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Supreme Court Preview. 211.

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VI. THEORIES OF INTERPRETATION

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LOOKING BACK: DISTRICT OF COLUMBIA V. HELLER

“In Defense of Looseness”

The New Republic

August 27, 2008

Richard A. Posner

At the end of June, the Supreme Court, in a case called *District of Columbia v. Heller*, invalidated the District's ban on the private ownership of pistols. It did so in the name of the Second Amendment to the Constitution. The decision was the most noteworthy of the Court's recent term. It is questionable in both method and result, and it is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology.

The majority opinion, by Justice Antonin Scalia, concluded that the original, and therefore the authoritative, meaning of the Second Amendment is that Americans are entitled to possess pistols (and perhaps other weapons) for the defense of their homes. Scalia's entire analysis rests on this interpretive method, which denies the legitimacy of flexible interpretation designed to adapt the Constitution (so far as the text permits) to current conditions. The irony is that the “originalist” method would have yielded the opposite result.

The Second Amendment, part of the Bill of Rights added to the original Constitution in 1791, states: “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 other words: since a militia, provided that it is well regulated, is a very good thing for a free state to have, the federal government must not be allowed to castrate it by forbidding the people of the United States to possess weapons. For then the militia would have no weapons, and an

unarmed militia is an oxymoron.

Politically conscious Americans in the late eighteenth century feared standing armies, having fought the British army in the Revolution, and feared centralized government (as in Britain); and on both counts they wanted to make sure that the states would be allowed to have armed militias. The federal government could regulate them but not disarm them. The fear was that in the absence of such a provision in the Bill of Rights, the provision in Article I of the Constitution authorizing Congress to organize, arm, discipline, and call into service “the Militia” (a term that embraces the state militias, because the same provision reserves the right to train and officer “the Militia” to the respective states) would enable Congress to disarm them. That fear surfaced in the debates over the ratification of the original Constitution and was, as Justice John Paul Stevens's dissenting opinion explains, the motivation for the Second Amendment.

The text of the amendment, whether viewed alone or in light of the concerns that actuated its adoption, creates no right to the private possession of guns for hunting or other sport, or for the defense of person or property. It is doubtful that the amendment could even be thought to require that members of state militias be allowed to keep weapons in their homes, since that would reduce the militias' effectiveness. Suppose part of a state's militia was engaged in combat and needed additional weaponry. Would the militia's commander have to

collect the weapons from the homes of militiamen who had not been mobilized, as opposed to obtaining them from a storage facility? Since the purpose of the Second Amendment, judging from its language and background, was to assure the effectiveness of state militias, an interpretation that undermined their effectiveness by preventing states from making efficient arrangements for the storage and distribution of military weapons would not make sense.

The Court evaded the issue in *Heller* by cutting loose the Second Amendment from any concern with state militias (the “National Guard,” as they are now called). The majority opinion acknowledges that allowing people to keep guns in their homes cannot help the militias, because modern military weapons are not appropriate for home defense (most of them are too dangerous), and anyway the opinion says that the only weapons the Second Amendment entitles people to possess are ones that are not “highly unusual in society at large.” Modern military weapons are highly unusual in society at large. By creating a privilege to own guns of no interest to a militia, the Court decoupled the amendment’s two clauses.

It justified this decoupling by arguing that the word “people” in the expression “the right of the people to keep and bear Arms” (the amendment’s second clause) must encompass more than just militiamen, because eighteenth-century militias enrolled only able-bodied free men—a mere subset of the people of the United States. But obviously the Framers did not mean to confer even a *prima facie* constitutional right to possess guns on slaves, criminals, lunatics, and children. The purpose of the first clause of the amendment, the militia clause, is to narrow the right that the second clause confers on the “people.”

My analysis to this point has been “originalist”—and it has led to the opposite conclusion from that of the majority of the Supreme Court. It has been a narrow originalism, like that of Scalia’s majority opinion, because it has ignored the interpretive conventions of the legal culture in which the Second Amendment was drafted and ratified. The reigning theory of legislative interpretation in the eighteenth century was loose (or flexible, or nonliteral) construction. This is explicit in William Blackstone’s *Commentaries on the Laws of England*, on which the majority opinion in *Heller* ironically relies. In the *Commentaries* we read that a medieval law of Bologna stating that “whoever drew blood in the streets should be punished with the utmost severity” should not be interpreted to make punishable a surgeon “who opened the vein of a person that fell down in the street with a fit.” Blackstone explained that “the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. . . . As to the effects and consequence, the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them” (emphasis added). John Marshall, the greatest Supreme Court justice of the generation that wrote the Constitution and the Bill of Rights, was also a loose constructionist.

Originalism without the interpretive theory that the Framers and the ratifiers of the Constitution expected the courts to use in construing constitutional provisions is faux originalism. True originalism licenses loose construction. And loose construction is especially appropriate for interpreting a

constitutional provision ratified more than two centuries ago, dealing with a subject that has been transformed in the intervening period by social and technological change, including urbanization and a revolution in warfare and weaponry.

The Framers of the Bill of Rights could not have been thinking of the crime problem in the large crime-ridden metropolises of twenty-first-century America, and it is unlikely that they intended to freeze American government two centuries hence at their eighteenth-century level of understanding. Because of the difficulty of amending the Constitution, it has from the beginning been loosely construed so as not to become a straitjacket or a suicide pact. The older the constitutional provision and the more the environment has changed since enactment, the more appropriate is the method of loose construction.

There are few more antiquated constitutional provisions than the Second Amendment. For example, the Framers and the ratifiers of the amendment probably did think that the right of militiamen to keep and bear arms entitled them to keep their weapons in their homes. They were expected to provide the militia's muskets rather than receive them from a weapons depot. Back then, moreover, guns required a lot of upkeep. Without constant care, they would rust and the powder would become moist. Storing the guns at a warehouse would have left many of them inoperable. To use this "original" understanding to allow members of the National Guard to store military weapons (machine guns, grenades, Hummers, and so on) would be preposterous, and it is disclaimed in the majority opinion.

In these and other ways, the *Heller* decision is exposed as an example of loose construction—despite the Court's pretense of engaging in originalist interpretation (but

again, an originalism stripped of the original understanding of how a constitutional provision should be interpreted). Just as when the Supreme Court, in 1947 in *Adamson v. California*, decided in the teeth of the language of the Fourteenth Amendment that the amendment "incorporates" the Bill of Rights, an exercise of judicial discretion is presented in *Heller* as historically determined. The Bill of Rights was added to the original Constitution to limit federal power. One provision of the Bill of Rights forbids government to deprive persons of life, liberty, or property without due process of law. The Fourteenth Amendment contains an identical due process clause, but directed against state action. The Court in *Adamson* turned historical handsprings to interpret the Fourteenth Amendment's due process clause as incorporating—that is, making applicable to state action—most of the other provisions of the Bill of Rights. If *Heller* is applied to the states, it will be on the authority of *Adamson*.

The true springs of the *Heller* decision must be sought elsewhere than in the majority's declared commitment to originalism. The idea behind the decision—it is not articulated, of course, and perhaps not even consciously held—may simply be that turnabout is fair play. Liberal judges have used loose construction to expand constitutional prohibitions beyond any reasonable construal of original meaning; and now it is the conservatives' turn. Another plausible example of payback is the conservative justices' expansive interpretation of the free-speech clause of the First Amendment to limit regulation of campaign financing.

It is possible that in both the gun control case and the campaign-finance cases the justices in the majority, rather than playing tit for tat, thought the laws they were

invalidating very dumb, and in the case of the District of Columbia's ban on possession of pistols thought the law wimpish and paternalistic, like requiring bikers to wear helmets. A law that bans possession of pistols outright may even be inferior, at least as a method of controlling crime, to a law that combines strict permit requirements with heavy penalties for violating them, or even to one that simply imposes draconian penalties on crimes committed with guns. But judges are not supposed to invalidate laws merely because, as legislators, they would have voted against them.

There is an important difference, obvious but often overlooked, between using loose construction to prevent making the Constitution a straitjacket and using it to make the Constitution a straitjacket. In *Kennedy v. Louisiana*, a decision handed down shortly before *Heller*, the Supreme Court held that to execute a person who rapes a child but does not kill her violates the cruel and unusual punishments clause of the Eighth Amendment. That was a loose construction that tied the hands of the states and the federal government, and Scalia and the other conservative justices dissented. But in *Heller* it was the liberal justices who were dissenting from a decision that ties the hands of the federal government, and of the states, too, if the Supreme Court decides that the Second Amendment constrains state as well as federal government action. Compare these two cases to the *Zelman* case, decided several years ago. There the Court upheld, against a challenge based on the clause of the First Amendment that forbids governmental establishments of religion, the funneling of public monies to private schools by means of vouchers that parents can use to pay for their kids' tuition. Most private schools are Catholic parochial schools. The interpretation of the establishment clause that permitted the use of public moneys to finance parochial

schools rejected the imposition on government of a constitutional restraint that the liberal justices wanted to impose.

