COVERT FUNDAMENTALISM

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In our book, *Patriarchal Religion, Sexuality, and Gender: A Critique of New Natural Law*,[1] Nicholas Bamforth and I argue that a group of thinkers, the new natural lawyers—including, prominently, Professors John Finnis and Robert George—are not what they claim to be. The new natural lawyers claim that their views are a secular form of political theory and, as such, are as much entitled to clarify important questions of value in liberal democracies as are any other such secular political theories—say, utilitarianism or contractualism—that try to make sense of the deep values of equality and liberty that justify democracy.[2] On critical examination, however—one developed at length in our book—the new natural lawyers are shown to propound not a secular democratic view, but a highly sectarian, theocratically religious one, centrally concerned with defending the anachronistic views of the currently embattled patriarchal papacy of the Catholic Church on a range of issues relating to sexuality and

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1. NICHOLAS BAMFORTH & DAVID A.J. RICHARDS, PATRIARCHAL RELIGION, SEXUALITY, AND GENDER: A CRITIQUE OF NEW NATURAL LAW (2008).

2. *See, e.g.*, ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999) (asserting that natural law theory is the superior approach for confronting issues of justice and morality). For an attractive statement of utilitarianism see JOHN STUART MILL, *Utilitarianism*, *in* THE BASIC WRITINGS OF JOHN STUART MILL: ON LIBERTY, THE SUBJECTION OF WOMEN, AND UTILITARIANISM 233, 233–301 (Modern Library 2002); for an attractive statement of contractualism, and its contrasts with utilitarianism, see JOHN RAWLS, A THEORY OF JUSTICE (Harvard University Press 1971). *See generally* DAVID A.J. RICHARDS, A THEORY OF REASONS FOR ACTION (Clarendon Press 1971).

gender.[3] In particular, the new natural lawyers offer an argument about, inter alia, the intrinsic moral wrongness of contraception, abortion, and all forms of gay and lesbian sexual intimacy.[4] Connected to this, they defend the current papacy's view of the subordination of women, a view reflected in the Vatican's recent attempt to tighten its rules in abuse cases by adding an "attempt by a cleric to ordain a woman" to the "list of crimes deemed punishable by excommunication," as if the sexual abuses of children were bizarrely somehow of the same order of moral wrongness as women in the priesthood.[5] Our argument is that none of these views can reasonably be regarded as secular in character, and that the new natural lawyers are not propounding the secular view they claim to defend, but a highly sectarian religious view, one that is reasonably controversial among many Catholics, let alone other forms of religious and nonreligious believers.[6]

Why is this kind of view objectionable? We have two explanations. First, as a matter of democratic candor and civility—prerequisites to democratic dialogue and deliberation—the view is not honest about the nature of its own claims, which is religious, not secular.[7] This is readily apparent in the two quite different styles of exposition that the new natural lawyers use: first, the *esoteric* style that they reserve for Catholic conservative co-religionists, in which

3. *See, e.g.*, BAMFORTH & RICHARDS, *supra* note 1, at 5 (arguing that new natural lawyers such as John Finnis can be viewed as defending authoritarian, patriarchal, and doctrinally conservative views espoused by the modern Roman Catholic Church).

4. *E.g.*, GEORGE, *supra* note 2, at 151 (arguing that non-marital sex, adultery, promiscuity, and other forms of sexual activity make the body nothing more than an instrument for pleasure and deeply harm the individual).

5. Stacy Meichtry, *Vatican Toughens Rules on Abuse Cases*, WALL ST. J., July 16, 2010, at A9 (reporting that women's rights groups have responded to the Vatican's revisions of church rules in response to the sex-abuse scandal by accusing the Vatican of "equating sexual abuse with the ordination of women"); *see also* Maureen Dowd, Op-Ed., *Rome Fiddles, We Burn*, N.Y. TIMES, July 18, 2010, at WK8 (disparaging the Catholic Church's refusal to ordain women as priests as inconsistent with the broader societal trend in favor of equality between men and women and arguing that the Vatican's insistence on maintaining its all-male hierarchy is rooted in misogyny).

6. BAMFORTH & RICHARDS, *supra* note 1, at 8–9; *see also* David D. Kirkpatrick, *The Right Hand of the Fathers*, N. Y. TIMES MAG., Dec. 20, 2009, at 27 (explaining that George's critics, including many Catholics, have concerns about his ties to the Republican party and find his new natural law arguments fixate on sex and morality while giving insufficient attention to other aspects of Christianity).

