Remembering the Boss

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INTRODUCTION

Justice Scalia never liked tributes or accolades. He would tell his law clerks not to get syrupy at the annual reunion, where the clerks from that year's term would present him with a bound volume of his opinions from the previous term, accompanied by a speech. During the term that I clerked for him, we took his instruction to heart and presented a roast that pushed against what I thought at the time were the outermost boundaries of permissible irreverence—only to see those boundaries far exceeded by law clerks in later years. The Justice loved all of it, and the annual pasquinade was always (at least for me) the highlight of our once-a-year gatherings. I imagine there are other justices who would prefer a raucous lampoon over stately adulation, though probably not a majority.

Justice Scalia didn't want eulogies at his funeral either, partly because they distracted from what he thought should be the principal focus of a funeral service,[1] but also because he never wanted (or needed) fawning acclamations to begin with. So I cannot think of a more fitting way to honor Justice Scalia than with this collection of essays, solicited from his admirers and critics alike, written not to eulogize but to reflect on his life and his writings, and to continue debating the ideas that he so powerfully advanced during his thirty-year tenure on the Court.

My perspective on Justice Scalia is shaped by the fact that I was fortunate to have worked for him for one year, and even more fortunate to have known him as a mentor and a friend. People often ask me what Justice Scalia was like, and when they do I always tell them the one thing that I most want people to know about Justice Scalia: he had a remarkably open mind. I

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[1] See Antonin Scalia, Associate Justice of the Supreme Court of the United States, Letter to Dr. James C. Goodloe (Sept 1, 1998), archived at http://perma.cc/D78T-J7QT.

say that not to imply that other members of the Court are closed-minded or less open-minded than Justice Scalia was, but because an open mind is (in my view) the most important character trait of a good judge, and because it is a quality that most people do not instinctively attach to Justice Scalia. If anything, I suspect that most people attribute the opposite to Justice Scalia and perceive him as a dogmatic jurist, which they surmise from his outspoken commitment to original-meaning textualism and his (occasionally) scorching opinions. But that's not the view that anyone who knows Justice Scalia has of him—and it's not the view that anyone else should have either.

The public record is enough to refute this caricature. Justice Scalia was aware of and publicly acknowledged the intellectual challenges that confront originalist theories of interpretation, having famously defended originalism as "the lesser evil."[2] He candidly admitted that originalist interpretation will sometimes require daunting historical inquiries that generalist judges are ill equipped to undertake,[3] and that full-throated originalism will sometimes produce results that seem normatively horrifying by today's standards.[4] It takes not only open-mindedness but also integrity for a Supreme Court justice to publicly recognize the weaknesses in the interpretive theory that he espouses, rather than posing as an oracle of the law or perpetuating the idea that the Supreme Court's finality gives its members a claim to infallibility.

Justice Scalia's decision to frankly admit the challenges that face originalist theory—and to address them as best he could—contrasts with other originalists who try to make these problems disappear, sometimes by propagating law-office history that offers simplistic or incomplete accounts of a complex historical record, sometimes by defining the "original understanding" at a level of generality high enough to give judges the flexibility to avoid normatively unappealing outcomes whenever they want to. I've always found Justice Scalia's candor about originalism refreshing. There is no shame in admitting that one's preferred interpretive theory has drawbacks—all theories of interpretation do—and choices among theories of interpretation present trade-offs, like all other choices in life. The more that an

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2 See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849, 856 (1989) (acknowledging that originalism is "not without its warts").

3 Id at 856–61.

4 Id at 861–62.

interpretive theory constrains judicial discretion, the more it will produce outcomes in individual cases that judges find normatively unattractive. And the more that an interpretive theory empowers judges to avoid untoward results in particular cases, the more it liberates judges to do as they please, and the more it runs the risk that judges will make the law worse than what it would have been under a regime of rigid formalism. There is no "perfect" interpretive theory that enables judges to avoid morally unacceptable results in individual cases, while constraining judicial discretion enough to erase the legitimacy concerns and the risk of judicial backsliding that arise when judges depart from the ordinary or original meaning of constitutional language.

Justice Scalia's open-mindedness was equally on display inside his chambers. He sought to hire law clerks who disagreed with him,[5] wanting to avoid the flabby groupthink that can set in when everyone in the room thinks alike.[6] He liked to be challenged, especially by his clerks. And he loved a good argument—emphasis on the word *good*. Bad arguments, he once said, deserve a "clunking over the head"[7]—and clunkings were frequently administered in his chambers and in his opinions. But no one should mistake intolerance for bad arguments with closed-mindedness toward good ones. It wasn't unusual for the Justice to change his mind about a case, and it wasn't unusual for him to support a liberal result if he thought it was supported by text or historical evidence.[8]

The clerk conferences that the Justice held to discuss the Court's cases were wide open and occasionally raucous.[9] Everyone felt free to express their views and to challenge the

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5 See Ian Samuel, *The Counter-Clerks of Justice Scalia*, 10 NYU J L & Liberty 1, 2 (2016); Gil Seinfeld, *The Good, the Bad, and the Ugly: Reflections of a Counterclerk*, 114 Mich L Rev First Impressions 111, 113, 117 (2016).

6 See Nicholas Quinn Rosenkranz, *Intellectual Diversity in the Legal Academy*, 37 Harv J L & Pub Pol 137, 138 (2014).

7 See Joan Biskupic, *'All Friends' on Court, Scalia Says* (Wash Post, Mar 27, 1993), archived at http://perma.cc/27JE-JM6M.

