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I Call Rigamarole (or Taradiddle) on 'Originalist' Justices

Rachel A. Van Cleave

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"If justices are going to abandon originalism, which I believe they should, they should open their eyes to the curren moment," says Rachel Van Cleave, a professor of law and dean emerita at Golden Gate University School of Law.

By **Rachel Van Cleave** | October 21, 2020 at 09:55 PM

Rachel Van Cleave, Golden Gate University School of Law dean. (Courtesy photo)

Last week, while Supreme Court nominee Amy Coney Barrett was holding forth about how she applies originalism, invoking her mentor and former boss Justice Antonin Scalia, current Supreme Court justices were undermining an originalist opinion authored by Scalia. Nominee Barrett explained originalism: "I understand

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[the Constitution] to have the meaning that it had at the time people ratified it. So that meaning doesn't change over time, and it's not up to me to update it or infuse my own policy views into it."

Oral arguments in *Torres v. Madrid* make clear that, for some justices, originalism is appropriate, except when it isn't.

In *Torres v. Madrid,* the court is considering a Tenth Circuit decision dismissing Torres' civil rights lawsuit after police shot her twice in the back. That court concluded that police did not "seize" her under the Fourth Amendment because she drove away after they shot her. The Fourth Amendment declares "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

It was dark in the early morning hours, when four police officers exited their unmarked car and approached Torres while she was in her parked car. The officers were planning to arrest someone else with whom she had no connection or relationship. Unable to read the markings on the officer's dark clothing, Torres feared they were carjackers. One officer attempted to open the locked driver's door. Torres began to drive away slowly, and the officers fired 13 rounds, shooting her twice in the back. Despite these injuries, she left the scene and called 911 for assistance.

The relevant precedent applying an originalist definition of "seizure" is Scalia's opinion in *Hodari D*, which considered whether officers who pursued Hodari D. had seized him before they made physical contact with him. Self-described "originalist," Scalia traced the meaning of seizure to the time of the founding. He explained that seizure of a person was a mere "laying on of hands … even when it is ultimately unsuccessful" (emphasis added). Scalia cited dictionaries, case law and commentators as support. Since the officer in *Hodari D.* had not touched the youth, the court held he had not been seized.

By contrast, Torres was touched twice—two bullets entered her back. This comes squarely within the originalist definition set out by the court in *Hodari D.* However, Justices Clarence Thomas, Neil Gorsuch and Samuel Alito peppered Torres' attorney with skeptical questions about whether the originalist definition in *Hodari D.* is relevant today.

I call "rigamarole" on this. Rigamarole, first used in 1736, is the equivalent of bu****it, or, malarkey, today. Alternatively, closer to the time "of the founding," tarradiddle (1796), according to the Merriam-Webster online dictionary. This is not to diminish the seriousness of Torres' claim but to underscore the apparent willingness of some justices to toss aside this theory of interpretation.

To be clear, I believe that "originalism" is based on faulty history and, ironically, is inconsistent with the founders' intent. For example, in "These Truths," Jill Lepore quotes a Thomas Jefferson letter in which he stated that, to treat the Constitution like "the ark of the covenant, too sacred to be touched" would "ascribe to [the founders] a wisdom more than human." Nonetheless, the legitimacy of the court is undermined when justices invoke originalism only when it suits their purposes.

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It is stunning that these conservative justices appear to completely dismiss an "originalist" analysis of a Fourth Amendment "seizure," while Barrett is championing the views of Scalia and originalism. Indeed, it is hypocritical and borders on intellectual dishonesty.

Even more troubling, there was little acknowledgement of the fact that the officers did not simply grab at Torres—they shot her in the back. Only Justices Stephen Breyer and Sonia Sotomayor raised this. At a time when police violence and excessive use of force are in the headlines almost daily, the justices came off as tone deaf to the gravity of this moment. Indeed, no one acknowledged that, under the definition espoused by the police, the Fourth Amendment would apply to their conduct only if they had so injured Torres that she was unable to leave, or if they had killed her.

Furthermore, Alito and Gorsuch asked about remedies under state law. Suggesting that the Supreme Court should not have to deal with police excessive force lawsuits. This is a tactic often used by the court in the context of the Fourth Amendment—rely on the theoretical possibility of alternatives for addressing unconstitutional police behavior. Typically, this is in the context of a criminal case when the court refuses to exclude evidence police acquired in violation of the Fourth Amendment. A civil rights lawsuit is the appropriate remedy. Here, Torres is pursuing a federal remedy and two justices suggested that a remedy in state court is a better response to police excessive force. Perhaps Alito and Gorsuch believe such cases should not take up time and space on the federal docket.

During Barrett's hearing, several senators raised concerns about the court's perceived legitimacy. From the influence of dark money dictating the types of cases that come before it, to the strictly partisan lines along which *Bush v. Gore* was decided. At a bare minimum, the court should recognize the life, dignity and humanity of people who have suffered injury as a result of police violence that violates the Constitution. If justices are going to abandon originalism, which I believe they should, they should open their eyes to the current moment.

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