7. BAMFORTH & RICHARDS, *supra* note 1, at 10.

the purely religious basis of their views is made quite clear;[8] and second, the *exoteric* style they use for their more public pronouncements to the world at large, in which their religious fundamentalism is, to say the least, covert and masked.[9] However, second and more importantly, it is a hallmark of modern liberal constitutional democracies that people construct arguments about constitutional essentials in a way that is reasonably accessible to all, irrespective of differences about more ultimate philosophical and religious ends.[10] Moreover, not only is it an important and defining feature of American constitutionalism that free exercise of conscience must be respected, but the State must also observe the principle of not establishing religion.[11] If we are right about the new natural lawyers, their arguments are objectionable on both grounds. Not only are they *not* candid about their views, but their argument, being highly religiously sectarian—indeed, grounded in patriarchal theocracy—also violates the principle that separates religious from political authority, a central principle of liberal constitutional democracy in general and American constitutional democracy in particular. We call this form of argument "covert fundamentalism," by which we mean a form of

8. *See, e.g.*, Kirkpatrick, *supra* note 6, at 27 (discussing a speech given by George to a group of Catholic bishops in which George argued that, unlike "moral social" issues like poverty and social injustice, which he claimed are not resolved by the Gospel or reasonable debate, the resolution of issues like same-sex marriage was perfectly clear under new natural law and the Gospel and is therefore beyond the scope of public policy debate).

9. *See, e.g.*, GEORGE, *supra* note 2, at 161 (introducing an argument—one which purports to be based entirely on natural law and not on prejudice against homosexuals—that "non-marital sexual acts are always and in principle contrary to an intrinsic personal good.").

10. For a classic statement of this position, including an argument that "principles of right" forming the basis of a society must be "general," in that they do not require specialized knowledge in order to be widely understood, but also "universal" in that they apply to everyone as moral persons, see RAWLS, *supra* note 2, at 131–32. *See also* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 7 (1986) (discussing an argument by Judge Learned Hand that a sound jurisprudence can only be attained by viewing the law through a cynical lens and without regard for subjective moral values).

11. U.S. CONST. amend. I; *see, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402 (1962) (stating that "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs*") (emphasis added); JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 1 (2000) (explaining the belief of the Framers of the Constitution, including Thomas Jefferson, that the Free Exercise and Establishment Clauses "defied the millennium-old assumptions inherited from Western Europe—that one form of Christianity must be established in a community and that the state must protect and support it against other religions").

religious fundamentalism that conceals and intends to conceal its character from what it is—religious fundamentalism.[12]

New natural law theory has been an important player in the American culture wars, in particular by regularly speaking out against abortion[13] and gay and lesbian rights[14]—both of which are now, to a significant extent, constitutionally protected in the United States[15]—in a way that has been somewhat more successful than other forms of fundamentalism by not appearing as the form of religious fundamentalism it really is. For example, it is associated with the distinctively Catholic tradition of moral and political thought that has, among forms of Christianity, tended not to treat biblical texts literally and has been famously open to general philosophical argument, in particular, to the neo-Aristotelianism of St. Thomas Aquinas.[16] Philosophy is a famously secular rational discipline, and thus new natural law, being supposedly grounded in philosophy, will appear less obviously sectarian than other forms of Christianity (thus, Thomas supposed that his philosophical arguments, being secular and not religious, would reasonably appeal not only to Christians, but

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12. *See* BAMFORTH & RICHARDS, *supra* note 1, at 279 (arguing that the term "fundamentalist" can apply to "*any* absolutist doctrinal argument that operates according to an internal logic but with little or no connection to the day-to-day morally relevant realities of the world").

13. *E.g.*, Kirkpatrick, *supra* note 6, at 28 (discussing Robert George's arguments for banning abortion and embryo-destructive research).

14. *E.g.*, Robert George, Timothy George & Chuck Colson, "The Manhattan Declaration: A Call of Christian Conscience" (Nov. 20, 2009), http://www.manhattandeclaration.org/pdfs/ManhattanDeclaration.pdf (denouncing the legitimacy of same-sex marriages).

15. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that a Texas statute outlawing consensual sodomy between adults furthered no legitimate state interest and was an impermissible intrusion of privacy and liberty interests protected under the Due Process Clause of the Fourteenth Amendment); Romer v. Evans, 517 U.S. 620, 635 (1996) (striking down an amendment to the Colorado Constitution prohibiting all government action intended to protect homosexual, lesbian, or bisexual persons, on the grounds that the amendment violated the Equal Protection Clause of the Fourteenth Amendment); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 838 (1992) (holding a Pennsylvania statute unconstitutional for requiring spousal notification of the wife's intent to have an abortion); Roe v. Wade, 410 U.S. 113, 164 (1973) (holding a Texas statute that criminalized assisting a woman in an abortion to be an unconstitutional violation of fundamental privacy rights under the Due Process Clause of the Fourteenth Amendment).

16. *See* ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 25–26 (1922) (discussing St. Thomas Aquinas's role in adopting the Aristotelian distinctions of justice into modern legal philosophy); BAMFORTH & RICHARDS, *supra* note 1, at 155 (explaining that St. Thomas Aquinas's philosophical theology relied on Aristotle's biology, psychology, and ethics) (citation omitted).

to Jews and Muslims—indeed, all reasonable people[17]). It is for this reason that Nicholas Bamforth and I felt only a quite long book could adequately expose new natural law as a form of covert fundamentalism, and show, for example, that its alleged Thomism is, in fact, a sham. New natural law does not develop the kind of rational philosophical argument Thomas used but instead distorts at crucial points such arguments to its own sectarian religious ends, which it defines as *self-evident* "moral axioms" that neither require nor invite reasonable discussion or debate. In effect, new natural law not only defends the views of the Catholic moral theologian Germain Grisez,[18] thus supporting the current papacy's anachronistic views on matters of sexuality and gender, but in characterizing those views as self-evident, it also shifts those views beyond reasonable debate.[19]

Because new natural law is a less obvious form of fundamentalism, it has played a particularly important role in the collaboration among several other forms of religious fundamentalism which have played a powerful, influential, and reactionary political role in the United States, notably in the administrations of President George W. Bush.[20] In my book, *Fundamentalism in American Religion and Law*,[21] I discuss at length three important forms of such religious fundamentalism—new natural law, evangelical Protestantism, and Mormonism—all of which have found a common reactionary ground in opposition to abortion and gay rights. Indeed, under the Bush administration, these forms played an important role in the nomination

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17. *E.g.*, JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 125 (1998) (discussing Aquinas's view that moral precepts could be truths of "natural law knowable in principle by anybody without appeal to any divine revelation . . . .") (citations omitted); BAMFORTH & RICHARDS, *supra* note 1, at 165.

18. *See, e.g.*, 1 GERMAIN GRISEZ, *Christian Moral Principles*, *in* THE WAY OF THE LORD JESUS 1, 122–23 (1983) (arguing that the "basic human goods" which provide the reasons behind the goals people choose to pursue can be found in Genesis, and are "the peace and friendship with God which are the concern of all true religion").

19. *See* BAMFORTH & RICHARDS, *supra* note 1, at 172 (arguing that in light of the range of possible motivations of heterosexual couples who engage in sexual activity, including expressions of sexual love and intimacy, the new natural lawyers' position that regards only heterosexual, procreational, marital sex as moral marks the beginning of the debate regarding sexual morality, instead of its end).

20. *E.g.*, Kirkpatrick, *supra* note 6, at 28 (observing that "[w]hen George W. Bush became president in 2001, [Robert] George was an active player in weekly White House conference calls for Catholic allies," and noting that President Bush later presented George with a Presidential Citizens Medal).

21. DAVID A.J. RICHARDS, FUNDAMENTALISM IN AMERICAN RELIGION AND LAW: OBAMA'S CHALLENGE TO PATRIARCHY'S THREAT TO DEMOCRACY (2010).

of two very conservative judges to the Supreme Court in Chief Justice John Roberts and Justice Samuel Alito, the latter of whom may be an originalist.[22] Accordingly, I suspect there is a strong connection between the religious fundamentalism and the constitutional fundamentalism of originalism, namely, that leading exponents of originalism on the Supreme Court (Justices Antonin Scalia and Clarence Thomas) are themselves covert religious fundamentalists. Thus, it is through the prism of their religious fundamentalism that they have been led to adopt originalism, which, in turn, reinforces their religious views as constitutional law.[23]

We can see the impact of new natural law in the way religious fundamentalists organized to oppose gay marriage in California, securing the passage of a state constitutional amendment, Proposition 8, which prohibited gay marriage.[24] Most of the considerable amount of money raised to pass the amendment came from Mormons,[25] but the Mormons self-consciously characterized their support in terms of a coalition that included evangelical Protestants and, in a lead position, the new natural lawyer Robert George.[26] By using new natural law's less obvious (i.e., covert) fundamentalism, George played a crucial role in masking the largely Mormon money and activism given under orders from the patriarchal church

22. *See, e.g.*, Jeffrey Rosen, *Alito vs. Roberts, Word by Word*, N.Y. TIMES, Jan. 15, 2006, http://www.nytimes.com/2006/01/15/weekinreview/15rosen.ready.html (reporting that then-Judge Alito appeared to endorse originalism during his Senate confirmation hearing).

