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## Justice Scalia, Originalism and Textualism

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## JUSTICE SCALIA, ORIGINALISM AND TEXTUALISM

Thomas A. Schweitzer\*

### INTRODUCTION

The inimitable Justice Antonin Scalia, who served nearly thirty years on the Supreme Court,<sup>1</sup> was one of the most consequential justices in recent history. More than any other justice, he frequently interrupted attorneys arguing before the Court, and the other justices, except for his close ally Clarence Thomas, tended to follow suit. He changed the character of Court rhetoric with his colorful language and unsparing ridicule of opinions he disagreed with.<sup>2</sup> The number of his humorous remarks which provoked laughter during Supreme Court arguments consistently exceeded his colleagues' numbers. His willingness to voice controversial views—he once stated that the Equal Protection Clause of the Fourteenth Amendment did not protect females against discrimination<sup>3</sup>—makes

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<sup>1</sup> *Biography of Former Associate Justice Antonin Scalia*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographyScalia.aspx> (last visited Apr. 30, 2017).

<sup>2</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting), in which the Court held that the Fourteenth Amendment required states to license marriages between people of the same sex; he stated: “The opinion is couched in a style that is as pretentious as its content is egotistic . . . . Of course the opinion’s showy profundities are often profoundly incoherent.” Numerous similar examples of Scalia’s sarcasm and ridicule of his colleagues’ opinions are quoted by eminent Constitutional scholar Erwin Chemerinsky, who while acknowledging Scalia’s “great intellect” and superb writing rebukes him for setting a bad example for law students. Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 386, 399-401 (2000).

<sup>3</sup> Allen Rostron, *Justice Scalia’s Truthiness and the Virtues of Judicial Candor*, 89 IND. L.J. SUPP. 12, 14-15 (2013). According to Rostron, Scalia was questioned while testifying before the Senate Judiciary Committee “about a magazine interview in which he had said that the Fourteenth Amendment should not be construed to prohibit sex discrimination because that was not its original meaning or intent.” *Id.* at 14. Of course, his good friend on the Court, Justice Ruth Bader Ginsburg, had made a legal career advancing the recognition of women’s rights under the Equal Protection Clause in cases that she had argued before the Court.

it surprising to recall that the 1986 Senate vote to confirm him was unanimous.<sup>4</sup>

For the first half of his tenure on the Supreme Court, which was before President George H. W. Bush's appointment of both Chief Justice John Roberts in 2005 and Justice Samuel Alito in 2006 (which would eventually cement a conservative majority on the Court), Scalia was often in the minority.<sup>5</sup> From that time until his death in February 2016, he was a reliable member of the conservative majority with Justice Alito and Justice Clarence Thomas, usually joined by Justice Anthony Kennedy and Chief Justice Roberts.<sup>6</sup> During that period, his consistent and sustained conservative leadership led *The New York Times* to suggest that the Supreme Court during this time should be called "the Scalia Court."<sup>7</sup>

The most important mark Justice Scalia left on the Supreme Court may have been his advocacy of the jurisprudential doctrines of textualism and originalism, which won wide acceptance on the Court, even among his ideological rivals. Justice Elena Kagan once remarked, "We're all textualists now."<sup>8</sup> As Dean of Harvard Law School before she was appointed to the Supreme Court by President Obama, Ms. Kagan had said of Justice Scalia:

His views on textualism and originalism, his views on the role of judges in our society, on the practice of judging, have really transformed the legal debate in this country. He is the justice who has had the most important impact over the years on how we think and talk about the law.<sup>9</sup>

If the meaning of a constitutional provision or statutory section was in question, Scalia held that a court should focus on the

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<sup>4</sup> JOAN BISKUPIC, *AMERICAN ORIGINAL – THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 121 (2009).

<sup>5</sup> Jan Crawford Greenburg, *Bush Legacy: The Supreme Court*, ABC NEWS (Jan. 12, 2009), <http://abcnews.go.com/TheLaw/BushLegacy/story?id=6597342>.

<sup>6</sup> Jeremy Bowers et al., *Which Supreme Court Justices Vote Together Most and Least Often*, N.Y. TIMES, <https://www.nytimes.com/interactive/2014/06/24/upshot/24up-sctus-agreement-rates.html> (last updated July 3, 2014).

<sup>7</sup> The Editorial Board, *Justice Antonin Scalia's Supreme Court Legacy*, N.Y. TIMES (Feb. 13, 2016), [https://www.nytimes.com/2016/02/13/opinion/justice-antonin-scalias-supreme-court-legacy.html?\\_r=0](https://www.nytimes.com/2016/02/13/opinion/justice-antonin-scalias-supreme-court-legacy.html?_r=0).

<sup>8</sup> KEVIN A. RING, *SCALIA'S COURT: A LEGACY OF LANDMARK OPINIONS AND DISSENTS* 542 (2016).

<sup>9</sup> *Id.* at 19.

text.<sup>10</sup> He stated that the textualist should “look[ ] for meaning in the governing text, ascribe[ ] to that text the meaning that it has borne from its inception, and reject[ ] judicial speculation about both the drafters’ extratextually derived purposes and the desirability of the fair reading’s anticipated consequences.”<sup>11</sup> Thus, if someone claimed that he or she were being denied the exercise of a right, or the government were asserting the authority to take a certain action, a court should apply the text’s plain meaning without reference to legislative history, so long as the text’s plain meaning was unambiguous.<sup>12</sup> Moreover, Scalia believed that if the meaning of a statute were plain, a court was bound to apply that literal meaning, even if the Court was convinced that the literal meaning clearly conflicted with the intent of those who enacted it.<sup>13</sup>

Of course, the meaning of words can evolve and change over time. A corollary of textualism is originalism, the principle that a legal text means what it was understood to mean at the time it was enacted,<sup>14</sup> and not a new meaning that may shift radically over time. Thus, the meaning of a law depends on its text, and that meaning is fixed in time.<sup>15</sup>

#### **I. TEXTUALISM VS. LEGISLATIVE INTENT: THE COURT UPHOLDS “OBAMACARE”**

No doubt the most important recent controversy over the theory of textualism involved the Supreme Court’s decision to uphold the Patient Protection and Affordable Care Act (the ACA or “Obamacare”).<sup>16</sup> Congress passed the law in 2010 without a single

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<sup>10</sup> *Id.* at 1.

<sup>11</sup> Enrique Schaefer, *What the Heller?: An Originalist Critique of Justice Scalia’s Second Amendment Jurisprudence*, 82 U. CIN. L. REV. 795, 796 (2014).

