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## Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism

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## SCALIA'S INFIDELITY: A CRITIQUE OF "FAINT-HEARTED" ORIGINALISM

Randy E. Barnett\*

*In this essay, based on the 2006 William Howard Taft Lecture, I critically evaluate Justice Antonin Scalia's famous and influential 1988 Taft Lecture, entitled Originalism: The Lesser Evil. In his lecture, Justice Scalia began the now-widely-accepted shift from basing constitutional interpretation on the intent of the framers to relying instead on the original public meaning of the text. At the same time, I explain how Justice Scalia allows himself three ways to escape originalist results that he finds to be objectionable: (1) when the text is insufficiently rule-like, (2) when precedent has deviated from original meaning and (3) when the first two justifications are unavailing, just ignore originalism to avoid sufficiently objectionable results. While Justice Scalia describes his approach as "faint-hearted originalism," I contend that he is not really an originalist at all as evidenced by this lecture and also by his stances as a Justice in several important cases. This leaves Justice Thomas as the only Justice who seems at all bound by originalist conclusions with which he may disagree. I then summarize why the courts ought to adhere to original public meaning originalism, why this form of originalism is preferable to the principal alternative—which I call the "underlying principles" approach—and why originalism, properly understood, does not lead to the types of grossly objectionable results that leads Justice Scalia to be faint of heart.*

I am deeply honored to be invited to give the 2006 William Howard Taft Lecture. It is an honor to stand here in the footsteps of such distinguished previous lecturers as Justices Sandra Day O'Connor and Antonin Scalia, Senators Orrin Hatch and Alan Simpson, Judges Patricia Wald and Ken Starr, university presidents Benno Schmidt and Lee Bollinger, and super-luminary law professors Pam Karlan and Akhil Amar. And it is also an honor to give a lecture dedicated to the memory of William Howard Taft, whom Justice Scalia aptly described as

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an extraordinary man by any standard. A state trial judge at twenty-nine, Solicitor General of the United States at thirty-two, a United States Circuit Judge at thirty-four, Professor and Dean at the University of Cincinnati Law School, High Commissioner of the Philippines, Secretary of War, President of the United States, and Chief Justice of the United States.<sup>1</sup>

While I am certainly far more sympathetic with Taft's efforts as Chief Justice to hold Congress to its enumerated powers than are most law professors, this will not be the focus of my remarks. At least not directly.<sup>2</sup>

#### JUSTICE SCALIA'S TAFT LECTURE

Instead, I wish to take as my subject Justice Scalia's 1988 Taft Lecture, *Originalism: The Lesser Evil*. The published version of this lecture in the *University of Cincinnati Law Review* has had an enormous influence. It is among the most frequently cited law review articles<sup>3</sup> and—together with Justice Scalia's introduction to *A Matter of Interpretation*<sup>4</sup>—helped shape the current debate over the proper method of constitutional interpretation. Indeed, his Taft Lecture can be credited with contributing to one of the most remarkable intellectual comeback stories of legal scholarship.

In the 1980s various leading figures in constitutional law took aim at the contention that the Constitution should be interpreted according to the original intentions of its framers. Originalism, it was widely thought, was thoroughly trounced by three unanswerable objections: First, originalism is impractical because it is impossible to discover and aggregate the various intentions held by numerous framers.<sup>5</sup> Second, originalism is actually contrary to the original intentions of the founding generation who themselves rejected reliance on original intent.<sup>6</sup> Finally, originalism is to be rejected because it is wrong for the living to be bound by the dead hand of the past.

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1. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

2. Adopting an original meaning method of interpretation would justify holding Congress to its enumerated powers, as Chief Justice Taft favored.

3. It is cited in 462 law review articles.

4. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3 (Antonin Scalia & Amy Gutmann, eds., 1998).

5. See, e.g., Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

6. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

In his Taft Lecture, Justice Scalia was perhaps the first defender of originalism to shift the theory from its previous focus on the intentions of the framers of the Constitution to the original public meaning of the text at the time of its enactment.<sup>7</sup> This shift from original framers intent to original public meaning obviated much of the practical objection to originalism.<sup>8</sup> That language has an accessible public meaning is what enables interpersonal communication. If words did not have an objective meaning beyond the subjective intention of speakers and writers, we would never be able to understand each other. Indeed, the objective theory by which private contracts are normally interpreted assumes the availability of such meaning. And the very same evidence that shows the founding generation rejecting reliance on the intentions of the framers also shows their reliance on the original public meaning of the text.

