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PROCESS THEORY, MAJORITARIANISM, AND THE ORIGINAL UNDERSTANDING

*William Michael Treanor**

In *Radicals in Robes*, Cass Sunstein posits that there are four primary approaches to constitutional interpretation: perfectionism, majoritarianism, minimalism, and fundamentalism.¹ The purpose of his eloquent and compelling book is twofold: Sunstein argues for minimalism, an approach that he contends makes most sense for America today; and with even greater force, Sunstein argues against fundamentalism, which he finds “wrong, dangerous, radical, and occasionally hypocritical.”² The “Radicals in Robes” who are the targets of Sunstein’s book are judges who embrace fundamentalism, which, in his view, embodies “the views of the extreme wing of [the] Republican Party.”³

In *Securing Constitutional Democracy: The Case of Autonomy*,⁴ James Fleming, with eloquence and insight, elaborates on Sunstein’s approach—an approach that sees the Constitution, properly read, as securing both deliberative autonomy and deliberative democracy. Fleming’s is a classic expression of one of the four schools of thought sketched out by Sunstein—perfectionism—and the approach has no better champion.

In this essay, I would like to focus on the two schools of thought that are not championed by either of our authors: majoritarianism and originalism (or fundamentalism, in Sunstein’s lexicon). Exploring these approaches, I will highlight judicial role, and, specifically, how early courts approached constitutional interpretation. Early courts deferred to the constitutional judgments of legislatures, except where those judgments produced statutes at odds with preconditions of constitutional governance. Thus, originalism was majoritarianism of a certain type, and that link between the approaches—the fact that the originalist approach has not just the majoritarian imprimatur of the “We the People” who enacted it, but that it also fully accords with an Ely-esque process-perfect theory of representative democracy—makes the case for originalism much stronger.⁵

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1. Cass R. Sunstein, *Radicals in Robes*, at xii-xiii (2005).

2. *Id.* at xv.

3. *Id.* at 244.

4. James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (2006).

5. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 75-77 (1980).

In discussing the overlap between originalism and majoritarianism, I will begin by drawing on *Radicals in Robes*, because a large part of Sunstein's project is critiquing originalism, while Fleming (in *Securing Constitutional Democracy*) does not focus on the approach. I will then suggest that if originalism is correctly understood, the approach should become much more appealing to Sunstein and Fleming (even as it continues to differ from their analytic approaches).

REUNDERSTANDING ORIGINAL UNDERSTANDING

As I read Sunstein's book, I was struck by how repeatedly he points out (sometimes in passing and sometimes after relatively detailed analysis) that fundamentalists, claiming to be defending the original understanding, embrace positions that are, in fact, inconsistent with the original understanding. He finds this to be the case with respect to (1) national security and the fundamentalist view that all national security powers are within the executive bailiwick;⁶ (2) protection of private property under the Fifth Amendment Takings Clause;⁷ (3) Congress's enforcement power under Section V of the Fourteenth Amendment;⁸ (4) Congress's ability to authorize private enforcement actions;⁹ (5) the constitutionality of affirmative action;¹⁰ (6) the delegation doctrine;¹¹ (7) the clarity of the historical evidence that the Second Amendment protects the individual's right, rather than a State's right, to have a militia;¹² (8) whether commercial speech is entitled to First Amendment protection;¹³ and (9) whether campaign finance laws run afoul of the First Amendment.¹⁴

It is quite a list, and while I may have missed one or two other areas, I believe these nine examples illustrate my point. On Sunstein's account (and I think he is right in each instance), fundamentalists are wrong about the original understanding with respect to most of the topics covered in his book. Moreover, they are, in each instance, wrong in the same way: They would invalidate statutes that are constitutional under the original understanding.

At a few points, Sunstein takes fundamentalists to task for not taking history seriously enough and for ignoring it when it is at odds with their political agenda.¹⁵ Sunstein, however, points out that something far more

6. Sunstein, *supra* note 1, at 151-73.

7. *Id.* at 232-35.

8. *Id.* at 240.

9. *Id.* at 244.

10. *Id.* at 138.

11. *Id.* at 206.

12. *Id.* at 219-20.

13. *Id.* at 229.

14. *Id.* at 230-32.

15. *Id.* at xv (arguing that fundamentalists are "occasionally hypocritical"); *id.* at 206 (discussing the delegation doctrine and arguing that "[h]ere is another case in which fundamentalists are spending too much time talking about the original meaning and too little

basic is going on here, rather than occasional inconsistencies. Even as he notes again and again that fundamentalists get the original understanding wrong, Sunstein assumes that the original understanding is basically consistent with a conservative agenda. Indeed, that is one of the key organizational principles of the book. Sunstein equates fundamentalism and originalism—“[f]undamentalists believe that the Constitution must be interpreted according to the ‘original understanding’”¹⁶—and his principal challenge to fundamentalism/originalism, which he repeatedly expresses, is that it leads to bad results.