8 For a few of the many examples, see *Maryland v King*, 133 S Ct 1958, 1980–90 (2013) (Scalia dissenting); *Blakely v Washington*, 542 US 296, 298 (2004) (Scalia); *Crawford v Washington*, 541 US 36, 68–69 (2004) (Scalia); *Hamdi v Rumsfeld*, 542 US 507, 554–79 (2004) (Scalia dissenting); *BMW of North America v Gore*, 517 US 559, 598–607 (1996) (Scalia dissenting); *Maryland v Craig*, 497 US 836, 860–70 (1990) (Scalia dissenting).

9 One of my former colleagues reports that "screw you" was once offered as a rejoinder during a clerk conference. See Seinfeld, 114 Mich L Rev First Impressions at 114 (cited in note 5).

views held by others. And the Justice's firm methodological convictions gave us an anchor for how to assess the arguments made by counsel, and how to present our own arguments to the Justice. I sometimes wondered what our discussion of the cases would have been like if the Justice had subscribed to the gestalt pragmatism that drives decision-making in some of the other chambers. In many of the cases that we handled during the year that I worked for him, the case law on which the parties relied did not clearly resolve the issue one way or the other. Each side trotted out cases that were helpful to their client's position—but that could nevertheless be distinguished if the Court wanted to do so. And in the one case in which the Supreme Court's precedent *did* clearly and unambiguously resolve the issue, the justices opted to overrule their precedent and chart an entirely new course.[10]

I thought about what it would be like to try to persuade a justice who regarded text and original meaning as mere factors to be considered alongside judicial precedent, policy considerations, legislative history, or whatever else might be in the mix. These factors invariably pull in different directions by the time a case reaches the Supreme Court—so how is it possible to falsify a person's choice among these competing considerations? In the Scalia chambers, there was an algorithm for dealing with those situations: the original meaning of legal enactments should control, unless a well-settled precedent of the Court compels a different outcome.[11] This standard is far from perfect,[12] and critics of Justice Scalia note that he did not always

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[10] See *Lawrence v Texas*, 539 US 558, 578 (2003), overruling *Bowers v Hardwick*, 478 US 186 (1986).

[11] See, for example, Scalia, 57 U Cin L Rev at 861 (cited in note 2) ("[A]lmost every originalist would adulterate [originalism] with the doctrine of *stare decisis*."); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 138–39 (Princeton 1997) (Amy Gutmann, ed) ("Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew."); id at 138 (observing that the Supreme Court's First Amendment doctrine "has developed long-standing and well-accepted principles . . . that are effectively irreversible").

[12] The principal objections to Justice Scalia's originalism-with-exceptions-for-stare-decisis proceed along the following lines: First, by accommodating stare decisis as a "pragmatic exception" to a judge's otherwise-binding obligation to follow the original meaning of constitutional enactments, Justice Scalia appears to concede that consequentialism is the ultimate touchstone of judicial decision-making. Scalia, *A Matter of Interpretation* at 140 (cited in note 11) (emphasis omitted). See also id at 139 ("The whole function of [stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."); Scalia, 57 U Cin L Rev at 864 (cited in note 2) ("[I]n a crunch I may prove a faint-hearted

live by this rule: sometimes he voted in ways that appeared to extend nonoriginalist or atextual judicial precedent into new situations.[13] But at least Justice Scalia *had* a methodology by which others could assess his rulings for consistency. And he had enough of an open mind to follow that methodology—in most cases even if not in all—and he did so even when it led to results that contradicted his initial intuitions or ideological beliefs.

Justice Scalia had many other admirable qualities. I've never known a lawyer who held himself to higher standards in his use of the English language. Justice Scalia understood that the written and spoken word is a lawyer's stock in trade, and he demanded perfection from himself in matters of grammar, usage, punctuation, and pronunciation. He encouraged others

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originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging."). But if consequentialist concerns can trump original meaning in these situations, then why not in others? There are many situations in which a decision to follow the original meaning of the Constitution will produce normatively undesirable consequences, so it's not apparent why consequentialist concerns should prevail only when supported by settled judicial precedent.

The second objection is that Justice Scalia's accommodation of stare decisis undercuts originalism's ability to constrain judicial discretion because there is no meta-rule for determining when a judicial precedent should be extended, distinguished, or overruled. See Mark Tushnet, *Taking the Constitution Away from the Courts* 156–57 (Princeton 1999) (criticizing "conservative originalists" for opportunistically invoking stare decisis to preserve nonoriginalist rulings, such as *Brown v Board of Education of Topeka*, 347 US 483 (1954), while refusing to accede to other nonoriginalist rulings, such as *Roe v Wade*, 410 US 113 (1973)); David A. Strauss, *The Living Constitution* 17 (Oxford 2010) (arguing that "fainthearted" originalism that accommodates stare decisis removes constraints on judicial discretion and allows judges to become "sometime-living-constitutionalists").