Shifting from original framers intent to original public meaning did little to answer the “dead hand” objection, however. Why be bound by the past? For that, Justice Scalia and other originalists had to develop a theory of constitutional legitimacy. Most originalists stressed the theory of popular sovereignty. They contended that the Constitution is an authoritative expression of the will of the People, which judges are duty-bound to follow. While some originalists may have thought this theory justified adhering to the original intent of the framers, most quickly saw that the relevant authority to be obeyed were the ratifiers rather than the framers of the Constitution.

The theory that constitutions obtain their legitimacy from the consent of the governed is widely held. It is favored by most on the left as well as on the right, as evidenced from the title of Bruce Ackerman's books, *We the People*,<sup>9</sup> as well as the substance of Taft Lecturer Akhil Amar's book, *The Bill of Rights*.<sup>10</sup> Also in this camp is the “popular constitutionalism” of Mark Tushnet's, *Taking the Constitution Away from the Courts*,<sup>11</sup> and Larry Kramer's, *The People Themselves*.<sup>12</sup> In all

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7. This is the term he (almost) consistently uses in his Taft Lecture. (For an exception see *infra* text accompanying note 35.) He defends this choice in Scalia, *supra* note 4, at 38 (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).

8. This and the next two paragraphs summarize the argument presented in Parts I & II of RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 1–131 (2004).

9. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

10. See AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

11. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

12. See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2006).

of these books, however, the theory of popular sovereignty is simply assumed rather than defended.

I won't attempt a detailed refutation of the popular sovereignty theory of constitutional legitimacy here, something I do provide in *Restoring the Lost Constitution*.<sup>13</sup> The basic problem is that, while the theory is founded on the consent of the governed, consent morally binds only those who themselves actually consent. No one has yet explained how the consent of some of our ancient ancestors, and in my case someone else's ancestors—or for that matter the consent of only some today—can bind those alive today who have not consented. The attempt to show how some can consent for others is the constitutional theory equivalent of squaring the circle, or perhaps a perpetual motion machine would be an even more apt analogy. No matter how well it outwardly seems to run, the insides of any such theory inevitably involve some form of cheat.

In his Taft Lecture, Justice Scalia did not emphasize the theory of popular sovereignty but offered a theory of legitimacy grounded in the role of the judiciary. Here is how he put the point:

The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. . . . [T]he Constitution, though it has an effect superior to other laws, is in its nature the sort of “law” that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a “law,” but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? One simply cannot say, regarding *that* sort of novel enactment, that “[i]t is emphatically the province and duty of the judicial department” to determine its content. Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and *its* determination that a statute is compatible with the Constitution should, as in England, prevail.<sup>14</sup>

According to this argument, originalism is based on the proper role of courts as “law followers” so the Constitution, as law, must be something that *can* be followed as opposed to invented or made up. The latter role we normally associate with the legislature. And the only way the Constitution provides “law” to be followed is if it is viewed as an authoritative command with a discernable public meaning at the time of its enactment.

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13. See BARNETT, *supra* note 8, at 11–31.

14. Scalia, *supra* note 1, at 854.

While I think the idea of viewing the Constitution as “law” is promising—and I will offer my own take on this later—there are two problems with Justice Scalia’s account. First, it begs the question of the Constitution’s legitimacy, focusing instead on the legitimacy of judicial review within our (assumedly legitimate) constitutional system. Even where the text of the Constitution contains clear law-like commands, the dead hand argument questions whether we the living are to be bound by the commands of the dead, however clear they may be. Scalia’s account offers no rejoinder, but I cannot fault him too much for this. After all, very few constitutional scholars have presented an explicit theory of what makes a constitution binding on the living.<sup>15</sup> Most prefer to silently assume it is, articulating something like a consent of the governed approach based on some notion of assent by today’s popular majority when forced to confront the issue.<sup>16</sup>

Still, I cannot critique a theory that Justice Scalia did not articulate, so I proceed to another difficulty with his normative defense of originalism: Justice Scalia’s approach would seem to justify judicial enforcement of only those passages of the Constitution that are sufficiently rule-like to constitute a determinate command that a judge can simply follow. The more general or abstract provisions of the Constitution are hardly rules that fit this description, so should judges ignore them?

