

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

HEARINGS ON THE NOMINATION OF JUDGE NEIL GORSUCH TO THE
SUPREME COURT OF THE UNITED STATES

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Mr. Chairman and Members of the Committee:

Thank you very much for the opportunity to appear before you in these hearings on the nomination of Judge Neil Gorsuch to the Supreme Court of the United States. My name is William Marshall. I teach constitutional law at the University of North Carolina, where I have been on the faculty since 2001. I have also served in the Office of the White House Counsel and as the Solicitor General of the State of Ohio.

The Air Force is unconstitutional. *Brown v. Board of Education*, 348 U.S. 886 (1954), was incorrectly decided. The Equal Protection Clause does not apply to women. The First Amendment does not protect speech on the internet or prevent persons from being forced to salute the flag when it conflicts with their conscientious or religious principles. The Constitution does not require one person/one vote. There is no freedom from government intrusion into such deeply personal decisions as to whether or not to have a child. There is no right to direct the raising and educating of one's own children. The Fifth Amendment does not require the police to inform persons charged with crimes that they have a right to counsel. The federal government may discriminate on the basis of race and ethnicity without constitutional constraint.

These are just some of the results to which a strict adherence to "originalism" would lead. The vacancy created by the death of Justice Antonin Scalia, the Court's most prominent proponent of originalism, and the subsequent nomination of Judge Neil Gorsuch to fill that position, has once again brought the theory of "originalism" into the spotlight. It is therefore appropriate to reexamine the validity and legitimacy of originalism as a governing mode of constitutional interpretation. I will address that issue in the remarks that follow.

First some background. Originalism, as initially conceived by those who came up with the term in the 1980's, proposed that the Constitution should be interpreted according to the "original intent" of the Framers. That "original intent" approach, however, was subsequently reconfigured by some originalists to require instead that the Constitution should be interpreted according to the "original public meaning" of the text, meaning the popularly understood meaning of the text at the time of the founding. Later, other originalists modified the "original meaning" approach to include the possibility that original meaning could be abstracted to accommodate for technological change -- such as how technological advances in surveillance would apply to Fourth Amendment search and seizure law. More recently, still other originalists have argued that the text should be understood, not by how the public actually understood its meaning at the time of the founding, but by how a hypothetical, reasonable (and presumably well-educated) person *should* have understood those terms. There is not, in short, one true theory of originalism. See Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 Duke L. J. 239 (2009). In fact, originalists not only disagree with each other as to what an originalist interpretation of a given text means, they also disagree as to what results an originalist approach requires.

Nevertheless, despite their lack of consensus on what originalism means and what the theory requires, those who support the theory argue that originalism accomplishes three goals. First, they posit that originalism promotes fealty to a written constitution and is therefore consistent with Framers' original design. Why have a written constitution, they argue, if its meaning can change through subsequent judicial interpretation? Second, they argue that originalism normally leads to fixed and predictable results. Third, they contend that originalism presents a neutral theory of constitutional interpretation that prevents judges from inserting their political preferences into constitutional decision-making.

Originalism, however, does not achieve the goals it purportedly advances. Instead, in many ways, originalism is antithetical to them. To begin with, originalism does not have the founding pedigree that its advocates suggest. As noted above, the term originalism itself is of recent origin -- dating back only to the 1980's. More importantly, although there were some cases decided in the nineteenth century that, viewed in hindsight, might appear to have used an originalist approach, an originalist type of methodology was not the dominant constitutional interpretive theory applied by the Court at the beginning of the Republic.

Rather, the prevalent interpretive method used by the Court during its early years rejected the notion that constitutional interpretation should be frozen in time. Thus Chief Justice John Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. 316 (1819), expressly stated that the meaning of the Constitution had to be understood in the contemporary contexts in which it was applied. As he famously wrote in *McCulloch*, "we must never forget it is a *constitution* we are expounding . . . intended to endure for ages to come and consequently to be adapted to the various crises of human affairs." *Id.* at 407, 415. This means, as Marshall suggests, that the principles set forth in the Constitution remain constant, but their applications may change as circumstances change. The task of constitutional interpretation then is to give meaning and substance to those enduring principles in new contexts.

Chief Justice Marshall's approach to constitutional interpretation has dominated constitutional law for over two centuries. And it is no overstatement to point out that the originalists' project would not only undo the early understanding of constitutional interpretation but also would essentially also undo much of current constitutional law. This would include, as noted above, overruling *Brown*, rejecting the application of the Equal Protection Clause to women, eliminating the principle of one-person/one-vote, abolishing *Miranda* warnings, allowing the state to mandate pledges of allegiance, as well as reversing a host of other cases that have become deeply embedded in our national fabric and identity.

Further, and perhaps even more significantly given the historical focus of the originalists' claims, originalism's lack of historical pedigree is established not just by its inconsistency with the Supreme Court's interpretive history and tradition dating back to the early Nineteenth Century. Originalism is also fundamentally inconsistent with the understanding of constitutional interpretation foreseen by the Framers themselves. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985)

This is so for a number of reasons. First, the fact that the Framers did not envision an originalist approach is reflected in the constitutional text. Many of the most important provisions in the Constitution were written in intentionally broad language, suggesting that the Framers expected that the meaning of these terms would be filled in by subsequent interpretations and understandings. Terms such as freedom of speech, executive power, equal protection of the law, commerce among the several states, due process of law, and privileges or immunities, for example, have no simple or fixed definition and necessarily require interpretation in context.

