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INAUGURAL EDWIN MEESE III ORIGINALISM LECTURE | DELIVERED MARCH 24, 2022

Originalism and Stare Decisis in the Lower Courts

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KEY TAKEAWAYS

A federal court of appeals judge is bound by Supreme Court precedent when interpreting the Constitution, whether the decisions are originalist or not.

Although it may be difficult, lower-court judges can be constitutional originalists because they retain a level of discretion as indicated in *Garza v. Idaho*.

Lower-court judges can expand their own use of constitutional originalism by investing the time and resources to generate meaningful originalist arguments.

It's an honor to deliver the inaugural Edwin Meese originalism lecture. We're honored here especially as we have Attorney General Ed Meese in the room. It's sort of like having an audience with the pope: It's kind of special to just have him in your presence. A lot of you are young law students. Maybe you don't quite know, but I hope today to give you some history to explain why this lecture is so significant.

Let's go back in time to 1985. President Ronald Reagan was sworn in for a second term. Attorney General Meese was sworn in as the 75th Attorney General. Chief Justice Warren Burger would begin his final term on the Supreme Court. And in 1985, I turned one year old: Thanks, Mom and Dad.

Over the span of one year, from 1985 to 1986, there would be a revolution in the law. Justice William Rehnquist became Chief Justice Rehnquist. Judge

Antonin Scalia became Justice Antonin Scalia. The Justice Department was staffed with Federalist Society attorneys, and Attorney General Meese gave three foundational speeches.

First, in 1985, General Meese spoke to the American Bar Association. He announced emphatically that the Reagan Administration would press for "a Jurisprudence of Original Intention."[1] The DOJ would "endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment." Meese's remarks sent shockwaves through the legal profession and struck a nerve at the Supreme Court.

Three months later, Justice William Brennan, the liberal lion, felt compelled to respond. In a speech at Georgetown, Brennan charged that originalism was "little more than arrogance cloaked as humility."[2] Brennan endorsed living constitutionalism and rejected originalism. He wrote, "[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

The debate wasn't over yet. The following month, in November of 1985, Attorney General Meese gave the second foundational speech at the DC chapter of the Federalist Society, and he responded forcefully to Brennan.[3] Meese said originalism is not difficult to describe. Three things:

First, where the language of the Constitution is specific, it must be obeyed.

Second, where there is a demonstrable consensus among the Framers, it should be followed.

And third, where there is ambiguity, it should be interpreted and applied in a manner so as at least not to contradict the text of the Constitution itself.

Finally, Meese laid out the terms of this great debate between the originalists and the living constitutionalists. He said, "We and our distinguished opponents carry on the old tradition, of free, uninhibited, and vigorous debate." Meese explained, "Out of such arguments come no losers, only truth. It's the American way. And the Founders wouldn't want it any other way."

One year later, in October of 1986, Meese would give the third foundational speech. The speech came at Tulane University in New Orleans.[4] Fun fact: Meese was hosted by a young law student named William Pryor. You may know him. He is the chief judge of the Eleventh Circuit.

At the time, Meese made a very simple but foundational point. He wrote that there "is a necessary distinction between the Constitution [capital C] and constitutional law [lowercase c]. The two are not synonymous." Meese articulated the theory known as departmentalism. He wrote that the Supreme Court "is not the only interpreter of the Constitution." Rather, "[E]ach of the three coordinate branches of government created

and empowered by the Constitution...has a duty to interpret the Constitution." Not just the courts: The executive and the legislative branches as well have that duty.

Here Meese channeled departmentalism. It wasn't new. Meese used the same language that Abraham Lincoln used a century earlier to challenge the *Dred Scott* decision. Yet Meese still created a firestorm in the profession. These three speeches—to the ABA in July of 1985, to the Federalist Society in November of 1985, and to Tulane in 1986—began a great debate. Three decades later, I think we can pronounce a winner and a loser in this debate. Justice Brennan and living constitutionalism—they lost. Attorney General Meese, Justice Scalia, and originalism were victorious.

If you want proof of this victory, look no further than across the street at the Supreme Court confirmation hearings that concluded today. Judge Ketanji Brown Jackson was asked how she interprets the Constitution. She said—I'm going to read you the quote, I didn't make this up, I swear—"I'm looking at original documents. I am focusing on the original public meaning because I am constrained to interpret the text." Amazing. She was asked, Is there a living constitution? She said, "I do not believe there is such a thing as a living constitution."

