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JUSTICE SCALIA AND THE RULE OF LAW: ORIGINALISM VS. THE LIVING CONSTITUTION

*Richard F. Duncan**

What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have *regarded* as constitutional for 200 years, is in fact unconstitutional? . . . The Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize.¹

INTRODUCTION

Justice Antonin Scalia's sudden death in February, 2016, was a great loss for his family, a great loss for his friends, and a great loss for the "Written Constitution" of the United States of America.² We will have no more of his brilliant, witty, and pugnacious judicial opinions. Instead, we will have to settle for the body of work he left behind as his legacy. But, as one commentator has said, his opinions are "so consistent, so powerful, and so penetrating in their devotion to the rule of law"³—the real rule of *law*, not the political decrees of judges creating the so-called "Living Constitution"⁴—"that one may take one or two almost at random and catch a glimpse of the great patterns of his jurisprudence, as well as flashes of his famous wit."⁵ Scalia was the greatest Supreme Court Justice of his generation, perhaps of all time.⁶ Professor Steven G. Calabresi, a former

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¹ Bd. of Cty. Comm'rs v. Umbehr, 518 U.S. 668, 688–89, 711 (1996) (Scalia, J., dissenting). This quote is so powerful that Judge Bork borrowed it as the title of his book, ROBERT H. BORK ET AL., "A COUNTRY I DO NOT RECOGNIZE": THE LEGAL ASSAULT ON AMERICAN VALUES (Robert H. Bork ed., 2005).

² The phrase "Written Constitution" represents a major characteristic of the originalist school of Constitutional thought: the application of a fixed meaning of the law of the Constitution. DAVID A. STRAUSS, THE LIVING CONSTITUTION 3 (2010). The Written Constitution contrasts the "Living Constitution," the idea that those applying the Constitution must revise it to adapt "to new circumstances, without being formally amended." *Id.* at 1.

³ Matthew J. Franck, *Scalia's Last Opinions*, NAT'L REV. (March 14, 2016), <https://www.nationalreview.com/nrd/articles/431866/scaliaslastopinions>.

⁴ STRAUSS, *supra* note 2, at 2.

⁵ Franck, *supra* note 3.

⁶ Other commentators agree with the author's opinion. *See, e.g.*, Symposium, *Antonin Scalia—A Justice in Full*, NAT'L REV. (Feb. 29, 2016), <http://www.nationalreview.com/article/432005/antonin-scalia-justice-full> (statement by

law clerk of Justice Scalia, recently said that “[Justice Scalia] is the most important justice in American history—greater than former Chief Justice John Marshall himself.”⁷ I will not dissent from Professor Calabresi’s opinion.

When Justice Scalia passed away, I lost the hero of my life in the law. But he lives on in his written words, a body of work that was designed to shape our understanding of the Constitution for generations yet to come. I love the pugnacious poetry of his opinions, particularly of his dissents.⁸ Margaret Talbot once referred to Justice Scalia’s provocative style as “the jurisprudential equivalent of smashing a guitar onstage.”⁹ And so it was.

Justice Scalia was once asked why he took such pains to use memorable terms and provocative phrases in his Supreme Court opinions (particularly in his dissents), and he said that he wrote them this way for

attorney and former FCC chairman Richard Wiley describing Scalia as “one of this nation’s all-time greatest justices”).

⁷ Steven G. Calabresi, *Scalia Towered over John Marshall*, USA TODAY (Feb. 14, 2016), <http://www.usatoday.com/story/opinion/2016/02/13/scalia-text-legacy-clerk-steven-calabresi-column/80349810/>; see also Steven G. Calabresi, *The Unknown Achievements of Justice Scalia*, 39 HARV. J.L. & PUB. POL’Y 575, 575 (2016) (“Scalia was the greatest Justice ever to sit on the Supreme Court . . .”).

⁸ For example, Justice Scalia demonstrated a witty use of satire in *PGA Tour, Inc. v. Martin*:

It has been rendered the solemn duty of the Supreme Court of the United States . . . to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer?

532 U.S. 661, 700 (2001) (Scalia, J., dissenting). His way with words is also on display, with a much more serious tone, in the famous Establishment Clause case of *Lee v. Weisman*:

I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays . . . has come to “requir[e] scrutiny more commonly associated with interior decorators than with the judiciary.” But interior decorating is a rock-hard science compared to psychology practiced by amateurs. A few citations of “[r]esearch in psychology” that have no particular bearing upon the precise issue here . . . cannot disguise the fact that the Court has gone beyond the realm where judges know what they are doing. The Court’s argument that state officials have “coerced” students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent.

505 U.S. 577, 636 (1992) (Scalia, J., dissenting) (citations omitted) (quoting *American Jewish Congress v. Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting)).

⁹ Margaret Talbot, *Supreme Confidence*, NEW YORKER (Mar. 28, 2005), <http://www.newyorker.com/magazine/2005/03/28/supreme-confidence>.

law students.¹⁰ If his dissents are provocative and memorable, they will appear in law school casebooks, and if they are in the casebooks, they will be read by law students who might well decide that his views about the original meaning of the Written Constitution are persuasive.¹¹ This made him a Justice who wrote in the spirit of a teacher or professor of constitutional law, and in the long run, this pedagogical function will likely stand as his most significant achievement.

Although some credibly believe that his greatest contributions to the law are in the area of statutory construction and the merits of textualism over legislative history,¹² for me, Justice Scalia's most important legacy is his work on originalism versus the Living Constitution and his persuasive conclusion that originalism is the "lesser evil."¹³

Together with former Attorney General Edwin Meese III and the late, great Judge Robert H. Bork, Justice Scalia was, in his own words, one of "a small hearty minority who believe in a philosophy called originalism"¹⁴ as an essential component of "a government of laws and not of men."¹⁵ To Justice Scalia, the text of the Written Constitution is law, and the duty of the Court is to interpret the constitutional text based upon its original meaning.¹⁶ The so-called Living Constitution is not law but rather clay in the hands of Justices who shape it to mean whatever they believe it "*ought* to mean."¹⁷

¹⁰ Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/>.

¹¹ A few months before his death, Justice Scalia told students at St. Thomas School of Law that he writes his dissents "for you guys." He continued: "If I write it I know it will be in the casebook, because the professors need something to talk about." His hope was that by writing colorful dissents that are must reading, he may be able to persuade future generations of law students about "what he believed to be true principles of law." Michael Stokes Paulsen, *Scalia at St. Thomas: Closing Arguments*, PUB. DISCOURSE (Feb. 18, 2016), <http://www.thepublicdiscourse.com/2016/02/16501/>.

¹² See Robert Post, *Justice for Scalia*, N.Y. REV. OF BOOKS (June 11, 1998), <http://www.nybooks.com/articles/1998/06/11/justice-for-scalia/> (referencing a study on the recent drop in Supreme Court cases that use statutory construction, and stating: "Scalia's relentless campaign against the use of legislative history, and his refusal to join opinions interpreting statutes by referring to that history, have been astonishingly effective.").

¹³ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862–63 (1989).

¹⁴ Talbot, *supra* note 9.

¹⁵ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997).

¹⁶ See Howard Slugh, *Antonin Scalia, the Forward-Looking Justice*, NAT'L REV. (Feb. 23, 2016), <http://www.nationalreview.com/article/431795/antonin-scalia-originalism-why-critics-are-wrong> (explaining Scalia's belief that the Supreme Court must follow the Constitution's original meaning to uphold the balance of power between our governmental branches).

¹⁷ SCALIA, *supra* note 15, at 39.