<sup>12</sup> RING, *supra* note 8, at 22-23.

<sup>13</sup> RING, *supra* note 8, at 22-23.

<sup>14</sup> RING, *supra* note 8, at 22-23.

<sup>15</sup> Originalism has not lacked for scholarly critics who oppose it. *See, e.g.*, FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 5 (2013); Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 30-31 (2009); Morgan Cloud, *A Conclusion in Search of a History to Support it*, 43 TEX. TECH. L. REV. 29, 33-34 (2010).

<sup>16</sup> *King v. Burwell*, 135 S. Ct. 2480, 2481-82 (2015) (dashing conservative hopes when conservative Chief Justice Roberts and Justice Anthony Kennedy voted to uphold the statute over a bitter dissent by Justice Scalia, joined by Justices Clarence Thomas and Samuel Alito).

Republican vote,<sup>17</sup> which led to a dramatic conflict on the Court between proponents of Scalia's textualism and their jurisprudential rivals, whose approach would justify departing from the literal meaning of a text when following such meaning would subvert the statute's entire purpose.<sup>18</sup>

The ACA, which achieved quasi-universal national medical insurance,<sup>19</sup> constituted the largest expansion of the welfare state since the FDR Administration and was also the most significant legislative achievement of the Obama presidency. It substantially accomplished for the first time a goal that had eluded every Democratic president since Harry Truman, but also provoked the bitter and implacable opposition by Congressional Republicans, who voted in the House of Representatives to repeal it more than fifty times.<sup>20</sup> Opposition to the ACA was obviously a major cause of the disastrous decline of Democratic strength in both houses of Congress beginning with the 2010 elections, although Republican numbers remained below the two-thirds needed to override an Obama veto.<sup>21</sup>

The ACA established a system of tax credit incentives and corresponding penalties to encourage people to sign up for medical insurance exchanges.<sup>22</sup> States that agreed with the ACA could set up their own exchanges to qualify for the tax credits.<sup>23</sup> However, many predominantly conservative states refused to establish their own exchanges, so the statute authorized the Secretary of Health and Human Services to establish federal exchanges in those states.<sup>24</sup> Because of an apparent drafting oversight, however, the vital tax

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<sup>17</sup> *Id.* at 2506; Shailagh Murray & Lori Montgomery, *House Passes Health-Care Reform Bill Without Republican Votes*, WASH. POST (Mar. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/21/AR2010032100943.html>.

<sup>18</sup> Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> [hereinafter *Incoherence of Antonin Scalia*].

<sup>19</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat 119 (2010); Sara Rosenbaum, *The Patient Protection and Affordable Care Act: Implications for Public Health Policy and Practice*, NCBI: PUBLIC HEALTH REPORTS (Jan-Feb. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3001814/>.

<sup>20</sup> Ed O'Keefe, *The House Has Voted 54 Times in Four Years on Obamacare. Here's the Full List*, WASH. POST (Mar. 21, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/?utm\\_term=.cf7eba84d658](https://www.washingtonpost.com/news/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/?utm_term=.cf7eba84d658).

<sup>21</sup> U.S. CONST. art I, § 7, cl. 3.

<sup>22</sup> 26 U.S.C. § 36B (2016); 42 U.S.C. § 1320d-2(j) (2016).

<sup>23</sup> 42 U.S.C. § 300gg-93(b)(1) (2010).

<sup>24</sup> 42 U.S.C. § 18041(b)(1)(B)(ii)(II) (2010).

credit provision was limited by the statute to “an [e]xchange established by the State,”<sup>25</sup> and a literal construction of these terms obviously excluded federally-established exchanges. The U.S. Treasury regulation issued under the ACA, however, made federal exchanges eligible for the tax benefits,<sup>26</sup> since otherwise far fewer people would be covered by the new law.<sup>27</sup> Opponents of the ACA challenged the regulation in court, arguing that the statute clearly limited tax credits and benefits to state exchanges and that by extending these benefits to exchanges established by the Secretary of Health and Human Services, the agency had exceeded the authority Congress had granted it.<sup>28</sup>

The plaintiffs in *King v. Burwell* and other adversaries of Obamacare felt confident of victory when the case was argued in the Supreme Court.<sup>29</sup> However, they received a rude surprise when the Supreme Court upheld the ACA and the challenged regulation in June 2015.<sup>30</sup> Conservative Chief Justice Roberts, perhaps influenced by the harsh criticism that would inevitably result if the Court he headed issued a decision which crippled the president’s major legislative accomplishment, wrote an opinion upholding the statute and regulation on the grounds that the statutory language was ambiguous, and treated it as a tax.<sup>31</sup> Since this conformed to Congress’s intent, he concluded that the phrase “established by the

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<sup>25</sup> 26 U.S.C. § 36B (2016).

<sup>26</sup> 45 C.F.R. § 155.20 (2017).

<sup>27</sup> Timothy S. Jost, *Subsidies and the Survival of the ACA – Divided Decisions on Premium Tax Credits*, 371 NEW ENG. J. MED. 890, 890-91 (2014) (explaining that enforcement of the narrow literal construction of the statutory language would have drastic results); Linda J. Blumberg et al., *The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums*, URB. INST. (Jan. 8, 2015), <http://www.urban.org/research/publication/implications-supreme-court-finding-plaintiff-king-vs-burwell-82-million-more-uninsured-and-35-higher-premiums> (estimating that a victory for the plaintiff would increase the number of uninsured by 8.2 million people).

<sup>28</sup> *King v. Sebelius*, 997 F. Supp. 415, 427-28 (E.D.Va. 2014).

<sup>29</sup> Robert Pear, *Top Plaintiff in Health Subsidies Case Awaits Edict Unperturbed*, N.Y. TIMES (Jun. 17, 2015), <https://www.nytimes.com/2015/06/18/us/david-king-obamacare-supreme-court.html>.

<sup>30</sup> *King*, 135 S. Ct. at 2496.

<sup>31</sup> *Id.* at 2495-96.

State” should be interpreted to mean “established by the state or the federal Department of Health and Human Services” (“HHS”).<sup>32</sup>

Scalia dissented angrily, insisting that the phrase “by the State” could not plausibly be read to mean “established by the State or the Federal Government.”<sup>33</sup> He protested: “[t]hat is of course quite absurd, and the Court’s 21 pages of explanation make it no less so.”<sup>34</sup> While acknowledging that the context of a statute matters, he remonstrated, “[l]et us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.”<sup>35</sup> Rather than attempt to rescue the legislative branch from the effects of its careless draftsmanship, he insisted that courts should apply the presumption that lawmakers use words in “their natural and ordinary signification,”<sup>36</sup> and should not alter that meaning in order to uphold Congress’s enactment.