23. *See* RICHARDS, *supra* note 21, at 213–14 (arguing originalism is analogous to religious fundamentalism and instills a self-perpetuating patriarchal psychology in its followers); *see also* Sean Wilentz, *From Justice Scalia, a Chilling Vision of Religion's Authority in America*, N.Y. TIMES, July 8, 2002, http://www.nytimes.com/2002/07/08/opinion/08WILE.html (observing Justice Scalia's view that people of faith should resolve to ensure the divine authority they believe in has influence in their government, notwithstanding a pluralist society).

24. *See* Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 15, 2008, at A1 (describing events leading up to the Proposition 8 vote, including "urgent" efforts by one Mormon-backed group that raised more than $5 million for advertising in the last two weeks before the vote); *see also* CAL. CONST. art. I, § 7.5, *invalidated on federal constitutional grounds by* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *certifying questions to Cal. Sup. Ct.* 628 F.3d 1191 (9th Cir. 2011) (questioning appellant's standing).

25. McKinley & Johnson, *supra* note 24.

26. 8: THE MORMON PROPOSITION (David v. Goliath Films 2010).

hierarchy of Apostles that regarded passing the amendment as crucial to achieving its highly sectarian religious aims.[27]

What makes the Mormons more conspicuously fundamentalist than the new natural lawyers is that their views so clearly rest not just on a literal interpretation of their basic text, the Book of Mormon,[28] but also on the authority of a patriarchal prophet in mandating that interpretation to believers.[29] Both foundations of Mormonism can be traced to the extreme form of religious patriarchy[30] that the religion's remarkable and charismatic founder, Joseph Smith, demanded, including forms of polygamous marriage largely limited to the leadership of the sect.[31] It is because the Book of Mormon establishes celestial marriage among all Mormons—which requires each Mormon to connect in the right way to his or her place in these marriages that exist in heaven—that Mormons so sharply repudiate any conception that women may have ultimate control of whether and when they will bear children.[32] It is for this same reason that Mormons also reject any form of sexual life, including gay and lesbian life, that does not connect in the required way to the fertility cult of celestial marriage.[33]

In light of both its history and current practices, Mormonism is so conspicuously religiously fundamentalist that, had its actual role

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27. *See* Tasnim Shamma, *NOM Was the Top Donor to Fund Proposition 8*, DAILY PRINCETONIAN (Nov. 19, 2008), http://www.dailyprincetonian.com/2008/11/19/22161 (stating that the National Organization for Marriage (NOM), founded by Robert George, was the largest financial contributor to the Proposition 8 campaign).

28. *See* RICHARDS, *supra* note 21, at 10.

29. *See id.* at 195–96.

30. Following Carol Gilligan, I define patriarchy as the rule of fathers as priests placed hierarchically over all other men and women. *See* CAROL GILLIGAN, THE BIRTH OF PLEASURE: A NEW MAP OF LOVE 16 (2003) (explaining that "[p]atriarchy, although frequently misintererpreted to mean the oppression of women by men, literally means a hierarchy—a rule of priests—in which the priest, the *hieros*, is a father.").

31. *See* HAROLD BLOOM, THE AMERICAN RELIGION 123 (1992). Polygamy was abandoned by a later prophet to accommodate federal criminal prohibitions, but remains alive among some Mormons. In this connection, Harold Bloom, one of the most astute students of Mormonism as the American religion, observes: "I cheerfully do prophesy that some day, not too far on in the twenty-first century, the Mormons will have enough political and financial power to sanction polygamy again. Without it, in some form or other, the complete vision of Joseph Smith never can be fulfilled." *Id.*

32. RICHARDS, *supra* note 21, at 201 (stating that "[w]omen had value solely within this order of things, sexually available to men, as fertile wives and mothers of children."). For fuller support of these claims about the patriarchal roots of Mormonism, see *id.* at 193–202.