The purpose of this Article is to focus on the part of Justice Scalia's incredible legacy that concerns the so-called "Great Debate" in constitutional law between originalism and the Living Constitution.¹⁸ I will focus particularly on Justice Scalia's argument that the Living Constitution is the greater evil because it substitutes the rule of unelected judges for the rule of law.

Importantly, Scalia's vision of original understanding originalism is not a vacuous call for total judicial disengagement. Rather, Scalia believed, quite simply, that the Written Constitution "says what it says and doesn't say what it doesn't say."¹⁹ When the Constitution speaks, it is the duty of the Court to practice judicial engagement and apply the Constitution's precepts to decide cases governed by its original meaning.²⁰ When the Constitution is silent, however, it is the duty of the Court to practice judicial restraint and permit Congress and state legislatures to make laws within their respective powers.²¹ In other words, the Court's job is to apply the Constitution, not to write the Constitution.

This is the remarkable legacy left behind by a giant of the law. So, saddle up your horses, and let's go for a ride down some of the paths Justice Scalia has blazed.

I. JUSTICE SCALIA'S ORIGINAL MEANING ORIGINALISM VS. THE LIVING CONSTITUTION

I have never heard of a law that attempted to restrict one's "right to define" certain concepts; and if the passage calls into question the

¹⁸ See *infra* note 23.

¹⁹ In a 2014 speech entitled "Interpreting the Constitution: A View From the High Court," Justice Scalia said this: "The Constitution is not a living organism. It's a legal document, and it says what it says and doesn't say what it doesn't say." *Justice Scalia: 'Constitution Is Not a Living Organism'*, FOX NEWS POLITICS (March 15, 2014), <http://www.foxnews.com/politics/2014/03/15/justice-scalia-constitution-is-not-living-organism.html>; see also Antonin Scalia, *Constitutional Interpretation*, at 18:38, C-SPAN (Mar. 14, 2005), <https://www.c-span.org/video/?185883-1/constitutional-interpretation&start=1073>.

²⁰ MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 26 (2015) ("The rights of the people are written down, and government is bound to honor and enforce those rights in strict accordance with what was written. Actions of government that infringe those rights are unconstitutional and illegal . . . because the words of the Constitution are supreme."); Slugh, *supra* note 16 (explaining Scalia's view on the proper role of the Court, which is to interpret and discern the written text of the Constitution and apply it).

²¹ Cf. Scalia, *supra* note 13, at 854 (describing how, if the Constitution did not have a fixed meaning, then it should be left entirely to the legislature—rather than the courts—to determine the content and meaning of the law through reference to modern social values).

government's power to regulate *actions based on* one's self-defined "concept of existence, etc.," it is the passage that ate the rule of law.²²

A. The Great Debate

The "Great Debate" in constitutional law²³—one that has raged for over 200 years and recently came to a boil in *Obergefell v. Hodges*²⁴—is this: Should courts interpret the Written Constitution's text as it would have been understood by ordinary citizens alive at the time the text was adopted? Or, should they interpret the Constitution as a "living" organism, one meant to evolve to suit the changing needs and values of contemporary American society?

Originalists believe that if the Constitution must evolve to keep pace with our constantly changing world, we should seek this change through the legitimate amendment process of Article V.²⁵ Simply put, amendments should come from the people, not the Supreme Court.

Conversely, proponents of a Living Constitution believe that the formal amendment process is too "cumbersome" to keep the Constitution current because it is too difficult to amend the Constitution under the process set forth in Article V, and that necessity, therefore, requires the Supreme Court to amend the Constitution from the bench.²⁶ For example, if the duly-ratified Constitution does not give Congress sufficient power to deal with a global economy and contemporary social issues such as same-

²² *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (emphasis in original).

²³ I am referring to the great debate between Justice Chase and Justice Iredell that took place in 1798 in *Calder v. Bull*, regarding the question of whether judges should impose their own interpretation of natural justice when reviewing legislative enactments or simply apply the fixed principles of the Constitution. *Compare* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–88 (1798) (opinion of Chase, J.) (arguing that judges have the right to impose their own interpretation of natural justice), *with id.* at 398–99 (opinion of Iredell, J.) (arguing that judges have no such right, and can only determine the validity of a law by judging whether it is within the power delegated to the legislature by the Constitution).

²⁴ *Compare* *Obergefell v. Hodges*, 135 U.S. 2584, 2598 (2015) (claiming that "[h]istory and tradition guide and discipline" the inquiry of constitutional interpretation, "but do not set its outer boundaries," and that the Constitution must be adapted to "new insight[s]" into the meaning of liberty), *with id.* at 2624 (Roberts, C.J., dissenting) (stating that this conception of the judiciary's role as a deliverer of social change is contrary to the Founder's conception of the judiciary).

²⁵ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 18 (5th ed. 2015). *See generally* U.S. CONST. art. V (delineating how the Constitution is to be amended).

²⁶ *See* CHERMERINSKY, *supra* note 25, at 24 (stating that the "cumbersome amendment process" makes it too difficult for we the people to amend the Constitution and thus judicial amendments are "necessary if the Constitution is to meet the needs of a changing society"). David Strauss also argues that we need a Living Constitution created by the Court because "the world has changed in incalculable ways" and "it is just not realistic to expect the cumbersome amendment process to keep up with these changes." STRAUSS, *supra* note 2, at 1–2.

sex marriage, then it is the duty of the Court to recognize that the Constitution has somehow evolved to meet our ever-changing political needs.²⁷ After all, why should contemporary Americans be encumbered with the views and philosophies of long-dead white males who had no understanding of the needs and values of America in 2016?²⁸ And, as Justice Brennan liked to say, there are so many “majestic generalities and ennobling pronouncements”²⁹ in the Constitution—due process, equal protection, privileges and immunities—and these “luminous and obscure” terms make it so easy to interpret the Constitution to mean whatever the Court wants it to mean while still claiming faithfulness to the written text.³⁰

B. Justice Scalia's Originalism

The Living Constitution is not the supreme law of the land. Rather, “*this* Constitution,” the Written Constitution as duly ratified by we the people in the several states from time to time, is explicitly recognized in Article VI as “the supreme Law of the Land.”³¹ Indeed, it was the existence of a Written Constitution, as a “paramount” and “unchangeable” law that binds and governs the courts, which allowed Chief Justice Marshall to infer the power of judicial review in *Marbury v. Madison*.³² As Justice

²⁷ CHEMERINSKY, *supra* note 25, at 24.

²⁸ See Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 73 (2004) (explaining how non-originalists reject “being ruled by dead white men”). Of course, Supreme Court Justices do not live forever, and yet their opinions under the Living Constitution “rule” us from the grave. For example, all of the Justices who decided *Roe v. Wade*, 410 U.S. 113 (1973), are now dead. See ORIGINALISM: A QUARTER-CENTURY OF DEBATE 310 (Steven G. Calabresi, ed., 2007) (noting that “*Roe v. Wade* represents the dead hand of the past for us now”).

²⁹ Justice William J. Brennan, Jr., *Speech to the Text and Teaching Symposium*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 28, at 55, 56.

³⁰ *Id.* In Justice Brennan’s mind, the ambiguity of these majestic generalities “calls forth interpretation, the interpretation of reader and text.” *Id.* And for himself, as a modern Justice reading the text of the Constitution, Brennan explained that “the ultimate question must be: What do the words of the text mean in our time?” *Id.* at 61.

³¹ U.S. CONST. art. VI, cl. 2 (emphasis added). The full clause states:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

Id.