Second, the Framers came from a common law tradition. They recognized that law evolved according to experience and changed circumstances. They knew that for law to be binding and for law to have authority, its meaning did not have to be fixed. Common law, to the Framers, was just as authoritative as statutory law. Adherence to the common law was adherence to the rule of law -- even if the rules of the common law evolved to allow for changed circumstances. It is therefore fundamentally incorrect to assert, as some originalists do, that non-originalist understandings of constitutional meaning are inconsistent with the rule of law. The Framers knew otherwise.

Third, the Framers were visionaries. They were not concerned only with addressing the issues of the day. They were concerned with setting forth broad principles that would be followed for generations. The irony of originalism is that while it purports fealty to the Framers, it actually demeans the Framers' enterprise because it suggests the Framers were short-sighted in their ambitions -- that they were primarily interested in crafting a Constitution fixated on the problems of 1787 and not a Constitution that, in the words of John Marshall, would "endure" so that it could address the problems of 2017.

The following hypothetical helps illustrate this point. In my classroom, I ask my students to imagine for the moment that we agree to pass a constitutional amendment on some subject -- for example, data privacy. I then ask whether they would expect or even desire that their understanding of the meaning of the text of that amendment in 2017 should decide how a court

sitting in the year 2217 interprets that provision. They invariably say no. Although they believe that the text and their understanding of the text should help guide subsequent interpretations, they do not want it to control the meaning of the amendment as it might apply to situations that those of us living in 2017 cannot even imagine. They want their amendment to work -- not to fail. Such was the case of the Framers. They wanted to create a constitution that would endure -- not one that would fade through obsolescence.

Originalism also does not serve its second professed goal of producing fixed and predictable results. To begin with, as we have seen, originalism itself has many branches, and originalists often disagree among themselves as to how cases should be resolved. Originalism, thus, fails to offer a clear path to “correct” constitutional answer even to those who subscribe to its precepts.

Further, and more fundamentally, originalism would be unable, no matter how it is cast, to consistently lead to fixed and predictable results because constitutional text is often ambiguous, and history is often unclear. *District of Columbia v. Heller*, 554 U.S. 570 (2008), the case establishing a Second Amendment right to bear arms, establishes the point. *Heller* is often cited as the high water mark in originalist theory before the Court because both majority and the dissent relied heavily on an originalist methodology in supporting their positions. But that is exactly the issue. As *Heller* emphatically shows, powerful originalist arguments are often available on both sides of constitutional issues. *Heller* instructs that text and history are, of course, valuable tools in constitutional interpretation; but the case also demonstrates that text and history are not so fixed and invariable that they only lead to one answer.

Finally, originalists err when they claim that originalism accomplishes their third purported goal of providing a neutral theory of constitutional interpretation that prevents judges from inserting their political preferences into constitutional decision-making. Recent current conservative jurisprudence, in fact, proves otherwise. Adherence to originalism has not proved to have a constraining effect when the issue before the Court lies at the heart of the conservative legal agenda. For example, originalists have continued to adhere to the decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), in which the Court struck down a federal affirmative action program on grounds that the program improperly discriminated on the basis of race, although no theory of originalism justifies that result. Text does not support *Adarand*. The Fourteenth Amendment’s Equal Protection Clause does not even apply to the federal government. History, likewise, does not support *Adarand*. The post-Civil War era, during which the Fourteenth Amendment was enacted, witnessed a number of federal programs that provided special benefits to African Americans.

Similarly, there is little evidence that the original meaning of the First Amendment justifies the Court’s decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), in which a purportedly-originalist Court majority held that corporations have a free speech right to spend unlimited funds to influence political elections. Corporations, after all, had very limited charters, were tightly regulated, and were deeply distrusted during the founding era.

Nor is there reason to believe that an originalist understanding should protect property owners against so-called regulatory takings, although many conservative jurists and theorists have strongly advocated for such protection. In fact, in the leading case on the subject, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Justice Scalia found the right against regulatory takings to be located not in text or history but in so-called “constitutional culture.” *Id.* at 1028.

There are numerous other examples. In the Eleventh Amendment cases restricting citizens’ ability to sue states, originalists relied on history and not text. At the same time, in Fourteenth Amendment cases striking down state affirmative action programs, they relied on text and not history. And in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), originalists had no reliable basis in either text or history when they struck down one of the most important pieces of legislation ever passed by the United States Congress -- § 5 of the Voting Rights. See Leah M. Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207 (2016).

Originalism, then, is a doctrine of false promises. It suggests a fealty to the Framers’ design when it is actually antithetical to the Framers’ vision. It purports to offer a jurisprudence with fixed and predictable results when its application is nebulous and variable. It claims value neutrality when it has been erratically deployed in order to achieve specific results.

Certainly the reminder that originalism offers regarding the importance of text and history in constitutional interpretation is important. But the claim that constitutional interpretation should be controlled *only* by history and text is one that was rejected in *McCulloch* in 1819. It should continue to be rejected today.

Thank you.

I would be happy to answer any questions the Committee might have.