These answers would have been unthinkable three decades ago. She is saying Brennan was wrong. She's admitting it. She is directly contradicting what was gospel for three decades or longer. It's a Democratic nominee to the Supreme Court who feels compelled to identify original public meaning as part of her methodology. And she is not alone.

- Justice Amy Coney Barrett: originalist.
- Justice Brett Kavanaugh: originalist.
- Justice Neil Gorsuch: originalist.

Even Elena Kagan said "we are all originalists" now. By my count, with Justice Breyer's retirement, only two members of the Court rejected originalism: Justice Sonia Sotomayor and, well, Chief Justice John Roberts. Seven out of nine ain't bad. Still, for this amazing transformation in the law, we must give credit to the namesake of this lecture: Attorney General Meese. Thank you. My sincere hope is that every year, this lecture will promote the cause of constitutional originalism and bring honor to the Attorney General's legacy.

Now on to my prepared remarks on originalism and stare decisis in the lower courts.

Introduction

The tension between originalism and stare decisis is well known. Many of the Supreme Court's most significant decisions are completely unmoored from the original public meaning of the Constitution. A Supreme Court Justice—let's say Clarence Thomas—may recognize that a given precedent is non-originalist and may decide to deviate from the decision, or a Justice can say I will follow the decision because of stare decisis. The Supreme Court's unique. They have that choice. They're perched atop the judiciary, and they have leeway to either follow stare decisis or say we reject it.

Lower-court judges do not have that sort of discretion. A judge on a federal court of appeals is bound by the Supreme Court precedent interpreting the Constitution, regardless of whether those decisions are originalist or not. They're called inferior courts for a reason. No matter how *wrong* a given Supreme Court case is from an originalist perspective, the precedent must be adhered to. Moreover, a circuit court judge is bound by circuit precedent, regardless of whether that precedent is originalist or not. Generally, only an *en banc* court of the Court of Appeals can reverse a circuit precedent, but those cases are quite rare.

An originalist circuit court judge has free rein only in rare cases of first impression where neither the Supreme Court nor the circuit court has considered the constitutional question. Even then, she's at a comparative disadvantage. Circuit courts seldom receive the wealth of originalist briefing that is directed to the U.S. Supreme Court. Here, the circuit judge will often have to do all the work on his own—the law office history report, as they call it—without the benefit of the adversarial process.

In short, it's tough for a lower-court judge to be a constitutional originalist. But it can be done, and that's the topic of my remarks this evening. The first part of my remarks will explain *when* a lower-court judge can be an originalist. The second part of my remarks will explain *how* a lower-court judge can be an originalist.

When Can a Lower-Court Judge Be an Originalist?

Let's start with the *when*. Originalism operates differently on the Supreme Court and on the lower courts. The Justices are constrained, but not bound by, stare decisis and can reverse a non-originalist precedent. Circuit court judges are bound by Supreme Court precedent, no matter how flawed those cases are. Lower-court judges will generally have free rein only in the rare case of first impression where there is no Supreme Court or circuit precedent on point. To be frank, in most cases, that's not the case.

Still, lower-court judges have discretion. I look for guidance in a recent case called *Garza v. Idaho.* Justice Thomas and Justice Gorsuch articulated one framework. They explained that "if there is little available evidence suggest[ing] that" certain precedents are "correct as an original matter, the Court should tread carefully *before extending our precedents* in this area."[5]

Lower-court judges can't be quite so bold as Justice Thomas can, but I think they can use this framework to promote the cause of originalism. The issue with *Garza* is, how do you know whether to extend or not extend a given precedent? And I think Justices Thomas and Gorsuch give you some guidance.

Garza v. Idaho considered whether an attorney provided ineffective assistance of counsel. The case turned on a court decision, a Sixth Amendment case called *Strickland v. Washington*.[6] *Garza* splits 7–2. The majority held that various precedents of the Court should rule for the defendant. Justices Thomas and Gorsuch disagreed. As a threshold matter, they argued that the majority opinion had no basis in precedent. Therefore, there was no reason to depart from *Strickland*.

But they didn't stop with precedent. They also contended that the majority opinion has no basis in the original meaning of the Sixth Amendment. Part III of the dissent charted a road map for lower-court judges. Justice Thomas observed that the majority opinion "break[s] from this Court's precedent" and "moves the Court another step further from the original meaning of the Sixth Amendment." He reiterated a point Justice Scalia made in a case called *Padilla v. Kentucky*.[7] Scalia wrote: "The Sixth Amendment as originally understood and ratified meant only that a defendant has a right to employ counsel, or to use volunteered services of counsel." Scalia said the Sixth Amendment did not guarantee a right to have *effective* counsel. *Strickland v. Washington,* Thomas wrote, was decided "[w]ithout even discussing the original meaning of the Sixth Amendment."