³² 5 U.S. (1 Cranch) 137, 177–78 (1803). The Court in *Marbury* made clear that the Constitution is a law of written rules for the government of judges interpreting it. *Id.* at 180 (“Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if [sic] it is closed upon him and cannot be inspected by him?”).

Scalia observed, Chief Justice Marshall's inference depended upon the "perception that the Constitution, though it has an effect superior to other laws, is in its nature that 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."³³ Indeed, if the Constitution were not a fixed law but rather an open invitation to apply contemporary meanings and values, "what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature?"³⁴ Thus, the Written Constitution governs the judiciary as well as Congress and the President. Just as an act of Congress or an executive decision that violates the Constitution is unconstitutional, a judicial ruling contrary to the Constitution is also illegitimate and unconstitutional.³⁵

In an important book he co-authored with Bryan A. Garner, Justice Scalia summarized his view of originalism as follows: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."³⁶ Thus, the Written Constitution is not a living organism that changes, evolves, or is self-amending. It is the product of a supermajority consensus among we the people of the several states, and only becomes law when ratified by three-fourths of the states.³⁷ In other words, the Constitution may only be changed when an amendment is ratified by thirty-eight of the present fifty states.³⁸ Since the Supremacy Clause makes the Constitution the supreme law of the land, binding Congress and all fifty state legislatures, the requirement of ratification by a supermajority ensures that democratically enacted laws will be invalidated only when there is strong consensus among the states concerning the entrenchment of new national norms.³⁹ This supermajority consensus ensures that regional differences about basic values and liberties are settled and compromised before new principles are

³³ See Scalia, *supra* note 13, at 854.

³⁴ *Id.*

³⁵ See PAULSEN & PAULSEN, *supra* note 20, at 26 ("No branch of the federal government—not the Congress, not the President, not even the Supreme Court—can legitimately act in ways contrary to the words of the Constitution.").

³⁶ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 81 (2012) (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905)).

³⁷ U.S. CONST. art. V.

³⁸ *Id.* (stating that an amendment to the Constitution shall take effect only "when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof").

³⁹ U.S. CONST. art. VI, cl. 2. See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE*, *supra* note 28, at 164, 168 (explaining how a supermajority allows the enactment of laws based on a significant consensus).

entrenched in the Constitution.⁴⁰ This process helps citizens “transcend their differences” and may even result in greater and more widespread allegiance to the Constitution and the Court.⁴¹

Justice Scalia once provided this pithy description of his approach to interpreting the Constitution: “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.”⁴² In other words, it is the objective meaning of the text that was ratified—not the subjective intentions of those who drafted the text—that governs Justice Scalia’s interpretation of the Constitution. In his landmark majority opinion in *District of Columbia v. Heller*,⁴³ Justice Scalia was finally able to write his version of originalism into law:

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.⁴⁴

The *Heller* opinion, using original meaning originalism to hold, for the first time, that the Second Amendment creates “an individual right to keep and bear arms,”⁴⁵ is, perhaps, Scalia’s greatest achievement. But it is a 5-4 opinion⁴⁶ and may not long outlive him.⁴⁷ Thus, his lasting legacy is likely to be his entire body of work that sets forth his defense of originalism and his convincing critique of Living Constitutionalism.

C. Justice Scalia’s Two Imperfect Librarians

Justice Scalia recognized that the choice between original meaning originalism and Living Constitutionalism is a search for the lesser of two evils, like being asked to choose between two librarians: one who speaks

⁴⁰ See McGinnis & Rappaport, *supra* note 39, at 168 (explaining why a supermajority consensus is important and what happens if the Supreme Court establishes national norms rather than a substantial consensus).

⁴¹ *Id.*

⁴² SCALIA, *supra* note 15, at 38.

⁴³ 554 U.S. 570 (2008).

⁴⁴ *Id.* at 576–77 (citations omitted) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

⁴⁵ *Id.* at 595.

⁴⁶ *Id.* at 572.

⁴⁷ *Justice Ginsburg Once Again Shares Her Intent to Overturn Heller*, NRA-ILA, (July 15, 2016), <https://www.nraila.org/articles/20160715/justice-ginsburg-once-again-shares-her-intent-to-overturn-heller>.

too softly and one who speaks too loudly.⁴⁸ For example, he admitted that the greatest defect of originalism “is the difficulty of applying it correctly . . . [because] it is often exceedingly difficult to plumb the original understanding of an ancient text.”⁴⁹ But that simply requires hard work and serious research: something lawyers are well-equipped to do.⁵⁰

On the other hand, the greatest defect of the Living Constitution—its total reliance on the subjective moral and philosophical preferences of nine unelected lawyers who serve on the Supreme Court⁵¹—is its incompatibility with the rule of law, “the very principle that legitimizes judicial review of constitutionality.”⁵² The Living Constitution, which evolves to mean whatever the Supreme Court thinks it ought to mean at any given time, is the rule of man, not the rule of law.⁵³

Proponents of the Living Constitution have no answer to the charge of “judicial personalization of the law.”⁵⁴ As Judge Bork has said, “The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else.”⁵⁵ Even when a judge purports to apply contemporary moral principles or fundamental community values to “discover” constitutional doctrine, the reality is that there are always competing moral systems and values in society, and the judge will always (or almost always) decide cases based upon his or her own moral

⁴⁸ Scalia, *supra* note 13, at 863. Obviously, the librarian who speaks too softly, although not perfect, is the lesser evil.

⁴⁹ *Id.* at 856.

⁵⁰ As Steven Calabresi has observed, we are literally “awash in pamphlets, newspapers and books” from the Founding Era and “the most authoritative sources of all for original meaning textualists—dictionaries and grammar books from the 1780s—abound, and can easily be consulted.” Steven G. Calabresi, *Introduction to ORIGINALISM: A QUARTER-CENTURY OF DEBATE*, *supra* note 28, at 1, 11.

⁵¹ Scalia, *supra* note 13, at 852.

⁵² *Id.* at 854. Judicial review is based upon the idea that “the constitution is to be considered, in court, as a paramount law.” *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177–78 (1803) (explaining how the Constitution is either foundational to our law or simply another piece of legislation)). Judge Bork similarly says that Marshall’s justification for judicial review was based “on the ground that the Constitution is a written document, that it is law, that it governs courts as well as legislatures, and that its principles are those contemplated by the ratifiers and the framers who produced it.” ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 28 (1990).

⁵³ In his dissent in *Obergefell v. Hodges*, Justice Scalia explicitly accused the majority of violating the rule of law by creating a constitutional right of same-sex marriage with complete disregard for the Constitution’s original meaning, declaring: “Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.” 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

⁵⁴ Scalia, *supra* note 13, at 863.

⁵⁵ Robert Bork, *The Struggle Over the Role of the Court*, NAT’L REV., Sept. 17, 1982, at 1138.

preferences and values.⁵⁶ To me, as to Justice Scalia and Judge Bork, the issue is a simple one: We can either have the rule of law or the Living Constitution, but we cannot have both. The power of judicial review does not give the Court the power to write or amend the Constitution but only the power to apply the Written Constitution as ratified by the founding society.⁵⁷ The Constitution is the work of *we the people*, not *they the Court*. Like Justice Scalia's librarian who speaks too loudly, the Living Constitution should be rejected because it is the greater evil.⁵⁸

D. Is a "Common Law" Constitution the Rule of Law or the Rule of Man?

Defenders of the Living Constitution sometimes try to argue that the Living Constitution is consistent with the rule of law because it has developed as a kind of common law system under which the "content" of constitutional law "is determined by the evolutionary process that produced it."⁵⁹ It is evolution, not creation, and therefore the Supreme Court does not act as a creator or a ruler but merely as a body of judges presiding over this "evolutionary process through the development of a body of precedents."⁶⁰ Justice Scalia begged to disagree. He once described the Living Constitution as:

[A] body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and "find" that changing law. . . . Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.⁶¹

This common law process, Justice Scalia persuasively argued, is illegitimate because the "evolution" of constitutional law begins and ends with Supreme Court decisions. "The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how

⁵⁶ *Id.*

⁵⁷ See Scalia, *supra* note 13, at 854 (explaining that, if the meaning of the constitution is not fixed, then there would be no reason why the judiciary should be entrusted with the power to discern its meaning rather than the legislature).