[13] See generally, for example, *Bush v Gore*, 531 US 98 (2000); *Seminole Tribe of Florida v Florida*, 517 US 44 (1996); *Adarand Constructors, Inc v Pena*, 515 US 200 (1995); *Texas v Johnson*, 491 US 397 (1989). Some have suggested that Justice Scalia's insistence on colorblind university admissions policies is another example of his willingness to elevate nonoriginalist doctrine over the text and original meaning of the Equal Protection Clause. See *Grutter v Bollinger*, 539 US 306, 349 (2003) (Scalia concurring in part and dissenting in part); *Gratz v Bollinger*, 539 US 244, 270–71 (2003); Seinfeld, 114 Mich L Rev First Impression at 118–20 (cited in note 5); Cass R. Sunstein, *In Memoriam: Justice Antonin Scalia*, 130 Harv L Rev 22, 27 (2016). But don't forget Title VI of the Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, which unambiguously prohibits any "program or activity" that receives federal funds from discriminating "on the ground of race." Civil Rights Act of 1964 § 601, 78 Stat at 252, codified at 42 USC § 2000d. Justice Scalia's votes to limit university affirmative-action programs were undeniably consistent with his textualist methodologies, given the language of Title VI, and that remains true even if the equal-protection rationale on which he relied was incompatible with textualism or originalism. See Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 Stan L Rev 1237, 1307–10 (2017).

to hold themselves to those same high standards,[14] but always in a good-natured way. More than once my colleagues drew his rebuke by pronouncing "applicable" with stress on the second syllable rather than the first, and the Justice would show us how he felt about this pronunciation by blurting it out with the slobbering, exaggerated lisp of Daffy Duck. But mostly he led by example, and he never behaved like a snoot even if his status and knowledge gave him the prerogative to do so.

And I've never known a lawyer who had higher standards of rigor in his use of sources. Justice Scalia personally cite-checked every one of his opinions before it went out the door. The chambers had an established routine for this process: the law clerk assigned to a case would gather all the volumes cited in the opinion and place them on a cart, and then sit down with the Justice as he checked each citation against the original source, one by one. This ritual was known as "booking" within the chambers, and it could take anywhere from a few hours to more than a day depending on the length of the opinion. It was not fun—I have never encountered a lawyer who enjoys cite-checking—and I found it remarkable that Justice Scalia would devote so much of his scarce time to this dreary and unstimulating task. But it was a mark of his unswerving integrity: no opinion under his name would ever mischaracterize a source, either by inadvertence or intent. In an era when lawyers regularly quote sources out of context and peddle misleading half-truths when describing factual records and legal authorities, Justice Scalia insisted on scrupulous accuracy and devoted thousands of hours to ensuring that each of his opinions properly represented every single source on which they relied.

All of this leads me to confess that I cannot put on the pretense of a neutral and disinterested observer when discussing Justice Scalia. For those who have clerked for any judge, familiarity tends to breed admiration, and that is especially true in my case. But with that disclaimer out of the way, I will first offer some brief remarks on Justice Scalia's writing. Then I will consider why his efforts to reshape constitutional law along originalist lines were less successful

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[14] *Making Your Case*, which Justice Scalia coauthored with Professor Bryan A. Garner, provides a treasure trove of sources related to grammar, style, and pronunciation for any lawyer seeking to improve in those areas. See Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 62–64, 145, 213–18 (Thomson/West 2008).

than his revolutionary transformation of the Court's approach to statutory interpretation. Finally, I will conclude by revisiting the challenge that Justice Scalia threw down to the living-constitution mindset.

I. JUSTICE SCALIA'S WRITING

Justice Scalia was a transformational jurist for many reasons, but foremost among them was his skill as a writer and rhetorician. Most judicial writing is drab, stilted, ridden with jargon and cliché, and something that no one would ever want to read unless it was part of their job or a class assignment. Justice Scalia showed everyone that it need not be done this way. Judicial writing—like any other type of writing—can be written with verve and panache, and the final product should be something enjoyable to read. The purpose of judicial writing is to persuade, and it is hard to persuade when the reader feels as though he's performing a chore. But when I read the work of a skilled writer, I can feel the tug of *wanting* to agree with that person, even independent of the substance of what they are saying. Who wouldn't want to be on the side of a position that is so elegantly and powerfully expressed?

I don't know how many converts Justice Scalia won over to his way of thinking—but I doubt that many of them would have been swayed had Justice Scalia stuck to the script and followed the flat and hackneyed prose that afflicts so much of contemporary judicial writing. And he greatly expanded his audience by writing opinions that instructors want to teach, that casebook authors want to include in their texts, and that lawyers and ordinary Americans want to read just for fun or even to improve their own writing. Pick up any Justice Scalia opinion and marvel at the turns of phrase, the arresting metaphors, the carefully chosen words, the rhetorical force potent enough to embarrass any majority or dissenting opinion that dared to get in its way. The Supreme Court has never before seen anything like it, and I worry that the Court may never see a writer of his skill again. As the Supreme Court continues its march to expand the reach of constitutional law, the predictable response of the political branches will be to impose more and more litmus tests on future Supreme Court nominees, leaving considerations of legal skill and writing ability to function only as weak tiebreaking mechanisms among the few candidates who successfully run the full ideological

gauntlet. One of the downsides, perhaps, of the modern Supreme Court's willingness to constitutionalize so many areas of law that were previously reserved to the political branches.

People can debate whether some of Justice Scalia's opinions went over the top,[15] and even I will admit that I found an occasional rhetorical barb to go beyond what the circumstances called for. But in the end this is just a quibble. We should be more troubled by the sophistry in his colleagues' opinions that provoked these responses. Bad arguments and muddled thinking should be exposed for what they are, especially when they come from an institution that demands unflinching obedience to its decisions and insists that its constitutional pronouncements be regarded as holy writ.[16] Justice Scalia did the country—and his colleagues—a service by so effectively showing how the Court's constitutional pronouncements need better arguments to support them. And if his colleagues were not up the task, then there is at least the hope that future litigants or scholars will be. Vigorous and memorable dissents provide an impetus for others to do the spadework needed to uncover more convincing arguments or evidence for the Court's position, and if this cannot be done, they point the way toward the future overruling of an unsustainable opinion. Humdrum dissents that merely register polite disagreement are not as likely to spur those developments.

