

FIVE THESES ON ORIGINALISM

CASS R. SUNSTEIN*

Thank you all. It's a pleasure to be here for many reasons, one of which is that I see in the room people I have known at extremely diverse stages of my life, from students who were students in my very first classes at the University of Chicago to teachers I had when I was a student. But I won't identify them; it might embarrass them and make them feel less young than in fact they are. So thank you for having me.

These remarks will come in five parts. I have five theses, and I am going to allocate three minutes to each of them. Each of them would of course require a fuller defense than I can supply here.¹

First: No approach to interpretation is self-justifying. Any system of interpretation needs a justification. In that sense, personal judgments are unavoidable.²

To this proposition, originalism is not at all an exception. It needs a defense of some sort. Those who find originalism attractive must mount a defense in terms of some account of the right or the good. References to legitimacy and political authority don't supply that defense; they are question-begging.

In the end, any system of interpretation needs to be backed by a claim that that system, more than any other, will make for a good system of constitutional law. There is no way of avoiding our own judgments on that question.

Second, constitutionalism in its American version has two fundamental goals. The first involves rule of law values. There is an intimate connection between constitutionalism and rule of law values: to-wit, the protection of stability, certainty, predictable expectations, and limits on official discretion, including prominently limits on judicial discretion.³

* Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, The University of Chicago Law School and Department of Political Science.

1. More detailed discussion will appear in CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT*, ch. 8 (forthcoming 1996).

2. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 96-104 (1993).

3. See generally *THE FEDERALIST* No. 78 (Alexander Hamilton) (defending lifetime tenure of judges as essential to judicial discretion); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177-80 (1989) (arguing that adherence to legal rules prevents arbitrariness).

A second goal of American constitutionalism involves democratic concerns. On this view, constitutionalism attempts to furnish the preconditions for democratic self-government. In its best form, our system of constitutionalism has the rule of law and democratic self-government at its foundations.⁴

Three: There are two forms of originalism, hard and soft. Hard originalism, which is the more famous, is unacceptable. For the hard originalist, we are trying to do something like go back in a time machine and ask the Framers very specific questions about how we ought to resolve very particular problems. The hard originalist view is the dominant theme of Judge Bork's book.⁵

Justices Scalia and Thomas sometimes speak as if they are hard originalists.⁶ Hard originalism is an unacceptable project because it is inconsistent with too much that is both settled and worthy in many areas, including free speech, religious liberty, racial discrimination, and sex discrimination. The problem with hard originalism—putting the epistemological problems to one side—is not that it is indeterminate, but that it would result in an unacceptably narrow set of liberties for the United States in the Twentieth Century.⁷

There have been heroic efforts to show that the Framers' conception of religious liberty, race equality, sex equality, and free speech is acceptably ample.⁸ These heroic efforts are, I believe, not just heroic but also a bit comic. We ought not to be fooled. It is not the case that the Framers' views justify the set of results that even those most suspicious of rights-based constitutionalism would find minimally necessary.

4. See SUNSTEIN, *supra* note 1, at 133-41.

5. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143-60 (1990).

6. See, e.g., *U.S. Term Limits v. Thornton*, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting) (relying on observations made by James Madison in support of the constitutionality of Congressional term limits); *United States v. Lopez*, 115 S. Ct. 1624, 1643-44 (1995) (Thomas, J., concurring) (examining the meaning of "commerce" commonly held at the time of the Constitution's drafting); *Harmelin v. Michigan*, 501 U.S. 957, 966-69 (1991) (Scalia, J.) (looking to historical influences of English and American law in determining that the Eighth Amendment's prohibition against cruel and unusual punishment contains no proportionality guarantee).

7. See Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 209-10 (1991).

8. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Doctrine*, 81 VA. L. REV. 947 (1995) (arguing that the original meaning and intent of the Fourteenth Amendment did support the school desegregation that *Brown v. Board of Educ.*, 347 U.S. 483 (1954), ushered in, despite the scholarly consensus to the contrary).