## II. SCALIA’S PRACTICE OF TEXTUALISM AND ORIGINALISM

If the meaning of a text were ambiguous, Scalia believed that a court “should look for support for the claimed right or authority in the legal and social traditions of the United States.”<sup>37</sup> If a government’s exercise of authority “had been accepted by law or custom [throughout United States history,] it should stand,” and an asserted right of individual liberty should fail if it “had been restricted or eliminated by the states throughout history.”<sup>38</sup> A remarkable application of this principle was Scalia’s citation of a Fifteenth-Century English decision<sup>39</sup> in rejecting an argument that the *capias ad respondendum*, by which a person served with process inside the jurisdiction could be forcibly detained and required to appear in court to defend a lawsuit, violated due process.<sup>40</sup> For

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<sup>32</sup> *Id.* at 2485, 2487, 2491. Justices Ginsburg, Breyer, Sotomayor and Kagan concurred in Roberts’s opinion for the majority, joined somewhat surprisingly by Justice Kennedy. *Id.* at 2484.

<sup>33</sup> *Id.* at 2497 (Scalia J., dissenting) (emphasis omitted).

<sup>34</sup> *King*, 135 S. Ct. at 2496 (Scalia J., dissenting).

<sup>35</sup> *Id.* at 2497 (Scalia J., dissenting).

<sup>36</sup> *Id.* (Scalia J., dissenting) (citing *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 12 (1878)).

<sup>37</sup> *RING*, *supra* note 8, at 2.

<sup>38</sup> *RING*, *supra* note 8, at 2.

<sup>39</sup> *Burnham v. Superior Court of Cal., Cty. of Marin*, 495 U.S. 604, 608 (1990) (citing *Bowser v. Collins*, Y.B. Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng. Rep. 97 (Ex. Ch.1482)).

<sup>40</sup> *Id.* at 608, 618.

Scalia, five centuries of accepted legal practice precluded a valid claim of violation of the Fourteenth Amendment.<sup>41</sup>

Another requirement of Scalia's originalism is that a judge should identify the meaning of a statute or constitutional provision by trying to ascertain what it meant to those who voted to adopt it.<sup>42</sup> While words' meanings sometimes change over the centuries, "the originalist at least knows what he is looking for: the original meaning of the text."<sup>43</sup> Thus, originalism is "the polar opposite of living constitutionalism," whose proponents believe that the text's meaning must be evaluated in the light of changing historical conditions and "the evolving standards of decency that mark the progress of a maturing society. . . ."<sup>44</sup> Justice Scalia emphatically opposed this approach; if the meaning of a statute or constitutional provision's wording were clear and unambiguous, he believed that judges should apply its original meaning unaffected by later developments.<sup>45</sup> An essential feature of both textualism and originalism is that they reject the attempt to rely on the legislators' intent in interpreting a statute's meaning, especially if that intent differs from the text's plain meaning.

Textualists and originalists also reject recourse to legislative history to elucidate a text's meaning.<sup>46</sup> This is because legislators vote for or against statutes for a wide range of possible reasons, and

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<sup>41</sup> See *id.* at 608 (holding that service on the defendant in the forum was sufficient to establish personal jurisdiction, and this obviated the need of minimum contacts with the forum) (citation omitted); see also *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that due process was satisfied if there were sufficient "minimum contacts" between the out-of-state defendant and the forum); *Pennoyer v. Neff*, 95 U.S. 714, 734-36 (1877) (holding that the due process clause of the Fourteenth Amendment protected the rights of a domiciliary of one state who was sued in another state).

<sup>42</sup> RING, *supra* note 8, at 16, 22

<sup>43</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION - FEDERAL COURTS AND THE LAW* 45 (1997). Scalia of course acknowledged that ascertaining the original meaning of a legal text was sometimes difficult, and that originalists could disagree on their conclusions. *Id.*

<sup>44</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that stripping a deserter of U.S. citizenship was an unconstitutional penalty); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 11 (2010).

<sup>45</sup> David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L. J. 1377, 1378, 1382 (1999) (explaining that Scalia famously stated that he liked his Constitution "dead," i.e., that it should have a fixed and enduring meaning, which would not change from age to age to reflect the evolving values of the American people).

<sup>46</sup> See RING, *supra* note 8, at 16 ("[Scalia] railed against the practice of using legislative history – the statements on the floor of the House or Senate by the bill's sponsors or committee reports drafted by staff, for example—to interpret a law's text.").



“there is no singular intent that can be attributed to the body passing the law.”<sup>47</sup> Even if such intent could be determined, however, it is not a legitimate source of meaning, since “[w]e are governed by laws, not by the intentions of legislators.”<sup>48</sup> And where the text of a statute is clear, it is improper to seek support for a court’s holding in the words of a Senate Committee Report, which might not reflect the views of the full committee, the Senate, the House, or the president who signed the bill.<sup>49</sup> Recourse to legislative history to determine the meaning of legal texts had become more and more common in the Supreme Court during the Twentieth Century,<sup>50</sup> but Justice Scalia’s espousal of textualism helped counter this trend.<sup>51</sup> Scholars noted that reliance on congressional committee reports and similar sources in order to identify the meaning of a legal or constitutional text diminished during Scalia’s tenure, at least among conservative justices.<sup>52</sup>

Textualist judges also oppose the recognition of “fundamental rights” which are not enumerated in the Constitution, such as the right of privacy<sup>53</sup> or the right to obtain an abortion,<sup>54</sup> which is why Supreme Court nominee Robert Bork<sup>55</sup> and Chief Justice Rehnquist<sup>56</sup>

<sup>47</sup> RING, *supra* note 8, at 16.

<sup>48</sup> Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

<sup>49</sup> See RING, *supra* note 8, at 16-17 (citing Intel Corp. v. Advanced Micro Devices, 542 U.S. 241, 267 (2004) (Scalia, J., concurring in the judgment) (showing how Scalia urged judges to search for its “original meaning” instead of seeking the intent of a law).

<sup>50</sup> Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 294, 297-98, 302-03 (1982); but see Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1175-76, 1192 (2009) (finding that use of historical analysis in constitutional cases (which is quite different from legislative history and typifies the originalist approach) increased from seven percent to thirty-five percent between 1987 and 2007).

<sup>51</sup> Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 HARV. J. LEGIS. 369, 379-80 (1999).

