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## Doing Originalism

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## DOING ORIGINALISM

*Henry Paul Monaghan\**

It is an honor to participate in celebrating Justice Ginsburg's tenth anniversary on the Court. She is a Justice whom I admire on many fronts; moreover, she continues to be a vital part of this school as this Symposium itself attests. But an invitation to participate also presents a challenge: This session is about her and her contributions to various aspects of the Court's jurisprudence. I know Justice Ginsburg well enough to believe that nothing would cause her more discomfort than to be in an audience with herself as the sole topic. So I thought that my remarks should be both about her, and not about her. What to do? An inspiration: Why not talk about *Great-West*, an ERISA (Employee Retirement Income Security Act) decision in which she wrote for a minority of four and Justice Scalia wrote for the Court.<sup>1</sup>

This may strike you as a mind-boggling idea. Other than tax cases, what set of Supreme Court decisions could be less interesting? Indeed, rumor has it that one well-known reason for recommending denial of certiorari is that "this is an ERISA case." But *Great-West* turns out to be the most recent expression of what has been an ongoing and important debate between Justice Scalia and Justice Ginsburg on the meaning of original understanding, particularly when the Constitution or statutes refer to common law institutions.

At the outset, I put to the side the fact that originalism in any form as an appropriate mode of constitutional interpretation holds little attraction for some Justices and many academic commentators. Justice Breyer is the most articulate member of the present Court in distancing himself from any form of originalism, especially the version endorsed by Justice Scalia. This is what he said in his Madison lecture:

[M]y discussion will illustrate an approach to constitutional interpretation that places considerable weight upon consequences—consequences valued in terms of basic constitutional purposes. It disavows a contrary constitutional approach, a more "legalistic" approach that places too much weight upon language, history, tradition, and precedent alone while understating the importance of consequences.<sup>2</sup>

At least in the area of civil liberties, this conception of the judicial office effectively eliminates original understanding as a constraint on the justices of the "supreme Court."<sup>3</sup> Justice Breyer is in a curious position:

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1. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

2. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 246–47 (2002) (publishing the revised text of Justice Breyer's 2001 James Madison Lecture on Constitutional Law at New York University School of Law).

3. U.S. Const. art. III, § 1, cl. 1.

Statutes constrain him, but (at least in the civil liberties context) the historical Constitution does not. This is doing constitutional adjudication without a Constitution. From such a capacious, untethered conception of the judicial role in constitutional cases, it is easy to see how Justice Breyer could support *Roe v. Wade*<sup>4</sup> and the Court's recent majority opinion in *Lawrence v. Texas*.<sup>5</sup>

### I. TAKING ORIGINALISM SERIOUSLY: TWO APPROACHES

So far as I can see, only four members of the Court consistently take original understanding in a genuinely serious manner: Justice Ginsburg, Justice Souter, Justice Thomas, and Justice Scalia. I would include Justice Kennedy at least on some issues. But *Great-West* once again illustrates that the central question for any form of originalism is "How does one 'do' original understanding?" Justice Ginsburg and Justice Scalia, it turns out, are the standard bearers for two quite different approaches, and *Great-West* provides an instructive example of that fact.

For our purposes, the facts of *Great-West* can be oversimplified and thus simply stated. Under ERISA, plan fiduciaries may sue only for "equitable" relief.<sup>6</sup> Justice Scalia's opinion, quite learned and elegantly written, held that the word "equitable" did not embrace a plan fiduciary's subrogation claim, which he described as simply a contractual obligation to pay money.<sup>7</sup> Such claims were not "typically available" in equity in the "days of the divided bench,"<sup>8</sup> and that was the end of the matter. The fact that the plaintiff requested "restitution" did not alter the legal character of the underlying claim.<sup>9</sup> After denying the relevance of the practice in the "days of the divided bench" as a premise for understanding the statute,<sup>10</sup> Justice Ginsburg's dissent showed how undesirable the Court's result was in terms of the overall ERISA statutory scheme.<sup>11</sup> Her criticisms have been echoed by numerous commentators.<sup>12</sup>

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4. 410 U.S. 113 (1973).

5. 123 S. Ct. 2472 (2003).

6. Employee Retirement Income Security Act § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2000).

7. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210–11 (2002).

8. *Id.* at 210, 212.

9. *Id.* at 218.

