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July 2, 2017: Trinity Lutheran Church Case Shows There is no Originalism

Bruce Ledewitz

Duquesne University, ledewitz@duq.edu

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Title: Trinity Lutheran Church Case Shows There is no Originalism

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7/2/2017--In constitutional law circles, you often hear debates about Originalism. This is the school of interpretation that argues that provisions in the Constitution should be interpreted in accordance with their original public meaning. Sometimes this approach is called Textualism, which is what Justice Scalia called it. There is a lot wrong with treating Originalism like a rule of interpretation, but, aside from all that, I have never understood why anyone treats the position seriously. Simply put, nobody ever interprets the Constitution that way. The Constitution is always interpreted as the Living Constitution--by which I mean that decisions always have to make sense given the way we currently understand the meaning of the Constitution's language. The Living Constitution was on display as usual in the Trinity Lutheran Church case on June 26, which held that Missouri had to include a church in a playground safety program. Sensible decision to me. Not including the Church would have discriminated against the Church in a context in which religion was not at all at issue. So, violation of Free Exercise and no tension with Establishment. However, under Originalism, the question should have been, what did the Free Exercise Clause mean at the time it was enacted. Now I don't know the answer to that question because the Court did not ask it. But I presume the Justices did not ask it because there is no plausible argument that Missouri had violated the original free exercise clause. Probably nobody thought back in 1791 that churches had any claim to government resources whatsoever. Times change. Today, we have a much greater commitment to equality and a vastly expanded government sector. Our expectations are different. But that is just the living constitution in action. Besides that, Trinity Lutheran is the pay off for the core Trump constituency of church goers. The biggest reason that Trump got elected was his promise to protect religious believers. And where their interests are at stake, they are not originalists. Given all this, why doesn't originalism just die? Because it is the only way for the Koch brothers to overturn the New Deal. The American people should keep their eyes on the ball. The Federalist Society and all the other conservative groups have nothing to do with thinking. Their activities are all about money and power. I have to say this--conservatives are much better at feigning intellectual interest than are liberals. Liberals just go straight for power. But because they do so, liberals are unable to point out how ridiculous conservative intellectual claims are. You heard it here first. Originalism is dead.