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Manly Originalism

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The Constitution cannot, and should not, be twisted to favor abortion.

The originalist firmament is on tenterhooks. Many leading originalists, trying their best to channel the great founding myth of William F. Buckley righteously kicking the nefarious Birchers out of the Big Tent, have been trying to gatekeep Harvard Law School professor Adrian Vermeule and his proposal for a non-originalist jurisprudence grounded in the classical legal tradition. Some have even come for me, too.

These originalists fear that Vermeule's proposal might gain momentum in the event that *Dobbs v. Jackson Women's Health Organization*, this Supreme Court term's marquee abortion case, fails to mollify conservative misgivings with the state of the "conservative legal movement." These

originalists wait, with bated breath, to see whether Justice Samuel Alito's leaked *Dobbs* majority opinion, which would overturn *Roe* v. *Wade*, will indeed withstand the unprecedentedintimidation campaign now before us to prevent precisely that.

Ironically, the reaction to the *Dobbs* leak has shined a spotlight on the biggest problem afflicting the originalist establishment, and the "conservative legal movement" more generally. That problem is not the work of Professor Vermeule. I have my own (at times profound) differences with Vermeule; my framework of "common good originalism," which I have since explicated at length but which I first proposed here at *The American Mind*, is entirely distinct. But at least Vermeule, whatever our differences may be, has helped refocus juridical attention on substantive goods such as life, family, and order.

The same cannot be said of the "libertarian originalists," who have too often exposed themselves as our enemies on core civilizational issues.

And the same *definitely* cannot be said for the abortion apologists who have come out of the woodwork to question, or outright condemn, Alito's leaked opinion, and either implicitly or explicitly defend *Roe*—all while having the temerity to cosplay as "originalists."

As originalism continues to face both internal and external intellectual dissension and struggles to define itself more broadly, as encapsulated by even a far-left progressive such as Ketanji Brown Jackson speaking the nomenclature of originalism at her recent confirmation hearing, we need some clearer definitions for what does and does not "count." Who are the real originalists, and who—or what—are the pretenders?

These fakers come in two flavors of what we might call *soyriginalism*.

The weak form of soyriginalism, in the *Dobbs* context, comes in the form of, "I'm just asking questions about originalism and *Roe*!" Weak-form soyriginalism is functionally similar to "progressive originalism," which for a decade has been most closely associated with Yale Law School professor Jack Balkin.

In the aftermath of the *Dobbs* leak, the clearest weak-form soyriginalist diatribe came in the form of a 12-tweet thread from University of Virginia School of Law professor Lawrence Solum, likely the second-most well-known "progressive originalist" after Balkin. While Solum does not actually endorse the idea that *Roe* is an originalist opinion, he argues that a Fourteenth Amendment abortion "right" is *arguably* defensible on originalist grounds—and that such an argument, had it been made persuasively at oral argument, would have "tip[ped] the scales" in favor of *Roe* on *stare decisis* grounds.

That's silly, but at least it makes sense that a pro-abortion law professor would argue it. But weak-form soyriginalism, again roughly synonymous with "progressive" or "living" originalism, appears to be here to stay—for better or for worse.

The strong form of soyriginalism in the *Dobbs* context, by contrast, is more troubling. The strong form of soyriginalism is uninterested in "just asking questions." Strong-form soyriginalism, lacking even a modicum of self-awareness or the faintest trace of intellectual humility, affirmatively argues that originalism compels legalized abortion—no ifs, ands, or buts.

One clear example of strong-form soyriginalism is seen in the recent musings of the Constitutional Accountability Center (CAC), which self-describes as a "think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history." The CAC defines its guiding interpretive methods as "honest textualism and principled originalism." Following

the *Dobbs* leak, CAC released a statement inexplicably asserting that "the right to abortion is rooted in th[e] broad and sweeping language in the Fourteenth Amendment." That bit of sophistry followed the March 2022 publication of a law review article by CAC's David H. Gans called, "Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion."