Another illuminating contrast to *Heller* is the recent *Kelo* decision. The Supreme Court held that the just compensation clause of the Fifth Amendment does not forbid a state to condemn private property and, having thus seized it, to turn it over to a private developer. The decision provoked outrage by conservatives, who oppose condemnation because it infringes rights of private property. They should not have been outraged. All the Court did was unshackle government from a potential constitutional constraint, and by doing so toss the issue into the political arena. And sure enough, in the wake of the decision a number of states, under pressure from property interests, curtailed their eminent domain powers.

Similarly, had the Supreme Court upheld the District of Columbia gun ordinance, it would not have been outlawing the private possession of guns. It would merely have been leaving the issue of gun control to the political process. The popularity of the decision and its prompt endorsement by both presidential candidates attests to the political power of the "gun lobby"; and an unpopular decision in favor of the government would actually have strengthened the lobby, just as *Roe v. Wade* strengthened the anti-abortion movement. The proper time for using loose construction to enlarge constitutional restrictions on government action is when the group seeking the enlargement does not have good access to the political process to protect its interests, as abortion advocates, like gun advocates, did and do.

Constitutional interpretations that relax rather than tighten the Constitution's grip on the legislative and executive branches of government are especially welcome when there are regional or local differences in

relevant conditions or in public opinion. The failure to recognize this point (or perhaps indifference to it) was the mistake that the Supreme Court made when it nationalized abortion rights in *Roe v. Wade*. It would be the mistake the Court would be making in the unlikely event that it created a federal constitutional right of homosexual marriage. It is the mistake the Court has made in *Heller*. The differences in attitudes toward private ownership of pistols across regions of the country and, outside the South, between urban and rural areas, are profound (mirroring the national diversity of views about gay marriage, and gay rights in general, as well as about abortion rights). A uniform rule is neither necessary nor appropriate. Yet that is what the *Heller* decision will produce if its rule is held applicable to the states as well as to the District of Columbia and other federal enclaves.

Heller gives short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation. A majority of Americans support gun rights. But if the District of Columbia (or Chicago or New York) wants to ban guns, why should the views of a national majority control? Is that democracy, or is it Rousseau's forced conformity to the "general will"? True, a member of a national majority can be a member of a minority within a local area: gun buffs in Washington, D.C., for example. But a person who is a member of a local minority but a national majority can relocate to a part of the country in which the national majority rules. A resident of Washington can move to northern Virginia. This is not to say that there should be no national rights—that Mississippi should be permitted to stone adulterers, or Rhode Island to ban *The Da Vinci Code*. But the question of whether to nationalize an issue in the name of the Constitution calls for an exercise of

judgment; and when the nation is deeply divided over an issue to which the Constitution does not speak with any clarity, and a uniform national policy would override differences in local conditions, nationalization may be premature.

There is a further difference between constitutional interpretations that permit government action and ones that forbid it: only the latter create new business for the federal courts. Conservatives rightly decry the enormous expansion in the federal caseload caused by the aggressive constitutional rulings of liberal justices in the 1960s. But if the new rule declared in *Heller* is applied to the states, we may see a similar result, this time engineered by conservatives; and we will have further confirmation that the Warren Court liberated conservative as well as liberal judges from the constraint of judicial modesty. Every time a gun permit is denied, the disappointed applicant will have a potential constitutional claim litigable in the federal courts.

Justice Scalia was emphatic that the right to possess a gun is not absolute. He sparred with Justice Stephen Breyer (who wrote a separate dissenting opinion) over the standard to be applied to restrictions on gun ownership. All that is clear is that an absolute ban on possessing a pistol is unconstitutional. The other restrictions that a government might want to impose are up for grabs. It may take many years for the dust to settle—many years of lawsuits that our litigious society does not need.

Conservatives rightly believe, moreover, that the efficacy of legally enforceable rights as an engine for social reform is overrated. The effects even of such well known and generally applauded decisions as those invalidating racial segregation of public schools and the malapportionment of state legislatures are uncertain, and may not have

been, on balance, beneficial. The only certain effect of the *Heller* decision—for the scholarly literature has yet to reach consensus on the effects of gun-control laws—will be to increase litigation over gun ownership.

I cannot discern any principles in the pattern of the Supreme Court's constitutional interpretations. The absence of principles supports the hypothesis that ideology drives decision in cases in which liberal and conservative values collide. If loose construction produces a conservative limitation on government, most conservatives will support it and most liberals will oppose it; and if it produces a liberal limitation on government, most liberals and conservatives will switch sides. The qualification in "most" is important, though. Scalia has voted to invalidate, on free-speech grounds, laws forbidding the burning of the American flag. That is loose construction—decidedly non-originalist in the narrow sense of his opinion in *Heller*—because burning is not speech; and it is a loose construction that produces a liberal outcome. Breyer concurred in a decision that allowed the Ten Commandments to be exhibited on the grounds of the Texas Capitol; and that was a conservative vote (and the swing vote in the case) by a liberal justice.

Whatever generated these justices' uncharacteristic votes in those two cases, it was not a decision-making method that prevents the exercise of discretion. Both justices employ judicial methodologies that leave them with plenty of running room. In his dissent in the *Zelman* case, Breyer argued that the school voucher system was unconstitutional because there was a "risk" that it could create "a form of religiously based conflict potentially harmful to the Nation's social fabric." In his dissent in *Heller* he reversed the burden, arguing that

the risk that allowing limited gun ownership in the District of Columbia would lead to more death and injury from guns was enough to uphold the District's gun law against constitutional challenge.

Since Stevens devoted most of his dissenting opinion in *Heller* to his own interpretation of the original meaning of the Second Amendment, observers may conclude that the entire Court has now embraced originalism as the canonical method of interpreting the Constitution. But this is not a plausible inference in light of the child-rapist case of just a few weeks earlier (non-murdering rapists of adult women were being executed in the United States as recently as the 1960s), from which Scalia dissented. One supposes that Stevens could not resist meeting the majority on its own ground, since the text and the history (both pre- and post-enactment) of the Second Amendment favor the dissent. Among other things, professional historians were on Stevens's side.

Still, his opinion seems to me too dogmatic (the historical evidence is not as one-sided as his opinion suggests); and it leaves the impression that all that divided the two wings of the Court was a disagreement over the historical record. That was playing into Scalia's hands. The majority (and the dissent as well) was engaged in what is derisively referred to--the derision is richly deserved—as "law office history." Lawyers are advocates for their clients, and judges are advocates for whichever side of the case they have decided to vote for. The judge sends his law clerks scurrying to the library and to the Web for bits and pieces of historical documentation. When the clerks are the numerous and able clerks of Supreme Court justices, enjoying the assistance of the capable staffs of the Supreme Court library and the Library of Congress, and when dozens and sometimes

hundreds of amicus curiae briefs have been filed, many bulked out with the fruits of their authors' own law-office historiography, it is a simple matter, especially for a skillful rhetorician such as Scalia, to write a plausible historical defense of his position.

But it was not so simple in *Heller*, and Scalia and his staff labored mightily to produce a long opinion (the majority opinion is almost 25,000 words long) that would convince, or perhaps just overwhelm, the doubters. The range of historical references in the majority opinion is breathtaking, but it is not evidence of disinterested historical inquiry. It is evidence of the ability of well-staffed courts to produce snow jobs.

This is strikingly shown by the lengthy discussion of the history of interpretation of the Second Amendment. Scalia quotes a number of statements to the effect that the amendment guarantees a personal right to possess guns—but they are statements by lawyers or other advocates, including legislators and judges and law professors all tendentiously dabbling in history, rather than by disinterested historians: more law-office history, in other words. Sanford Levinson, a distinguished constitutional law professor, has candidly acknowledged that the most important reason for his support of a constitutional right of private possession of guns is that opposition to this right is harmful to the electoral prospects of the Democratic Party.

The statements that the majority opinion cited had little traction before *Heller*. For more than two centuries, the “right” to private possession of guns, supposedly created by the Second Amendment, had lain dormant. Constitutional rights often lie dormant, spectral subjects of theoretical speculation, until some change in the social environment creates a demand for their

vivification and enforcement. But nothing has changed in the social environment to justify giving the Second Amendment a new life discontinuous with its old one: a new wine in a decidedly old wineskin. There is no greater urgency about allowing people to possess guns for self-defense or defense of property today than there was thirty years ago, when the prevalence of violent crime was greater, or for that matter one hundred years ago. Only the membership of the Supreme Court has changed.

If constitutional decisions are to be determined by the balance between liberals and conservatives on the Supreme Court, the fig-leaving that we find in *Heller*—the historicizing glaze on personal values and policy preferences—will continue to be irresistibly tempting to the justices, with their large and tireless staffs and their commitment to a mystique of “objective” interpretation. There is no way to purge political principles from constitutional decision-making, but they do not have to be liberal or conservative principles. A preference for judicial modesty—for less interference by the Supreme Court with the other branches of government—cannot be derived by some logical process from constitutional text or history. It would have to be imposed. It would be a discretionary choice by the justices. But judging from *Heller*, it would be a wise choice. It would go some distance toward de-politicizing the Supreme Court. It would lower the temperature of judicial confirmation hearings, widen the field of selection of justices, and enable the Supreme Court to attend to the many important non-constitutional issues that it is inclined to neglect.

Richard A. Posner is a judge for the Seventh Circuit of the U.S. Court of Appeals and a senior lecturer at the University of Chicago.