Although most self-proclaimed originalists are also political conservatives, originalism, taken seriously, is very far from providing support for a fundamentalist political agenda. Instead, originalism is very close to majoritarianism. Two of Sunstein’s schools of thought essentially overlap. The bad results he deplures are, for the most part, not actually consistent with originalism.

Scholars once recognized the link between originalism and majoritarianism. James Bradley Thayer’s *The Origin and Scope of American Constitutional Law*¹⁷ is both the urtext of the majoritarian movement and a work of originalism. Thayer posits that his deferential approach to judicial review was the original approach, and he traces it back to the case of *Commonwealth v. Caton*.¹⁸ In recent years, scholars such as Sylvia Snowiss and Larry Kramer have revived the Thayerian approach and argued that the original understanding was that only concededly unconstitutional statutes were to be invalidated as unconstitutional. Under this approach, majoritarianism and originalism merge.

My research into judicial review in this country after the start of the Revolution and before *Marbury v. Madison*¹⁹ suggests a more nuanced approach by early courts. As a general matter, courts—both at the state and federal levels—were entirely deferential to popularly enacted statutes. There were only a few types of statutes held unconstitutional, but statutes of these types were invalidated with notable frequency. Courts invalidated statutes that limited the jury trial right or implicated judicial powers; here, statutes that could plausibly be justified in terms of text and prior practice were repeatedly invalidated. I found twenty-one cases in the early republic in which such statutes affecting the right to a jury trial or judicial matters were held unconstitutional, and in eighteen of those cases there were plausible arguments in favor of the statute’s constitutionality. Similarly,

time investigating it”); *id.* at 252 (“Proclaiming their devotion to history and their fidelity to the law, [fundamentalists] are all too willing to dress up a partisan program in legal garb.”).

16. *Id.* at xiii.

17. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, in *Legal Essays* 1 (1908). Thayer’s book is discussed in Sunstein, *supra* note 1, at 45-48, and Fleming, *supra* note 4, at 35-36, 168-69.

18. Thayer, *supra* note 17, at 17 (discussing *Commonwealth v. Caton (Case of the Prisoners)*, 8 Va. (4 Call) 5 (1782)).

19. See William Michael Treanor, *Judicial Review Before Marbury*, 58 *Stan. L. Rev.* 455 (2005).

federal courts were very aggressive in their review of state statutes that arguably undercut national powers (such as the federal power over interstate and foreign commerce). I found eight cases in which federal courts struck down state statutes, and in seven there were plausible arguments in support of the statutes. Finally, state courts struck down state statutes that violated a federal constitutional limit on state authority (i.e., the Contract Clause). Here, the unconstitutionality was clear.

This suggests not the simple majoritarianism that Kramer and Snowiss find in the early case law, but rather an approach that is Ely-esque. Courts completely deferred to legislatures except where the legislative acts affected political entities that were not involved in the legislative decision making: juries, courts, and, in the case of state legislation, the national government. Here, courts could be quite aggressive. Courts were thus policing the preconditions of constitutional governance by ensuring that the legislatures did not undercut the authority of political actors not part of the legislative process.

As with any originalist practice, a question here is at what level of generality one should understand what the founding generation was doing. To use Larry Lessig's terminology, we need to determine whether to translate the original understanding into a modern context or instead to apply heightened judicial review only to the specific areas in which early courts invalidated statutes. While there may be other topics in which there are good arguments against translation, it seems to me that this is an area in which the case for a broad understanding of the practice is compelling because the early courts did not articulate a particular rationale for their approach. Rather, they seem to have been applying, almost on an intuitive level, an approach under which they acted aggressively to ensure that the preconditions of constitutional government were protected. Adopting this approach to questions courts confront today, I would argue, leads to an Ely-esque process-protecting approach.

This general approach accords with two other aspects of the original understanding. First, the founders were primarily concerned with creating a structure of governance, more than with resolving substantive questions. They anticipated that many critical questions would be resolved (or not resolved) over time by the political process, rather than being determined at the outset by the founders. For example, rather than assigning war powers to Congress or to the executive, the founders gave the former a series of powers (most prominently, the power to declare war) and the latter the Commander-in-Chief power. The structure was, to quote Corwin, an "invitation to struggle."²⁰ Which branch dominated in the war powers area would be determined not by courts applying a preexisting framework, but by the political branches, as each struggled to use the tools assigned it. Similarly, the scope of the powers granted to Congress in Article I, and the

20. Edward S. Corwin, *The President: Office and Powers: 1787-1957*, at 171 (4th ed. 1957).

Article's limitations, were contested from the very beginning. The early case law reflects the view that matters such as the scope of the commerce power, or the Necessary and Proper Clause, was to be determined by the political process, not by courts.