But the epitome of the soyriginalists is Evan Bernick, the social conservative-turned Randian Objectivist-turned "preferred pronouns" Twitter-bio flaunter now sojourning as an assistant professor at Northern Illinois University's College of Law.

In Bernick's furious tweeting, he has emerged as the most avowed "pro-*Roe* originalist" on the internet. Just on the Fourteenth Amendment, he has argued that *Roe* is independently correct on the universally ridiculed "substantive due process" grounds that the *Roe* majority actually relied upon and, in the alternative, also on Privileges or Immunities Clause grounds.

There has long been a robust debate within the "conservative legal movement" about the Privileges or Immunities Clause, the correctness of the 1873 *Slaughter-House Cases*, and whether the Clause "incorporates" against the states (if it "incorporates" any particular suite of rights at all) simply textually enumerated rights or a larger swath of unenumerated common law rights and natural rights. But abortion is, of course, neither a common law right nor a natural right (obvious to all except the radicals on the Kansas Supreme Court). A Privileges or Immunities Clause argument on behalf of *Roe* thus represents a new low for anything purporting to be "originalist."

Unbelievably, Bernick has also argued that the Thirteenth Amendment—ratified in 1865 to abolish chattel slavery in America—"encompasses badges and incidents of slavery…[o]f which lack of reproductive control is arguably

one." He even went so far as to retweet a tweet that reads: "And for everyone who is about to come at me and say the 13th Amendment was just about 'ending slavery' and not about reproductive autonomy, I say to you: enslavement happened through taking the choices that black women wanted to make about their bodies away from them."

Translation: The Thirteenth Amendment, which worked its way through Congress in the denouement of the Civil War to redeem the Declaration's Founding-era promise of human equality and eradicate the evil of chattel slavery, compels a constitutional right to abortion—which, at the time, was criminalized virtually everywhere, as the appendix to Alito's leaked opinion points out—because… "originalism!" Or something.

Say what you will about these "arguments"—but if the "conservative legal movement" as currently constituted wishes to have any credibility moving forward, it must excise these views from the fold. If the movement fails to do so—if it permits "originalism" to be defined at such a cartoonishly high degree of abstraction, so far removed from any guiding *telos* and the proper view of the enterprise—then it will allow itself to be defined into theoretical irrelevance. Surely, that is not what the gatekeepers of the originalist firmament wish. And surely, those gatekeepers do not wish to waste scarce resources credentialing those who will then "mature" and fight for the forces of Moloch and civilizational suicide.

Furthermore, to the extent practitioners and jurists take seriously this sort of kitchen sink-style armchair "originalist" discourse that requires debunking obviously frivolous theories before engaging in substantive truths, the effect would be to exacerbate the difficulty for originalist judges to actually bring our law back into conformity with the Constitution. What the Evan Bernicks—and in this case, also the Larry Solums—of the world are arguing is, in effect, that judges have no right to overrule counter-

considered and meticulously exhausted the most baroque and counter-intuitive proposed "originalist" constructions. The practical effect is to sow doubt, gum up the works, and increase the cognitive load upon originalist judges—a bizarre result for any self-proclaimed "originalist."

If originalism is to save itself, then, it must begin by purging the soyriginalists—folks like Bernick (preferred pronouns of "he" and "him," in case you were wondering) and the Cato Institute's Clark Neily, the latter of whom is an anti-cop/anti-law enforcement zealot with a particular soft spot for Democrat-nominated, pedophile-sympathizing Supreme Court nominees. Seriously: If active support for Ketanji Brown Jackson is not worthy of a purge, then what is?

Soyboy caricatures such as Bernick and Neily—self-proclaimed "originalists" who speak at the "right" conferences and have the "right" credentials, but who now actively score points for the would-be petty tyrants who wish to subjugate us—have nothing to do with anything remotely approximating the conservative project to restore an American constitutionalism rooted in virtue and ordered liberty. They have to go.

Soyriginalism *delenda est*.

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