Second, Thomas reasoned that because of these non-originalist precedents, "convicted criminals can relitigate their claims" on appeal "couched as ineffective-assistance-of-counsel claims."

Thomas's third point was the most significant. He concluded that "[b]ecause little available evidence suggests that this reading is correct as an original matter"—here comes the important part—"the Court should tread carefully *before extending our precedents* in this area." Rather, he sought to cabin the Court's ineffective-assistance precedents to the context in which they arose.

Thomas did not ask the Court to overrule *Strickland*. He probably wanted to, but he didn't ask for that in this case. Thomas wants to overrule a lot of

cases: *New York Times v. Sullivan*,[8] among others. Instead, Thomas said, we should use *Garza* to limit the reach of these non-originalist precedents. I'll use a familiar hypothetical from torts which you most of you probably studied.

Imagine there's a row of three townhouses. The first house is on fire, and in the law, to prevent the third house from burning down, you can demolish the second house. Justice Thomas's approach operates in a similar fashion. He confines the fire and prevents further collateral damage: Limit the bad precedent to that case and do not extend it further. Thomas wrote: "Even if we adhere to this line of precedents, our dubious authority in this area should give us pause before we extend these precedents further." In other words, this far, but no farther.

So how can lower-court judges extend precedent or decline to extend precedent? I think it can be done with certain tweaks, and here's how I phrase it. If a Supreme Court precedent is unequivocally wrong as an original matter, a lower court should tread carefully before extending that precedent to a novel context. I think this operation has three steps.

First, a circuit judge should determine whether a given Supreme Court precedent is completely unmoored from the original understanding of the Constitution. This standard should be deferential. A *mixed* Supreme Court decision that relies on originalism and non-originalism would not suffice. For example, in a case called *McKee v. Cosby*, Justice Thomas described *New York Times v. Sullivan* "and the Court's decisions extending it [as] policy-driven decisions masquerading as constitutional law."[9] He's right.

To be sure, the "actual malice" standard from *Sullivan* was just made up out of whole cloth. But the constitutional objections to the Sedition Act of 1798 provide some originalist basis to impose a higher bar of liability for government officials, so there's some basis. Moreover, many landmark decisions rely on originalism as the "law," whether they admit it or not. Will Baude and Steve Sachs have made this point quite well.[10] So I think the circuit judge should only apply the *Garza* framework if she can demonstrate in a written opinion that a given constitutional rule was fabricated entirely out of whole cloth. It's a hard standard to satisfy, but I think it can be done.

Step two: A circuit judge must decide whether the instant case requires an *extension* of non-originalist precedent. Again, this standard should be deferential. In almost all litigation, the plaintiff will argue that her position is squarely supported by long-standing precedent. The defendant will counter, "No, no, no, no, this is a radical departure; don't rule in favor of the plaintiff." If the plaintiff is correct, the court should follow the non-originalist precedent. If the judge decides that it is unclear, follow the precedent.

But if you have a case that is such a clear deviation from precedent, then don't extend it. The judge should decline to extend the precedent by its own force to the plaintiff's novel claim. Constrain the fire; knock down the townhouse. A Supreme Court precedent with no basis in the Constitution has only one value: It's a Supreme Court precedent. No more, no less. And that precedent should be given all of its due weight, but nothing more.

There's a third step: This one's the important one. After the non-originalist precedent has been cabined, the circuit judge should consider the question presented from an originalist perspective. Is the plaintiff's novel claim based on a persuasive originalist case, divorced from precedent? Or does the original understanding of the Constitution foreclose the plaintiff's claim? The originalist circuit judge would then decide which side is stronger. The originalist circuit judge would decide the case as a matter of first principles, not encumbered by non-originalist precedent. Going back to Attorney General Meese's speech 35 years ago, where the original meaning of the Constitution does not support the novel claim, the court should defer to the state and the government to make the policy determinations.

Now, some people may object to this methodology. Litigants may lose a constitutional remedy if the lower courts adhere to the original meaning of the Constitution, but that purported unfairness is premised on an important assumption: Judges have some general power to develop constitutional law to promote fairness. Some scholars and judges may support this sort of common-law framework. I don't. In some cases, the law as written does promote fairness; in other cases, to quote Dickens, the "law is a[n] ass." It's true: Some of the law is just unfair, even the Constitution. When possible, originalist judges should restore the correct—albeit unpopular—understanding of the Constitution, and they can do so by following *Garza*'s three-step framework.

