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What Constitutional Originalism Actually Means (and Why Cosmopolitan Is So Wrong)

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The whole point of the straw-man fallacy is that an opponent of straw is supposed to be easier to defeat than one of flesh and blood: one constructs an adversary of one's choosing precisely so one can then deconstruct it. Such is the tactic of Jill Filipovic, the seriousness of whose critique of originalism is indicated by the headline that introduces it to readers of *Cosmopolitan*: "9 Reasons Constitutional Originalism Is Bullsh*t." Nine reasons later, the straw man she constructs is still standing, unscathed. So is actual originalism.

The straw man is her description of originalism as "the theory that judges should interpret the Constitution as its authors meant it when they wrote it," which is a good three decades behind originalist thought as Justice Scalia embodied it, and a solid two centuries behind the understanding of James Madison, who wrote in 1821 that what was authoritative was not the private intentions of the Constitution's framers but rather "its true meaning as understood *by the nation* at the time of its ratification." This "public meaning originalism" makes the people sovereign.

What Filipovic gets right is that originalism "positions judges not as moral agents but simply neutral translators of the written word, seeking solely to carry out the law and not create it." Since she later claims the framers "did [not] get into specifics on what each of its provisions meant," we can assume she is unfamiliar with the existence of *The Federalist,* much less the particulars of its 47th or 78th numbers. The first of those says the combination of powers she appears to endorse—judges with authority to "create" the law—would be "the very definition of tyranny." The second says the judiciary can never endanger liberty so long as it "remains truly distinct from both the legislature and the executive."

Notwithstanding this, Filipovic is scandalized that Judge Neil Gorsuch, soon of the Supreme Court, is a proponent of originalism. Yet she protests that "no one is really an originalist." By this she seems to mean that no one is a perfectly consistent originalist, by which she might as well mean she endorses the doctrine of original sin.

If so, she would be right: judges are human, and there being no perfect specimens of the latter, there are unlikely to be Platonic forms of the former actually wearing robes and sitting on benches. The question is whether they should aspire to an objective reading of the Constitution's meaning or, realizing perfection is impossible, cast caution to the winds of political convenience. Robert Bork noted that "judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom."

Having discovered the imperfection of judges, Filipovic proceeds along the path of self-evidence: "It turns out," she declares, "people disagree about the precise meaning of words and sentences." This much Filipovic should know, since she apparently uses words casually herself, having in the space of two paragraphs called originalism "a compelling vision" and "bullsh*t."

Yet the fact that people disagree about the meaning of words does not prove that meaning cannot be reasonably ascertained. Words have become instruments of power in recent politics, their meaning—in a phenomenon not confined to either political party—assertions of mere will. It is a phenomenon that ought not to be acceded to simply because it exists. (On this, see "Bork, Robert," above.)

This, Filipovic fears, would lead to various forms of atavism. "Societies evolve," she crows, "and that's a good thing." (See "evident, self," above.) Originalism is not a theory merely of conservation. It is a theory of *how change should occur*: at a steady pace by popular consent, or erratically at the whim of judges. Since a judge with whom she disagrees is about to ascend to the court, this might be a time for Filipovic to reconsider her reliance on judge-driven change.

In perhaps her most facile complaint, Filipovic, a lawyer, asks whether originalists believe the Constitution applies to technology that did not exist when it was adopted. May we, sans the vulgarity, imitate the informality of *Cosmopolitan*'s headline and inquire, as the kids would, "Are you for real?" This principle was settled in *Heydon's Case* in, wait for it, 1584. Filipovic would be hard pressed to identify any originalist, anywhere, of any stripe, at any time, who has disagreed that the underlying purpose of a law indicates its application.

Yet Filipovic is very much for real, as in charging that originalism legitimizes legal discrimination. "Originally, people who were not white, Christian, land-owning men were not treated particularly well in the United States, and were not granted a full set of rights and liberties."

To this we may respond: still? Anti-originalism has still not progressed beyond the dead-white-male impulse rather than actual argument? And—Filipovic apparently not having read George Washington's Letter to the Hebrew Congregation at Newport—we are now adding "Christian" to the mix of shame?

It must be said in fairness that Filipovic provides an argument beyond this rhetoric. The problem is its profound confusion. She says originalism licenses discrimination because *Plessy v. Ferguson* endorsed segregation while, on the basis of sociology, *Brown v. Board of Education* forbade it. This is precisely why originalism rejects discrimination: *Plessy* is as anti-originalist a case as the court has ever decided, abrogating as it did the plain public meaning of the Fourteenth Amendment within three decades of its adoption—while *Brown* ought to have been capable of prohibiting segregation simply on an originalist reading of the equal-protection clause.

Indeed, *Plessy* was exactly the kind of license-taking Filipovic should fear, since judges who can act as "moral agents" can also act as immoral agents. Originalism, by contrast, grounds the Constitution in a meaning that changes only by the people's consent.

The theory, Filipovic declares, is impossible since "not even the Founders were originalists." They did not "offer any instructions for how to interpret the document" (see "Madison, James" and "Hamilton, Alexander," above), "nor," in a truly breathtaking claim, "did they get into specifics on what each of its provisions meant." Actually, they wrote a book on what each of its provisions meant. It is called *The Federalist*. It used to be taught in college.

The question Filipovic's broadside raises is what alternative she would prefer. As an attorney, she surely would not counsel a client to enter into a legal agreement whose terms were open to reinterpretation by unaccountable overseers on the grounds that "people disagree" on the meaning of words. Lawyers actually write contracts, wills, and other legal documents precisely because words have objective meanings, which is the same reason legislators use words to make laws. Similarly, one presumes Filipovic would not buy a car or a home on the basis of a sales agreement that could so evolve. ("That may be what 'warranty' meant in 2017, but what it means *today* is. . . .")

Perhaps the lack of coherent alternatives to originalism is why she closes with the stunning concession: "Of course the Constitution should be interpreted as it's written." So it turns out that the reasons originalism is bullsh*t are themselves—well, baloney.

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