And this leads into a caveat that should overlay any discussion of Justice Scalia's legacy: one cannot accurately measure the impact of a great justice until decades or even centuries after their departure. Justice Oliver Wendell Holmes's views on free speech and substantive due process had been rejected repeatedly by the Supreme Court when he retired in 1932.[17] But the Supreme Court eventually adopted the Holmesian positions on these matters,[18] and today it is hard to imagine that anyone who openly rejects those views could be nominated or confirmed to the Supreme Court. On the other side, Holmes's views on eugenics carried an 8–1 majority in

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15 See, for example, Seinfeld, 114 Mich L Rev First Impression at 120–22 (cited in note 5).

16 See, for example, *Cooper v Aaron*, 358 US 1, 18 (1958).

17 See, for example, *Abrams v United States*, 250 US 616, 624–31 (1919) (Holmes dissenting); *Lochner v New York*, 198 US 45, 74–76 (1905) (Holmes dissenting).

18 See generally *Brandenburg v Ohio*, 395 US 444 (1969). See also *West Coast Hotel Co v Parrish,* 300 US 379, 396 (1937).

Buck v Bell,[19] but today Holmes's majority opinion in that case is looked on with revulsion. Doubtless some Scalia dissents will one day be vindicated as Holmes's were, and some Scalia majority opinions will be discredited. One cannot determine the ultimate successes and failures of a justice by the lights of today's winners. But it is still instructive to consider where things stand today, and to assess the changes that Justice Scalia effected during his time on the Court, while bearing in mind that the final chapters of his legacy have not yet been written.

II. JUSTICE SCALIA'S IMPACT

There is little doubt that Justice Scalia's presence on the Supreme Court produced dramatic changes in the Court's approach to statutory interpretation. Efforts to derive statutory meaning from floor statements and committee reports were common in the 1960s and 1970s;[20] today they are mostly relegated to dissenting opinions.[21] From the nineteenth century until recently, textual analysis often took a backseat to ruminations about a legislature's "purpose" or "intent."[22] Now the Supreme Court recognizes that purposivist inquiries can unravel legislative compromise,[23] undermine a legislature's

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[19] 274 US 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.").

[20] See, for example, *United Steelworkers of America v Weber*, 443 US 193, 201–08 (1979); *Monell v Department of Social Services of the City of New York*, 436 US 658, 665–90 (1978).

[21] See, for example, *Burwell v Hobby Lobby Stores, Inc*, 134 S Ct 2751, 2791, 2792–93 (2014) (Ginsburg dissenting); *University of Texas Southwestern Medical Center v Nassar*, 133 S Ct 2517, 2539, 2545–46 (2013) (Ginsburg dissenting); *Arlington Central School District Board of Education v Murphy*, 548 US 291, 323–24 (2006) (Breyer dissenting); *Exxon Mobil Corp v Allapattah Services, Inc*, 545 US 546, 572–76 (2005) (Stevens dissenting).

[22] See, for example, *Church of the Holy Trinity v United States*, 143 US 457, 459 (1892); *United Steelworkers of America*, 443 US at 201.

[23] See *Board of Governors of the Federal Reserve System v Dimension Financial Corp*, 474 US 361, 374 (1986):

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise.

choice to establish rules rather than standards,[24] and erode the Constitution's bicameralism-and-presentment requirements by giving unenacted thoughts or aspirations the force of law.[25] Text and structure have become paramount in resolving disputed questions of statutory construction—and Justice Scalia's tenure on the Court is a big reason why.[26]

At the same time, it seems fair to say that Justice Scalia's impact was less transformative in the field of constitutional law. One need only read *Obergefell v Hodges*[27] to see that a majority of the Supreme Court still subscribes to the living-constitution philosophy that Justice Scalia railed against—an approach that exalts judicial precedent over constitutional text, departs radically from the original understanding of constitutional provisions, and rejects efforts to constrain judicial discretion through formal rules. There may be fewer adherents to this methodology than there were before Justice Scalia joined the

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[24] See *MCI Telecommunications Corp v American Telephone & Telegraph Co*, 512 US 218, 231 n 4 (1994) (declaring that courts and agencies are "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes").

[25] See William N. Eskridge Jr and John Ferejohn, *Super-Statutes*, 50 Duke L J 1215, 1228 (2001) ("Article I, Section 7 of the Constitution deliberately makes it hard to enact statutes and thereby makes it important that statutes laden with compromises not be construed too liberally nor beyond their plain textual meanings.").

[26] See, for example, Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* 7:59 (Harvard Law School, Nov 17, 2015), archived at http://perma.cc/7RYG-M8K7:

> Justice Scalia . . . is going to down as one of the most important, most historic figures in the Court. . . . [T]he primary reason for that is that Justice Scalia has taught everybody how to do statutory interpretation differently. . . . [W]e're all textualists now, in a way that just was not remotely true when Justice Scalia joined the bench.

There are still rare occasions in which the Supreme Court will adopt a purposivist construction of a statute. See, for example, *King v Burwell*, 135 S Ct 2480, 2492–93 (2015) ("[T]he statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."); id at 2493 ("We cannot interpret federal statutes to negate their own stated purposes."), quoting *New York State Department of Social Services v Dublino*, 413 US 405, 419–20 (1973). Yet even in *King*, the Court went out of its way to cabin its approach to the unique circumstances of the Affordable Care Act. See id at 2492 ("[T]he Act does not reflect the type of care and deliberation that one might expect of such significant legislation."); id at 2495 ("In this instance, the context and structure . . . compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."). And the Court's opinion never once cited the Act's legislative history or acknowledged the concept of congressional "intent."

