning based on the mistaken fact claim, the Court then just relied on this precedent to decide later similar cases.Footnote[6]

5. Looking at old dictionaries cannot solve the multiplicity problem. Dictionaries are no more determinate than practice or statements of views of one's favored framers. Dictionaries vary, lists of meanings vary. Justices can pick and choose.

In delineating Part 2 of the "dangerous fallacy" of originalism, Chemerinsky returns often to the unacceptable results problem: He says, "Originalism, if followed as Bork and Scalia and Thomas define it, would lead to unacceptable results: it would make *Brown v. Board of Education* wrongly decided."Footnote[7] Justice Scalia, the progenitor of original meaning originalism, himself acknowledged the general problem, and therefore called himself a "faint-hearted" originalist.Footnote[8] Although his specific context was a hypothetical modern law imposing flogging, I imagine that he meant to imply as well that he would not throw out deeply embedded and revered precedents like *Brown,* even though they were non-originalist. My guess is that by "faint-hearted," Scalia meant, broadly speaking, that he as a prudent and practical citizen, took into account political and societal costs of Supreme Court decisions. Upending decades of revered precedent is not without institutional costs.

This admission of half-hearted originalism highlights another of Chemerinsky's arguments: all justices, self-proclaimed originalist or not, are making value-inflected choices when they decide cases. They may be weighing the value of stable precedent and of public esteem for the Supreme Court against the value of pulling Constitutional policy back toward its original meaning, as Scalia has admitted to doing. Or they may be making value-laden choices in discerning "original meaning" from a wide range of originalist source material that points in competing directions. The fact that we now sometimes read dissents presenting originalist claims contrary to those originalist claims made by majority justices, perfectly illustrates this fact.

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Chemerinsky says more than once, "Constitutional law is now, always has been, and always will be largely a product of the views of the justices."Footnote[9] This is so because most decisions require balancing of values.

At one time it seemed rational in every state to restrict the privileges granted by marriage to couples who could biologically produce children, a couple with one female and one male. As modernity brought both longer life expectancies and an increase in divorces, they in turn brought second marriages among people too old to reproduce and brought single-parenting by divorced persons. The late twentieth century brought societal acceptance of same-sex orientation to the degree that state authorities were willing to allow adoptions by individual gay people and eventually by gay couples. The development of institutionalized egg donation, sperm donation and surrogacy pregnancies further decoupled parenthood from the need for heterosexual coupling. Once all this happened, the logic for denying legal marriage privileges to same-sex couples seemed to have evaporated. What, at a societal level, had appeared to be a reasonable legal distinction no longer appeared so. Thus, the constitutional prohibition against denying equal protection of the law changed its meaning, along with society's evolution.

Laws don't interpret themselves; we will always need judges. Those judges still have to justify their decisions with explanations of the text of the Constitution. But textual words like "due" and "unreasonable" and "unusual" virtually scream out for the Justices to look at the society they inhabit, in order to discern what has by that point in time become "unreasonable" or "unusual." This is not a matter of Justices simply imposing their values on the rest of us; it is rather a situation where they are doing what their job requires of them.

Not long ago, in *Bostock v. Clayton County* (2020) the Constitutional originalist Justice Neil Gorsuch, who is a textualist when it comes to statutes, ruled that the 1964 Title VII ban on employment discrimination by sex protects trans and gay people from being fired on account of sex.

In *Employment Division v. Smith* (1990) Scalia, leader of the **originalist** movement, produced the Court opinion that religious belief does not give one a right to exemption from an otherwise valid secular statute. This is one of the doctrines that Chemerinsky in his final chapter identifies as being threatened by the rise of originalism on the Court.

Chemerinsky is quite happy with the two opinions by originalists that I just cited. He says the debate over originalism is a distraction; that it is really a fight about how

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conservative the results get. I agree that this is his real concern. His attack on originalism in this book is basically an attack on originalism when used as a weapon in the war against liberal judicial rulings by the current Supreme Court. He warns in the final chapter about future bad decisions to be expected from the Trump Court. I agree that they are coming, and some will be bad. This, however, is an appointment process problem, not a problem that comes from originalism, flawed as it may be. Chemerinsky correctly notes several weaknesses in originalist theory, but if his true goal is to challenge particular conservative judicial decisions, it would seem that he needs to write a second book, one explaining how robust and persuasive constitutional interpretation properly applied would yield the case results appropriate for the twenty-first century.