<sup>52</sup> This trend reversed itself somewhat after Judge Stephen Breyer was appointed to the Court in 1994. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1991) (endorsing the use of committee reports as the best evidence of Congress’s institutional intent).

<sup>53</sup> Griswold v. Connecticut, 381 U.S. 479, 508-10 (1965) (Black, J., dissenting).

<sup>54</sup> Roe v. Wade, 410 U.S. 113, 172, 177 (1973) (Rehnquist, J., dissenting).

<sup>55</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990) (“[A] judge, no matter on what court he sits, may never create new constitutional rights or destroy old ones. Any time he does so, he violates not only the limits to his own authority but, and for that reason, also violates the rights of the legislature and the people.”).

<sup>56</sup> *Roe*, 410 U.S. at 221-22 (White, J., dissenting) (“I find nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and

criticized previous Warren Court decisions as unmoored to the text of the Constitution. But it was probably Justice Scalia who was the most influential exemplar of this approach, and the consistency of his jurisprudence with conservative political views helped advance the fifty-year project of Republican presidents to move the Supreme Court to the right.

In his 1997 book *A Matter of Interpretation*, Scalia described the “Great Divide” in constitutional interpretation between “original meaning” (for instance, how the meaning of the Bill of Rights was understood by those who ratified it) and “current meaning” (how it is differently understood nowadays).<sup>57</sup> He, of course, opposed the latter. As examples of current meaning, former Justices Brennan, Marshall and Blackmun and current Justice Breyer all concluded that capital punishment was abhorrent by modern standards and thus, constituted cruel and unusual punishment in violation of the Eighth Amendment.<sup>58</sup> In contrast, for Scalia, because capital punishment was universally accepted in 1791 (when the Bill of Rights was adopted), capital punishment could not be considered “cruel and unusual punishment.”<sup>59</sup>

Similarly, in keeping with their implicit belief in a living Constitution, Justices Anthony Kennedy and Ruth Bader Ginsburg, in opinions restricting capital punishment for mentally challenged defendants<sup>60</sup> and youthful offenders,<sup>61</sup> gave positive weight to evolving standards of decency in a maturing society.<sup>62</sup> In contrast,

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announces a new constitutional right for pregnant women . . . with scarcely any reason or authority for its action . . . . As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.”).

<sup>57</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 82 (Amy Gutmann ed., 1997) (emphasis omitted).

<sup>58</sup> *Stanford v. Kentucky*, 492 U.S. 361, 382 (1989) (Brennan, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 305, 321 (2002).

<sup>59</sup> *See, e.g., Atkins*, 535 U.S. at 311, 337-40 (2002) (Scalia, dissenting).

<sup>60</sup> *Id.* at 311-12, 319-20.

<sup>61</sup> *Roper v. Simmons*, 543 U.S. 551, 554-56, 570-71, 578-79 (2005) (noting that Christopher Simmons was seventeen years old when he committed a horrible murder. In a 5-4 decision authored by Justice Kennedy, the Supreme Court affirmed the lower court holding that capital punishment was cruel and unusual when applied to a juvenile offender.).

<sup>62</sup> *See supra* note 44 and accompanying text. In 1972, the Supreme Court effectively suspended the death penalty because its arbitrary imposition violated due process. *Furman v. Georgia*, 408 U.S. 238, 285-86 (1972). It was later made available again after the Court’s decision in *Rhodes v. Chapman*, 452 U.S. 337, 346, 351-52 (1981).

Justice Scalia's preferred Constitution was "dead," and its meaning could not evolve together with historical changes and changing cultural and moral values.<sup>63</sup> In addition, Scalia rejected outright any relevance of foreign legal doctrines to American jurisprudence, unlike Kennedy and Ginsburg, who cited them with respect in cases involving American constitutional issues.<sup>64</sup>

Another instance in which Scalia refused to follow the Court in taking a "living Constitution" approach involved gay rights and same-sex marriage.<sup>65</sup> Justice Kennedy, ordinarily a member of the conservative wing of the court, proudly diverged from it in a series of cases expanding the rights of homosexuals.<sup>66</sup> The Court struck down laws against sodomy.<sup>67</sup> It invalidated the Defense of Marriage Act.<sup>68</sup> Most significantly, in 2015 it struck down state laws barring marriage between persons of the same gender as violations of the equal protection clause of the Fourteenth Amendment.<sup>69</sup>

The Obergefell decision marked a remarkable shift towards acceptance of same-sex marriage (at least by courts) which would have seemed implausible twenty years earlier. Justice Scalia joined Chief Justice Robert's dissent in full, but he wrote separately to "call attention to this Court's threat to American democracy"<sup>70</sup> when the unelected nine justices invaded the area of marriage law, which had traditionally been entrusted to the states. Predictably, the originalist Scalia ridiculed the five-vote majority for holding that the Fourteenth Amendment included a protection for same-sex marriage and further argued that the Framers could not have intended this when the Amendment was ratified in 1868.<sup>71</sup>

<sup>63</sup> RING, *supra* note 8, at 7-8.

<sup>64</sup> *Roper*, 543 U.S. at 574-75, 622-23.

<sup>65</sup> *Lawrence v. Texas*, 539 U.S. 558, 586, 593-94 (2003) (Scalia, J., dissenting); *U.S. v. Windsor*, 133 S. Ct. 2675, 2697-98, 2707 (2013) (Scalia, J., dissenting); *Obergefell*, 135 S. Ct. at 2626-27 (Scalia, J., dissenting).

<sup>66</sup> *Lawrence*, 539 U.S. at 562, 578; *Windsor*, 133 S. Ct. at 2682; *Obergefell*, 135 S. Ct. at 2593, 2608.

<sup>67</sup> *Lawrence*, 539 U.S. at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

<sup>68</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>69</sup> *Obergefell*, 135 S. Ct. at 2608; *but see Windsor*, 133 S. Ct. at 2629 (Scalia, J., dissenting) ("[T]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.").

<sup>70</sup> *Obergefell*, 135 S. Ct. at 2626 (Scalia, J., dissenting).