“History’s Lessons on Gun Rights”

SCOTUSblog

March 15, 2008

Lyle Denniston

When history is pressed through filters of legal advocacy, what comes out may be very different, depending, of course, upon the filter used. The Constitution’s Second Amendment—the one that guarantees “a right to keep and bear arms”—has a history that has been examined exhaustively for generations, and the disagreements over how to read it have gone on unendingly. Now, opposite sides in the Supreme Court case testing the scope and meaning of that Amendment—the case that comes up for argument next Tuesday morning—have taken their turn at reading the history as a matter of legal advocacy. Not unexpectedly, James Madison, the primary architect of the Amendment, is caught in the middle. And that is but an illustration of the history—the histories—that have been laid before the Justices.

When a convention met in Virginia to consider ratifying the proposed Constitution, Madison was a delegate. When some delegates said a new national convention should be called to change the document, a committee on which Madison sat tried to head off that maneuver by offering a list of 40 changes that would be passed along to the First Congress to consider. One contained the words “the people have a right to keep and bear arms” as well as these words: “a well regulated militia . . . trained to arms is the proper, natural and safe defense of a free state.” Another proposed that anyone with religious objections to “bearing arms” should be allowed to pay someone else “to bear arms in his stead.”

When Madison, in the First Congress, sat down to draft what would become the

Second Amendment, his draft was to combine all of those words and phrases into a composite: “The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.”

In the end, these are the words that wound up in the Amendment: “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.”

What does that history show? To the District of Columbia government and its mayor, that sequence shows that the Amendment had a military-only focus. Its brief argues: “Reading the text of the Second Amendment as a unified whole to protect only militia-related firearm rights reflects the concerns expressed by the Framers from the time of the Constitutional Convention through adoption of the Amendment by the First Congress.” The brief goes on to examine some history from the deliberations in the First Congress, suggesting that “Madison’s draft was revised to make the Amendment’s exclusively military focus even clearer.”

But, starting from some of the same historical bases, a group named Academics for the Second Amendment (law professors who set up their group in 1992 to advocate an individual rights interpretation) comes out differently. It agrees that Madison crafted his initial proposal primarily from the work of the Virginia ratifying

convention's committee. The proposal to have a right to keep and bear arms and to recognize a militia as a key to defense, the Academics say, was intended to embrace a concept of "essential and inalienable rights of the people." Another set of the Virginia proposals discussed distribution of government power for dealing with military needs, not rights. Madison, the Academics contend, wrote his draft from the rights proposals, not the distribution of power. They go on to address activity in the First Congress, noting that the Senate voted down a proposal to add the military needs idea to the Constitution—language that, they note, Madison left out of his draft.

The technique of advocacy in each case—and this is typical of the other historical ruminations put before the Court—is to examine history with some selectivity rather than comprehensively. Note, in the example about Madison's choices, that some parts of the history are the same, but others are not, yet each points to a conclusion supporting that side's core argument. That, of course, is more the method of those with legal skills than those trained in history's disciplines.

Another example comes in the two sides' review of the English history that lies behind the Second Amendment, and the issue at stake before the Court. Going back to the Glorious Revolution of 1688 and its early aftermath, each side sees its perceptions validated by the English Bill of Rights accepted by William and Mary. Article VII guaranteed Protestants that they would have "arms for their defense suitable to their condition and as allowed by law."

A group of 15 constitutional historians, supporting the District of Columbia, reads that provision as a specific response to the need to safeguard the Protestant population and all of England from a restoration of Catholicism. Moreover, their brief goes on,

Article VII was only a part of a larger movement to vindicate the supremacy of Parliament. The historians sum up: "The liberty Englishmen cherished would be secured by confirming that a Parliament respectful of their rights and representative of society would have sovereign authority to make law. Article VII endorsed the idea that well-to-do Protestants might keep arms against the threat of a Catholic restoration, but as the formula 'according to law' made clear, this imposed no limit on the reach of parliamentary power."

On the other side, Joyce Lee Malcolm, a professor of legal history at George Mason Law School and the author of two books on the English right to arms, goes back to the same English history in a joint brief she filed with the Cato Institute. Citing the same language of Article VII of the English Bill, the professor and Cato say: "This article set out a personal right." It was part of a list of rights that accompanied 12 indictments against King James II, including one indictment that accused him of disarming Protestants. The brief adds: "Neither the article nor the indictment tied having arms to militia service, which the Declaration nowhere mentioned." The brief sums up that "by the Second Amendment's adoption, Americans had inherited a broadly applicable and robust individual right that had been settled for at least fifty years. This right of course had limits, but they did not intrude on the core right to keep firearms to defend home and family: They confirmed it."

Much of the disagreement in the legal briefs in the D.C. gun case focuses on the impact that guns, and, alternatively, the impact that gun control laws, have on racial and other minorities. Again, history is brought to bear to support the conclusions stated in the two sides' conflicting briefs.

For example, the NAACP Legal Defense Fund notes one historian's argument that a function of the "well regulated militia" of the Second Amendment was used during colonial times and afterward to help maintain slavery and suppress slave rebellion. And it argues that the Black Codes of the post-Civil War Reconstruction era should not be confused with modern attempts to control gun laws. Those Codes, it says, were blatantly discriminatory, but there is no proof of that in the D.C. gun ban's history. By contrast, the Congress of Racial Equality, in a lengthy excursion into the history of the Black Codes of Reconstruction days, notes that those provisions "often prohibited the purchase or possession of firearms" by freed slaves. It cites an 1867 report of the Anti-Slavery Conference concluding that blacks were "forbidden to own or bear firearms, and thus were rendered defenseless against assaults." (One of the authors of the CORE brief is law professor Robert Cottroll of George Washington University—who also is cited as one of the authorities in the brief of the NAACP LDF.)

On another level, there is strong disagreement, from a number of former U.S. attorneys general and other ex-officials in the Justice Department top echelon, about what that Department's history says about the nature of the Second Amendment. One group, led by former Attorneys General Janet Reno and Nicholas Katzenbach, stresses the decades during which their Department supported the view that the Amendment did not embrace a private, individual right—and notes that the Department put that argument before the Supreme Court when it last examined the Amendment's meaning: *U.S. v. Miller*, in 1939 (which, they recall, was "the first and

only Second Amendment challenge to federal firearms legislation resolved by this Court"). But a different group, led by former Attorneys General Edwin Meese and William P. Barr, conclude that the Department's history on the subject did not "provide well-reasoned, or even consistent, support" for the view that the Amendment does not protect an individual right. And they counter the other ex-officials' citation to the U.S. brief in the *Miller* case by noting that the argument picked out in the other brief was only an argument alternative to others that were consistent with an individual rights view.

Perhaps it was inevitable: the notion that silence speaks also comes into arguments about what history has to say (or not). Eighteen Democratic members of Congress, for example, cite the Supreme Court's "decades-long silence" in addressing the meaning of the Second Amendment as a reason for the Court now to pay more attention to what Congress was doing during that time: passing many laws to impose gun control without fretting over the Second Amendment. But, countering that argument, Vice President Cheney and a majority of the current members of the House and Senate examine that period of congressional activity and find in it repeated instances of legislative comments supporting the individual rights theory, including "a scholarly report" by a Senate subcommittee in 1968 saying that what the Amendment protects "is an individual right of a private citizen to own and carry firearms in a peaceful manner." And, in its own suggestion of eloquence in silence, that brief recites references to an individual rights theory in pending bills that Congress has not enacted.

“Justices, Ruling 5-4, Endorse Personal Right to Own Gun”

New York Times
June 27, 2008
Linda Greenhouse

WASHINGTON—The Supreme Court on Thursday embraced the long-disputed view that the Second Amendment protects an individual right to own a gun for personal use, ruling 5 to 4 [in *District of Columbia v. Heller*, No. 07-290,] that there is a constitutional right to keep a loaded handgun at home for self-defense.

The landmark ruling overturned the District of Columbia ban on handguns, the strictest gun-control law in the country, and appeared certain to usher in a new round of litigation over gun rights throughout the country.

The court rejected the view that the Second Amendment’s “right of the people to keep and bear arms” applied to gun ownership only in connection with service in the “well regulated militia” to which the amendment refers.

Justice Antonin Scalia’s majority opinion, his most important in his 22 years on the court, said that the justices were “aware of the problem of handgun violence in this country” and “take seriously” the arguments in favor of prohibiting handgun ownership.

“But the enshrinement of constitutional rights necessarily takes certain policy choices off the table,” he said, adding, “It is not the role of this court to pronounce the Second Amendment extinct.”

Justice Scalia’s opinion was signed by Chief Justice John G. Roberts Jr. and Justices Anthony M. Kennedy, Clarence Thomas and Samuel A. Alito Jr.

In a dissenting opinion, Justice John Paul Stevens took vigorous issue with Justice Scalia’s assertion that it was the Second Amendment that had enshrined the individual right to own a gun. Rather, it was “today’s law-changing decision” that bestowed the right and created “a dramatic upheaval in the law,” Justice Stevens said in a dissent joined by Justices David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. Justice Breyer, also speaking for the others, filed a separate dissent.

Justice Scalia and Justice Stevens went head to head in debating how the 27 words in the Second Amendment should be interpreted. The majority opinion and two dissents ran 154 pages.