33. *Id.* at 214.

as primary fundraiser and organizer behind passage of Proposition 8 been more widely known, it would have prevented the Mormon's little known campaign from realizing the success it did by making the issue of religious fundamentalism too conspicuous and polarizing for the general public. Thus, new natural law's public support of Proposition 8 played the politically useful and more covertly fundamentalist role of obscuring the actual level and intensity of fundamentalism at work. What this coalition among fundamentalists reveals, however, is that there is little in their different theologies, rituals, and beliefs which unites them; few religions could be as different as the Catholicism of new natural law, evangelical Protestantism—with the weight placed on the interpretation of the Bible—and Mormonism, for which the Book of Mormon supplants the Old and New Testaments. What unites them is their common commitment to religious patriarchy. What the new natural lawyers, evangelical Protestants, and Mormons share is their common fundamentalist belief in a rigidly patriarchal and male-only priesthood, irrespective of all convincing historical and biblical argument to the contrary (including Jesus' own anti-patriarchal teachings[34]). It is through this patriarchal prism that all three denominations converge, as demonstrated by their shared beliefs in the subordination of women and the intrinsic wrongness of contraception, abortion, and homosexuality, all of which support patriarchal controls over women's and men's sexuality. In particular, this patriarchal prism on issues of gender and sexuality is illustrated by the bizarre connection the embattled papal hierarchy drew between tightening its standards condemning both sex abuse and advocacy of women in the priesthood.[35] The broader problem of covert fundamentalism, therefore, arises from the perpetually uncritical role that patriarchy plays in our understanding of re-

34. *See* Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 COLUM. J. GENDER & L. 67, 106–07 (1991) (arguing that while Jesus' primary mission was not the liberation of women, his teachings ran counter to those of the patriarchal society in which he lived); *see also* RICHARDS, *supra* note 21, at 171 (describing Jesus' sensitivity to the plight of women at the time he lived).

35. William Cardinal Levada, *A Brief Introduction to the Modifications Made in the Normae de Gravioribus Delictis* (May 21, 2010), http://www.vatican.va/resources/resources_rel-modifiche_en.html; *see* Meichtry, *supra* note 5 and accompanying text; *see also* RICHARDS, *supra* note 21, at 141 (stating that the "political psychology of patriarchy . . . [was] often not acknowledged but [was instead] covered over with gender-stereotypical idealizations."); John F. Burns & Rachel Donadio, *Facing Protests in London, Pope Expresses Sorrow Over Child Abuse*, N.Y. TIMES, Sept. 19, 2010, at A18.

ligion and the way in which such patriarchal religions, otherwise so theologically different, have mobilized a unified political strategy[36] to enforce the theocratically sectarian views they share—views that have no place, as the basis for law, in our secular constitutional democracy.

The problem of covert fundamentalism in the United States, though rarely discussed, would likely diminish if it became the subject of the sustained critical examination it deserves. Yet for me, as a constitutional lawyer, this dilemma is most dramatically seen in the power covert religious fundamentalism has had on legitimating originalism as an approach to constitutional interpretation. Indeed, it even influenced President George W. Bush's decision to appoint Justices to the Supreme Court who share this approach.[37] Still, the failure of originalism as an approach to constitutional interpretation is shown by the fact that no judge who defends this position actually adheres to it in any consistent way.[38] The approach, rather, only enjoys the appeal it has had when it leads to the result that religious fundamentalists endorse on sectarian grounds, namely, that *Roe v. Wade* was wrongly decided[39] and that the denial of gay marriage raises no significant constitutional claims.[40] Consequently—and ironically—originalism is not a consistent or coherently developed position on constitutional interpretation, and would certainly have been rejected by leading Founders as incompatible with a Constitu-

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36. *Cf.* Kirkpatrick, *supra* note 6, at 24–25 (describing a meeting of religious leaders in which the participants restated their commitment to conservative religious principles by writing the Manhattan Declaration).

37. *See* Rosen, *supra* note 22.

38. *See, e.g.*, Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 HARV. J.L. & PUB. POL'Y 73, 77, 86 (observing a common objection to originalism that judges are incapable of discerning the meaning of the Founders when interpreting constitutional text, reviewing numerous Supreme Court constitutional interpretations, and concluding that strict reliance on the Constitution's text can have little to do with disparate outcomes); *cf.* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 20–22 (2001) (discussing how the adaptive nature of the common law legal system at times contrasts with, and is preferable to, the principles of originalism). *See generally* RICHARDS, *supra* note 21, at 53–60 (discussing objections to originalism and providing "an internal and external criticism of its reasonableness").