<sup>71</sup> *See id.* at 2629 (Scalia, J., dissenting) ("But what really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely

Scalia did not claim that taking an originalist approach to legal texts was always simple. On the contrary, he believed that it necessitated sustained, in-depth studies of the relevant legal texts and sources.<sup>72</sup> Moreover, while the general outlines of originalism may be clear, there is no firm consensus among originalists as to what texts are authoritatively original.<sup>73</sup> Scalia's originalism clearly accepted the bedrock of common law as valid.<sup>74</sup> Moreover, while he had doubts about the original validity of the incorporation doctrine,<sup>75</sup>

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comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification, and almost everyone else in the time since.") (footnote omitted). Interestingly, Edward L. Rubin leveled a similar charge against Scalia himself when he charged Scalia with an egregious departure from longstanding understanding of another Constitutional provision, the Second Amendment. Edward L. Rubin, *Question Regarding D.C. v. Heller: As a Justice, Antonin Scalia is (A) Great, (B) Acceptable, (C) Injudicious*, 54 WAYNE L. REV. 1105, 1113-14 (2008) (accusing Scalia of a "startling" reinterpretation of an ancient text, the Second Amendment: "Heller represents the first time that the Supreme Court has struck down a statute on Second Amendment grounds in the entire history of the Republic. Justice Scalia has apparently discovered the true meaning of a provision that other judges have been reading and interpreting differently for two hundred years."). Rubin further charged that the *Heller* opinion "has no purpose beyond political partisanship." *Id.* at 1117.

<sup>72</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57 (1989) (conceding in his view that "[i]ts greatest defect, in my view, is the difficulty of applying it correctly . . . . [I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material – in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states.").

<sup>73</sup> *Id.* at 856.

<sup>74</sup> *Id.* at 864-65. This is not self-evident with respect to Constitutional provisions, according to Erwin Chemerinsky. Commenting on the "original meaning" of such provisions, he notes that "the search for original meaning in contemporaneous practices assumes that the Constitution sought to codify those particular behaviors" but contends, "[y]et, there is no basis for this assumption. Even if a particular practice was universal at the time the constitutional provision was drafted and ratified, that still does not establish that the Constitution was meant to enshrine that behavior...." Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 285, 395 (2000).

<sup>75</sup> This is the accepted doctrine that the Fourteenth Amendment's due process clause makes important parts of the Bill of Rights, such as the First Amendment, binding against state governments. *See, e.g., De Jonge v. Oregon*, 299 U.S. 353 (1937); *Gitlow v. N.Y.*, 268 U.S. 652 (1925); Dave Benner, *The 14th Amendment and the Incorporation Doctrine*, DAVE BENNER (Aug. 11, 2015), <http://www.davebenner.com/the-14th-amendment-and-the-incorporation-doctrine/>.

he accepted this as a *fait accompli* enshrined in decades of legal precedent.<sup>76</sup>

Controversy has also swirled for decades over whether *Brown v. Board of Education*,<sup>77</sup> perhaps the greatest landmark of Twentieth Century jurisprudence, is consistent with originalist principles. Scalia believed that *Brown* was a valid originalist decision from the outset.<sup>78</sup> In support, he cited the dissent by the first Justice Harlan in *Plessy v. Ferguson*,<sup>79</sup> which he claimed was “thoroughly originalist.”<sup>80</sup> However, while *Brown* has been firmly rooted in our constitutional firmament for decades, it is easy to forget that when it was decided, prominent law professor Herbert Wechsler questioned the Court’s use of sociological evidence to support its holding.<sup>81</sup>

Ronald Turner stated that he regards the *Brown* decision as “nonoriginalist, if not anti-originalist,”<sup>82</sup> and he rejected Scalia’s reliance on the views of Justice Harlan because Harlan, despite his dissent in *Plessy*, “believed in racial hierarchy, endorsed white supremacy and rejected the idea that African Americans were the

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<sup>76</sup> *Antonin Scalia and the Incorporation Doctrine*, TENTH AMEND. CTR., <http://tenthamendmentcenter.com/2017/01/15/antonin-scalia-and-the-incorporation-doctrine/> (last visited Apr. 30, 2017).

<sup>77</sup> 347 U.S. 483 (1954).

<sup>78</sup> *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (“In my view the Fourteenth Amendment’s requirement of ‘equal protection of the laws’, combined with the Thirteenth Amendment’s abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.”). However, the same Congress that approved the Fourteenth Amendment also voted to segregate the District of Columbia public schools. See RONALD DWORKIN, *LAW’S EMPIRE* 360 (1986). This was only held unconstitutional in *Brown*’s companion case, *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>79</sup> 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

<sup>80</sup> *Id.* (Scalia, J., dissenting); Ronald Turner, *A Critique of Justice Antonin Scalia’s Originalist Defense of Brown v. Board of Education*, 60 UCLA L. REV. DISCOURSE. 170, 182-83 (2014).

<sup>81</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959) (arguing that *Brown* is inconsistent with the demands of principled adjudication). While he was a Harvard Law School student, Scalia was evidently strongly influenced by a speech of Columbia Professor Wechsler in Cambridge in 1959, in which Wechsler recommended that lawyers prevent the Supreme Court from becoming a “naked power organ” by conducting a “sustained, disinterested, merciless examination” of litigants’ arguments. Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER, (Mar. 28, 2005).

<sup>82</sup> Turner, *supra* note 80, at 173.

social equals of whites.”<sup>83</sup> The conclusion seems plain that the *Brown* decision is hard to square with originalism.<sup>84</sup>

Another legal principle that Scalia claimed was originalist, but others challenged, was that flag burning was protected by the First Amendment.<sup>85</sup> Evidently, there was no tradition of burning cloth to exercise one’s freedom of expression in 1791.<sup>86</sup> Nevertheless, Scalia concurred in the controversial decision striking down laws against flag burning as unconstitutional.<sup>87</sup>

In any event, while the broad outlines of originalism seem fairly clear, opinions differ on its details. In a recent survey of originalist jurisprudence, Chicago Professor William Baude, who subscribes to “inclusive originalism”, describes some of the varying approaches of self-proclaimed originalists.<sup>88</sup> Many but not all originalists accept the persuasive authority of precedent that characterized common law for centuries before the American Revolution and the Constitution.<sup>89</sup> The originalism of original meaning appears to have prevailed over the originalism of original intent, and Justice Scalia heartily approved of this.<sup>90</sup> But with respect to provisions of the Constitution, his originalist approach assumed the validity of the common law background of particular constitutional questions, while other originalists disagreed.<sup>91</sup> Scalia also regarded

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<sup>83</sup> Turner, *supra* note 80, at 173.

<sup>84</sup> However, a contemporary commentator has argued that *Brown* stems from valid constitutional law, even though the decision did not follow an originalist approach. Pamela S. Karlan, *What Can Brown Do for You? – Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L. J. 1049, 1054 (2009).