Justice Stevens said the majority opinion was based on “a strained and unpersuasive reading” of the text and history of the Second Amendment, which 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.”

According to Justice Scalia, the “militia” reference in the first part of the amendment simply “announces the purpose for which the right was codified: to prevent elimination of the militia.” The Constitution’s framers were afraid that the new federal government would disarm the populace, as the British had tried to do, Justice Scalia said.

But he added that this “prefatory statement

of purpose” should not be interpreted to limit the meaning of what is called the operative clause—“the right of the people to keep and bear arms, shall not be infringed.” Instead, Justice Scalia said, the operative clause “codified a pre-existing right” of individual gun ownership for private use.

Contesting that analysis, Justice Stevens said the Second Amendment’s structure was notable for its “omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense,” in contrast to the contemporaneous “Declarations of Rights” in Pennsylvania and Vermont that did explicitly protect those uses.

It has been nearly 70 years since the court last examined the meaning of the Second Amendment. In addition to their linguistic debate, Justices Scalia and Stevens also sparred over what the court intended in that decision, *United States v. Miller*.

In the opaque, unanimous five-page opinion in 1939, the court upheld a federal prosecution for transporting a sawed-off shotgun. A Federal District Court had ruled that the provision of the National Firearms Act the defendants were accused of violating was barred by the Second Amendment, but the Supreme Court disagreed and reinstated the indictment.

For decades, an overwhelming majority of courts and commentators regarded the *Miller* decision as having rejected the individual-right interpretation of the Second Amendment. That understanding of the “virtually unreasoned case” was mistaken, Justice Scalia said Thursday.

He said the *Miller* decision meant “only that the Second Amendment does not protect those weapons not typically possessed by

law-abiding citizens for lawful purposes, such as short-barreled shotguns.”

Justice Stevens said the majority’s understanding of the *Miller* decision was not only “simply wrong,” but also reflected a lack of “respect for the well-settled views of all of our predecessors on the court, and for the rule of law itself.”

Despite the decision’s enormous symbolic significance, it was far from clear that it actually posed much of a threat to the most common gun regulations. Justice Scalia’s opinion applied explicitly just to “the right of law-abiding, responsible citizens to use arms in defense of hearth and home,” and it had a number of significant qualifications.

“Nothing in our opinion,” he said, “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”

The opinion also said prohibitions on carrying concealed weapons would be upheld and suggested somewhat less explicitly that the right to personal possession did not apply to “dangerous and unusual weapons” that are not typically used for self-defense or recreation.

The Bush administration had been concerned about the implications of the case for the federal ban on possessing machine guns.

President Bush welcomed the decision. “As a longstanding advocate of the rights of gun owners in America,” he said in a statement, “I applaud the Supreme Court’s historic

decision today confirming what has always been clear in the Constitution: the Second Amendment protects an individual right to keep and bear firearms.”

The opinion did not specify the standard by which the court would evaluate gun restrictions in future cases, a question that was the subject of much debate when the case was argued in March.

Among existing gun-control laws, just Chicago comes close to the complete handgun prohibition in the District of Columbia’s 32-year-old law. The district’s appeal to the Supreme Court, filed last year after the federal appeals court here struck down the law, argued that the handgun ban was an important public safety measure in a congested, crime-ridden urban area.

On the campaign trail on Thursday, both major-party presidential candidates expressed support for the decision—more full-throated support from Senator John McCain, the presumptive Republican nominee, and a more guarded statement of support from Senator Barack Obama, his presumptive Democratic opponent.

Mr. McCain called the decision “a landmark victory for Second Amendment freedom in the United States” that “ended forever the specious argument that the Second Amendment did not confer an individual right to keep and bear arms.”

Mr. Obama, who like Mr. McCain has been on record as supporting the individual-rights view, said the ruling would “provide much-

needed guidance to local jurisdictions across the country.”

He praised the decision for endorsing the individual-rights view and for describing the right as “not absolute and subject to reasonable regulations enacted by local communities to keep their streets safe.”

Unlike the court’s ruling this month on the rights of the Guantanamo detainees, this decision, *District of Columbia v. Heller*, No. 07-290, appeared likely to defuse, rather than inflame, the political debate. The Democratic Party platform in 2004 included a plank endorsing the individual-rights view of the Second Amendment.

The case reached the court as a result of an assumption by the Cato Institute, a libertarian organization here, that the time was right to test the prevailing interpretation of the Second Amendment. Robert A. Levy, a lawyer and senior fellow of the institute, looked for law-abiding district residents rather than criminal defendants appealing convictions, to challenge the law.

Mr. Levy, who financed the case, recruited six plaintiffs. Five were dismissed for lack of standing. But the United States Court of Appeals for the District of Columbia Circuit ruled in favor of one, Dick Anthony Heller. He is a security guard who carries a gun while on duty at a federal judicial building here and was denied a license to keep his gun at home. The court said Thursday that assuming Mr. Heller was not “disqualified from the exercise of Second Amendment rights,” the district government must issue him a license.

“Supreme Court Finds History Is a Matter of Opinions”

Los Angeles Times

July 13, 2008

David Savage

WASHINGTON—In 1985, President Reagan’s attorney general, Edwin Meese III, criticized the Supreme Court’s decisions and called on the justices to decide cases based on the “original intent” of the Constitution. The justices were wrong to rely on contemporary views of liberty and equality, Meese said; instead, they should rely on the understanding of those concepts in the late 18th century, when the Constitution and the Bill of Rights were written.

This year the Supreme Court relied more than ever on history and the original meaning of the Constitution in deciding its major cases.

In doing so, however, the court has drawn criticism from some historians and legal experts who say the justices’ readings of history were less than scholarly. And the justices sometimes disagreed sharply on the historical record, demonstrating that divining the original meaning of the Constitution is no small matter.

The term’s two most important opinions—on the reach of habeas corpus in the war on terrorism, and on the meaning of the 2nd Amendment—trace the origins of the right to go to court and the right to “keep and bear arms” to 17th century England and Colonial America.

All nine justices agreed that the original understanding was crucial. However, they split 5 to 4 in both cases on how to interpret the history.

In the case of Guantanamo Bay detainees,

Justice Anthony M. Kennedy cited early English cases in which Spanish sailors and African slaves petitioned a judge for their freedom. This suggests that the right of habeas corpus was not limited to English subjects, he said. Rather, when this right was written into the U.S. Constitution in 1787, it set a basic principle of liberty that protects people who are captured and held by the government, including the foreign prisoners held at Guantanamo, Kennedy said in *Boumediene vs. Bush*.

Wrong, Justice Antonin Scalia wrote in dissent. He said English history showed that the writ of habeas corpus was limited to sovereign English territory. It certainly did not extend to prisoners captured abroad by soldiers or sailors, he said.

In the other case, *District of Columbia vs. Heller*, the justices wrote about 150 pages of opinion and dissent on whether the 2nd Amendment was intended to preserve a “well-regulated militia” in each state or to protect an individual’s right to keep a gun for self-defense.

Scalia, speaking for a 5-4 majority, described how the Stuart kings of England had held power by confiscating the arms of their opponents. This, in turn, led to their overthrow and to the English Bill of Rights of 1689, which said Englishmen “may have arms for their defense.”

Scalia also cited studies by UCLA law professor Eugene Volokh and others showing that some Colonial-era state constitutions spoke of a right “to bear arms

for the defense of themselves and the state.” This suggests that the right to bear arms extended beyond service in the state militia.

In dissent, Justice John Paul Stevens said Scalia was looking in the wrong place. James Madison, the author of the Bill of Rights, rejected broader proposals and focused on preserving “a well-regulated militia” and a right to “bear arms” in military service, Stevens contended.

The phrase “bear arms” referred to military service, he added. In a footnote, he quoted a judge in the 19th century saying, “A man in the pursuit of deer, elk and buffaloes might carry his rifle every day for 40 years, and yet it would never be said of him that he had borne arms.”

The court’s new focus on history drew the attention—and some snide blog postings—of legal historians who faulted the justices for selectively citing cases and writings to bolster their favored view.

“Neither of the two main opinions in *Heller* would pass muster as serious historical writing,” Stanford University historian Jack Rakove wrote on a blog called Balkinization.

Neither Scalia nor Stevens is a “competent historian,” University of Texas at Austin professor Sanford Levinson wrote in another Balkinization posting. Their work is “what is sometimes called ‘law-office history,’ in which each side engages in shamelessly (and shamefully) selective readings of the historical record in order to support what one suspects are predetermined positions.”

Harvard law professor Mark Tushnet, like Levinson, has studied the 2nd Amendment. Tushnet wrote that both opinions “demonstrate why judges shouldn’t play historian.”

History is complicated, Tushnet suggested, but the law requires clear answers, and the justices “share the natural human tendency to exaggerate the case that can be made for the side they ultimately favor.”

The court’s focus on history went well beyond those two cases. The justices cited a series of early shipwreck cases to help decide whether Exxon could be forced to pay punitive damages for the 1989 Exxon Valdez oil spill off Alaska.

“The modern Anglo-American doctrine of punitive damages dates back at least to 1763,” Justice David H. Souter wrote in *Exxon Shipping Co. vs. Baker*. He noted that an ancient forerunner of the notion of punitive damages is found in a case under the Code of Hammurabi from Babylon, which established the principle that the penalty for stealing a goat was 10 times its value.