⁵⁸ *Id.* at 864. Originalism is the lesser evil, "the librarian who talks too softly," because it "establishes a historical criterion" for interpreting the Constitution "that is conceptually quite separate from the preferences of the judge himself." *Id.*

⁵⁹ STRAUSS, *supra* note 2, at 38.

⁶⁰ *Id.*

⁶¹ SCALIA, *supra* note 15, at 38.

far that logic, thus extended, has distanced us from the original text and understanding.”⁶²

Thus, a constitutional right to abortion may “evolve” like so: On day one, the Court creates a new right for parents to direct the education and upbringing of their children by choosing to send them to private rather than public schools.⁶³ On day two, the Court reasons that if parents have a right to direct the education of their children, then surely they must also have the right to decide whether to conceive children in the first place; thus, first married couples,⁶⁴ and then all individuals⁶⁵ have the right to use contraceptives. Finally, on day three, the Court cites the Day One and Day Two precedents as creating a “right of privacy” that “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁶⁶ Like *Tinker to Evers to Chance*,⁶⁷ the Court went from one decision to another and yet another to create a right to abortion-on-demand in a Constitution that says not one word about parental rights, or contraception, or abortion, or privacy.⁶⁸

Moreover, this judge-made abortion amendment became part of constitutional law without any ratification by we the people in the several states. Indeed, one may well ask whether there was ever a time in American history when the abortion right created by the Supreme Court in *Roe v. Wade* could have been ratified by three-fourths of the several states as required by Article V.⁶⁹ It seems unimaginable that thirty-eight

⁶² *Id.* at 39. Moreover, if today’s Court disagrees with yesterday’s decisions, it “will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean.” *Id.* (emphasis in original).

⁶³ See *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (discussing the parents’ right to teach children a foreign language); see also *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (discussing parents’ right to direct the education and upbringing of their children by enrolling them in nonpublic schools).

⁶⁴ *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (discussing the right of married couples to use contraceptives).

⁶⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 452–53 (1972) (discussing the right of an individual, whether married or single, to use contraceptives).

⁶⁶ *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

⁶⁷ “Tinker to Evers to Chance” is a reference to a line from *Baseball’s Sad Lexicon*, a baseball poem written by Franklin Pierce Adams and referring to the 1910 Chicago Cubs infield of shortstop Joe Tinker, second baseman Johnny Evers, and first baseman Frank Chance. Thus, a double play on a ball hit to the shortstop would go from Tinker to Evers to Chance. See Tom Singer, *Power of Poem Immortalizes Cubs Trio*, MLB.COM (2008), <http://m.mlb.com/news/article/3000452>.

⁶⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 951–53 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citing *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).

⁶⁹ This was certainly not the case in 1973 when *Roe v. Wade* was decided; at that time, all but four states had laws prohibiting abortions in most cases, and thirty-three states prohibited it nearly entirely. Sarah Kliff, *CHARTS: How Roe v. Wade Changed Abortion*

states would ratify an amendment proposing the Court's abortion doctrine. And yet, all it took for such a right to be grafted on to the living common law constitution was for the Court to decide that such a right ought to exist. This is not the rule of law; it is "judicial despotism."⁷⁰

Professor David A. Strauss believes that a common law approach to changing the Constitution is legitimate because "the common law has been around for centuries"⁷¹ and because it is better to be ruled by contemporary legal elites than by "[t]he will of the people who lived so long ago."⁷² But the ancient common law of property, torts, and contracts that first-year law students study in every law school in the country, unlike the Living Constitution's judicial decrees amending the Written Constitution, does not give courts the power to strike down acts of Congress and the laws of all fifty states.⁷³ Ordinary common law rules can be changed or even abolished by ordinary acts of legislatures.⁷⁴ I spend half of my course in first-year property law teaching students about all the common law rules that have been repealed or altered by state legislatures. It is this legislative supremacy over judge-made law that renders the ordinary common law compatible with the rule of law.⁷⁵ Judges make rules to decide cases that come before them, but the legislature always has the last word. At the end of the day, free men and women should prefer democratic self-governance by means of legislative enactments over subjective rule by the decrees of an unelected body of lawyers. The former is the rule of law; the latter is the rule of man.

E. "Constitutional Law" vs. "This Constitution": The Latter is Supreme, the Former is Not

There is a crucial distinction between the Written Constitution and what we call "constitutional law."⁷⁶ The Written Constitution of 1789, as

Rights, WASH. POST (Jan. 22, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/01/22/charts-how-roe-v-wade-changed-abortion-rights/>.

⁷⁰ BORK, *supra* note 52, at 41.

⁷¹ STRAUSS, *supra* note 2, at 43.

⁷² *Id.* at 49.

⁷³ Baker, *supra* note 28, at 66.

⁷⁴ *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1709 (2012) (stating that Congress "plainly can override [common law] principles").

⁷⁵ See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) (explaining the subordinate role of judge-made common law to law duly enacted by the legislature).

⁷⁶ See Edwin Meese III, *The Law of the Constitution*, in ORIGINALISM: A QUARTER CENTURY OF DEBATE, *supra* note 28, at 99, 101 (explaining that the distinction is necessary to maintain a limited government).

amended from time to time under Article V,⁷⁷ is the real Constitution, the one Article VI refers to when it declares that “[t]his Constitution . . . shall be the supreme Law of the Land.”⁷⁸ In contrast, “constitutional law” is the case law of the Supreme Court that is decided in the name of the Constitution but often has little or nothing to do with the text or original meaning of the Written Constitution.⁷⁹

When one looks at Supreme Court opinions decided under the Living Constitution, it becomes apparent “that what the judges have done and are continuing to do is to treat the document [the Written Constitution] as having authorized courts to create a body of constitutional law related only in the most general sense to the original understanding.”⁸⁰ In other words, Judge Richard A. Posner sees constitutional law as a body of law which is “legislative in character, [with] the judges being the legislators.”⁸¹ As Judge Posner correctly observes, “[c]onstitutional law is the Supreme Court’s practice of forbidding whatever a majority of the Justices consider egregious invasions of rights that those Justices think people in the United States *should have*.”⁸²

Speaking at the 2015 Loyola Constitutional Law Colloquium,⁸³ Judge Posner explained his views about constitutional law under the Living Constitution. Basically, he said that he is “not particularly interested” in the “text of the Constitution” or in the history of the framing and ratification of the Written Constitution.⁸⁴ Remarkably, here are Judge Posner’s actual words as transcribed:

I’m not particularly interested in the 18th century, nor am I particularly interested in the text of the Constitution. I don’t believe that any document drafted in the 18th century can guide our behavior today. Because the people in the 18th century could not foresee any of the problems of the 21st century. . . . I think we can forget about the 18th century, much of the text. We ask with respect to contemporary constitutional issues . . . what is a sensible response.⁸⁵

⁷⁷ U.S. CONST. art. V.

⁷⁸ U.S. CONST. art. VI.