Second, the rights provisions of the Bill of Rights were seen as binding on political actors, even when they were not subject to judicial enforcement. For example, the Takings Clause was not judicially enforceable—Congress specifically denied federal courts jurisdiction over claims against the government—but the Clause was not, for that reason, a nullity. Compensation was determined by Congress. The fact that rights provisions (other than the jury trial right) were not the basis for overturning statutes did not mean that they were nullities. Rather, it meant that their scope was to be determined by the political process. To apply Larry Sager's phrase, rights were judicially underenforced.²¹

In sum, under the original understanding, the Constitution's meaning was largely to be determined through the political process. The role of the courts in constitutional adjudication was to determine that the process functioned. The original understanding was thus consistent with a process-based approach to judicial review. Rather than being distinctive approaches, originalism and majoritarianism are thus coextensive (although it is majoritarianism of the Ely-esque version).

This linkage weakens Sunstein's critique of originalism in two ways. First, embracing a standard critique, he indicates that originalism's claims to majoritarian grounding are weak—because of the limitations on participation in ratification (no women, few blacks, property requirements) and because of the temporal gap (no one alive today participated in the ratification). Thus, Sunstein indicates, originalist claims that originalism is about construing the Constitution in accordance with the will of "We the People," rather than the whim of courts, are profoundly unconvincing. If, however, originalism is about empowering current majorities by policing the preconditions of deliberative democracy, then originalism is centrally concerned with the public will.

Second, many of the bad results that Sunstein highlights are not, in fact, reflective of the original understanding. An honestly originalist court, for example, would not take a crabbed view of the powers of Congress; it would not be hostile to gun control legislation; it would not embrace the regulatory takings doctrine. To the extent that Sunstein's approach reflects a pragmatic concern with outcomes, he should be much more sympathetic to a true originalism than to the originalism of his fundamentalists.

The largest gap between the outcomes that Sunstein favors and eighteenth-century originalism concerns the realm of the privacy right, since the analytic approach of early courts is not sympathetic to the invalidation of statutes as violative of an enumerated privacy right. Even

21. Cf. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

here, however, I would like to raise the possibility that a thorough-going originalist might be favorable to a privacy right. I note here that I raise this as a possibility; the subject needs further research.

The key is the analytic shift between the way in which early courts read the Constitution and the way in which courts read the Constitution at the time of the ratification of the Fourteenth Amendment. If early courts were deferential, except where the preconditions of constitutional governance were at issue, that was no longer the case by the middle of the nineteenth century. Beginning in about 1850, courts started to review legislation more aggressively.²² *Dred Scott*²³ is the most famous example, but, even if the Fourteenth Amendment reflected a repudiation of *Dred Scott* (as it did), the acceptance in *Dred Scott* of substantive due process evidenced a more expansive conception of the judicial role in the exercise of judicial review.

An extensive look at mid-nineteenth-century judicial review thus suggests that an open-ended evolutionary approach to constitutional text was the original understanding of the Fourteenth Amendment. As a result, even with respect to the privacy right, it is conceivable that an originalist, construing the Fourteenth Amendment, might come out with a view not so far from Sunstein's.

I also think a true originalist approach is much closer to Fleming's than the fundamentalist-originalist approach. I have argued that the originalist approach is actually Ely-esque. Fleming's treatment of John Hart Ely is very sympathetic.²⁴ Fleming sees Ely, with his process-perfecting theory of reinforcing representation, as grasping a part of what is necessary for securing constitutional democracy. At the same time, Fleming criticizes Ely for failing to grasp the substantive dimension of the Constitution and the need for judicial protection of both substantive and procedural liberties.

In the founding vision, there was recognition that the Constitution protects both substantive and procedural liberties. But the essence of protection lay with the political process. As noted, much of the Bill of Rights can be seen, to paraphrase Larry Sager, as involving judicially underenforced rights.²⁵ A critical gap between Fleming and the original understanding lays, then, in a different conception of the judicial role, rather than in a different substantive vision of the Constitution. This is not to say that an originalist would fully embrace deliberative autonomy as Fleming conceives of it. Instead, an originalist would embrace many parts of deliberative autonomy, with the critical factor being that securing deliberative autonomy was seen as something that the political actors, rather than the courts, were charged with doing. For example, James Madison

22. See Charles Grove Haines, *The American Doctrine of Judicial Supremacy* 407-09 (Russell & Russell, Inc. 1959) (1932); William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. Pa. L. Rev. 1166, 1178-85 (1972).

23. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

24. See Fleming, *supra* note 4, at 19-36.

25. Cf. Sager, *supra* note 21.

took the view that the underlying principles of the Takings Clause meant that the federal government should not, through economic regulation, “indirectly violate[] [the individual’s] property, in [his] actual possessions, in the labor that acquires [his] daily subsistence, and in the hallowed remnant of time which ought to relieve [his] fatigues and soothe [his] cares.”²⁶ Madison is here taking the view that the federal government should not act in ways that undermine what Fleming would see as individual autonomy. But Madison is not calling on courts to protect that sphere of autonomy. He is making a political argument.

True originalism clearly is not the same approach as Fleming’s perfectionism or Sunstein’s minimalism. But the historical record indicates that true originalism is much closer to these approaches than it is to a fundamentalist conception of originalism.

26. James Madison, *Property*, in 14 *The Papers of James Madison* 266, 267 (Robert A. Rutland et al. eds., 1983).

Notes & Observations