How Can a Lower-Court Judge Be an Originalist?

In an ideal world, all advocates would develop originalist arguments in all constitutional cases. Even progressives—Ketanji Brown Jackson perhaps—who are generally skeptical of originalism would fine-tune their briefs to persuade originalists to cross the jurisprudential divide. Even now, progressives are writing so-called Gorsuch briefs in *Bostock* and other cases to try to persuade one of the Court's most conservative members. That strategy makes sense at the Supreme Court, where there are only five or six votes in play, but given the current status quo, advocates in the lower courts are less likely to invest the time and resources to generate meaningful originalist

arguments. More often than not, the effort is not worth the candle. At the Supreme Court, all high-profile cases get many amicus briefs on both sides of the "v." In the lower courts, originalist friends are far and few between.

But lower-court judges have some power. They can remedy this deficiency. They can request supplemental briefing to determine whether a given Supreme Court precedent is supported by originalist meaning and whether that precedent can be extended. These requests can be made on an ad hoc basis or even through a standing order. Either way, judges can ensure that originalism is tested through the adversarial process, and through this process, judges can ensure that their opinions are of the highest quality and persuasiveness.

So let me talk a bit about the current lack of originalist briefing in the lower courts. We'll be honest: Briefing is not always the best. In some cases, law school moot court briefs are better those you see in the federal courts. It's true.

Current Lack of Originalist Briefing in the Lower Courts. As a result, judges, or at least originalist judges, have to do their own homework sometimes. And this raises ground to the criticism of the *law office history*, which is a common charge against conservative justices.

Again, it's commendable but problematic. Often, the rigor of the research varies. Most attorneys—from judges to law clerks—don't have the kind of training needed to develop originalist research—and I do not mean to criticize the judges. Only a tiny percentage of their docket implicates original meaning; they don't have the time to go through this. Also, there's a general failure of legal education. It's true: I'm a professor; I can speak to this. Most law students are exposed to originalism, if at all, briefly during their first-year constitutional law class. Law schools, outside of a few places, do not offer upper-level classes on originalism.

This is a mistake, but I hope it's going to change. I hope you all consider programs at Georgetown such as Randy Barnett's Constitutional Law seminar and others. These programs will give you intensive training, and I hope judges encourage their clerks to apply there.

There's another problem when law clerks and judges go at it alone. There are errors. If you have more judges who can check your work, that helps. But still, we do not want mistakes. It's very problematic.

And third, when judges do their own homework, it's not vetted through the adversarial process. Lawyers may receive an adverse judgment based on a flawed historical analysis. This problem is not limited to originalism, but we should be more careful. So the better answer is to promote what I call *adversarial* originalism. Have the parties brief it. This can be done on an ad hoc basis.

Lower Courts Should Request Originalist Briefing. Let's consider a hypothetical case. The plaintiff asks the court to recognize a new Sixth Amendment violation. The panel can specifically ask the parties to brief how that extension of precedent is justified by the original understanding of the Sixth Amendment. Simple order. The courts often ask for supplemental briefing on really unusual questions. They can do that. And you can make this appeal at the outset when the scheduling order is issued. That way the parties aren't given the burden of writing two sets of briefs, which I think is actually problematic. Judges and law clerks can actually screen cases when you get the initial assignments, read what the case is about, and decide if a briefing is warranted.

These orderly processes ensure that the parties have adequate time to address these issues, and counsel can answer those questions at oral argument. This is helpful because of the responses. The plaintiff can respond to the defendant, and the defendant can respond to the plaintiff, so you actually have adversarialism in the originalist process.

It's also possible the court may decide to appoint an *amicus* to participate in the proceedings. It could be a scholar who has an expertise in this area, or even a private party. This is especially important if the parties are just deficient, and they don't do the job the court wants. An *amicus* may be warranted.

A Standing Order to Request Originalist Briefing. Another approach which could be suitable in the Fifth or Sixth or Eighth or Eleventh Circuit would be a standing order or a court rule that says if you are doing a constitutional case, brief originalism. I have a sample text that can say: "In any case that implicates an extension of a constitutional precedent, all parties shall brief and explain how the original public meaning of the Constitution supports or forecloses that extension."

You can invite *amici* to file briefs as a matter of right on this issue. A very simple order that can really shift how the courts work. I think we have a critical mass of originalist judges who can actually pull this off. It works.