⁷⁹ RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 94 (2016) (“What is called ‘constitutional law’ is for the most part not in the Constitution itself.”).

⁸⁰ *Id.* at 94–95.

⁸¹ *Id.* at 96.

⁸² *Id.* (emphasis added).

⁸³ Hon. Richard A. Posner, U.S. Court of Appeals for the Seventh Circuit, Address at the Loyola University Chicago School of Law Sixth Annual Constitutional Law Colloquium (Nov. 7, 2015).

⁸⁴ Josh Blackman, *Judge Posner on Judging, Birthright Citizenship, and Precedent*, JOSH BLACKMAN’S BLOG (Nov. 6, 2015), <http://joshblackman.com/blog/2015/11/06/judge-posner-on-judging-birthright-citizenship-and-precedent/>.

⁸⁵ *Id.*

Judge Posner went on to describe his personal, pragmatic approach, when acting as a judge deciding constitutional issues:

I'm a pragmatist. I see judges as trying to improve things within certain bounds. There are practical restrictions on the exercise of one's moral views. There are specific laws that are deeply entrenched. Where the judges are free, their aim, my aim, is to try to improve things. My approach with judging cases is not to worry initially about doctrine, precedent, and all that stuff, but instead, try to figure out, what is a sensible solution to this problem, and then having found what I think is a sensible solution, without worrying about doctrinal details, I ask "is this blocked by some kind of authoritative precedent of the Supreme Court"? If it is not blocked, I say fine, let's go with the common sense . . . solution.⁸⁶

Having freed themselves from the text and original meaning of the Written Constitution, non-originalists are free to write a Living Constitution that requires everything they think is good and prohibits everything they think is bad. Indeed, within weeks after Justice Scalia's sudden death earlier this year, two prominent non-originalist scholars, Dean Erwin Chemerinsky of UC Irvine School of Law and Professor Mark V. Tushnet of Harvard Law School, began dreaming about what a liberal Supreme Court could accomplish under the Living Constitution. Dean Chemerinsky's wish list included decisions by a liberal Supreme Court:

- extending abortion rights;
- upholding affirmative action programs giving racial preferences to minorities;
- overruling *Citizens United v. Federal Election Commission*⁸⁷ and its protection of corporate political speech;
- upholding broad "congressional power to regulate interstate commerce and to tax and spend for the general welfare;"
- "returning to the view that the Second Amendment protects only a right to have guns for the purpose of militia service;" and
- using the Establishment Clause "to strike down religious prayers at government functions, religious symbols on government property, and government support for religious schools."⁸⁸

Moreover, according to Dean Chemerinsky, "[t]he possibility of five or six Democratic justices allows one to imagine"⁸⁹ what other liberal policies

⁸⁶ *Id.*

⁸⁷ 558 U.S. 310, 319 (2010).

⁸⁸ Erwin Chemerinsky, *What if the Supreme Court Were Liberal?*, THE ATLANTIC (Apr. 6, 2016), <http://www.theatlantic.com/politics/archive/2016/04/what-if-the-supreme-court-were-liberal/477018/>.

⁸⁹ *Id.*

could be imposed on all 320 million Americans in the name of the Living Constitution. Of course, one man's dream is another man's nightmare.

Professor Tushnet was even more extreme than Dean Chemerinsky. Licking his lips at the prospect of a liberal Supreme Court, Professor Tushnet blogged that it is now time for liberals to abandon “defensive-crouch liberalism” and go on offense.⁹⁰ Believing mistakenly that liberal control of the Court was in reach, Tushnet said liberal constitutionalists should compile “lists of cases to be overruled at the first opportunity,” to take a “hard line” approach toward the losers in the LGBT culture wars by denying them religious accommodations, and to always remember that evolving constitutional doctrine “is a way to empower our allies and weaken theirs.”⁹¹

The Living Constitution is a weapon of ideological war when wielded by legal elites who view constitutional law as the means of imposing their views of the good life on everyone else through the supreme law of the land. Justice Scalia understood this, and it was his life's work to protect we the people from being ruled by an unelected body of lawyers with the power to shape the Constitution to mean whatever they want it to mean.⁹² The Written Constitution as originally understood is law; the Living Constitution as decreed by 5-4 majorities of the Supreme Court is power.⁹³ As to which is better, the choice should be a simple one.

II. JUSTICE SCALIA'S DEFENSE OF ORIGINALISM FROM ITS CRITICS

It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.⁹⁴

Living constitutionalists attack originalism primarily on two fronts. First, they argue that originalism produces a dead and inflexible constitution, one that was created “hundreds of years ago by people who are no longer alive.”⁹⁵ In the words of Justice Scalia, the argument most frequently made against originalism and “in favor of The Living Constitution is a pragmatic one: Such an evolutionary approach is necessary in order to provide the ‘flexibility’ that a changing society

⁹⁰ Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), <http://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html?m=0>.

⁹¹ *Id.*

⁹² See *supra* Part I.B.

⁹³ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (declaring that “[t]he majority’s decision is an act of will, not legal judgment.”).

⁹⁴ SCALIA, *supra* note 15, at 40.

⁹⁵ STRAUSS, *supra* note 2, at 18.

requires.”⁹⁶ Since the “cumbersome amendment process” makes it too difficult for we the people alive today to amend the Constitution to keep it up to date, “it is desirable to have the Constitution evolve by interpretation and not only by amendment.”⁹⁷

Second, living constitutionalists attack originalism because they believe it will not allow the Court to reach results that they believe are desirable.⁹⁸ They argue that under original meaning originalism the Constitution would not protect abortion rights, same-sex marriage, women’s equality, or even racial equality and integration in public schools.⁹⁹

The critics of originalism are wrong on both counts. The Written Constitution may not be easy to amend, but it creates a republican system of government that is designed to allow laws to be updated from time to time to take account of changing times, new technologies, and the contemporary policy preferences of we the people alive today.¹⁰⁰ Within the scope of its enumerated powers—powers that, while limited, give it broad and sweeping authority over interstate commerce,¹⁰¹ taxing and spending,¹⁰² declaring war,¹⁰³ and the raising and support of armed forces¹⁰⁴—Congress has the power to pass any law that is required to meet the needs of changed times and circumstances.¹⁰⁵ Moreover, with respect to issues beyond the enumerated powers of Congress, our system of federalism allows the states reserved powers extending “to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.”¹⁰⁶ Indeed, when the Court constitutionalizes an issue committed to Congress or the States by the Written Constitution, it deprives the people of the most fundamental liberty of all: the liberty to

⁹⁶ SCALIA, *supra* note 15, at 41.

⁹⁷ CHEMERINSKY, *supra* note 25, at 24.

⁹⁸ See, e.g., STRAUSS, *supra* note 2, at 12–16 (discussing a number of holdings the author claims are unsupportable by an originalist theory of interpretation).

⁹⁹ See CHEMERINSKY, *supra* note 25, at 18, 24; STRAUSS, *supra* note 2, at 12–16 (discussing these specific outcomes the authors claim would not be constitutionally protected using an originalist theory of interpretation).

¹⁰⁰ See SCALIA & GARNER, *supra* note 36, at 410 (discussing the flexibility of changing the Constitution via amendment or legislative action rather than by judicial activism).

¹⁰¹ U.S. CONST. art. I, § 8, cl. 3.

¹⁰² *Id.* art. I, § 8, cl. 1.

¹⁰³ *Id.* art. I, § 8, cl. 11.

¹⁰⁴ *Id.* art. I, § 8, cl. 12.

¹⁰⁵ See PAULSEN & PAULSEN, *supra* note 20, at 43–48, 50.