10. *Id.* at 224–25 (Ginsburg, J., dissenting). Justice Ginsburg rejected the claim that the Congress that enacted ERISA intended to enact the "rigid and time-bound" conceptions of the divided bench; indeed, she said, there was no basis for believing that the enacting Congress was aware of them. *Id.*

11. *Id.* at 225–28 (Ginsburg, J., dissenting).

12. See Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup. Ct. Rev. 343, 346–51 (collecting and amplifying criticism of Justice Scalia's opinion). See generally John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 Colum. L. Rev. 1317 (2003) (criticizing Justice Scalia's opinions in a series of ERISA cases, including *Great-West*, for reading one word—equitable—in isolation from the statutory text, instead of in functional relation to the text).

What is important here is Justice Scalia's focus on chancery practice at the time of the founding. For him, the Constitution is a static document. Interpreting the Constitution and statutes referring to common law institutions seems to entail taking a snapshot of the institutional arrangements as they existed at a fixed point in time.<sup>13</sup> His mode of original-understanding inquiry necessarily has a heavy descriptive component, that is, "In 1787 what were the central structural characteristics of the institutions to which the document refers?" On the application of a simple contract creditor (i.e., a contract creditor without a lien or judgment), would chancery in 1787 appoint a receiver or grant an injunction against the transfer of assets? No, and so a court in 1999 cannot either, at least absent a statute. That is what the Court held five to four in *Grupo Mexicano*,<sup>14</sup> with Justice Scalia writing for the majority and Justice Ginsburg in dissent. Could appellate courts review a trial court's refusal to set aside a civil jury verdict as against the weight of the evidence? Not in 1787. So neither can they do so now. Thus wrote Justice Scalia in dissent from Justice Ginsburg's majority opinion in *Gasperini*.<sup>15</sup>

Without playing Dr. Freud, I wonder whether Justice Scalia's attraction to this conception of a static form of originalism may be reinforced by the fact that, like me, he was brought up immersed in pre-Vatican II Roman Catholicism. The idea of doctrine evolving (at least after the doctrinal consolidation worked by the great ecumenical councils in the fourth and fifth centuries) is not naturally congenial to many in my generation. And the doctrine is in the details. The Pope does not alter "originalist" doctrine because he believes he cannot do so; no place exists for overruling original understanding based on the argument that it is now arguably socially undesirable.<sup>16</sup>

I myself have considerable sympathy for Justice Scalia's position. There is an impressive historical basis for his view. The Constitution was intended by the founding generation to be not only *lex legum*, a law of laws, but also *lex immutabilis*, unalterable law, unless changed by the amendment process.<sup>17</sup> So for me, the Court's decisions redefining the meaning of the Sixth and Fourteenth Amendments' right to trial by jury

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13. Lumping together questions of the meaning of the Constitution and the meaning of statutes referring to common law institutions is surely problematic, as David Shapiro, drawing upon Justice Ginsburg's dissent in *Great-West*, correctly emphasized during the panel discussion at this session of the Symposium.

14. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319–22 (1999).

15. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 457–58 (1996) (Scalia, J., dissenting).

16. And I wonder whether Justice Scalia is any more emotionally reconciled than I am to the so-called liturgical "reforms" of the Second Vatican Council.

17. Henry Paul Monaghan, *The Constitution of the United States and American Constitutional Law*, in *Constitutional Justice Under Old Constitutions* 175, 177–80 (Eivind Smith ed., 1995) [hereinafter Monaghan, *Constitution*].

(at least in the state courts)<sup>18</sup> may or may not be good social policy, but they are very hard to reconcile with an idea that our Constitution can be legitimately altered only by amendment. There are constitutions, South Africa's comes to mind, that specifically direct courts considering questions of civil liberties to consult evolving practices in other countries.<sup>19</sup> Like Justice Scalia, however, I do not believe that the drafters and ratifiers of our original Constitution or of the Civil War Amendments contemplated such a practice.