Even a Los Angeles murder case was decided largely on English history.

Dwayne Giles shot and killed his girlfriend Brenda Avie in 2002. He claimed self-defense, but a police officer testified to the jury that three weeks before the shooting, Avie said Giles had threatened to kill her.

In *Giles vs. California*, Scalia said the police officer’s testimony violated the defendant’s right to “confront” the witnesses against him. Avie was dead and could not testify, so the judge should not have allowed her words to be read to the jury, Scalia said, unless prosecutors could show that Giles killed her in order to silence her testimony.

According to Scalia, this “doctrine has roots in the 1666 decision in Lord Morley’s case,” which set the rule that statements of a missing witness may not be used unless the witness was “kept away” by the “means or

procurement” of the defendant. Scalia drew the lesson that statements to the police may not be used at a trial unless the defendant intentionally “procured” the absence of the witness.

In dissent, Justice Stephen G. Breyer said it was bizarre to rely on snippets of 17th century English cases to decide the Constitution today. “Each year, domestic violence results in more than 1,500 deaths” in this country, he said, and there is no good reason for giving a defendant “a windfall”

for killing the witness against him.

Scalia was appointed to the court by Reagan in 1986, a year after Meese’s speech, and he advocated a historical approach. Justice Clarence Thomas, who joined the court in 1991, followed suit. Since the arrival of Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. in the last couple of years, Scalia has more often found himself in the position of speaking for the court’s majority rather than firing off opinions in dissent.

“What Did the Framers Have in Mind?”

New York Times

July 6, 2008

Stanley Fish

Whatever side of the Second Amendment controversy you may be on, the clear winner in *District of Columbia v. Heller* (striking down a Washington, D.C., ban on hand guns) was intentionalism, the thesis that a text means what its author or authors intend.

The text in dispute is 27 words long, and it is cited in the opening pages of each of the three opinions: “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.” None of the words in this sentence is esoteric and the syntax is straightforward; but if textual simplicity were sufficient to determine meaning, there would be no reason for 157 pages of close legal and linguistic argument.

What are the justices arguing about? A lot—the meaning of words, the significance of documents contemporary to the framing of the amendment, debates at constitutional conventions, regulations adopted or not adopted by various states, the Court’s own precedents—but basically the argument is about what the framers had in mind. As Justice Antonin Scalia, writing for the majority, observes, “The two sides in the case have set out very different interpretations of the amendment.”

But the two sides do not proceed from different theories of interpretation. Both agree that the task is to read the amendment in the light of the purpose the framers would have had in writing it. They disagree about what that purpose was, and the materials they cite are meant to establish a purpose so firmly that in the light of it the words of the

amendment will have one and only one obvious meaning.

For Scalia, that meaning is that Americans have “an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” For Justice John Paul Stevens, the Second Amendment “was adopted to protect the right of the people of each of the several states to maintain a well-regulated militia,” and he finds no “evidence supporting the view that the amendment was intended to limit the power of Congress to regulate the civilian uses of weapons.”

The evidence that might satisfy Stevens will not be found in the amendment itself, for as the opinions amply demonstrate, the 27 words can be made to bear either interpretation. Does the first clause of the amendment govern the second, propositional, clause and constrain its meaning (it is only in relation to the desire to maintain a healthy militia that the right to bear arms is asserted)? Or does the first clause only establish a general, pre-existent condition that does not direct the application of the second?

Scalia, who holds the latter view, declares that “a prefatory clause does not limit or expand the scope of the operative clause.” But in fact it sometimes does and it sometimes doesn’t. A formal, grammatical analysis will no more settle the matter than will a lexical analysis. Only by putting a background intention firmly in place can one stabilize a text that (like all texts) varies with

the purpose assigned to it. That is why each side hears the other's interpretation as "grotesque" or "strained." Reading within different assumptions of the framers' intention, they see different texts and cannot understand how anyone could miss what is to each of them so differently clear. Scalia confidently concludes that nothing in the Court's precedents "forecloses our adoption of the original understanding of the Second Amendment," and he is sure he knows what that understanding was.

Stevens just as strongly believes that the evidence he marshals "sheds revelatory light on the purpose of the amendment" and that he too knows what that purpose (and therefore the amendment's meaning) was. And yet, while the two jurists come to different interpretive conclusions, they are playing the same interpretive game, the game of trying to figure out what the authors of the amendment intended by its words.

For a large part of his separate dissenting opinion, Justice Stephen G. Breyer seems to be playing another game. He is less concerned with intention and purpose than with the problems faced by crime-ridden urban areas. His question, at least at first, is not *How can we be true to the framers' intention?* but *How can we read the amendment in a way that furthers our efforts to deal with a serious social problem?* He wants to focus on "the practicalities, the statute's rationale, the problems that called it into being, its relationship to those objectives—in a word, the details." He identifies as the statute's "basic objective" the saving of lives and he cites statistics that establish, he believes, a strong correlation between the availability of hand guns and crime. Handguns, he observes, "are involved in a majority of firearms deaths and injuries in the United States." And they are also, he declares, "a very popular weapon among

criminals." He puts particular weight on a report from a congressional committee that found handguns "to have a particularly strong link to undesirable activities in the District's exclusively urban environment."

If that were all there was to Breyer's opinion, it would be vulnerable to Scalia's retort that even if "gun violence is a serious problem," no mere sociological finding authorizes or obligates the Court "to pronounce the Second Amendment extinct." Where's the link to what the Constitution says?

Breyer claims to find it in the phrase "exclusively urban environment," which allows him to ground his support of the statute in what at least looks like an intentionalist argument. The reasoning is somewhat convoluted because it relies on a negative. The problem the statute is intended to redress, he says, is largely urban; but in thinking about the Second Amendment, the framers would have been "unlikely . . . to have thought of a right to keep loaded handguns in homes to confront intruders in urban settings," if only because in the America they knew there were no urban settings. Therefore they couldn't have had the intention to disallow a regulation of a kind they could not have contemplated.

Whether or not this argument is persuasive as an account of the framers' intention (and it wasn't persuasive to five of Breyer's brethren), its intention is clear—to allow Breyer to present himself as an intentionalist.

In the end, what we have in *District of Columbia v. Heller* is a unanimous decision. The vote is 5-to-4 on the interpretation of the amendment's intention, but it's 9-to-0 on the specification of intention as the interpreter's task.

“News Flash: The Constitution Means What It Says”

Wall Street Journal

June 27, 2008

Randy E. Barnett

Justice Antonin Scalia’s majority opinion in yesterday’s Supreme Court decision in *District of Columbia v. Heller* is historic in its implications and exemplary in its reasoning.

A federal ban on an entire class of guns in ordinary use for self-defense—such as the handgun ban adopted by the District of Columbia—is now off the table. Every gun controller’s fondest desire has become a constitutional pipe dream.

Two important practical issues remain. First, will this ruling also apply to states and municipalities? That will depend on whether the Supreme Court decides to “incorporate” the right to keep and bear arms into the 14th Amendment. But in the middle of his opinion Justice Scalia acknowledges that the 39th Congress that enacted the 14th Amendment did so, in part, to protect the individual right to arms of freedmen and Southern Republicans so they might defend themselves from violence.

My prediction: This ruling will eventually be extended to the states.

Second, how will the court deal with firearms regulations that fall short of a ban? The majority opinion strongly suggests that such regulations must now be subjected to meaningful judicial scrutiny. The exact nature of this scrutiny is not clear, but Justice Scalia explicitly rejects the extremely deferential “rationality” review advocated by Justice Stephen Breyer.

Most likely, gun laws will receive the same sort of judicial scrutiny that is now used to

evaluate “time, place and manner” regulations of speech and assembly. Such regulations of First Amendment freedoms are today upheld if they are narrowly tailored to achieve a truly important government purpose, but not if they are really a pretext for undermining protected liberties.

My prediction? Because gun-rights groups like the NRA have so successfully prevented enactment of unreasonable gun laws, most existing gun regulations falling short of a ban will eventually be upheld. But more extreme or merely symbolic laws that are sometimes proposed—whose aim is to impose an “undue burden” by raising the cost of gun production, ownership and sale—would likely be found unconstitutional. All gun regulations—for example, safe storage laws and licensing—will have to be shown to be consistent with an effective right of self-defense by law-abiding citizens.

Justice Scalia’s opinion is exemplary for the way it was reasoned. It will be studied by law professors and students for years to come. It is the clearest, most careful interpretation of the meaning of the Constitution ever to be adopted by a majority of the Supreme Court. Justice Scalia begins with the text, and carefully parses the grammatical relationship of the “operative clause” identifying “the right to keep and bear arms” to the “prefatory clause” about the importance of a “well-regulated militia.” Only then does he consider the extensive evidence of original meaning that has been uncovered by scholars over the past 20 years—evidence

that was presented to the Court in numerous “friends of the court” briefs.