¹⁰⁶ THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

make laws through the cherished right of democratic self-government.¹⁰⁷ As G.K. Chesterton once said, “What is the good of telling a community that it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people.”¹⁰⁸ Chesterton’s observation has the ring of a deep truth. The right of democratic self-government is what separates free men and women from serfs tugging their forelocks in total obedience to the decrees of the great lords and ladies of the feudal estate (or of the Supreme Court).

The original Constitution is not dead and inflexible; rather, it creates a flexible and enduring system of democratic self-government. Justice Scalia powerfully turned the tables on the Living Constitutionalists and explained how originalism creates flexibility—not rigor mortis—and how it is the Living Constitution that is inflexible:

[T]he notion that the advocates of the Living Constitution want to bring us flexibility and openness to change is a fraud and a delusion. All one needs for flexibility and change is a ballot box and a legislature. The advocates of the Living Constitution want to bring us what constitutions are designed to impart: rigidity and difficulty of change. The originalists’ Constitution produces a flexible and adaptable political system. Do the people want the death penalty? The Constitution neither requires nor forbids it, so they can impose or abolish it, as they wish. And they can change their mind—abolishing it and then reinstituting it when the incidence of murder increases. When, however, Living Constitutionalists read a prohibition of the death penalty into the Constitution . . . all flexibility is at an end. It would thereafter be of no use debating the merits of the death penalty, just as it is of no use debating the merits of prohibiting abortion. The subject has simply been eliminated from the arena of democratic choice. And that is not, we emphasize, an accidental consequence of the Living Constitution: It is the whole purpose that this fictitious construct is designed to serve. Persuading five Justices is so much easier than persuading Congress or 50 state legislatures—and what the Justices enshrine in the

¹⁰⁷ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626–27 (2015) (Scalia, J., dissenting) (discussing the problem of allowing the courts to decide issues that the Constitution says should be left to the states or to Congress).

¹⁰⁸ G.K. CHESTERTON, *Mr. Bernard Shaw*, in *HERETICS* 54, 61 (1905). Justice Scalia made the same point, perhaps more colorfully, in his powerful dissent in the Court’s recent same-sex marriage decision: “This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.” *Obergefell*, 135 S. Ct. at 2627 (Scalia, J., dissenting). See also Bork, *supra* note 55, at 1139 (making the same point).

Constitution lasts forever. In practice, the Living Constitution would better be called the Dead Democracy.¹⁰⁹

The Living Constitution is not a one-way ratchet that only creates new rights and freedoms. Rather, it is a make-it-up-as-you-go body of law that gives and takes based upon the moral and policy preferences of five members of the Supreme Court.¹¹⁰ And when the Court speaks, the debate is over and the decree of the Court is embedded forever (or until the Court decides to overrule itself). As Justice Scalia has said, “the reality of the matter is that, generally speaking, devotees of the Living Constitution do not seek to facilitate social change but to prevent it.”¹¹¹ The Court’s job is to decree amendments to the Living Constitution, and the job of we the people is to shut up and obey.¹¹²

The idea of a Living Constitution being revised by the Court to keep up with changing times is nothing more than a results-oriented theory of interpretation.¹¹³ Basically, Living Constitutionalists say that because it is too difficult to amend the Constitution under Article V to reach desirable contemporary results, then it is the duty of the Court to sit as an ongoing constitutional convention with the power to both propose and ratify constitutional revisions by a vote of at least 5-4.¹¹⁴ This is the law of rulers, not the rule of law, and no results, no matter how desirable, are

¹⁰⁹ SCALIA & GARNER, *supra* note 36, at 410; *see also* SCALIA, *supra* note 15, at 41–42 (discussing how judicial decisions can actually reduce, rather than increase, constitutional flexibility).

¹¹⁰ *See* SCALIA, *supra* note 15, at 43 (“[T]he record of history refutes the proposition that the evolving Constitution will invariably enlarge individual rights.”).

¹¹¹ *Id.* at 42.

¹¹² Consider the infamous “we-rule-you-shut-up-and-obey” passage on the abortion liberty from the plurality opinion of *Planned Parenthood of Southeastern Pennsylvania v. Casey* (delivered by Justices O’Connor, Kennedy, and Souter):

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present *whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.*

505 U.S. 833, 866–67 (1992) (plurality opinion) (emphasis added). Of course, the national division over the abortion issue is based upon the fact that the Court’s abortion jurisprudence is not rooted in the Constitution, but rather is the product of the Court’s subjective policy preferences about abortion versus the right to life.

¹¹³ *See* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 943–44 (2016) (explaining the problem with results-oriented interpretation of the Constitution, but suggesting that it cannot be avoided).

¹¹⁴ *See* CHEMERINSKY, *supra* note 25, at 24 (discussing the need for non-originalist revision of constitutional provisions due to the difficulty of the amendment process).

worth taking the Constitution away from we the people to whom the Constitution belongs.

Living constitutionalists also use another kind of results-based justification for allowing the Court to revise the Constitution. Non-originalists reject originalism based upon “the old canard that originalism cannot justify *Brown v. Board of Education*,¹¹⁵ which struck down segregation in schools, or *Loving v. Virginia*,¹¹⁶ which struck down anti-miscegenation laws.”¹¹⁷ Not only is this wrong, but the opposite is actually true. Originalism not only supports the racial equality rulings in *Brown* and *Loving*,¹¹⁸ but only originalism can avoid holdings like that in *Plessy v. Ferguson*,¹¹⁹ which upheld racial segregation in public transportation and created the Orwellian notion of “separate but equal.”¹²⁰

For example, in the *Slaughter-House Cases*,¹²¹ in which the Supreme Court first considered the meaning of the Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments), the Court carefully considered “the history of the times”¹²² and concluded that “the one pervading purpose”¹²³ of the Civil War Amendments was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”¹²⁴ Thus, the original meaning of the equal protection explicitly guaranteed by the Fourteenth Amendment is to strike down “any action of a State” resulting in “discrimination against the negroes as a class, or on account of their race.”¹²⁵ Thus, any state action involving racial discrimination or racial segregation, whether in public transportation, or

¹¹⁵ 347 U.S. 483, 495 (1954).

¹¹⁶ 388 U.S. 1, 12 (1967).

¹¹⁷ ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 28, at 34.

¹¹⁸ See SCALIA & GARNER, *supra* note 36, at 87–88 (discussing how the Court did not need to rely on the changing times in its reasoning because the original meaning of the Thirteenth and Fourteenth Amendments supports the holding in *Brown v. Board of Education*).

¹¹⁹ 163 U.S. 537, 544 (1896).

¹²⁰ *Id.* at 552 (Harlan J., dissenting).

¹²¹ 83 U.S. (16 Wall.) 36, 66–67 (1873); *id.* at 125, 128 (Swayne J., dissenting) (indicating that the Thirteenth, Fourteenth, and Fifteenth Amendments were products of the Civil War).

¹²² *Id.* at 67 (majority opinion).

¹²³ *Id.* at 71.

¹²⁴ *Id.*

¹²⁵ *Id.* at 81 (“The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this [equal protection] clause, and by it such laws are forbidden.”).

public schools, or marriage, violates the original meaning of the Fourteenth Amendment.¹²⁶

Of course, some results that liberal elites love, such as the Court-created right to abortion-on-demand and the judicial re-definition of marriage to include same-sex couples, are based upon non-originalist reasoning. Originalism could *never* have reached these results.¹²⁷ Indeed, much of the attraction of the Living Constitution to legal elites and their allies is that it allows them to constitutionalize their moral and policy preferences.¹²⁸ If you like abortion and same-sex marriage, they are constitutionally protected even though the Written Constitution says nothing about abortion, or privacy, or marriage, or sexuality.¹²⁹ If you don't like the right to bear arms or property rights, they are not protected even though the Written Constitution explicitly covers them.¹³⁰ The Constitution can be whatever Living Constitutionalists want it to be. But be careful, because a constitution of clay that can be molded into the shape of your happiest dreams of the good life can just as easily morph into the form of your worst nightmares of dystopia.