It turns out that, with respect to the Ninth Amendment, for example, this is precisely the view later adopted by Justice Scalia himself. In the case of *Troxel v. Granville*,<sup>17</sup> he dismissed the unenumerated rights “retained by the people” to which the Ninth Amendment expressly refers as subject only to the protection of majorities in legislative bodies.<sup>18</sup> But this puts him in an awkward position. According to his argument, judges must decide for themselves which clauses meet his standard of a rule of law and which do not, because only the former merit judicial protection. By this route, large portions of the Constitution become nonjusticiable by judicial fiat. For example, all unenumerated rights become judicially unenforceable, which certainly results in their being “disparaged” or “denied”—exactly how the Ninth Amendment says the Constitution is *not* to be construed. Also banished from the courts would be much of the Fourteenth Amendment, and who knows what other more abstract provisions.

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15. For an exception, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787 (2005).

16. See *supra* text accompanying notes 9–12.

17. 530 U.S. 57 (2000).

18. *Id.* at 91–93 (Scalia, J., dissenting).

No doubt, Justice Scalia would condemn those many constitutional law professors who would urge courts to ignore the original meaning of the Constitution where doing so conflicts with their conception of “justice.” But Justice Scalia himself commits the comparable sin of ignoring the original meaning of those portions of the Constitution that conflict with his conception of “the rule of law as a law of rules.”<sup>19</sup> Discarding those provisions that do not meet with one’s approval hardly seems like what we would call “fidelity” to a written constitution.

Justice Scalia’s infidelity to the original meaning of the Constitution as a whole manifests itself in another way in his Taft Lecture. To the objection that originalism “[i]n its undiluted form, at least, . . . is medicine that seems too strong to swallow,”<sup>20</sup> he offers two responses. First, he asserts a strong role for precedent, even where it is inconsistent with the original meaning of the text: “Thus, almost every originalist would adulterate it with the doctrine of *stare decisis*,” he admitted, “so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong.”<sup>21</sup> Notice that, contrary to his professed skepticism about the legitimacy of judicial review, this stance puts prior opinions of mere judges above that of the Constitution. Why? Simply because the results of doing otherwise seem to him too objectionable to countenance.

Even adherence to *stare decisis*, however, is inadequate to escape the objectionable results that Justice Scalia thinks stems from a fearless adherence to original meaning.

But *stare decisis* alone is not enough to prevent originalism from being what many would consider too bitter a pill. What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge.<sup>22</sup>

So what does Justice Scalia say an originalist judge should do in the face of such objectionable results? Punt. In perhaps the most famous passage of his Taft Lecture, Justice Scalia describes himself as a “faint-hearted originalist.” In his words, “I hasten to confess that in a crunch I

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19. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175–81 (1989).

20. Scalia, *supra* note 1, at 861.

21. *Id.*

22. *Id.*

may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging."<sup>23</sup> Indeed, he thinks, it is

the fact that most originalists are faint-hearted and most nonoriginalists are moderate (that is, would not ascribe evolving content to such clear provisions as the requirement that the President be no less than thirty-five years of age) which accounts for the fact that the sharp divergence between the two philosophies does not produce an equivalently sharp divergence in judicial opinions.<sup>24</sup>

#### IS JUSTICE SCALIA AN ORIGINALIST?

On his account of the proper approach to interpreting the Constitution, then, Justice Scalia proves unfaithful to the original meaning of the text in three distinct ways. First, he is willing to ignore the original meaning of those portions of the Constitution that do not meet his criteria of the rule of law as the law of rules. Second, he is willing to avoid objectionable outcomes that would result from originalism by invoking the precedents established by the dead hand of nonoriginalist justices. Third, where precedent is unavailing as an escape route, he is willing simply to abandon originalist results that he and most others would find too onerous by some unstated criteria.

Does Justice Scalia's faint-hearted fidelity to the original meaning of the Constitution not represent something of a refutation of originalism itself. Others have surely drawn this lesson both from Justice Scalia's Taft Lecture and from the way he practices originalism as a Justice. And why shouldn't they? After all, if so lion-hearted a jurist as he shrinks in practice from the implications of a theory he so vociferously defends, is this not pretty strong evidence that originalism itself ought to be rejected as unworkable and ultimately unwise?

I think not. Instead, I would conclude from his Taft Lecture and his behavior on the Court that Justice Scalia is simply not an originalist. Whatever virtues he attributes to originalism, he leaves himself not one but three different routes by which to escape adhering to the original meaning of the text. These are more than enough to allow him, or any judge, to reach any result he wishes. Where originalism gives him the results he wants, he can embrace originalism. Where it does not, he can embrace precedent that will. Where friendly precedent is unavailing, he can assert the nonjusticiability of clauses that yield results to which he is

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23. *Id.* at 864.