Justice Scalia’s opinion is the finest example of what is now called “original public meaning” jurisprudence ever adopted by the Supreme Court. This approach stands in sharp contrast to Justice John Paul Stevens’s dissenting opinion that largely focused on “original intent”—the method that many historians employ to explain away the text of the Second Amendment by placing its words in what they call a “larger context.” Although original-intent jurisprudence was discredited years ago among constitutional law professors, that has not stopped nonoriginalists from using “original intent”—or the original principles “underlying” the text—to negate its original public meaning.

Of course, the originalism of both Justices Scalia’s and Stevens’s opinions are in stark contrast with Justice Breyer’s dissenting opinion, in which he advocates balancing an enumerated constitutional right against what some consider a pressing need to prohibit its exercise. Guess which wins out in the balancing? As Justice Scalia notes, this is not how we normally protect individual rights, and was certainly not how Justice Breyer protected the individual right of habeas corpus in the military tribunals case decided just two weeks ago.

So what larger lessons does *Heller* teach? First, the differing methods of interpretation employed by the majority and the dissent demonstrate why appointments to the Supreme Court are so important. In the future, we should be vetting Supreme Court nominees to see if they understand how Justice Scalia reasoned in *Heller* and if they are committed to doing the same.

We should also seek to get a majority of the Supreme Court to reconsider its previous

decisions or “precedents” that are inconsistent with the original public meaning of the text. This shows why elections matter—especially presidential elections—and why we should vet our politicians to see if they appreciate how the Constitution ought to be interpreted.

Good legal scholarship was absolutely crucial to this outcome. No justice is capable of producing the historical research and analysis upon which Justice Scalia relied. Brilliant as it was in its execution, his opinion rested on the work of many scholars of the Second Amendment, as I am sure he would be the first to acknowledge. (Disclosure: I joined a brief by Academics for the Second Amendment supporting the individual rights interpretation; one of my articles was cited by Justice Scalia and another by Justice Breyer in his dissent.)

Due to the political orthodoxy among most constitutional law professors, some of the most important and earliest of this scholarship was produced by nonacademics like Don Kates, Stephen Halbrook, David Kopel, Clayton Cramer and others. Believe it or not, *Heller* was a case of nearly first impression, uninhibited by any prior decisions misinterpreting the Second Amendment.

Last but not least, tribute must be paid to the plaintiffs—Shelly Parker, Dick Anthony Heller, Tom Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon—who went where the National Rifle Association feared to tread, and to their lawyers Robert Levy, Clark Neily, and lead counsel Alan Gura. I was privileged to witness Mr. Gura argue the case—his first Supreme Court argument ever—and he was outstanding. *Heller* provides yet another reminder of the crucial role that private lawyers play in the preservation of our liberties.

“A Liberal Case for the Individual Right to Own Guns Helps Sway the Federal Judiciary”

New York Times

May 7, 2007

Adam Liptak

In March, for the first time in the nation’s history, a federal appeals court struck down a gun control law on Second Amendment grounds. Only a few decades ago, the decision would have been unimaginable.

There used to be an almost complete scholarly and judicial consensus that the Second Amendment protects only a collective right of the states to maintain militias. That consensus no longer exists—thanks largely to the work over the last 20 years of several leading liberal law professors, who have come to embrace the view that the Second Amendment protects an individual right to own guns.

In those two decades, breakneck speed by the standards of constitutional law, they have helped to reshape the debate over gun rights in the United States. Their work culminated in the March decision, *Parker v. District of Columbia*, and it will doubtless play a major role should the case reach the United States Supreme Court.

Laurence H. Tribe, a law professor at Harvard, said he had come to believe that the Second Amendment protected an individual right.

“My conclusion came as something of a surprise to me, and an unwelcome surprise,” Professor Tribe said. “I have always supported as a matter of policy very comprehensive gun control.”

The first two editions of Professor Tribe’s influential treatise on constitutional law, in

1978 and 1988, endorsed the collective rights view. The latest, published in 2000, sets out his current interpretation.

Several other leading liberal constitutional scholars, notably Akhil Reed Amar at Yale and Sanford Levinson at the University of Texas, are in broad agreement favoring an individual rights interpretation. Their work has in a remarkably short time upended the conventional understanding of the Second Amendment, and it set the stage for the *Parker* decision.

The earlier consensus, the law professors said in interviews, reflected received wisdom and political preferences rather than a serious consideration of the amendment’s text, history and place in the structure of the Constitution. “The standard liberal position,” Professor Levinson said, “is that the Second Amendment is basically just read out of the Constitution.”

The Second Amendment says, “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.” (Some transcriptions of the amendment omit the last comma.)

If only as a matter of consistency, Professor Levinson continued, liberals who favor expansive interpretations of other amendments in the Bill of Rights, like those protecting free speech and the rights of criminal defendants, should also embrace a broad reading of the Second Amendment. And just as the First Amendment’s

protection of the right to free speech is not absolute, the professors say, the Second Amendment's protection of the right to keep and bear arms may be limited by the government, though only for good reason.

The individual rights view is far from universally accepted. "The overwhelming weight of scholarly opinion supports the near-unanimous view of the federal courts that the constitutional right to be armed is linked to an organized militia," said Dennis A. Henigan, director of the legal action project of the Brady Center to Prevent Gun Violence. "The exceptions attract attention precisely because they are so rare and unexpected."

Scholars who agree with gun opponents and support the collective rights view say the professors on the other side may have been motivated more by a desire to be provocative than by simple intellectual honesty.

"Contrarian positions get play," Carl T. Bogus, a law professor at Roger Williams University, wrote in a 2000 study of Second Amendment scholarship. "Liberal professors supporting gun control draw yawns."

If the full United States Court of Appeals for the District of Columbia Circuit does not step in and reverse the 2-to-1 panel decision striking down a law that forbids residents to keep handguns in their homes, the question of the meaning of the Second Amendment is almost certainly headed to the Supreme Court. The answer there is far from certain.

That too is a change. In 1992, Warren E. Burger, a former chief justice of the United States appointed by President Richard M. Nixon, expressed the prevailing view.

"The Second Amendment doesn't guarantee the right to have firearms at all," Mr. Burger said in a speech. In a 1991 interview, Mr. Burger called the individual rights view "one of the greatest pieces of fraud—I repeat the word 'fraud'—on the American public by special interest groups that I have ever seen in my lifetime."

Even as he spoke, though, the ground was shifting underneath him. In 1989, in what most authorities say was the beginning of the modern era of mainstream Second Amendment scholarship, Professor Levinson published an article in *The Yale Law Journal* called "The Embarrassing Second Amendment."

"The Levinson piece was very much a turning point," said Mr. Henigan of the Brady Center. "He was a well-respected scholar, and he was associated with a liberal point of view politically."

In an interview, Professor Levinson described himself as "an A.C.L.U.-type who has not ever even thought of owning a gun."

Robert A. Levy, a senior fellow at the Cato Institute, a libertarian group that supports gun rights, and a lawyer for the plaintiffs in the *Parker* case, said four factors accounted for the success of the suit. The first, Mr. Levy said, was "the shift in scholarship toward an individual rights view, particularly from liberals."

He also cited empirical research questioning whether gun control laws cut down on crime; a 2001 decision from the federal appeals court in New Orleans that embraced the individual rights view even as it allowed a gun prosecution to go forward; and the Bush administration's reversal of a

longstanding Justice Department position under administrations of both political parties favoring the collective rights view.

Filing suit in the District of Columbia was a conscious decision, too, Mr. Levy said. The gun law there is one of the most restrictive in the nation, and questions about the applicability of the Second Amendment to state laws were avoided because the district is governed by federal law.

“We wanted to proceed very much like the N.A.A.C.P.,” Mr. Levy said, referring to that group’s methodical litigation strategy intended to do away with segregated schools.

Professor Bogus, a supporter of the collective rights view, said the *Parker* decision represented a milestone in that strategy. “This is the story of an enormously successful and dogged campaign to change the conventional view of the right to bear arms,” he said.

The text of the amendment is not a model of clarity, and arguments over its meaning tend to be concerned with whether the first part of the sentence limits the second. The history of its drafting and contemporary meaning provide support for both sides as well.

The Supreme Court has not decided a

Second Amendment case since 1939. That ruling was, as Judge Stephen Reinhardt, a liberal judge on the federal appeals court in San Francisco acknowledged in 2002, “somewhat cryptic,” again allowing both sides to argue that Supreme Court precedent aided their interpretation of the amendment.

Still, nine federal appeals courts around the nation have adopted the collective rights view, opposing the notion that the amendment protects individual gun rights. The only exceptions are the Fifth Circuit, in New Orleans, and the District of Columbia Circuit. The Second Circuit, in New York, has not addressed the question.

Linda Singer, the District of Columbia’s attorney general, said the debate over the meaning of the amendment was not only an academic one.

“It’s truly a life-or-death question for us,” she said. “It’s not theoretical. We all remember very well when D.C. had the highest murder rate in the country, and we won’t go back there.”

The decision in *Parker* has been stayed while the full appeals court decides whether to rehear the case.

Should the case reach the Supreme Court, Professor Tribe said, “there’s a really quite decent chance that it will be affirmed.”