[27] 135 S Ct 2584 (2015).

Court, but it still commands a majority, and the Court continues to use it without apology.

That's not to say that Justice Scalia left no mark at all on the Supreme Court's approach to constitutional law. Constitutional doctrine today is less reliant on the dreadful three-prong tests and balancing standards that featured so prominently in decisions of the Burger Court. And the majority and dissenting opinions in *District of Columbia v Heller*[28] were argued almost entirely on textualist and originalist turf. But on the big-ticket items—including abortion, homosexual rights, and capital punishment—the Supreme Court is still a living-constitutionalist court, just as it was before Justice Scalia arrived. Even the conservative victories from the Rehnquist and Roberts Courts were rarely victories for the textualist or originalist methodologies that Justice Scalia championed. More often than not, those decisions relied on or expanded judicial precedent whose grounding in constitutional text and original meaning is hotly disputed.[29]

So this is one of the puzzles surrounding Justice Scalia's legacy: Why is it that Justice Scalia—who so profoundly changed the way the Supreme Court interprets statutes—was less successful in changing the Court's approach to constitutional interpretation?

Part of the reason may be that so much of the Constitution had already been interpreted by the Supreme Court before Justice Scalia arrived—and it had been interpreted in rulings that did not employ textualist or originalist methodologies. When this fact is combined with the Supreme Court's stare decisis norms and its culture of precedent worship, it becomes difficult for any member of the Court to reorient constitutional law along textualist or originalist lines. A related challenge is that new constitutional provisions are almost never enacted, which deprived Justice Scalia of opportunities to apply his methodologies to constitutional passages that were not weighed down by the baggage of earlier court rulings. New statutes, on the other hand, emerge all the time, and every term the

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[28] 554 US 570 (2008).

[29] See, for example, *Free Enterprise Fund v Public Company Accounting Oversight Board*, 561 US 477, 492–508 (2010); *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701, 720–48 (2007); *Bush v Gore*, 531 US 98, 104–10 (2000) (per curiam); *Seminole Tribe of Florida v Florida*, 517 US 44, 54, 57–73 (1996); *Adarand Constructors, Inc v Pena*, 515 US 200, 212–37 (1995); *Lujan v Defenders of Wildlife*, 504 US 555, 559–62 (1992).

Supreme Court considers provisions of the US Code that it has never previously interpreted.[30] So it will always be easier for a Supreme Court justice to advance new interpretive approaches for statutes than for constitutional provisions—simply because there is more fresh material with which to work.

But I think the challenges that confronted Justice Scalia's efforts to reshape constitutional law ran deeper than that. In the end, the originalism that Justice Scalia championed in constitutional law proved to be a harder sell than the textualism that he advanced in statutory interpretation. Statutory textualism had an easy foil: the idea of "legislative intent" was easy to ridicule in an era when legislators seldom if ever read the bills on which they vote,[31] and the judiciary's reliance on legislative history creates obvious incentives to pollute the legislative record with utterances that reflect the idiosyncratic views of individual legislators rather than the majority view of the legislative body.[32] Perhaps more importantly, none of the Supreme Court's purposivist or intentionalist statutory pronouncements have attained canonical status. *Church of the Holy Trinity v United States*[33]—the bête noire of statutory textualists—is hardly regarded as a paragon of judicial statesmanship,[34] and Justice David Brewer's opinion does not help the cause of intentionalism by relying on then-widespread

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[30] See, for example, *Exxon Mobil Corp*, 545 US at 549–50; *Lamie v United States Trustee*, 540 US 526, 528–33 (2004).

[31] See John F. Manning, *The Supreme Court 2013 Term—Foreword: The Means of Constitutional Power*, 128 Harv L Rev 1, 9 (2014) ("Today, however, almost no one really believes that Congress—as a collective body—forms an *actual* intent about the hard questions that preoccupy the law of statutory interpretation."); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron,* 12 Intl Rev L & Econ 239, 239 (1992) (asserting that "legislative intent, along with military intelligence, jumbo shrimp, and student athlete," is an oxymoron because it is "an internally inconsistent, self-contradictory expression").

[32] See Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U Chi L Rev 149, 160 (2001); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv L Rev 1005, 1012 (1992) ("[T]he widespread expectation that judges will consult legislative histories leads to [their] distortion . . . and makes them unreliable indicators of congressional intent.").

[33] 143 US 457 (1892).

[34] See generally Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 Stan L Rev 1833 (1998) (showing how the Court's opinion in *Holy Trinity* misread the legislative history on which it relied).

laws that barred atheists from public office[35] or by gratuitously declaring the United States to be "a Christian nation."[36]

Constitutional originalism does not have an easy foil of this type, because so many of the Court's nonoriginalist pronouncements have been accepted and embraced across the political spectrum. Celebrated nonoriginalist rulings of this sort include the Court's race- and sex-equality pronouncements,[37] the incorporation of the Bill of Rights,[38] the prohibitions on malapportioned districting,[39] and expansive interpretations of the First Amendment's Speech Clause.[40] In addition, many of the nonoriginalist constitutional rulings that remain controversial are nevertheless backed by powerful constituencies who can demand that their political allies reject judicial nominees who might threaten those rulings.[41] Finally, many of the Court's nonoriginalist decisions impose policies that are popular among members of the legal profession[42]—and it is not easy to motivate judges to embrace an interpretive theory that will prevent them

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35 *Holy Trinity*, 143 US at 468–70.