24. *Id.* at 862.



opposed. And where all else fails, he can simply punt, perhaps citing the history of traditionally-accepted practices of which he approves.

For those who may still doubt Justice Scalia's lack of fidelity to originalism, I cite three examples. The first is his stance in the famous case of *United States v. Lopez*<sup>25</sup> in which the Court held the Gun Free School Zones Act unconstitutional because it exceeded the powers of Congress under the Commerce Clause. In this case, although Chief Justice Rehnquist based his opinion for the Court on "first principles,"<sup>26</sup> he also expended considerable effort to reconcile the result in *Lopez* with the Court's post-New Deal Commerce Clause jurisprudence. In contrast, Justice Thomas authored a concurring opinion urging the Court to reconsider its post-New Deal interpretation of the Commerce Clause in light of its original meaning.<sup>27</sup>

I think it is telling that, in *Lopez*, Justice Scalia joined Chief Justice Rehnquist's opinion of the Court but did not join the originalist concurring opinion of Justice Thomas. This refusal is all the more remarkable because Justice Scalia obviously agreed with the outcome of an originalist analysis in the case at hand. We can only guess at why Justice Scalia avoided noting his agreement with Justice Thomas's originalist analysis. Future events I shall describe in a moment, however, suggest that he may well have foreseen the day when he would not approve of the results of an originalist analysis, so he declined to endorse them when he did. And one virtue of originalism is that such results are often not hard to predict.

My second example of Justice Scalia's infidelity to originalism is very much like the first. In *Kelo v. New London*,<sup>28</sup> in which the Court upheld the use of eminent domain to take private property for the use of a private developer, Justice Scalia joined Justice O'Connor's dissent.<sup>29</sup> Once again he chose not to join the explicitly originalist dissenting opinion of Justice Thomas.<sup>30</sup> This choice is another example of Justice Scalia's refusal to endorse an originalist justification of a result with which he agrees.

My final example is quite different. In the medical cannabis case of *Gonzales v. Raich*<sup>31</sup>, which I argued in the Supreme Court two terms

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25. 514 U.S. 549 (1995).

26. *Id.* at 552 ("The Constitution creates a Federal Government of enumerated powers.").

27. *See id.* at 584-602 (Thomas, J., concurring).

28. 125 S. Ct. 2655 (2005).

29. *See id.* at 2671-2677 (joining O'Connor, J., dissenting).

30. *Id.* at 2229-2239 (Thomas, J. dissenting). I am not here asserting that Justice Thomas's originalist analysis of the Takings Clause in *Kelo* is correct, but that it was incumbent on a truly originalist Justice either to agree or to explain the originalist basis for his disagreement.

31. 125 S. Ct. 2195 (2005).

ago, Justice Scalia joined the majority of the Court in upholding the application of the Controlled Substances Act to persons who grow cannabis on their own property solely for their own medical use as recommended by their physicians and authorized by state law.<sup>32</sup> Unlike *Lopez* and *Kelo*, in *Raich* Justice Scalia was on the opposite side of the case from Justice Thomas, who filed an impassioned originalist dissent. Unlike the previous cases where he silently joined the nonoriginalist opinions of others without telling us why he rejected Justice Thomas's originalist analysis, this time he filed his own concurring opinion in which he stressed his reliance on the Necessary and Proper Clause.<sup>33</sup> While there is much I could say about the position he articulates in *Raich*, most pertinent for present purposes was Justice Scalia's complete refusal to confront and refute Justice Thomas's originalist analysis, something it would seem incumbent on a justice truly committed to originalism to do.

I think these three examples reveal that, if any current justice can fairly be described as a committed originalist, it is Justice Thomas and not Justice Scalia. But this would surprise no one who read Justice Scalia's Taft Lecture. Any judge who leaves himself not one, but three different avenues by which to abandon original meaning can hardly be viewed as committed to the methodology. And indeed, his judicial stances reveal that he is not, as does his distancing himself from Justice Thomas's willingness to reconsider precedents that are inconsistent with original meaning.<sup>34</sup>

At this point, I could speculate about what Justice Scalia *is* committed to, if not to originalism. My guess is that it is some mixture of democratic majoritarianism, judicial restraint, and acceptable policy outcomes, but such a claim would be hard to establish, and I shall not try. Instead, in the final portion of my remarks, I wish to return to the challenge to which I earlier alluded: If someone so stout-hearted and disputatious as Justice Scalia cannot stick with originalism when it pinches, does this not strongly suggest that the fault lies not with him but with originalism itself?