<sup>85</sup> Robert A. Stein, *A Consequential Justice*, 101 MINN. L. REV. HEADNOTES 1, 8 (2016).

<sup>86</sup> *Timeline of Flag Desecration Issues*, BETSY ROSS AND THE AMERICAN FLAG, <http://www.ushistory.org/betsy/more/desecration.htm> (last visited Apr. 30, 2017).

<sup>87</sup> *United States v. Eichman*, 496 U.S. 310, 312 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989). Professor Laurence H. Tribe comments that “surely the extension of ‘freedom of speech’ to encompass flag burning or cross burning . . . would—to a Scalia originalist—entail a most ambitious exercise in attributing modern ideas of the free speech principle to our predecessors.” SCALIA, *supra* note 57, at 83.

<sup>88</sup> William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2363 (2015).

<sup>89</sup> *Id.* at 2358-59. Another non-constitutional rule which originalists favor is the doctrine of waiver: if there was legal authority favorable to the case of a litigant who did not argue it, a court would ordinarily not address it and instead would deem it waived. *Id.* at 2359-60.

<sup>90</sup> Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 9 (2006).

<sup>91</sup> *Id.* at 9, 12.

court decisions interpreting and applying constitutional provisions as valid, unlike some other originalists.<sup>92</sup>

When the meanings of words used in law evolve and change over time, it can be argued that applying their evolving meaning to new cases is required in order to be faithful to their original sense. A related issue regarding *District of Columbia v. Heller* is whether originalists should evaluate the permissibility of gun control regulations which apply to contemporary firearms by the same standards which made sense for the much more primitive and less lethal muskets of the late 1700s.<sup>93</sup> Some originalists adhere to unoriginalist precedents. These approaches are typical of inclusive originalism,<sup>94</sup> whereas they might be rejected by exclusive originalists.<sup>95</sup> In addition, the most ardent originalists do not question the validity of subsequent constitutional amendments that overrule prior constitutional court decisions.<sup>96</sup>

### III. DISTRICT OF COLUMBIA V. HELLER

One of the Roberts Court's greatest constitutional law innovations is *District of Columbia v. Heller*,<sup>97</sup> a 2008 Second Amendment decision by Chief Justice Roberts in which the Court held for the first time in history that the right to bear arms was a fundamental Second Amendment right, subjecting any governmental

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<sup>92</sup> *Id.* at 12-13 (asserting that “Justice Scalia is simply not an originalist” because “he asserts a strong role for precedent, even where it is inconsistent with the original meaning of the text.”); *see also* Scalia, *supra* note 72, at 861 (“Thus, almost every originalist would adulterate [the original meaning of the text] with the doctrine of stare decisis - so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong.”); Barnett comments: “Notice that, contrary to [Scalia’s] professed skepticism about the legitimacy of judicial review, this stance puts prior opinions of mere judges above that of the Constitution.” Barnett, *supra* note 90 at 12. Barnett also charges that Scalia effectively gave himself an exemption from originalist results that he found unpalatable by postulating and utilizing three different loopholes or avoidance mechanisms to get around such results. *Id.* at 13, 15.

<sup>93</sup> 554 U.S. 570, 576-77, 626-27 (2008).

<sup>94</sup> Baude, *supra* note 88, at 2355.

<sup>95</sup> *Id.* Scalia appears to have been an “inclusive” originalist, and this is probably why Barnett regarded Clarence Thomas as the most “committed” originalist on the Court. *But see* Lee J. Strang, *The most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 874 (2011) (naming Justice Scalia as the most consistent originalist).

<sup>96</sup> Baude, *supra* note 88, at 2366-67.

<sup>97</sup> *Heller*, 554 U.S. at 635-36.

regulation of this right to strict scrutiny.<sup>98</sup> The rather ambiguous Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>99</sup> Prior Supreme Court Second Amendment case law had always viewed the right to bear arms in the context of military defense,<sup>100</sup> as the prefatory clause seems to imply, whereas the *Heller* decision untethered the right from the prefatory clause.

A District of Columbia law banned the possession of handguns in the home.<sup>101</sup> When special police officer Dick Heller was denied a gun permit and later sued to challenge the law, the federal district court dismissed his complaint, but the D.C. Circuit reversed,<sup>102</sup> holding the D.C. law unconstitutional, and the Supreme Court affirmed the Court of Appeals.<sup>103</sup> Justice Scalia’s majority decision, through a lengthy, scholarly marshaling of Eighteenth Century sources and authorities, based its holding on originalism,<sup>104</sup> and Justice Stevens’s dissent marshaled a comparable phalanx of sources and authorities from the same period for the opposite thesis.<sup>105</sup>

The obscure character of the cases and other references, most of them more than two centuries old, makes it extremely difficult for an originalist reader not well-versed in the legal and historical background of the Eighteenth Century to judge whether the Second Amendment issue was correctly decided. Moreover, the *Heller* opinion contains a major gap that appears to undercut its originalist

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<sup>98</sup> *Id.* at 628, 636. Justice Scalia was himself a gun enthusiast while growing up in Queens. When he was a child, his grandfather, Antonino, took him rabbit hunting on Long Island, and as a student at the Jesuit Xavier High School, in Manhattan, he was a member of junior ROTC, engaged in target practice, and carried his rifle home on the subway. BISKUPIC, *supra* note 4, at 19, 21-22.

<sup>99</sup> U.S. CONST. amend. II.

<sup>100</sup> *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

<sup>101</sup> *Heller*, 554 U.S. at 573.

<sup>102</sup> *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

<sup>103</sup> *Heller*, 554 U.S. at 636.

<sup>104</sup> *Id.* at 584, 600-01.

<sup>105</sup> See Rory K. Little, *Heller and Constitutional Interpretation: Originalism’s Last Gasp*, 60 HASTINGS L.J. 1415, 1417-18, 1427 (2009) (critiquing both Justice Scalia’s majority opinion and Justice Stevens’s dissent in *Heller*). Both opinions may be examples of “law office history”, in which advocates for particular conclusions pick and choose from their reading of history and select those practices which confirm the legal conclusions they want to reach. Such an approach was criticized in Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119.



claim to authoritativeness. While the decision affirms for the first time since 1791 that there is a constitutional right to possess handguns, at least for the purpose of defending one's home, it concludes with a cautionary note that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>106</sup>

The footnote to this important list of exceptions to the *Heller* holding merely states without the slightest citation of support: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."<sup>107</sup> However sensible such exceptions may be as a matter of sound policy, it seems that Scalia unevenly applied his originalist approach in omitting any textual rationale or authority for concluding that such significant exceptions to the *Heller* holding are valid.<sup>108</sup> In addition, the decision does not even attempt to announce a standard for adjudicating the constitutionality of future gun control laws, and thus it imposed on lower courts in subsequent cases the fraught and controversial task of establishing such standards.<sup>109</sup>

Liberal proponents of gun control laws, appalled at the long string of gun murders and massacres in recent years, might understandably be troubled by *Heller's* announcement of a new Second Amendment right for individuals to possess firearms.<sup>110</sup> Criticism of *Heller*, however, was not limited to liberals; two eminent conservative federal appellate judges, Richard Posner of the Seventh Circuit and J. Harvie Wilkinson of the Fourth Circuit, were also among Scalia's critics.<sup>111</sup>

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<sup>106</sup> *Heller*, 554 U.S. at 626-27.