Justice Ginsburg, by contrast, seems to me to have a view drawn from the Hart & Sacks legal process methodology.<sup>20</sup> She looks for the central purposes of the relevant constitutional provision and tries to apply it in a vastly different world.<sup>21</sup> Some evolution in the details is to be expected. Thus in *Great-West* she chides Justice Scalia for his "unjustifiably static conception of equity jurisdiction."<sup>22</sup>

## II. THE PREDICTED TRIUMPH OF JUSTICE GINSBURG

On the division between Justice Scalia and Justice Ginsburg, the palm of victory has long been hers. Given the practically unamendable nature of the Constitution, the passage of time makes it more and more impossible to hold on to Justice Scalia's version of originalism, however attractive its historical pedigree may be. Justice Souter is, of course, with Justice Ginsburg on this issue. So too are Justice Breyer and Justice Stevens, but (as I said) not because either is an originalist. A present-centered pragmatist, a problem solver, an all-things-considered Justice, Justice Breyer finds Justice Scalia's approach far too suffocating, and his Madison lecture is obviously directed squarely at Justice Scalia. The present box score looks to me like four to two. And while Justice Ginsburg's position may lose some skirmishes in the immediate future, it is not going to lose the war. Indeed, fundamentally that "war" has been over at least since *Powell v. Alabama* overturned the English doctrine on the meaning of the right to counsel in criminal cases.<sup>23</sup>

Interestingly, this whole debate seems to operate in its clearest and sharpest form only at the "micro" constitutional and statutory level, involving such issues as the meaning of law, equity, jury, and habeas

18. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Williams v. Florida*, 399 U.S. 78 (1970).

19. See, e.g., S. Afr. Const. ch. II, § 39(1) ("When interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law.").

20. See generally Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

21. Cf. *id.* at 1374 ("In interpreting a statute a court should . . . [d]ecide what purpose ought to be attributed to the statute . . . and then . . . [i]nterpret the words of the statute . . . so as to carry out the purpose as best it can . . .").

22. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 228 (2002) (Ginsburg, J., dissenting) (citing to this language in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 336 (1999) (Ginsburg, J., dissenting)).

23. *Powell v. Alabama*, 287 U.S. 45, 60-61, 73 (1932).

corpus—the kinds of topics of great interest to lawyers. On the “macro” issues, such as the nature of “Our Federalism”<sup>24</sup> and school vouchers, there are references to original understanding, but other variables come into play.<sup>25</sup> And at the macro level Justice Scalia’s devotion to originalism seems considerably more tempered. Justice Thomas’s opinion in *Lopez*<sup>26</sup> is arguably correct as to the original understanding of the Commerce Clause. But Justice Scalia did not join it; he is not about to set loose doctrinal change in the name of originalism that would threaten national regulatory authority over the national economy. Nor is he about to invalidate the massive delegations of lawmaking authority to administrative agencies that underpin that regulatory authority, even while his opinion in *American Trucking* persists in the fiction that legislative power cannot be delegated.<sup>27</sup>

### III. JUSTICE GINSBURG’S HISTORICALLY CONSTRAINED EVOLUTION

When I first read *Great-West*, I was surprised to see Justice Ginsburg’s “cf.” to *Moses v. Macferlan*.<sup>28</sup> (I actually wrote an article on that case when I was young.<sup>29</sup>) There, the great Lord Chief Justice Mansfield took the bold step forward of allowing the writ of assumpsit to be used for purposes of restitution.<sup>30</sup> From that point on, restitution became available in actions of law, at least so long as it did not require complex accounting. As I thought more about it, however, *Moses v. Macferlan* seemed to me to be yet another illustration of a point that Paul Freund made many years ago with respect to habeas corpus. He said:

I think some of the provisions have a deceptively precise historic meaning which should not mislead the courts. I think this is particularly true of the guarantee of the privilege of the

24. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

25. As an example, see *Zelman v. Simmons-Harris*, where the Court upheld a school voucher program as sufficiently neutral to defeat an Establishment Clause challenge, while declining to adopt the “first principles” reasoning of Justice Thomas’s concurrence. 536 U.S. 639, 653 (2002). Justice Thomas questioned whether the Establishment Clause, originally conceived of as protecting primarily state, not citizen, rights, could be so fully incorporated through the Fourteenth Amendment as to require state programs to meet the same strict test applied to federal programs, especially where this would work an ironic deprivation of the individual liberty interests (here, parental choice) at the core of the Fourteenth Amendment. *Id.* at 676, 677–80 (Thomas, J., concurring).

26. See *United States v. Lopez*, 514 U.S. 549, 585–87 (1995) (Thomas, J., concurring) (arguing that the Commerce Clause only sought to regulate direct forms of interstate trade).

27. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–76 (2001) (reaffirming nondelegation doctrine while finding congressional conferral of decisionmaking authority to EPA constitutionally permissible).

28. 534 U.S. at 229 (Ginsburg, J., dissenting) (citing *Moses v. Macferlan*, 97 Eng. Rep. 676 (K.B. 1760)).

29. Henry Monaghan, *Constructive Trust and Equitable Lien: Status of the Conscientious and the Innocent Wrongdoer in Equity*, 38 U. Det. L.J. 10 (1960).

30. *Macferlan*, 97 Eng. Rep. at 678.

writ of habeas corpus. The Supreme Court has had a tendency throughout to regard habeas corpus as that form of remedy which was known in 1787 on the basis of a congeries of English statutes, practices, and traditions. My point is that there is involved in such institutions or practices a dynamic element which itself was adopted by the framers.

There is an analogy here of course to the adoption of the common law. The organic element in an institution ought to be taken into account, and so as to habeas corpus I would say that whether or not a specific wrong could be redressed by habeas corpus or whether the order of a court of competent jurisdiction could be attacked on habeas corpus as of 1787 is not controlling, because the whole history of habeas corpus shows that the courts in England were capable of developing the writ, and we did not adopt an institution frozen as of that date.<sup>31</sup>

Unsurprisingly, Justice Scalia wrote a dissenting opinion in a recent case, *St. Cyr*, which shows little sympathy for this view.<sup>32</sup> Relying on a grudging construction of the Suspension Clause, he concluded that habeas was unavailable to obtain review of the legal rules governing the deportation process, specifically to determine whether the Attorney General still had discretion to suspend deportation of a resident alien.<sup>33</sup> Justice Ginsburg was with the majority.

*Moses v. Macferlan* thus shows that but a few years prior to the adoption of the Constitution common law institutions were still evolving. This process was of course particularly true of chancery. Justice Ginsburg made this point in her dissent in *Grupo Mexicano*,<sup>34</sup> and strongly emphasized it again in *Great-West*.<sup>35</sup> The evolutionary aspects of common law institutions leave Justice Scalia, and his sympathizers like me, with the task of explaining why originalism requires the institutional characteristics at a given point in time to be frozen.<sup>36</sup> The argument that the Constitution is *lex immutabilis* is not a clear winner once the dynamism of common law institutions is recognized. Even a strict form of originalism,

31. Paul A. Freund, Discussion of William Hurst, The Role of History, *in* Supreme Court and Supreme Law 59, 61 (Edmond Cahn ed., 1954) (recording Freund's unedited remarks at 1953 symposium).

32. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001) (Scalia, J., dissenting).

33. *Id.* at 344 (Scalia, J., dissenting). For a replay, see *Demore v. Kim*, 123 S. Ct. 1708 (2003).

34. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 336 (1999) (Ginsburg, J., dissenting) ("We have also recognized that equity must evolve over time, in order to meet the requirements of every case." (internal quotation marks and citation omitted)).

35. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 233 (2002) (Ginsburg, J., dissenting) ("[E]quity, characteristically, was and should remain an evolving and dynamic jurisprudence . . .").

36. Any such argument would, of course, both stress the differences between the American conception of a constitution and that of the common law, see Monaghan, *Constitution*, *supra* note 17, at 177-79, and emphasize the importance of Article V of the U.S. Constitution.

properly understood, must acknowledge that the original understanding of some clauses could be fairly read to have included a background assumption of further judicial development.<sup>37</sup> But with too much change, the idea of implementing original understanding is of course gone. And I think that has occurred in the criminal jury trial cases.<sup>38</sup> But not all evolution is too much change. And Justice Ginsburg's position—historically constrained evolution—is an attractive one. In any event, I believe that it will prove to be the only possible version of originalism as time goes on.

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37. Neither Madison nor anyone else believed that the document set out, once and for all, a clear set of rules. Speaking of the Constitution, he wrote "all new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated." *The Federalist* No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961). Hamilton made a similar point. See *The Federalist* No. 81, at 488–91 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that different meanings given to "appellate jurisdiction" in the states would allow a measure of flexibility in determining the constitutionally permitted scope of the Supreme Court's jurisdiction).

38. See *supra* note 18 and accompanying text.