Of course, if Justice Scalia, like *professed* nonoriginalists, is actually committed to other values or objectives above originalism, he may well assert the difficulties of originalism as a means of pursuing these other

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32. *Id.* at 2215–2220 (Scalia, J., concurring).

33. *Id.* at 2215–2220 (Scalia, J. dissenting).

34. Justice Scalia has been quoted as saying that Justice Thomas “doesn’t believe in *stare decisis*, period. . . . [I]f a constitutional line of authority is wrong, [Thomas] would say, ‘Let’s get it right.’ I wouldn’t do that.” As quoted by Ken Foskett in Douglas T. Kendall, *A Big Question About Clarence Thomas*, WASH. POST, Oct. 14, 2004, at A31.

values, as nonoriginalists do. If so, the only thing distinguishing him from nonoriginalists is his admission that originalism is the most defensible method of interpretation. Indeed, he notes in his Taft Lecture the similarity in all but name between his faint-hearted originalism and moderate nonoriginalism.<sup>35</sup>

If we take his reservations about a fearless originalism at a face value, however, we can separately assess two distinct problems for originalism raised by Justice Scalia's infidelity. The first is his willingness to abandon the text where it is insufficiently rule-like to be properly enforced by judges. The second is his willingness to abandon originalism when it leads to untenable results.

Justice Scalia's willingness to enforce only those portions of the text that he finds sufficiently rule-like is based on his claim that judicial review is warranted only when judges are doing lawyerly tasks like interpreting rules. When something like a policy judgment is required, that judgment is properly left to the legislature, as is the application of more abstract constitutional requirements to the laws they enact. In other words, we leave it to the legislatures to decide how and whether to adhere to the more abstract provisions of the text. Judges must stick to their rule-following knitting. But this position is based on a largely unspecified and highly under-theorized view of constitutional legitimacy in general and judicial review in particular.

#### A CRITIQUE OF JUSTICE SCALIA'S FAINT-HEARTED ORIGINALISM

Let me now sketch an alternative that I have elaborated at greater length elsewhere.<sup>36</sup> As already noted, in my book *Restoring the Lost Constitution*, I reject the idea of popular sovereignty or the "consent of the governed" as any support for a constitution of a polity such as the United States. While unanimous consent to governance is quite possible and common—all of you who are students or faculty at the University of Cincinnati have done so—it is a fiction to think that such unanimous consent exists, or has ever existed, at the national level. While some may consent, others surely do not, and mere acquiescence to prevailing government does not constitute consent. I will not pursue this claim here. Instead, I wish to describe the alternative route to constitutional legitimacy I defend in my book.

The challenge is to establish legitimate governance of those who have *not* consented. I contend that such governance is warranted, even in the

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35. See Scalia, *supra* note 1, at 862.

36. See BARNETT, *supra* note 8, at 32–52.

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absence of consent, (a) if the rights of those on whom it is imposed coercively have not been violated and (b) if such coercion is needed to protect the rights of others, which all have a duty to respect regardless of whether they consent to do so. In other words, no one can complain about a particular legal regime if their rights have not been violated; and they are obligated to obey rules that are necessary to protect the rights of others.

Put another way, nonconsensual legal regime is legitimate if it follows procedures that assure the laws it imposes on a nonconsenting public are both *necessary* to protect the rights of others and *proper* insofar as they do not violate the rights of those on whom they are imposed. By "legitimate," I mean that the regime is capable of producing laws that are entitled to a prima facie duty of obedience. Laws made according to such procedures are entitled to a benefit of the doubt.

At this juncture, I ask you to set aside your doubts about both my critiques of popular sovereignty and the theory of legitimacy I offer as an alternative to it. Be assured that I address objections to both stances elsewhere. Assume for the sake of argument that there exists this alternative nonconsensual route to legitimacy based on the respect for individual rights. If established, what implications would this alternative basis for constitutional legitimacy have for constitutional interpretation?

To begin, in the absence of consent, the legitimacy of a constitutional regime should be assessed by how well it protects individual rights. Does following a particular constitution when enacting laws make it more likely than not that such laws do not violate rights and are necessary to protect the rights of others? To answer this question requires an assessment of both the substance and procedural features of a particular constitutional order. Such an assessment would need to decide whether a system that combines elements of federalism, separation of powers, a bifurcated legislature, a presidential veto power subject to a supermajoritarian override, judicial review, enumerated and limited powers, and an explicit but limited bill of rights provides confidence that lawful commands emerging from such a system are so likely to respect rights that they merit the benefit of the doubt. I won't address this complex question here, but I hope you can see both the nature of such an inquiry, and how it differs from worrying about whether a particular constitutional regime was consented to by some or all of those upon whom it is coercively imposed.