36 Id at 471.

37 See generally, for example, *Loving v Virginia*, 388 US 1 (1967); *Brown v Board of Education of Topeka*, 347 US 483 (1954); *Frontiero v Richardson*, 411 US 677 (1973).

38 See, for example, *McDonald v City of Chicago*, 561 US 742, 750 (2010).

39 See generally, for example, *Reynolds v Sims*, 377 US 533 (1964).

40 See generally, for example, *New York Times Co v Sullivan*, 376 US 254 (1964).

41 See generally, for example, *Obergefell*, 135 S Ct 2584 (2015) (same-sex marriage); *Roe v Wade*, 410 US 113 (1973) (abortion).

42 The American Bar Association's House of Delegates has adopted resolutions calling for legalized abortion, fifty-state same-sex marriage, and a moratorium on capital punishment. See *Roe*, 410 US at 146–47 (noting that the ABA's House of Delegates had approved the "Uniform Abortion Act," which would allow abortion in the first twenty weeks of pregnancy for any reason, and after twenty weeks whenever a physician "has reasonable cause to believe" that the pregnancy would "gravely impair the physical or mental health of the mother"); *The 1992 Campaign; Bar Group Votes to Fight Restrictions on Abortion* (NY Times, Aug 12, 1992), online at http://www.nytimes.com/1992/08/12/us/the-1992
-campaign-bar-group-votes-to-fight-restrictions-on-abortion.html (visited Apr 17, 2017) (Perma archive unavailable); *ABA Backs Marriage Equality for Gays and Lesbians* (ABA Journal, Aug 10, 2010), archived at http://perma.cc/L64S-LQJJ; Leslie A. Harris, *The ABA Calls for a Moratorium on the Death Penalty: The Task Ahead—Reconciling Justice with Politics* (Focus, Spring 1997), archived at http://perma.cc/E5HP-HH6B. The ABA's positions on these matters are consistent with empirical evidence showing that the average lawyer's political ideology is well to the left of the median voter. See Adam Bonica, Adam S. Chilton, and Maya Sen, *The Political Ideologies of American Lawyers*, 8 J Legal Analysis 277, 292 (2016) ("American lawyers lean to the left of the ideological spectrum. . . . [T]he average American lawyer's ideology [is] close to the ideology of Bill Clinton.").

from imposing policies that many of them regard as normatively desirable.[43]

Constitutional originalism faced other challenges—both practical and theoretical—that hindered Justice Scalia's efforts to refashion constitutional law in the way that he transformed the judiciary's approach to statutes. For one thing, rigid and formalistic interpretive methodologies are easier to swallow in the field of statutory construction because it is easier for the political branches to amend a statute than it is to amend a constitutional provision. So there is less cause for judicial angst when statutory textualism leads to undesirable results in particular cases, because the legislature can respond by amending the statute—and if the legislature fails to amend the statute, that will often signal that the supposedly undesirable result isn't that big of a deal. Article V, by contrast, imposes extreme supermajoritarian obstacles that have caused the process of formal constitutional amendment to fall into desuetude. This puts tremendous pressure on both Congress and the judiciary to interpret the Constitution's text in a manner consistent with contemporary values rather than original understandings.

Then there is the challenge of discerning original meaning from a complex and sometimes voluminous historical record. Justice Scalia described this as the "greatest defect" of originalism,[44] so he was aware of the pitfalls that can arise when generalist judges undertake historical inquiries. But even some of Justice Scalia's own opinions were too quick to find an original meaning in cases where the historical evidence is at best conflicting or unclear. Justice Scalia's dissent in *Morrison v Olson*[45] is one of his most celebrated opinions, and his policy criticisms of the Ethics in Government Act of 1978[46] have been vindicated in emphatic fashion.[47] But is it accurate to say that

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43 Statutory textualism, by contrast, does not have an obvious political valence, because new statutes are enacted every year and will continue to be enacted in the future, and the quantity of existing statutes is so vast that no one can possibly know whether textualism or intentionalism will produce outcomes conducive to one's ideological beliefs over the mine-run of cases. It is impossible to create this veil-of-ignorance effect for theories of constitutional interpretation because the Constitution is short and rarely amended, and everyone knows what's in it.

44 Scalia, 57 U Cin L Rev at 856 (cited in note 2).

45 487 US 654, 697–734 (1988) (Scalia dissenting).

46 Pub L No 95-521, 92 Stat 1824, codified as amended in various parts of Title 5.

47 See generally David A. Strauss, *The Independent Counsel Statute: What Went Wrong?*, 51 Admin L Rev 651 (1999).

independent prosecutors violate the original understanding of Article II's vesting clause or the separation of powers? Justice Scalia argued that they did,[48] but there is evidence showing that early federal prosecutions took place independent of presidential control.[49] The early Congresses allowed both private citizens and state officials to enforce federal criminal laws.[50] And qui tam actions and prosecutions initiated by private citizens were common before and after the Constitution's ratification.[51] So it's hard to maintain that the original understanding of the Constitution *requires* criminal prosecution to rest exclusively within the president's control. And at the very least, this evidence of early practice should be acknowledged and discussed before opining that the Ethics in Government Act violates the Constitution.

Justice Scalia also insisted that the Constitution requires every sentencing factor that increases a defendant's maximum allowable punishment to be treated as an "element" of a substantive crime.[52] But here, too, the historical evidence that Justice Scalia marshaled for this rule is more complex and nuanced than his opinions have let on. Justice Scalia and his colleagues relied on nineteenth-century treatise writers who claimed that indictments must include "every fact which is legally essential to the punishment."[53] But the claims in these

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48 See *Morrison*, 487 US at 697–99 (Scalia dissenting).