39. *See* ETHAN GREENBERG, DRED SCOTT AND THE DANGERS OF A POLITICAL COURT 275 (2009) (explaining that many originalists critique *Roe v. Wade* as being based on "subjective notions of justice," pejoratively calling it "The *Dred Scott* of Our Time") (citation omitted).

40. *See also* RICHARDS, *supra* note 21, at 190–91; c*f.* GEORGE CHAUNCEY, WHY MARRIAGE? 144 (2004) (describing efforts to amend the federal constitution to prohibit same-sex marriage).

tion the interpretation of which would reasonably change over time by adjusting its enduring principles to evolving circumstances,[41] a concept that is also consistent with the sensitivity to change of the American Enlightenment.

What remains, then, is a question of personal and political psychology: how and why has originalism had the particular appeal it has had as a kind of orthodoxy on constitutional interpretation in the Republican Party—the party of Abraham Lincoln! A little history is relevant here.

Chief Justice Roger Taney in *Dred Scott v. Sanford* led a majority of the Supreme Court on such originalist grounds, not only to entrench slavery both in the states and territories but also to exclude people of color from the protections of the United States Constitution.[42] Better lawyers than Chief Justice Taney, notably Lincoln, condemned his originalism because it indulged America's most debased impulse—its racism—at the expense of the text and history that appealed to universal human rights as powerful constitutional counterweights to such an impulse.[43] Lincoln and others also rebuked Taney's originalism for betraying democratic constitutionalism.[44] Together these critiques precipitated the constitutional crisis that led to the Civil War.[45]

Our contemporary experience with the revival of originalism is not dissimilar. Even its leading advocates do not consistently apply it, for such consistency would undermine the legitimacy of cases—

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41. *See, e.g.*, FALLON, *supra* note 38, at 18 (questioning whether the Framers understood "the Constitution as commanding adherence to originalist interpretative norms" or, alternatively, whether "the meaning of the Constitution's general language [was] necessarily fixed by contemporaneous application").

42. *See* Dred Scott v. Sanford, 60 U.S. (19 HOW.) 393, 454 (1857) (holding that Scott's African descent denied him standing to challenge provisions of the federal Constitution as he was not considered a U.S. citizen), *superseded by constitutional amendment*, U.S. CONST. AMEND. XIV. For a penetrating critique of the opinion, see DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (New York: Oxford University 1978).

43. *See* DANIEL FARBER, LINCOLN'S CONSTITUTION 178 (2003) (discussing Lincoln's objections to the *Dred Scott* decision). For more on Lincoln's critique of *Dred Scott* and its role in precipitating the Civil War, see DAVID A.J. RICHARDS, CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS 41, 54–57, 81 (1993).

44. *See* FARBER, *supra* note 43, at 178 (discussing a number of faults associated with Chief Justice Taney's opinion in *Dred Scott*, including its misunderstanding of the legal profession's customs, impairment of authority, and sharp partisan biases).

45. *See* RICHARDS, *supra* note 43, at 56–57, 81 (describing Lincoln's critique of Dred Scott and that decision's role in precipitating the Civil War).

like those repudiating state-imposed racial segregation[46] or striking down anti-miscegenation laws[47]—that such advocates are now eager to endorse.[48] Thus, we are left with a deeply and unreasonably interpretive attitude that is aggressively applied only to those developments in constitutional interpretation that question traditional patriarchal views of sexuality and gender, perhaps inadvertently revealing the root of the problem in the process.

Lincoln's criticism of Stephen Douglas for indulging racism applies to politicians who indulge sexism and homophobia today: "he is blowing out the moral lights around us . . . he is, in my judgment, penetrating the human soul and eradicating the light of reason and the love of liberty in this American people."[49] It is shocking that the party of Lincoln would become the political agent of such unreason.

46. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that the practice of school segregation on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment).

47. Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that Virginia's anti-miscegenation statutes violated the Fourteenth Amendment).

48. *See, e.g.*, Jeffrey Rosen, *If Scalia Had His Way*, N.Y. TIMES, Jan. 9, 2011, WK1 (stating Justice Scalia's endorsement of originalism explicitly excludes an endorsement of a pre-*Brown* jurisprudence).

49. RICHARDS, *supra* note 43, at 55 (quoting Abraham Lincoln from a Senate debate with Steven Douglas (Aug. 21, 1858)), *in* THE LINCOLN-DOUGLAS DEBATES 67 (Robert W. Johannsen ed., 1965).