The second step in discerning the implications of this route to legitimacy for constitutional interpretation is to note that a written

constitution is one more structural feature of our constitutional order in addition to those I just listed. Why put a constitution in writing? There are at least two good reasons for doing so. First, because it helps “lock in” all the other legitimacy-enhancing features of a constitution I have already described. If you want to preserve a constitutional order that is legitimate because it has certain procedural features that ensure the protection of rights, then to prevent degeneration into an illegitimate system, we want these procedures to be put in writing.

When the presidential veto power is put in writing, for example, denying or disparaging that power becomes much harder. Students, ask yourselves why you would want your professors to put their attendance policy in writing, and you will begin to see why the “lock-in” function of a written constitution is legitimacy enhancing. Second, a written constitution was devised as a means to impose law on those who impose laws on the governed. In other words, it was way to impose law on law-makers, interpreters, and enforcers. Such a law is meant to restrict the exercise of law-making to actions that respect the rights retained by the people.

But a written constitution can perform neither the “lock-in” or rights-protecting functions if those who are supposed to be bound and limited by its terms may alter their meaning at their discretion—especially when these changes systematically expand the powers of law-makers. What it means to bind those who make, interpret and enforce the laws, is that they may not rewrite the laws that bind them. For this reason, *the meaning of the Constitution must remain the same until it is properly changed*; and it is as improper for those upon whom the restraints of the Constitution are imposed to alter its meaning—whether alone or in combination with other branches—as it is for you or I to alter the laws that bind us.

The principle that “the meaning of the Constitution shall remain the same until it is properly changed,” is simply another way of describing original meaning originalism. Because those who are to be governed by the law of the Constitution may not change it in their own, the founders provided alternate institutions—either state legislatures or state conventions—who must concur in any changes. To summarize, for a written constitution to perform its legitimacy-enhancing function, judges cannot alter the meaning of the written Constitution they swear an oath to uphold. That would be like taking an oath “to preserve protect and defend what I think the Constitution ought to say.” That is hardly an oath of fidelity at all. It is like crossing one’s fingers when making a promise.

This route to legitimacy in the absence of consent explains why adherence to a written constitution contributes to legitimacy by limiting the proper powers of those who impose laws on the nonconsenting people and why the meaning of such a writing should remain the same until properly changed. It also explains why all the limits on the powers of government by which rights are protected should be enforceable, not merely the ones that look like rules. Judicial review of legislation provides an important means by which legislatures can be held to their proper powers. If judges decline to enforce these limits, then all we have is trust in the discretion of legislatures to stay within them. But if we could trust legislatures to this degree to protect the rights retained by the people, we would have no need for a written constitution, indeed for any constitution.

I maintain that the enterprise of constitutionalism is based, in whole or in part, on a basic distrust that government will stay within its proper role of protecting and respecting the rights of the people. If this distrust is unwarranted, then we can do without a written constitution altogether. I think many who reject originalism would favor this option. On both the political left and right you find the belief that majoritarian voting is sufficient to protect the rights of the people. Or at least they believe this when their side is in power. The founders personally experienced a purely majoritarian system in their post-revolutionary states and rejected it. Perhaps the founders were wrong. But I find it worth noting that those who seem to desire an escape from some of the bonds of our written Constitution do not openly advocate its abandonment or change. Instead, they claim to be respecting it.

#### ORIGINALISM: THE BETTER APPROACH

Although alternatives to originalism are surprisingly hard to identify with any specificity, there is one very popular method that can be called the “underlying principles” approach. We discern from the text the deeper underlying principles that underlie its particular injunctions. We then appeal to these underlying principles to limit the scope of the text or ignore it altogether. Those who employ this approach can claim that they are still enforcing the Constitution, in the sense that they are implementing the principles for which it stands. The principal appeal of this approach is the possibility that it produces better results than can be produced by the written text.