49 See Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1, 14–22 (1994); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am U L Rev 275, 281 (1989) ("[F]rom the inception of the republic, the President has not exercised total dominion over criminal law enforcement matters.").

50 Krent, 38 Am U L Rev at 290–310 (cited in note 49).

51 Id at 290–302; Lessig and Sunstein, 94 Colum L Rev at 18–20 (cited in note 49).

52 See *Monge v California*, 524 US 721, 737–41 (1998) (Scalia dissenting); *Apprendi v New Jersey*, 530 US 466, 493–97 (2000); id at 510–12 (Thomas concurring, joined by Scalia); *Ring v Arizona*, 536 US 584, 610–13 (2002) (Scalia concurring); *Sattazahn v Pennsylvania*, 537 US 101, 111 (2003) (Scalia) (plurality); *Blakely v Washington*, 542 US 296, 311–13 (2004).

53 *Blakely*, 542 US at 302 n 5, quoting Joel Prentiss Bishop, 1 *Commentaries on the Law of Criminal Procedure; or, Pleading, Evidence, and Practice in Criminal Cases* § 81 at 51 (Little, Brown 2d ed 1872); *Apprendi*, 530 US at 489 n 15; id at 511 (Thomas concurring, joined by Scalia), quoting Bishop, 1 *Criminal Procedure* § 81 at 51 (cited in note 53). See also *Blakely*, 542 US at 301–02, quoting Bishop, 1 *Criminal Procedure* § 87 at 55 (cited in note 53) ("[A]n accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.") (ellipsis in original); *Apprendi*, 530 US at 480, quoting John Archbold, *Pleading and Evidence in Criminal Cases* 51 (H Sweet 15th ed 1862):

treatises did not accord with actual court decisions of that era, which repeatedly held that the degree of murder did *not* need to be mentioned in the indictment or treated as an "element" of a substantive crime, even though a first-degree murder finding increased a defendant's maximum allowable punishment from life imprisonment to death.[54]

These are just some examples of originalist opinions that rely on an incomplete discussion of the relevant historical evidence. And these opinions show how constitutional originalism confronts problems of judicial competence that are less pronounced in the field of statutory textualism, where judging is focused less on historical materials and more on the contemporary meaning of everyday language. Judicial time is scarce, especially at the Supreme Court, and the partisan advocacy that appears in briefs is not conducive to disinterested and scholarly historical inquiries.

Finally, constitutional originalism faces a theoretical challenge that arises even when the historical evidence is clear and conclusive: Why *should* the original understanding of a constitutional provision control when the text does not purport to lock in those specific understandings? Consider the constitutional provisions that secure the right of jury trial.[55] The original meaning of a "jury" is clear and undisputed: at the time the Constitution and the Bill of Rights were ratified, a jury

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> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision.

[54] See, for example, *White v Commonwealth*, 6 Binn 179, 182 (Pa 1813):

> All that [the first-degree murder statute] does, is to define the different kinds of murder, which shall be ranked in different classes, and be subject to different punishments. It has not been the practice since the passing of this law, to alter the form of indictments for murder in any respect; and it plainly appears by the act itself, that it was not supposed any alteration would be made. It seems taken for granted, that it would not always appear on the face of the indictment of what degree the murder was.

See also Jonathan F. Mitchell, Apprendi*'s Domain*, 2006 S Ct Rev 297, 298–99, 329–42 (collecting authorities).

[55] See, for example, US Const Art III, § 2, cl 3 ("The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury."); US Const Amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."); US Const Amend VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.").

comprised "twelve good men and true."[56] But none of the jury-trial provisions in the Constitution specify that a "jury" must consist of twelve men. The Framers *could* have enacted language to specifically require the use of twelve-men juries for all time. But they didn't, and their failure to do so implies that future generations may interpret the word "jury" in a manner that includes women and bodies of fewer than twelve members—contrary to the original understanding of that term.

Today all fifty states and the federal government allow women into the jury box—and they did so long before the Supreme Court interpreted the Fourteenth Amendment to prohibit state-sponsored sex discrimination. They also regularly employ juries of fewer than twelve members. I have no problem with any of this, because the constitutional text does not specify the sex or number of the jurors—even though the idea of a jury with women or only six members is contrary to the original understanding of a "jury." I imagine that most self-described originalists would have the same reaction. But if the word "jury" can be interpreted in a way that reflects contemporary rather than original understandings of what a "jury" should entail, then why is it impermissible to interpret other provisions of the Constitution in a similarly dynamic fashion?

None of these challenges discredit originalism as a theory of judicial interpretation. But they show how constitutional originalism encounters a unique set of challenges that do not affect statutory textualism—and they begin to explain why Justice Scalia had less success in his efforts to remake the Supreme Court's constitutional jurisprudence in his image.

III. JUSTICE SCALIA'S CHALLENGE TO THE LIVING CONSTITUTION

At the same time, none of these objections or challenges to Justice Scalia's originalism validate the practices of the current

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[56] William Blackstone, 3 *Commentaries on the Laws of England* 349 (1772). The early editions of *Black's Law Dictionary* consistently defined the term "jury" as a "body of men" or a "certain number of men," indicating that the all-male nature of the institution was baked into the very meaning of the word. See *Black's Law Dictionary* 664–65 (1st ed 1891); *Black's Law Dictionary* 674–75 (2d ed 1910). The only jury-like entity on which women were permitted to serve was the "jury of matrons," which would be empaneled when a female prisoner sentenced to death pleaded her pregnancy as grounds for delaying her execution. The "jury of matrons" would resolve whether the condemned woman was indeed pregnant. See James C. Oldham, *On Pleading the Belly: A History of the Jury of Matrons*, 6 Crim Just Hist 1, 1 (1985) ("[T]he women chosen to serve on the jury were to be matrons, who were regarded as experts on the subject of pregnancy and childbirth.").