<sup>107</sup> *Id.* at 627 n.26.

<sup>108</sup> *Id.* at 692.

<sup>109</sup> *Id.* at 719.

<sup>110</sup> Dorothy Samuels, *The Second Amendment was Never Meant to Protect an Individual's Right to a Gun*, MOYERS & COMPANY (Dec. 4, 2015), <http://billmoyers.com/story/the-second-amendment-was-never-meant-to-protect-an-individuals-right-to-a-gun/>.

<sup>111</sup> Marc O. DeGirolami & Kevin C. Walsh, *Judge Posner, Judge Wilkinson, and Judicial Critique of Constitutional Theory*, 90 NOTRE DAME L. REV. 633, 647 (2014).

Justice Scalia had collaborated with Bryan Garner on a series of books on originalism and legal writing.<sup>112</sup> In a rather negative book review of one of these books, which he titled *The Incoherence of Antonin Scalia*,<sup>113</sup> Posner argued that Scalia relied on legislative history in violation of his originalist approach, which provoked Scalia to call Posner a “liar.”<sup>114</sup> Posner later charged that the *Obergefell* same sex marriage decision drove Scalia in dissent to espouse “an extreme position concerning the role of the Supreme Court”<sup>115</sup> akin to the status of the traditional British Constitution, where acts of Parliament were *ipso facto* constitutional and could not be invalidated by courts.<sup>116</sup> Posner stated that Scalia suggested that the Constitution could not override the religious beliefs of many American citizens who oppose same sex marriage, a view Posner called “radical.”<sup>117</sup>

Judge Wilkinson, also a respected conservative, condemned *Roe v. Wade*<sup>118</sup> as well as *Heller* in a book entitled *Cosmic Constitutional Theory*.<sup>119</sup> Wilkinson argued that both decisions involved “judicial value judgments based on thin and shaky grounds.”<sup>120</sup> He condemned originalism as a form of “Activism Masquerading as Restraint,”<sup>121</sup> which “fails to constrain judicial choices”<sup>122</sup> when the historical evidence is ambiguous, as it is in every hard case. The Roberts Court has not been reluctant to strike down statutes as unconstitutional, and Judge Wilkinson obviously adheres to traditional canons of judicial conservatism, in which courts

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<sup>112</sup> Posner, *Incoherence of Antonin Scalia*, *supra* note 18.

<sup>113</sup> Posner, *Incoherence of Antonin Scalia*, *supra* note 18.

<sup>114</sup> Corey Adwar, *The Story of Why One of America’s Most Renowned Judges is Feuding with Antonin Scalia*, BUS. INSIDER: L. & ORD. (Jul. 2, 2014 1:37 PM), <http://www.businessinsider.com/judge-richard-posner-criticizes-antonin-scalia-2014-7>.

<sup>115</sup> Richard A. Posner & Eric J. Segall, *Justice Scalia’s Majoritarian Theocracy*, N.Y. TIMES (Dec. 2, 2015), [https://www.nytimes.com/2015/12/03/opinion/justice-scalias-majoritarian-theocracy.html?\\_r=0](https://www.nytimes.com/2015/12/03/opinion/justice-scalias-majoritarian-theocracy.html?_r=0) [hereinafter *Majoritarian Theocracy*].

<sup>116</sup> Thomas Poole, *Constitutional Exceptionalism and the Common Law*, 7 INT’L J. CONST. L. 247, 269-70 (2009).

<sup>117</sup> Posner & Segall, *supra* note 115.

<sup>118</sup> 410 U.S. 113 (1973).

<sup>119</sup> J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY 68 (2012); *See also* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009). For a sharp rebuttal, especially of Wilkinson’s criticism of the *Heller* decision, *see* Nelson Lund and David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson III*, 25 J. L. & POL. 1 (2009).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 33.

<sup>122</sup> *Id.* at 46.

should eschew policymaking and should instead show deference to laws enacted by the elected representatives of the people.<sup>123</sup>

Judge Wilkinson also criticized *Bush v. Gore*<sup>124</sup> as “no friend of self-governance,”<sup>125</sup> mirroring the reported views of Justice David Souter, who reportedly was upset by the decision, which cut short the Florida Supreme Court’s review of the 2000 presidential election returns.<sup>126</sup> Justice Scalia defended the *Bush v. Gore* decision on the grounds that subsequent studies by various private groups had concluded that Bush received the majority of votes in Florida, yet Scalia disregarded other studies which reached the opposite conclusion.<sup>127</sup> Scalia’s subsequent response to repeated questions challenging *Bush v. Gore*, “[g]et over it,” was scarcely judicious or persuasive in tone.<sup>128</sup>

In any event, Scalia did not claim to be an originalist without any exceptions; he called himself a “faint-hearted originalist”<sup>129</sup> and cited as an example the Eighth Amendment’s ban on cruel and unusual punishments.<sup>130</sup> He noted that felons in the Eighteenth Century were sometimes flogged and branded. While these were accepted practices at the time he would never support them, despite their originalist pedigree, if they were ever revived.<sup>131</sup>

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<sup>123</sup> *Id.* at 68-69. See also Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement: A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127 (2009). In this article, Professor Alan Gura, a different kind of originalist, criticized Wilkinson’s support of deference to current politicians and argued that the *Heller* decision faithfully adhered to principles of textualism, originalism, federalism and respect for the separation of powers. *Id.* at 1128.

<sup>124</sup> 531 U.S. 98 (2000).

<sup>125</sup> WILKINSON, *supra* note 119, at 79.

<sup>126</sup> The Associated Press, *Souter Considered Resigning After Bush v. Gore, Book Says*, POLITICO (Sept. 7, 2007, 2:43 PM), <http://www.politico.com/story/2007/09/souter-considered-resigning-after-bush-v-gore-book-says-005709>.

