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### July 7, 2017: My Response to Randy Barnett

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Title: My Response to Randy Barnett

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7/7/2017--Randy Barnett graciously responded to my op-ed in the Washington Post blog, [The Volokh Conspiracy](#). I was unable to reply beyond a few words, so I am responding here.

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It is not surprising that Randy Barnett would respond to my op-ed in full and fairly. That is the kind of person he is. My only regret is that he thinks my original op-ed was snarky. I am in deadly earnest in opposing originalism and the damage it is causing and has caused.

Let me respond to his main points, although briefly.

1. Originalism is not a theory of language. The meaning of language changes. That is why common law discriminations against women violate equal protection today when no one thought they did when the Fourteenth Amendment was adopted. It is why regulatory takings are takings when that category did not exist before. The Constitution is not in quotation marks. If it says "freedom of speech," that phrase has to be interpreted to make sense to the current citizens of the United States. Nobody asks whether the framers meant to include art or advertising if it is obvious to almost everybody now that these matters are part of speech.

I mean this point as descriptive rather than prescriptive. I am pretty sure the Constitution will mostly be interpreted in accordance with what the words mean in the modern context. And it has mostly been interpreted in that way. Only where there is some important political agenda present does originalism actually matter.

To put it simply, by 1954 de jure school segregation did not constitute equal protection of the laws, whether it did before or not.

2. Originalism is not a political theory. Here I mean that the framers did not enact originalism. They enacted the underlying value—or rather, since they believed in natural rights, they recognized the underlying value. But they did not imagine that they were the last interpreters of those values. So, if they meant to ban cruel punishments—leaving aside unusual—they meant cruel punishments, not punishments they thought were cruel.

3. Originalism is nihilism in action. This was the criticism noted conservative thinker Harry Jaffe leveled against originalism years ago. And it is present in Randy's criticism of my op-ed. What could go wrong, he asks. Randy means that there is nothing but power play in judicial reasoning about values. And this is what Justice Antonin Scalia thought as well—he wrote that values were just something philosophers could play with in his book, *A Matter of Interpretation*.

But is there no fact of the matter that reasoning might lead to about cruel punishments—or whether the unborn are fully human?

Weirdly, Randy has written that public meaning is a fact. Well, how is it that history can be a fact when history is so controversial and plainly unprovable, but there is nothing to say, for example, about whether the right to counsel requires public payment of an attorney when a defendant is too poor to afford one? Why can't we reason about that rather than ask what the people who wrote the provision thought?

Again to put the matter simply, is there nothing about truth in constitutional law? And if there is no truth, then why are we surprised that the Republic is falling to pieces? Why are we surprised that we are prey to false news and that the public is cynical about any claims of truth?

4. All of Randy's discussion of the Fourteenth Amendment and related matters is beside the point. The Court did not mention those matters. I wrote that there are no originalists on the Court. A majority of the Justices wrote that the Free Exercise Clause required the payment of public money to a church. That is unjustifiable by any stretch of originalism. They wrote that way because they were assuming incorporation of the Free Exercise Clause against the States as it would be interpreted against the federal government. So they dealt with Free Exercise only and did so in an unsupportable way from an originalist perspective. Randy writes that they could have written a different opinion. But then they might be originalists. But they did not, so they are not.

I should also add here that the bigotry of the Blaine Amendments adopted in State Constitutions after 1875, which Randy mentions, should be irrelevant to an originalist, though Justice Thomas has also mentioned them in a similar context. In originalism, original public meaning does not change. For the living constitution, on the other hand, the experience of the Blaine Amendments is part of political learning that demonstrates that our original understanding of Free Exercise was too narrow. Randy's reference to the Blaine Amendments just shows that it is impossible to be an originalist. We learn over time what the Constitution means. It cannot be, should not be and isn't fixed. (That was also true of Justice Scalia's majority opinion in *Heller*, in which Justice Scalia learned from 19th century state judicial decisions that the second amendment should not be interpreted to protect concealed carry--why are 19th century opinions relevant to the original public meaning of the second amendment?)

5. I do impugn the motives of originalists. Originalists are generally on the political right. When they get results they like—such as the aforementioned regulatory takings—they do not ask, or they do so very gently, whether the public meaning of takings originally required loss of title. They do not ask whether corporations originally had rights against the government.

There is a game going on and the American people are not in on it. I assume that Justice Gorsuch, like Justice Thomas, intends to overturn the thrust of *J&L Steel* and return America to a vastly different and shrunken national government. And I know Randy believes that that result will just return us to the original Constitution. But if that is the case, why did he not just say so in his hearings? Because if he had, he would not have been confirmed. I believe he was on the list of potential nominees because that is his intention and belief.

But it is even worse than that. As the Trinity Lutheran Church decision shows, Justice Gorsuch is not a consistent originalist and neither is Justice Thomas. So, their eventual overturning of 80 years of basically settled law will just be the victory of a Party. It will be the victory of the rich against the interests of workers, the poor and the planet. And it will be done without ever trying to convince the American people that this result—not the misleading claim that the law is the law in general, but this particular result—is best.