The subjectivity of the Living Constitution and the oligarchic powers it gives to an unelected legal elite are, for me, the conclusive argument for rejecting this dangerous theory. Or, to put it differently: "The conclusive argument in favor of originalism is a simple one: It is the only objective standard of interpretation even competing for acceptance."¹³¹

The original Written Constitution creates a flexible system of government with the capacity of passing laws necessary to meet the needs and challenges of contemporary America while at the same time

¹²⁶ See, e.g., BORK, *supra* note 52, at 74–76 (discussing how the original understanding of the equal protection clause supports the holdings in desegregation cases); SCALIA & GARNER, *supra* note 36, at 87–88 (discussing how the original meaning of the Fourteenth Amendment supports the desegregation of schools and how reliance on changing times is not necessary to support such a holding); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 960–61, 1140 (1995) (discussing the strong support of the desegregation cases by the original meaning of the Fourteenth Amendment).

¹²⁷ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627–28 (2015) (Scalia, J., dissenting) (discussing how the original meaning of the Fourteenth Amendment could not have supported a conclusion that a prohibition of same-sex marriages is unconstitutional).

¹²⁸ See *supra* Part I.C.; see also STRAUSS, *supra* note 2, at 37–39 (summarizing the originalist argument that going beyond the intent and original understanding of a law inherently requires personal preferences, and discussing the value of individual judges' notions of fairness and beliefs of what social policy should be).

¹²⁹ See *Obergefell*, 135 S. Ct. at 2640–41 (Alito, J., dissenting) (discussing the Constitution's silence as to same-sex marriage and the majority's opinion that it is a constitutionally protected right nonetheless).

¹³⁰ See U.S. CONST. amends. II, V (guaranteeing the right to bear arms and protecting private property).

¹³¹ SCALIA & GARNER, *supra* note 36, at 89.

embedding certain liberties deemed essential by a consensus of we the people in the several states who ratified them.¹³² If the rule of law means anything, it means that changes in the Constitution should come from a strong consensus of the people acting pursuant to Article V, and not from a 5-4 majority of the Supreme Court acting in accordance with its subjective beliefs about what the Constitution ought to be.¹³³ The Constitution says what it says and it doesn't say what it doesn't say. Those are the only results permitted by the rule of law. Justice Scalia believed that originalism was a lesser evil because it rejects the rule of man in favor of the rule of law.¹³⁴ And that is where I stand as well.

III. JUSTICE SCALIA'S DISSENT IN *OBERGEFELL* AND THE RULE OF LAW: "JUST WHO DO WE THINK WE ARE?"¹³⁵

Recently, Justice Kennedy spoke at Harvard Law School and, in answer to a question from an audience member, said that under the rule of law a public official who cannot in good conscience obey a Supreme Court decision, such as its same-sex marriage decree in *Obergefell*, must either enforce the law or resign from public office.¹³⁶ This exchange was obviously a reference to Kim Davis, the Kentucky county clerk recently jailed for refusing to issue marriage licenses to same-sex couples in violation of a federal court order requiring her to do so.¹³⁷

Rather than focus on Kim Davis and her disobedience of the Court's decree in *Obergefell*, I want to ask a different question. Is Justice Kennedy's opinion in *Obergefell* a legitimate exercise of the rule of law? In

¹³² See *id.* at 410 (discussing the flexibility of the legislative process).

¹³³ See, e.g., *Obergefell*, 135 S. Ct. at 2622–23 (Roberts, C.J., dissenting) (discussing how the rule of law should be rooted in the objective security of formalism rather than the subjective personal beliefs of a majority of the Court).

¹³⁴ SCALIA, *supra* note 15, at 25.

¹³⁵ *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting). Justice Scalia joined this opinion "in full." *Id.* at 2626 (Scalia, J., dissenting).

¹³⁶ HarvardLawSchool, *Supreme Court Associate Justice Anthony Kennedy Visits HLS*, at 50:42, YOUTUBE (Oct. 26, 2015), <https://www.youtube.com/watch?v=ZHbMPnA5n0Q>. Here is the transcript of Justice Kennedy's response:

Great respect, it seems to me, has to be given to people who resign rather than do something they think is morally wrong in order to make a point. However, the rule of law is that, as a public official, in the course of performing your legal duties, you are bound to enforce the laws.

John Riley, *Justice Kennedy: Public Officials Can't Ignore Supreme Court Rulings*, METRO WKLY. (Oct. 28, 2015), <http://www.metroweekly.com/2015/10/justice-kennedy-public-officials-cant-ignore-supreme-court-rulings/>.

¹³⁷ Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), <http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html>.

other words, is it a valid application of the Written Constitution, or is it an illegitimate exercise of raw judicial power?

Obergefell, of course, held that same-sex couples have a fundamental right to marry under the Due Process Clause of the Fourteenth Amendment, and that therefore, “there is no lawful basis for a State to refuse to recognize” same-sex marriages.¹³⁸ Of course, in *Obergefell*, Justice Kennedy made absolutely no effort to root the right to same-sex marriage in the original meaning of the Written Constitution.¹³⁹ Instead, he relied on his “reasoned judgment” and a “new insight,”¹⁴⁰ on his “understanding of what freedom is and must become,”¹⁴¹ and on “a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”¹⁴² Or, in the words of Chief Justice Roberts, Justice Kennedy’s *Obergefell* decree is based merely on his personal belief “that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society.”¹⁴³

Justice Kennedy’s majority opinion in *Obergefell* is not law; it is full of moral philosophy and bad poetry, but not a speck of constitutional law.¹⁴⁴ As both Chief Justice Roberts and Justice Scalia made clear in their dissenting opinions, Justice Kennedy’s “judicial policymaking . . . is dangerous for the rule of law.”¹⁴⁵ Or, in the words of Justice Scalia, Justice Kennedy’s opinion constitutes a “judicial Putsch,” lacks “even a thin veneer of law,” and amounts to “a naked judicial claim to legislative . . . power . . . fundamentally at odds with our system of government.”¹⁴⁶

Although the Written Constitution is silent about homosexuality and same-sex marriage,¹⁴⁷ it is not silent about which level of government is entrusted with the power to define and regulate “all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.”¹⁴⁸ Under the Tenth Amendment, the power to define and regulate

¹³⁸ *Obergefell*, 135 S. Ct. at 2607–08.

¹³⁹ *Id.* at 2598.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2603.

¹⁴² *Id.* at 2602.

¹⁴³ *Id.* at 2616 (Roberts, C.J., dissenting). Or to put it another way, “The majority’s driving themes are that marriage is desirable and petitioners desire it.” *Id.* at 2619 (Roberts, C.J., dissenting).

¹⁴⁴ *Id.* at 2611.

¹⁴⁵ *Id.* at 2622.

¹⁴⁶ *Id.* at 2628–29 (Scalia, J., dissenting).

¹⁴⁷ See *id.* at 2613 (Roberts, C.J., dissenting) (discussing the Constitution’s silence as to marriage in general).