<sup>127</sup> Ford Fessenden & John M. Broder, *Examining the Vote: The Overview; Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES (Nov. 12, 2001), <http://www.nytimes.com/2001/11/12/us/examining-vote-overview-study-disputed-florida-ballots-finds-justices-did-not.html>; Ian Millhiser, *Scalia Rewrites History, Claims 5-4 Bush v. Gore Decision ‘Wasn’t Even Close’*, THINK PROGRESS (Mar. 9, 2012), <https://thinkprogress.org/scalia-rewrites-history-claims-5-4-bush-v-gore-decision-wasnt-even-close-50f73c6babe1>.

<sup>128</sup> Sheldon Nahmod, “Get Over It”: Justice Scalia and *Bush v. Gore*, *Roe v. Wade* and *Obergefell v. Hodges*, IIT CHICAGO-KENT C. L.: SCOTUS NOW (Feb. 23, 2016), <http://blogs.kentlaw.iit.edu/iscotus/get-over-it/>.

<sup>129</sup> See *supra* notes 86-88 and accompanying text.

<sup>130</sup> Scalia, *supra* note 72, at 864.

<sup>131</sup> Scalia, *supra* note 72, at 861, 864.

While no doubt he was referring to more important contemporary issues, influential originalist law professor Randy Barnett criticized Justice Scalia for his “faint-heartedness.”<sup>132</sup> In contrast, another law professor, Lee J. Strang, saluted Scalia as the most faithful adherent of originalism.<sup>133</sup> This disagreement highlights the broader, general disagreements within the originalist school of jurisprudence.<sup>134</sup> Nevertheless, whatever may have been Justice Scalia’s inconsistency as an avatar of originalism, the effect of his Supreme Court opinions on American jurisprudence is undeniable and is likely to prove lasting.

In contrast, the future of originalism as a jurisprudential philosophy capable of yielding predictable concrete results when applied to particular legal issues is cloudy and uncertain. It may be easy to define originalism in crystal clear terms as an abstract theory, but using the theory to resolve the novel legal issues which crop up in new cases yields cloudy and inconsistent results.

In what is apparently the most detailed, in-depth study both of articles by self-proclaimed academic originalists and the opinions of Supreme Court justices who either profess or oppose originalism, Frank B. Cross concluded that originalism had little predictive value for the justices’ opinions:

The results [of Cross’s analyses] suggest that originalism, at least as measured by use of originalist sources, has failed to constrain the justices, not because justices ignore it but instead because the originalist sources can be employed for either a liberal or a conservative result in the closely contested cases before the Court.<sup>135</sup>

Cross believes that people of opposing views will both inevitably find support for their personal policy preferences in the originalist materials, since

[t]he originalist record is obscure, circumstances and legal controversies have changed greatly since the

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<sup>132</sup> Barnett, *supra* note 90, at 13-15.

<sup>133</sup> Strang, *supra* note 95, at 874, 878-81.

<sup>134</sup> Moreover, Scalia’s application of the originalist method plainly departed in important respects from traditional conservative judicial values, such as deference to the legislative branch and the presumption that legislation is constitutional. Judge J. Harvie Wilkinson exemplifies this more classic variety of judicial conservatism. See *supra* note 119.

<sup>135</sup> CROSS, *supra* note 15, at 186.

time of the founding, and the proper degree of generalization of original language is highly indeterminate. It should not be surprising that the theory has little controlling legal power and that advocates see in those materials what they want to see.<sup>136</sup>

Whatever originalism as a jurisprudential theory may hold for the future of the Supreme Court, it is universally agreed that Justice Scalia played a decisive role in shifting the Supreme Court to the right during his tenure on the Court, and his embrace of originalism was a critical part of his jurisprudential legacy. Democratic senators charged that they were robbed of a Supreme Court choice to succeed him because of Senate Majority Leader Mitch McConnell's brazen refusal even to meet with Judge Merrick Garland, President Obama's nominee.<sup>137</sup> Whatever the propriety of this move, it ensured that Scalia's legacy would be honored by his successor, Justice Neil Gorsuch.<sup>138</sup> Justice Gorsuch, a devoted disciple of Scalia's jurisprudence and an active outdoorsman, learned of Scalia's death while skiing downhill in Colorado.<sup>139</sup> By his own account, he was so overcome by grief that his eyes welled up with tears, and it was difficult for him to make his way safely to the bottom of the hill.<sup>140</sup>

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<sup>136</sup> *Id.* at 192-93.

<sup>137</sup> Greg Milam, *President Trump is to Name Choice of Supreme Court Justice*, SKY NEWS (Jan. 31, 2017, 8:41 PM), <http://news.sky.com/story/president-trump-is-to-name-choice-of-supreme-court-justice-10750430>.

<sup>138</sup> Richard Wolf, *On Anniversary of Scalia's Death, Will His Legacy Live on in Neil Gorsuch?*, USA TODAY (Feb. 13, 2017), <https://www.usatoday.com/story/news/politics/2017/02/13/supreme-court-neil-gorsuch-antonin-scalia-president-trump/97707654/>. It seems evident that the answer to this question is in the affirmative. A blog of the conservative Heritage Foundation noted with satisfaction that in his "...first few cases, Gorsuch is showing just how well he fits the Scalia mold of being a committed constitutionalist and textualist on the High Court." John Michael Seibler, *In His First Criminal Cases, Neil Gorsuch Already Mirroring Scalia*, The Daily Signal, May 3, 2017. On his first day hearing arguments on the Supreme Court, Justice Gorsuch manifested his commitment to textualism when he asked an attorney, "Wouldn't it be a lot easier if we just followed the plain text of the statute?" Adam Liptak, *Bitter Fight Behind Him, Justice Gorsuch Starts Day With Relish*, N.Y. TIMES, Apr. 17, 2017, at A13.

<sup>139</sup> Bill Mears, *Analysis: Scalia Tribute May Have Boosted Gorsuch in Search for Court Pick*, FOX NEWS POL. (Feb. 2, 2017), <http://www.foxnews.com/politics/2017/02/02/analysis-scalia-tribute-may-have-boosted-gorsuch-in-search-for-court-pick.html>.

<sup>140</sup> On April 7, 2016, then Judge Gorsuch recalled this while delivering a lecture at Case Western Reserve University School of Law, which was subsequently adapted and published in the school's law review. Honorable Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905 (2016) (endorsing Justice Scalia's textualist approach to jurisprudence).