Chemerinsky opens himself up to a potential critique when he insists that "our" changing values no longer consider it proper to discriminate against gays or women, and that therefore the Supreme Court should act to bring the Constitution in line with the newly prevailing point of view. The modern Court certainly did this both with respect to gender discrimination and to the right of same-sex couples to marry. In each instance, there had been legislative action indicating a developed national consensus. Action in favor of the Equal Rights Amendment had come from ninety percent of each house of Congress and state-level ratification in more than two-thirds of the states prior to *Craig v. Boren* (December 1976), when the Court created a new constitutional standard against gender discrimination. (Eventually, thirty-five of the fifty states ratified the ERA. Thirty-eight are needed for a constitutional amendment.)Footnote[10] Similarly, same-sex marriage had been legalized by thirty-six of the fifty states plus D.C. and Guam, by the time of the Supreme Court's *Obergefell v. Hodges* (2015) decision.

The critique of such action by the Court, to bring along laggard states whose legislatures do not share the consensus of the sizable vanguard majority, would be that it is the purpose of elected legislatures to reflect or express changes in societies' values, by themselves adopting new, up-to-date laws. On behalf of Chemerinsky, however, against this critique, one might marshal the following argument:

Long ago John P. Roche pointed out that there have been two successive models of liberty prevalent in the American tradition. The eighteenth-nineteenth century model of American liberty was one that entailed freedom of movement among homogeneous, intolerant, small communities. One could live among Catholics; one could live among Quakers, and so forth; one could not choose to be a Catholic living among Quakers. In the twentieth century, the U.S. Supreme Court, created a new

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model of liberty. Relying on the postbellum Fourteenth Amendment due process clause primarily (rather than the seemingly more appropriate Privileges or Immunities Clause), it "incorporated" fundamental individual rights from the Bill of Rights so as to apply them against the states, creating a uniform national model of liberty for the entire country.Footnote[11]

Whether the Court was right or wrong to make this move with respect to the freedom to be free from state action discriminating on the basis of gender or sexual orientation, would seem to hinge on whether the Fourteenth Amendment in fact is properly read as having nationalized the fundamental liberties of all Americans.

Notes

1 Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), 69–100; Raoul Berger, *Government by Judiciary* (Cambridge: Harvard University Press, 1977); Edwin Meese III, "Speech to the American Bar Association," Washington, D.C., July 9, 1985, U.S. Department of Justice. Accessed August 27,
2023. https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf: "What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention."

2 H. Jefferson Powell, *The Original Understanding of Original Intent,* 98 Harv. L. Rev. 885 (1985).

3 Scalia in 1989 defended his theory of originalism in an article in the *Cincinnati Law Review* (Vol.57: 849–865) "Originalism: the Lesser Evil." This article was the published version of a 1988 speech.

4 James Mohr, *Abortion in America*, 124. As of 1840, only seven of the states regulated a pre-quickening abortion. The other states generally did not move to alter the common law until after the civil war. The common law quickening deadline dominated until the 1870s.

5 J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity,* 1980 Duke L.J. 879 (1980).

6 For instance, *Mireles v. Waco*, 502 U.S. 9 (1991); Chemerinsky, 66, 218 nn.45–46.

7 See Chapter 5, "The Abhorrence Problem."

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8 “Originalism: the Lesser Evil,” at 864 (see note 3 above).

9 For instance, in the Conclusion section of Chapter 3.

10 Leslie F. Goldstein, *Constitutional Rights of Women*, 2d ed. (Madison: University of Wisconsin Press, 1988), 112 and 165.

11 Roche, “American Liberty: An Examination of the ‘Tradition’ of Freedom,” In Roche (ed.), *Origins of American Political Thought* (New York: Harper Torchbooks, 1967), 15–58.