Allowing the underlying principles to substitute for or supercede the text, however, has its drawbacks. For one thing, because the underlying principles are not themselves in writing and are often far from

incontestable, the principles may simply represent the preference of whoever is doing the “interpreting.” Secondly, because the underlying principles, even if correct, are usually very abstract, how they are to be applied in particular cases can be very uncertain. Does the principle of free expression supposedly underlying the right of freedom of speech lead one to support or oppose restrictions on paid political advertisements within 60 days of an election? Although such restrictions take the form of restricting speech, perhaps they enhance freedom of expression by “leveling the playing field” and letting other voices be heard.

If pretty much anyone can play this game to reach virtually any result, then the Constitution is no longer the source of law for law-makers. Instead, the real arbiters of government power are those in the courts who discern the underlying principles. Everything then depends on who the Justices are, rather than on what the Constitution says. Some root for Ginsberg or Stevens, others for Kennedy, still others for Scalia. I think the judicial nomination and confirmation process we now see stems in part from a willingness to place the judges’ views of underlying principles ahead of what the Constitution actually says to reach arguably better results than can be reached by the text of the Constitution.

The appeal of the underlying principles approach is two-fold. First, the approach is plausible because we often do need to consider the principles underlying the text to make sense of it. Does the Second Amendment protect the right to bear weapons, or the appendages to which our hands are attached? Does its protections extend beyond ordinary bearable weapons that are used in legitimate self-defense, to side-winder missiles or nuclear weapons? These questions cannot be asked without some appeal to what historical purpose the provision was supposed to serve.

What is objectionable is when appeal to the underlying principles is used to ignore or trump the text. If the principle underlying the Second Amendment is defined as contributing to public safety or even personal protection, some can then contend that with the emergence of government police forces and more lethal weapons, this purpose is best served by ignoring the right to keep and bear arms that is locked into the text. In other words, where there is a will to do so, the technique can be as easily and almost always used to obviate rather than interpret the Constitution.

The second appeal of the underlying principles approach is that it appears to yield better results than respecting the text and nothing but the text. Its supporters point to particular cases we all accept today as

sacred. *Brown v. Board of Education*<sup>37</sup> is perhaps the most canonical of cases in the canon. It is then claimed that, because the original meaning of the Fourteenth Amendment cannot deliver the desired result, the meaning of the text must be changed by judges to something that is morally superior. I would guess that this argument motivates the approach of ninety percent of constitutional law professors.

There are three responses to this contention. First, those who make this argument often strain to show why originalism cannot produce the same result because their real purpose is to refute originalism. Very often a proper version of original meaning originalism offers support for results that present doctrine has a difficult time justifying. As I explain in *Restoring the Lost Constitution*, the original meanings of the Ninth Amendment and the Privileges or Immunities Clause offer far more justifiable and robust protection of personal liberty, for example, than do current approaches based on the Due Process clauses.<sup>38</sup>

Second, the underlying principles approach typically yield results that appeal to majorities when they are decided, but look decidedly inferior in hindsight. In this category, I would put *Dred Scott v. Sandford*,<sup>39</sup> *Plessy v. Ferguson*,<sup>40</sup> and *Korematsu v. United States*.<sup>41</sup> In other words, superior results are supposed to justify an abandonment of original meaning in favor of appeals to underlying principles, but all that is truly guaranteed are results that are popular with some segment of the population when they are decided. There is simply no guarantee that judges responding to popular sentiments will outperform the text of the original Constitution as it has been formally amended.

Third, your political enemies can use the underlying principles approach to gut the provisions of the Constitution you care about when they get in power. When they do, the only objection you can make is to their politics. You cannot rightly complain about their method, or that they are violating the text of the written constitution, because they are simply doing what you would do. If you do not like Justice Scalia's underlying principles, you can hardly complain that he is disregarding the text of the Ninth Amendment, when you would ignore any text that contradicted the underlying principles you support.

Given that we all care about the Constitution because we want a better rather than a worse society, the question is which approach is preferable. A system of nonoriginalist or faint-hearted originalist Justices enforcing

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37. 347 U.S. 483 (1954).

38. See BARNETT, *supra* note 8.

39. 60 U.S. 393 (1857).

40. 163 U.S. 537 (1896).

41. 323 U.S. 214 (1944).



the principles they find underlying the text of the Constitution and ignoring the text itself when it stands in the way of results of which they approve? Or a consistent respect for the original meaning of the written Constitution as a whole?

Given what this Constitution says, I choose the Constitution, but I can understand why those who disagree with what it says would prefer the Justices. To them I can offer only two types of objections. The first is to contest their claim that their system yields a better society than does reliance on the original meaning of the written Constitution as a whole. The second is to object that they are engaged in bait and switch. While invoking “the Constitution” that is revered by the American people, they are really replacing it with their own visions of the principles they see underlying the text. If they were candid about what they were doing, however, I doubt that this technique would be well received.