JUSTICE SCALIA'S A MATTER OF INTERPRETATION

"Judge Dread"

Slate

January 22, 1997

David Franklin

There are two kinds of law, wrote Thomas Paine in 1805: Legislative law is the law of the land, enacted by our own legislators, chosen by the people for that purpose. Lawyerslaw is a mass of opinions and decisions which courts and lawyers have instituted themselves. Paine liked the first kind of law better. So does Antonin Scalia. As the most intellectually consistent and stylistically gifted member of the Supreme Court, Scalia has never hidden his enthusiasm for the American tradition of mistrusting courts and lawyers. The basics of his judicial philosophy are now usefully collated in [*A Matter of Interpretation*,] which consists of an essay by the associate justice, followed first by responses from Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin, and then by a reply from Scalia.

According to Scalia, the problem begins in law school, where tomorrow's judges digest a steady diet of fusty 19th-century English appellate decisions, and taste—for the first time—the joys of reasoning by analogy and precedent. A few of these students befriend their senators, or find some other way to become federal judges; by that time, they have internalized what Scalia calls the common-law attitude, and they become a dangerous lot. Faced with an ambiguous statute or regulation, these judges, reared on the common law, too often treat the enacted text as just one more precedent to circumvent. In other words, they hijack the democratic process.

Scalia offers two antidotes to this epidemic of judicial lawmaking: textualism and originalism. Textualism is just what it sounds like. As Scalia puts it, The text is the law, and it is the text that must be observed. The only democratically binding feature of a statute is its literal language, because that language alone has been ratified by both houses of Congress and the president in accordance with the Constitution. Originalism, as Scalia defines it, is a species of textualism particularly relevant to constitutional interpretation. Its adherents tether their interpretations to plain meanings as they were understood when the text was first penned. Originalists believe, as Scalia puts it, that a constitution's whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot take them away.

None of this is new to anyone who has paid attention to Scalia's opinions and other writings over the past decade. Yet, in *A Matter of Interpretation*, his reprise of the traditional jeremiad against judicial usurpation concludes with a twist. The specter raised by common-law judging, Scalia says, is not the unelected judge determined to impose the values of an elite few upon the masses, but that old Tocquevillian villain, the tyranny of the majority. Scalia's argument goes like this: As judges persist in bending the law, the majority of the moment will begin to insist ever more stridently on judges of its particular ideological stripe. Once on the

bench, these judicial politicians (emboldened by their anything-goes common-law attitudes) will set about encoding the popular will into law, to the detriment of unpopular minorities.

As law Professor Mary Ann Glendon points out in her response, this is an odd coda, especially given the majoritarian premises of Scalia's philosophy. (Glendon shares Scalia's distrust of undisciplined judges, but hers is the more traditional anxiety, rooted in a fear of elites.) At the end of the book, Scalia, defending his prediction that judges will carry democracy too far, contends that the individual rights favored by judges tend to be the same ones championed by popular majorities. Here is Scalia's list: women's rights, racial-minority rights, homosexual rights, abortion rights, and rights against political favoritism. Scalia's notion of what constitutes a popular cause does seem questionable—racial-minority and gay rights are not nearly as universally supported as Scalia seems to think they are. His nightmare scenario is also far-fetched: Life-tenured judges are dubious vehicles for implementing a popular will that changes from moment to moment. Besides, judges can't be relied on: Supreme Court justices, for instance, are famous for disappointing their appointers.

Scalia's prescriptions have long drawn fire from legal academics. Some of their criticisms are repeated here by legal academics Laurence Tribe and Ronald Dworkin: Scalia's originalism is too glib, because it doesn't distinguish between what the Constitution says and what its framers expected it to do; too malleable, because it merely substitutes the guesswork of historians for the musings of moral philosophers; too value-laden, because it imputes an anti-evolutionary purpose to the

Constitution. And so on.

Yet, Scalia is refreshingly right in several particulars. He justifiably laments the virtual disregard of statutory interpretation in law-school curricula, where the hoary common-law case-study method still predominates despite the fact that most law nowadays takes the form of statutes and regulations.

Scalia also rightly rejects the use of legislative history (committee reports and floor debates) as a guide to divining lawmakers' intent. Committee reports are worthless, not only because they lack a democratic pedigree, but because they are infinitely pliable. (Scalia quotes Judge Harold Leventhal's quip that using legislative history is like looking over the heads at a cocktail party until you spot your friends.) And Scalia is right to object to the caricature of the textualist/originalist judge as wooden and unimaginative—nontextualists, after all, can be plenty wooden and unimaginative themselves.

Admitted nontextualists, incidentally, are becoming harder and harder to find. Scalia's plain language approach has certainly become more popular among his bench mates. The simplest proof of this is the remarkable increase in citations to dictionaries in Supreme Court opinions. A recent study found that dictionary definitions were 14 times more likely to appear in the court's decisions five years after Scalia's swearing-in than they were five years before it. (The originalists, of course, like to dust off old dictionaries—Dr. Johnson's 1785 edition for the Bill of Rights, for instance.) This lexicographical trend won't cure the textualists' reputation for stiltedness; reading some of these opinions is like listening to the high-school valedictorian who inevitably begins, I didn't

know what to say today, so I looked up the word “commencement.”

Even devotees of the Living Constitution like Tribe now declare their fidelity to text. It’s surprising that Tribe’s essay doesn’t discuss his textualist argument for the unconstitutionality of Colorado’s Amendment 2, which forbade cities to enact anti-discrimination ordinances based on sexual orientation. Citing almost no cases, Tribe told the Supreme Court that the Colorado initiative violated the letter of the Equal Protection Clause because it denied gays alone the protection of the anti-discrimination laws. Not an airtight argument (all anti-discrimination laws pick and choose among protected classes), but a cleverly textualist one—and one that seems to have helped convince a majority of the court to strike down the amendment, despite a lack of helpful precedent. (Scalia offered a different textualist reading of the Equal Protection Clause, grounding his arch dissent firmly in majoritarianism—The Court has mistaken a *Kulturkampf* for a fit of spite.)

So how often are judges actually as willful as Scalia claims they are? It still sometimes happens. Last spring, the 9th U.S. Circuit Court of Appeals found in the Due Process Clause a constitutional right to physician-assisted suicide by relying on Plato, Montaigne, Thomas More, and the Roper poll. Its decision, which Tribe defended before the court earlier this month, is almost certain to be reversed, probably on textualist grounds. Most of the current textual infidelity, though, occurs because the doctrine of *stare decisis*—which dictates adherence to precedent—forces today’s

judges to live with adventurous Supreme Court decisions from earlier in the century. Not surprisingly, Scalia is no big fan of *stare decisis*: In his dissents, he often calls upon the court to scour away layers of encrusted precedent in order to get at the original meaning of the underlying text.

How judges interpret statutes and constitutions is, according to Scalia, a question utterly central to the existence of democratic government. That’s hard to dispute. Yet, as Wood—a historian of early America—shows in his essay, it’s also a question we’ve been asking since the colonial era, fitting the answer to the needs of the moment. The revolution of 1776, for instance, was fueled in part by the colonists’ resentment of the overweening powers of royal judges. As early as the 1780s, however, the pendulum had swung back, and many Americans looked to the courts to check the excesses of their legislators. To Scalia, however, the idea that judicial power responds to the demands of the time merely proves that there have always been willful judges who bend the law to their wishes.

Seen from a historian’s perspective, Scalia’s view of the debate over the judiciary does look a bit Manichaean. But it would be a mistake to dismiss him for that reason. Scalia’s arguments have shaped the debate in our time; he has gone a long way toward changing how judges interpret the letter of the law. Not all the way—he has not yet succeeded in building a durable majority on the court. Does this mean that unpopular individual rights are in peril? More likely, it simply goes to show—as do the exchanges in this stimulating book—that there is more than one way to read a text.

“Courtroom Arguments”

The Wall Street Journal

February 4, 1997

John O. McGinnis

Of all the justices now sitting on the Supreme Court, Antonin Scalia is perhaps the most notorious—for his unrelenting courtroom interrogations, his rhetorically sharp judicial prose and (not least) his uncompromisingly conservative ideas. It is probably fair to say that most professional court-watchers do not share Justice Scalia's view of the world—or of the Constitution; indeed, in much of the popular press he has become a kind of right-wing caricature. So we are lucky to have, in book form, an essay on legal interpretation by Justice Scalia, as well as a critical review of his entire judicial corpus. Taken together they present a clearer picture of the justice and his ideas—and help to explain why he incites so much opposition in our current political culture.

In *A Matter of Interpretation*, Justice Scalia defends the jurisprudence of originalism, which requires that judges interpret the Constitution in accordance with the meaning of its text at the time it was enacted. He contrasts originalism with the so-called Living Constitution, according to which judges are permitted to update the Constitution to keep it in tune with their view of society's current needs.

Justice Scalia recognizes that the “living” approach gives courts the power to create law, a power that originated, he shows, in a monarchical era when individuals were much more willing to acquiesce in the judgments of nondemocratic institutions. The U.S. Constitution, however, is the product of democratic principles by which fundamental law is created by the people. The meaning of the Constitution, he argues,

must be fixed at the time it was ratified. In recent years, however, the court has discovered all sorts of rights and prohibitions—concerning abortion, capital punishment and much else—that are nowhere to be found in the Constitution itself. Certain matters, Justice Scalia reminds us, the Framers expressly left to legislatures.