This umbrella approach ensures that all judges are provided with comprehensive and balanced historical analyses that are vetted by the adversarial process. There are no surprises, and advocates on both sides can have their arguments duly considered.

Moreover, *amici* will have an express incentive to participate in a case knowing that a court will be receptive to their arguments. Once this briefing record is developed, judges should be far more comfortable to engage in originalist jurisprudence—to determine whether a given Supreme Court precedent is supported by original meaning and whether that precedent can be extended.

Dissenting colleagues, who may otherwise not be inclined to find originalism persuasive, will need to develop originalist responses to majority opinions. Look no further than Judge Jackson, who's speaking in our language about originalism. Look no further than *District of Columbia v. Heller*, an originalist case on the Second Amendment.[11] Justice John Paul Stevens didn't say, "As a matter of living constitutionalism, the Second Amendment is outmoded; let's go on." He tried to write a thoroughly originalist dissent in response to Justice Scalia's majority opinion.

Moreover, when you have an appellate record on originalism, it provides clarity for Supreme Court review. If a lower-court judge makes a compelling originalist argument that the Supreme Court's own precedent cannot be supported by original meaning, that has an upward effect. Reagan's popular here: Trickle-down can also be trickle-up.

It is entirely feasible that this process actually convinces the judges that you can't resolve an issue. This research may not actually be helpful. Maybe after all the originalist research, you realize originalism doesn't give you an answer here. It happens. But this framework leaves open the possibility that originalism can be used to decide important questions.

Conclusion

My theme here is how lower-court judges can expand their own use of constitutional originalism, but this approach need not be so limited. Judges who adopt this framework will invariably exert market pressure, so to speak, on the bench and the bar to become more familiar with originalism. Law firms who want to persuade originalist judges will rationally incorporate originalist arguments into their briefs—whether voluntarily or in response to a court order. Public defenders in particular would be well-served to think in terms of originalism: Conservative jurists may be personally opposed to the plight of the accused but favor the rights of the accused as originally understood.

But this sort of briefing cannot be cobbled together haphazardly. Practicing attorneys of all stripes will need to improve their ability to develop originalist arguments. In an ideal world, law firms will begin to recruit associates who have originalist bona fides. Imagine that. You don't have to hide it on your resume; you can actually brag about it. And dare I dream: Law schools may recognize these market forces. Law schools may offer specialized courses on originalism, taught by actual originalists and not people who criticize it as a straw man. Law schools can establish originalism clinics.

This is not hard, folks. Once an issue is briefed in one court, you just copy and paste it to other courts. This is actually very repetitive work. You all know this; that's how it's done.

A simple order from a federal court, a standing order or otherwise, would in time trickle down to all facets of the legal profession. It's not top-down; we don't need the Supreme Court to make these changes. It's bottom-up. And in turn, that ripple will trickle back up to the Supreme Court. As the bench and bar are acculturated to originalism, it will become far more normal for the Supreme Court to base its decisions on originalism.

Let me wrap up by going back to the opening of my remarks today. I was born, again, in 1984, so my entire life, I sort of had Meese in the wings just doing the amazing work that he did. I'm able to give this speech because of what he did, what Judge Robert Bork did, what Justice Scalia did, what Justice Thomas did, what President Reagan did. But for these giants we would not be here, there would be no Meese Center for originalism, there would not be an originalism. We'd still be living the world of William Brennan, where Judge Jackson gets up and says, "Yeah, there's a living constitution. We look at values, contemporary standards. We look at international law." Even if they will not walk the walk, so to speak, they're forcing themselves to talk the talk.

We won the battle of language; we won the battle of ideas; and now, as the Supreme Court sort of ekes to the end of this term with momentous cases ahead on abortion, on guns, on affirmative action, an entire slew of cases from the Warren and Burger Courts may be on the chopping block. I want you all to think very carefully: What comes next? It's not obvious. It's like the dog who chases the car and then when he catches the car, he doesn't know what to do. In 35 years, what does the Constitution look like? What Supreme Court precedents are there? Are there nine members, 150 members of the court? But my point is, more broadly, that we are standing on the shoulders of giants—Bork, Scalia, Meese, and others—and we should be very grateful for what they've done.

Josh Blackman is a Professor of Law at South Texas College of Law Houston. These remarks are based on his article, *Originalism and Stare Decisis in the Lower Courts*, 14 NYU Journal of Law & Liberty 44 (2020).

Endnotes

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