#### CONCLUSION

Does this defense of a fearless originalism by which the whole Constitution is enforced—including the original meaning of abstract clauses like the Ninth Amendment—lead to the sort of horrible results that, in part, leads Justice Scalia to be faint of heart? I think not. In my view, the original meaning of the entire Constitution, as amended, is far more felicitous than he apparently believes it to be. But this is partly because I do not think the original meaning of the more general clauses is as limited he does. In other words, an appropriate use of original meaning originalism leads to far fewer objectionable results than he thinks it will.

In his Taft Lecture, Justice Scalia anticipated and rejected this move. One way to avoid objectionable results, he observed,

would be to say that it was originally intended that the cruel and unusual punishment clause would have an evolving content—that “cruel and unusual” originally meant “cruel and unusual for the age in question” and not “cruel and unusual in 1791.” But to be faithful to originalist philosophy, one must not only *say* this but demonstrate it to be so on the basis of some textual or historical evidence. Perhaps the mere words “cruel and unusual” suggest an evolutionary intent more than other provisions of the Constitution, but that is far from clear; and I know of no historical evidence for that meaning. And if the faint-hearted originalist is willing simply to posit such an intent for the “cruel and unusual punishment” clause, why not for the due process clause, the equal protection clause, the privileges and immunity clause, etc.? When one goes down that road, there is really no difference between the faint-hearted originalist and the moderate nonoriginalist, except that the former

finds it comforting to make up (out of whole cloth) an original evolutionary intent, and the latter thinks that superfluous.<sup>42</sup>

But here I think Justice Scalia misunderstands what originalism requires. Indeed, here he appears to be reverting to original intent originalism when he asks whether “the mere words ‘cruel and unusual’ suggest an evolutionary *intent*.” In contrast, original public meaning originalism attempts to identify the level of generality in which the Constitution is objectively expressed. Does the text ban particular punishments of which they were aware, or does it ban all cruel and unusual punishments? Does the text protect only enumerated rights, or does it also insist that other rights not be denied or disparage? Does the Fourteenth Amendment protect a specific list of liberties debated at the time from infringement by states, or did it protect all “privileges or immunities of citizenship”? Did the Second Amendment protect only such weapons as existed in 1789 or did it protect bearable “arms”?

This is not to say, however, that the broader provisions of the text lack all historical meaning and are open to anything we may wish them to mean. I do not know enough about the phrase “cruel and unusual” to comment knowledgeably on it, but I do know that the rights retained by the people was a reference to natural rights, which were conceived of as liberty rights. That this was its public meaning at the time of its enactment is demonstrable.<sup>43</sup> Similarly, the “privileges or immunities” in the Fourteenth Amendment was a reference both to natural liberty rights *and* the extra procedural protections of individuals provided by the Bill of Rights.<sup>44</sup> Broad as both these provisions are, they are neither unlimited nor entirely open-ended.

In sum, an originalist must take the whole text of the Constitution as it was written, whether rule-like or not. That the founders and the authors of the Fourteenth Amendment drafted texts that leave some discretion in application to changing circumstances is not a bug. It's a feature. Applying the more abstract provisions of the text is required by a proper approach to originalism. Justice Scalia fails to realize that original meaning originalism, properly understood, avoids many of the abhorrent results that caused him in his Taft Lecture to shrink from a fearless adherence to originalism.

Of course, there is much more to be said about originalism than I have said here, some of which I have discussed at length elsewhere. And I and other originalists have more work to do, both theoretically and

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42. Scalia, *supra* note 1, at 861–862.

43. See Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1 (2006).

44. See BARNETT, *supra* note 8, at 60–66.

investigating original meaning. But I hope I have shown first, that Justice Scalia's faint-hearted commitment to originalism is not really originalism at all, either in theory or in practice. Second, that adherence to original meaning originalism is warranted as an implication of a written constitution, a structural feature of our constitutional order that enhances its legitimacy. Third, that the most prevalent alternative to originalism—an "underlying principles" approach—has its own serious drawbacks. And finally that a fearless commitment to originalism might avoid rather than reach the horrible results that causes even so fearless a jurist of originalism to become faint of heart. Because Justice Scalia places a higher priority on other considerations—such as majoritarianism and judicial restraint—I doubt this defense of originalism would change his mind. But perhaps it will embolden others to venture where Justice Scalia fears to tread.