The fact that hard originalism is inconsistent with a minimal approach to free speech, religious liberty, and race and sex equality is important because any system of interpretation depends on a justification (recall thesis one). That justification must, broadly speaking, have a connection to whether such a system would make the world better or worse. Abstract words like political legitimacy and political theory won't do the job. This is why hard originalism is very hard to defend in principle.

On what account, I ask, would hard originalism be better than the interpretive alternatives? This is the unanswered question. People who purport to be hard originalists tend to rest content with large-sounding but question-begging abstractions.

Fourth: Soft originalism is a valuable project and it has great advantages over the alternatives, originalist and nonoriginalist. For the soft originalist it matters very much what history shows; but the soft originalist will take the Framers' understanding at a certain level of abstraction or generality. As Judge Bork rightly argues, it matters that the First Amendment, for the Framers, had a large connection with democratic self-government.⁹ A democratic conception of the First Amendment is defended in significant part by virtue of the fact that that was the Framers' understanding.¹⁰ A conception of the Equal Protection Clause that takes from the history a ban on second-class citizenship in the United States provides a defensible interpretive strategy. Indeed, it is a desirable interpretive strategy; it helps orient our inquiry.

Soft originalism thus does not run afoul of the problems faced by hard originalism, and it is much better for rule of law reasons and for democratic reasons than nonoriginalist alternatives of the sort defended by Ronald Dworkin¹¹ and practiced on occasion by the Warren Court.¹²

Fifth: It would be very good to converge, if we could, on soft originalism. Soft originalism does have a problem, however: its incompleteness as a theory of interpretation. Soft originalism

9. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26-34 (1971).

10. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1990).

11. See generally RONALD M. DWORKIN, *LAW'S EMPIRE* (1986) (questioning whether past politics can be decisive of present rights).

12. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (creating a constitutional right to privacy); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the exclusionary rule against the States); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that school segregation violates the Equal Protection Clause of the Fourteenth Amendment).

needs supplementation. At its best, our practice in the United States has two supplementary devices, neither of which should be foreign to nor incompatible with Federalist Society aspirations. One supplementary device is Burkean; the other is Madisonian.

From the standpoint of the rule of law, the problem with soft originalism is that the soft originalist identifies constitutional aspirations at a level of imprecision. How is it that we can have a system committed to the rule of law in the face of that fact? We don't have to look terribly far. As Burke saw, the great legal achievement of the English system is the common law.¹³ And our system of constitutional law is in significant part a process of case-by-case development. The origin of constitutional doctrine is not principally in the understandings of the founders, but rather in rules developed by the Supreme Court over generations and generations. Our rules come from case-by-case development, Burkean style. That is where the rule of law under our constitutional system has its vindication, not by particular understandings of the Founders.¹⁴

What about democracy? A measure of judicial restraint is highly desirable. What I would like to suggest is that we have had too little of it and that the source of judicial restraint ought not to be principally or at all in hard originalism, but ought to be instead in more self-consciously democratic or, to be a little more precise, Madisonian considerations. This is a suggestion that the supplement to soft originalism ought to be an account of democracy, or republicanism—one that sees the judicial role as passive and restrained, except in cases where Madisonian considerations themselves argue for a judicial role.

We can have a lot of debate about what that particularly entails. That was (roughly) John Hart Ely's project.¹⁵ I suggest that a version of that project is the right way to pursue the democratic aspirations of good Madisonians (noting that "democratic" was not a word that Madison was thrilled with).¹⁶

Let me suggest that the Burkean and Madisonian supplements to soft originalism are far more promising than hard originalism,

13. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 348 (Gateway 1962) (1790).

14. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949); DAVID A. STRAUSS, COMMON LAW CONSTITUTIONALISM (1995) (unpublished manuscript, on file with author); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 754 (1993).

15. See generally JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

16. See SUNSTEIN, *supra* note 1, at ch. 5.

which is really a misguided surrogate for the constitutional values of the rule of law and democratic self-government. Soft originalism, thus supplemented, brings out the underlying judgments more clearly and more honestly—and, most important, it does not rely on question-begging or (I think) impenetrable claims about legitimate authority.