¹⁴⁸ THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

marriage is “reserved to the States respectively, or to the people.”¹⁴⁹ Indeed, even Justice Kennedy, in his opinion in *U.S. v. Windsor*,¹⁵⁰ recognized that under the Constitution, “The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.” Moreover, as Chief Justice Roberts’ principal dissent in *Obergefell* made absolutely clear: “There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way . . . as the union of a man and a woman.”¹⁵¹

Chief Justice Roberts and Justice Scalia, dissenting in *Obergefell*, did not hesitate to declare the majority’s decree in the case a clear violation of the rule of law. Justice Scalia joined Chief Justice Roberts’ dissent in full.¹⁵² He also wrote a separate dissent “to call attention to this Court’s threat to American democracy.”¹⁵³ Chief Justice Roberts’ dissent brought the light, and Justice Scalia’s dissent brought the thunder to Justice Kennedy’s non-originalist majority opinion in *Obergefell*. Here are just a few of the points Chief Justice Roberts and Justice Scalia made:

- “[W]e have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.”¹⁵⁴
- “If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can?”¹⁵⁵
- “The majority’s decision is an act of will, not legal judgment.”¹⁵⁶
- “Those who founded our country would not recognize the majority’s conception of the judicial role. They after all risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges The Court’s accumulation of power does

¹⁴⁹ U.S. CONST. amend. X.

¹⁵⁰ 133 S. Ct. 2675, 2691 (2013) (quoting *In re Burrus*, 136 U.S. 586, 593–594 (1890)).

¹⁵¹ *Obergefell*, 135 S. Ct. at 2614 (Roberts, C.J., dissenting).

¹⁵² *Id.* at 2626 (Scalia, J., dissenting).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2617 (Roberts, C.J., dissenting) (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting)).

¹⁵⁵ *Id.* at 2622 (Roberts, C.J., dissenting).

¹⁵⁶ *Id.* at 2612.

not occur in a vacuum. It comes at the expense of the people.”¹⁵⁷

- And finally, Justice Scalia leaves not a hint of doubt as to his view that *Obergefell* is not a legitimate part of the rule of law: “Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.”¹⁵⁸

If “this” Written Constitution is not only law, but “the supreme Law of the Land,” as Article VI explicitly prescribes,¹⁵⁹ then Justice Kennedy’s lawless opinion in *Obergefell* does not follow the rule of law. As Chief Justice Roberts said so well in his dissent, if you like the results in *Obergefell*, by all means celebrate those results: “But do not celebrate the Constitution. It had nothing to do with it.”¹⁶⁰

If the Constitution had nothing to do with the doctrine of *Obergefell*, then the rule of law had nothing to do with it either. Here is a way to think about *Obergefell* and whether it is an activist, extra-constitutional decision by the Supreme Court. Think about this: Was there ever a time in American history when three-fourths of the States—thirty-eight of the fifty states today—would have ratified a constitutional amendment proposing to redefine marriage as decreed by the Court in *Obergefell*?

Remember, the Constitution is supposed to represent a consensus among we the people in the states, not a national democratic vote or poll and not the policy preferences of unelected judges.¹⁶¹ So was there ever a time in American history when three-fourths of the states would have ratified a proposed constitutional amendment redefining marriage as including same-sex marriage? 1789? 1868 (when the Fourteenth Amendment was ratified)? 1920? 1973? 2015? Ever?

If your answer is “no, never,” then that tells you something about *Obergefell* and whether it is legitimate. How can same-sex marriage be a legitimate constitutional right if we all agree it could never have been ratified as a legitimate part of the Written Constitution?

Thus, perhaps it is Justice Kennedy, not Kim Davis, who is guilty of violating the rule of law. And Justice Scalia is surely correct when he concludes that the Living Constitution is a clear and present danger to the precious right of we the people to democratic self-government in the several states.¹⁶² As Justice Scalia said in his last great dissent: “[T]o allow

¹⁵⁷ *Id.* at 2624.

¹⁵⁸ *Id.* at 2627 (Scalia, J., dissenting).

¹⁵⁹ U.S. CONST. art. VI.

¹⁶⁰ *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

¹⁶¹ See U.S. CONST. art. V (stating that the Constitution may only be amended by the consent of three-fourths of the state legislatures).

¹⁶² *Obergefell*, 135 S. Ct. at 2626–27 (Scalia, J., dissenting).

the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.”¹⁶³ Justice Scalia should have dropped the microphone when he published this truth about the threat of the Living Constitution to liberty and democratic self-government. His voice on the Court will be missed more than we can quantify.

CONCLUSION: JUSTICE SCALIA’S LEGACY

“When I’m dead and gone, I’ll either be sublimely happy or terribly unhappy.”¹⁶⁴

When we talk about the passing of a great man, we ask: what was his legacy? What did he leave behind? In the smash Broadway hip-hop musical about the life and death of Alexander Hamilton, *Hamilton: An American Musical*, Hamilton, after being mortally wounded in a duel with Aaron Burr, raps about his legacy:

Legacy. What is a legacy?

It’s planting seeds in a garden you never
get to see.

I wrote some notes at the beginning of a song
someone will sing for me.

America, you great unfinished symphony, you
sent for me.

You let me make a difference.

A place where even orphan immigrants
can leave their fingerprints and rise up.¹⁶⁵

So, as we think about the legacy of Justice Scalia, what would the song of his legacy sound like? Justice Scalia, of course, believed that the Written Constitution should be interpreted based upon the original understanding, the original public meaning, of the ratified text of the Constitution, rather than a subjective and evolving meaning based upon the moral and policy preferences of “nine unelected lawyers” who happen to serve on the Supreme Court.¹⁶⁶ He wrote his opinions with powerful and

¹⁶³ *Id.* at 2629.

¹⁶⁴ Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/>. Justice Scalia was referring to his belief in the existence of both heaven and hell. Ms. Senior seemed surprised when he said this and asked him whether he actually believed in heaven and hell, to which Scalia replied “Oh, of course I do.” *Id.*

¹⁶⁵ LIN-MANUEL MIRANDA, *The World Was Wide Enough*, on HAMILTON: AN AMERICAN MUSICAL (Atlantic Recording Corp. 2015). *Hamilton* is a work of artistic genius.

¹⁶⁶ *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting).

provocative prose so that they would survive his time on earth and be read by law students and law professors for generations to come.¹⁶⁷

Like Rafael Sabatini's delightful character, Scaramouche, Justice Scalia "was born with a gift of laughter and a sense that the world was mad."¹⁶⁸ He was the hero of my life in the law. Like Hamilton, Justice Scalia left behind an enormous legacy of scholarship published in his brilliant, pugnacious, and often bitingly humorous judicial opinions, books, law review articles, and speeches.¹⁶⁹ He has slipped this mortal coil, and his absence leaves a hole in constitutional law that may never be filled. But I know where he is; he is in a place in which he is "sublimely happy," one in which "justice roll[s] on like a river, [and] righteousness like a never-failing stream!"¹⁷⁰

¹⁶⁷ See *supra* notes 10–11 and accompanying text.

¹⁶⁸ RAFAEL SABATINI, SCARAMOUCHE: A ROMANCE OF THE FRENCH REVOLUTION 1 (1976).

¹⁶⁹ Compare Joyce O. Appleby, *Foreword* to THE REVOLUTIONARY WRITINGS OF ALEXANDER HAMILTON vii, viii–x (Richard B. Vernier, ed., 2008) (discussing the skill and impact of Hamilton's writings), with notes 9–11 and accompanying text (discussing Justice Scalia's lasting legacy, as evidenced by his writings).

¹⁷⁰ Amos 5:24 (New International Version).