Supreme Court, which insists that the Constitution's meaning evolves *and* that the Supreme Court gets to impose its preferred interpretations of an evolving Constitution on the rest of us. And Justice Scalia's critique of this court-imposed living Constitution remains powerful and (as far I know) unanswered by any member of the Supreme Court: If the meaning of constitutional provisions can change and evolve, then why should the Supreme Court's preferred interpretation prevail over the interpretations adopted by the political branches?[57]

Of course, the Supreme Court has long asserted that it holds the power to ignore and set aside duly enacted laws that conflict with the Court's preferred interpretation of the Constitution.[58] But the justification for judicial review in *Marbury v Madison*[59] was premised on the assumption that the Constitution's meaning is fixed, and that its authority comes from the "original and supreme will"[60] of the people who ratified it. The Supreme Court has never attempted to reconcile the power of judicial review—or its claims to interpretive supremacy over the Constitution—with the idea of a Constitution whose meaning morphs and evolves over time. And the Court has never attempted to answer the following challenge: If the Constitution's meaning changes and evolves, then why shouldn't the political branches disregard the Supreme Court's constitutional pronouncements and adopt new interpretations of the Constitution that they think superior to the judiciary's? Nothing in the text of the Constitution tags the judiciary as the ultimate expositor of constitutional meaning, and if the meaning of the Constitution is a morphing and changing thing, then there does not appear to be any basis for the judiciary to demand obedience to its constitutional pronouncements. If the judiciary gets to disregard duly enacted statutes that conflict with its

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57 See Scalia, 57 U Cin L Rev at 854 (cited in note 2) ("The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. . . . [T]he legislature would seem a much more appropriate expositor of social values, and *its* determination that a statute is incompatible with the Constitution should, as in England, prevail."). Others have raised similar challenges to nonoriginalist judicial review. See Frank H. Easterbrook, *Alternatives to Originalism?*, 19 Harv J L & Pub Pol 479, 485 (1996) ("Nothing beats originalism *in court*, because nothing else is capable of supporting a judicial veto."); Adrian Vermeule, *Law and the Limits of Reason* 92 (Oxford 2009) (observing that under theories of common-law constitutionalism, it is "not at all obvious why judges should rely on precedent or tradition to trump the views of current legislatures").

58 See generally *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

59 5 US (1 Cranch) 137 (1803).

60 Id at 176.

preferred interpretation of an evolving Constitution, then one would think that the political branches should have an equal right to ignore court rulings that contradict *their* beliefs of what the evolving Constitution should mean.

It is also common for academic discourse to simply assume that the Supreme Court holds the power to nullify duly enacted laws that conflict with the Court's preferred interpretation of the Constitution—whatever that may be—and then proceed to debate how the courts can deploy their interpretive powers in a manner that will produce normatively desirable consequences. Perhaps this power is simply assumed because Chief Justice John Marshall once asserted that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[61] or because of the brute fact that the country has acquiesced to the Supreme Court's repeated assertions of interpretive supremacy over the Constitution. But these do not qualify as *reasons* to give such a power to the judiciary; an "ought" cannot be derived from an "is." And it is somewhat paradoxical to defend the courts' interpretive supremacy over the Constitution by observing that this is the way things have always been done, while simultaneously defending the judiciary's prerogative to depart from time-honored understandings of what the Constitution means.

So Justice Scalia may not have vanquished the idea of an evolving Constitution during his lifetime, and his efforts to promote originalism as a substitute ran into some practical and theoretical obstacles. But his challenge to the notion of a *judicially imposed* living Constitution remains formidable, and it is likely to have more staying power than his attacks on the idea of an evolving Constitution generally.

CONCLUSION

When debating Justice Scalia's ideas, it is easy to overlook how unusual it has been for a justice to leave behind such a rich collection of scholarship and writing. So even those who disagree with Justice Scalia should nevertheless admire his pluck, his eloquence, and his challenging ideas and arguments. I know that his colleagues on the Supreme Court did, including

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[61] Id at 177.

(perhaps especially) those who did not share his judicial philosophy.[62]

Indeed, some of my most cherished memories regarding Justice Scalia are not memories of the justice himself, but of the secondhand anecdotes that I heard from others about what his colleagues on the Supreme Court had to say about him. The Court photographer who related to me how another justice had compared the writing in Justice Scalia opinions with the music of Mozart. The cadre of Justice Scalia clerks who told me how a different justice had remarked over lunch that in one hundred years no one would be talking about any member of the current Supreme Court, except for our boss, whom people would be talking about for centuries to come. Hearing these anecdotes provided a jolting reminder of something I had all too often lost sight of: that we were all witnesses to the work of a legendary jurist, and how lucky we were to have lived during his time on the Court.

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[62] See, for example, Ruth Bader Ginsburg, *In Memoriam: Justice Antonin Scalia*, 130 Harv L Rev 2, 2–5, (2016) ("[F]rom his first days on the Court, Justice Scalia had great affection for Justice Brennan, as Justice Brennan was drawn to him."); Elena Kagan, *In Memoriam: Justice Antonin Scalia*, 130 Harv L Rev 5, 5–9 (2016).