The natural temptation of judges to follow their own inclinations rather than the dictates of a written text is strengthened, Justice Scalia argues, by their legal training. In first-year law courses students are not only invited to admire the judges who are the great architects of the common law but they are challenged, in Socratic dialogue with their professors, to create the legal rule that they think will make for a better (i.e., “more just”) society. It is hard to put aside the heady experience of working one's will on the world and become instead a humble servant of the Framers of the Constitution.

One of the great merits of Justice Scalia's essay, however, is to show that the protection of our liberties depends on such faithful service. If the First Amendment is expanded beyond its historically rooted meaning to meet the felt necessities of today—e.g., if it is interpreted to protect not only political speech but the “speech” of, say, nude dancing, as it now does—there is no reason that it cannot be contracted to meet the necessities of tomorrow: The individual rights judges give they can also take away. Indeed, once people recognize that judges are inventing rights, they will take steps to ensure the confirmation of

justices who will enforce only those rights with which the majority agrees, thereby making the actual set of rights in the Constitution irrelevant.

A Matter of Interpretation includes comments on Justice Scalia's essay by four academics, including Laurence Tribe and Ronald Dworkin, who argue that the broad language of many constitutional provisions, like the Equal Protection Clause, was intended to be the means by which judges could express the best of contemporary moral values. In both his essay and his response to his commentators, Justice Scalia projects a sanguine humor through a robust prose enlivened by sly sallies against what he sees as the gaps in logic of the opposing camp. He is anything but the angry justice of popular myth. Our political discourse has become so jejune that the natural habits of a powerful mind—sharp reasoning and imaginative rhetoric—are mistaken for petulant temperament.

In *Justice Scalia and the Conservative*

Revival, Richard Brisbin shows us another reason why Justice Scalia is unpopular in certain precincts: In a time of value-relativism and militant identity politics, he is the leading exponent of Enlightenment beliefs. Justice Scalia's jurisprudence, Mr. Brisbin shows, seeks to protect our property from bureaucrats, to require that people be treated as individuals rather than as representatives of a class or race, and to use the rule of law as a restraint against disorder and conflict.

As an advocate of postmodernism and a proud egalitarian, Mr. Brisbin appears to deplore these results, but he has the fairness to acknowledge that Justice Scalia is a tenacious exponent of the politics of reason that the Framers bequeathed to us through a written constitution. Since the romantic rebellion against the politics of reason is responsible for most of this century's political disasters, we should be grateful that there is at least one such exponent on the Supreme Court. Would that there were more.

JUSTICE BREYER'S ACTIVE LIBERTY

"Consent of the Governed"

New York Times
February 5, 2006
Kathleen Sullivan

On the first Monday in October, the United States Supreme Court opened its term under the gavel of the new Chief Justice, John G. Roberts Jr., President Bush's first nominee to the court. In promising that the justices he appoints "will not legislate from the bench and will strictly interpret the Constitution," Bush has faithfully recited the mantra that conservatives regularly use to signal their belief that the Supreme Court should defer to democratic decision making.

But in fact, conservative justices have frequently invoked the Constitution in recent years to strike down laws passed by representatives of the people, especially statutes enacted by Congress. At last month's Senate Judiciary Committee hearings on the nomination of Samuel A. Alito Jr., Democrats and Republicans agreed on little except the view that the court presided over by Chief Justice William H. Rehnquist had struck down too many of their own statutes.

For example, the Rehnquist court held invalid such popular legislation as the Gun Free School Zones Act, the Violence Against Women Act and the Religious Freedom Restoration Act as intrusions by the federal government upon the powers of the states. The Rehnquist court also voted to immunize state governments from federal lawsuits on issues ranging from patent infringement to mismanagement of seaports to discrimination against public employees on the basis of disability or age.

Each of these cases was decided by a 5-to-4

vote. And in each decision, Justice Stephen Breyer, appointed to the court in 1994 by President Clinton, was among the dissenters. In his clear and elegant new book, *Active Liberty: Interpreting Our Democratic Constitution*, based on his 2004 Tanner lectures at Harvard University (where he taught before becoming a federal judge), Breyer offers an extended reflection on why he would have deferred to Congress and upheld the statute in each of these and other cases, as well as why he sometimes finds statutes trumped by a constitutional right.

For Breyer, the guiding theme in constitutional interpretation, whether in upholding statutes or enforcing rights, should be enabling democracy—"a form of government in which all citizens share the government's authority, participating in the creation of public policy." Such democratic participation is what Breyer means by the "active liberty" of the book's title. He takes his cue less from any particular provision of the Constitution than from the spirit of the document as a whole, and from Thomas Jefferson's reminder in the Declaration of Independence that, in our system, governments must derive "their just powers from the consent of the governed."

Yet the fair-minded, balanced and dispassionate tone of *Active Liberty* cannot conceal its startling premise: that self-professed conservatives who espouse textualism, originalism and strict constructionism often produce results that in fact turn our democratic tradition on its head. It may come as a surprise to some

readers to encounter a Clinton nominee—indeed, one of only six justices appointed to the court by Democratic presidents in the past half-century—arguing so powerfully for “judicial modesty” and “judicial restraint” in the face of decisions by a court so long dominated by Republican appointees.

The great strength of *Active Liberty* lies in Breyer’s detailed application of his general thesis to particular recent controversies. In the federalism cases mentioned above, for example, Breyer would have allowed Congress to regulate in matters like gun possession and domestic violence under a broad reading of the federal commerce power. This, he explains, is because in enacting such laws, “the public has participated in the legislative process at the national level,” and democratic participation is discouraged when Congress holds “elaborate public hearings only to find its legislative work nullified.”

Justices like Rehnquist and Sandra Day O’Connor, who has held state legislative office, have argued that invalidating such federal legislation in fact shifts democratic decision making to the state or local level. Breyer disagrees. In a passage candidly criticizing some of the court’s recent decisions as “retrograde,” he notes that a number of decisions made in the name of states’ rights “paradoxically threaten to shift regulatory activity from the state and local to the federal level.” By telling federal officials they may not enlist county sheriffs to check the backgrounds of handgun purchasers, for instance, the court in effect forces Congress to expand the “federal enforcement bureaucracy” in order to achieve the same ends.

By the same token, Breyer writes approvingly of court decisions that in his view advance democratic values against claims that the statutes in question violate

individual rights. His two main examples are recent challenges to campaign finance regulation and race preferences in university admissions.

Breyer praises the court’s 2003 decision in *McConnell v. Federal Election Commission*, in which he joined a 5-to-4 majority upholding the McCain-Feingold law’s limits on campaign advertisements focused on special issues and on soft money contributions. The statute was challenged on First Amendment grounds. Conceding that McCain-Feingold interferes with speech, Breyer argues that such laws also enhance speech by democratizing “the influence that money can bring to bear upon the electoral process.” In his view, they “facilitate a conversation among ordinary citizens that will encourage their informed participation.” Seeing First Amendment interests on both sides, he finds that enhancing the active liberty of speaking together justifies limiting the negative liberty of each of us speaking as we please.

Breyer likewise justifies upholding race preferences in university admissions on the ground that such policies enhance democracy. In 2003, in *Grutter v. Bollinger*, he joined a 5-to-4 majority rejecting a challenge to the University of Michigan Law School’s use of racial criteria in admissions. He acknowledges that different theories of equality competed in the case, but holds that democratic values tipped the balance: “a racially diverse educational environment,” by diversifying the leaders whom the university produces, helps to “facilitate the functioning of democracy” and foster “effective participation in today’s diverse civil society.” The overwhelming majority of examples in the book come out the same way: in favor of the choices made by elected decision makers.

Breyer offers only a few examples that

would go the other way—invalidating the work of a political majority in recognition of a constitutional right. He would favor, for instance, Nike’s right to publicly contest allegations that it runs sweatshops; a radio station’s right to broadcast an illegally intercepted recording of union leaders’ threats of violence; and taxpayers’ right not to finance public subsidies to religious schools. In each of these cases Breyer sees enforcement of the constitutional right as serving to strengthen democracy—by enhancing public debate or preventing debilitating religious divisiveness.

In this respect, *Active Liberty* echoes John Hart Ely’s 1980 masterwork, *Democracy and Distrust*. Ely argued that judicial intervention in democratic outcomes could be justified only if it would make democracy itself function better. His examples included allowing oppressed minorities to gain representation and permitting dissent as a way to help clear the channels of political change.

Breyer goes farther than Ely, however, by applying his theory to statutory as well as constitutional interpretation. He explains why it is best to interpret statutes in the light of testimony before Congress and legislative history rather than their literal texts: “the interpretative process” should make “an effort to locate, and remain faithful to, the human purposes embodied in a statute.”

Here Breyer takes on arguments made by Justice Antonin Scalia, who has articulated a very different theory of adjudication. Scalia, like Breyer a former law professor, set forth his principles for deciding cases in his 1997 book, *A Matter of Interpretation: Federal Courts and the Law*. There Scalia argued that the rule of law should be a law of rules, and that reliance on literal text and original

meaning are the only methods that can prevent judges from descending into hopeless subjectivity. On the current court, these arguments are sometimes echoed by Justice Clarence Thomas.

Breyer offers a methodical rebuttal to such arguments, taking them seriously but contending that they are wrong. Clear rules are often unfair, he argues, as when petty criminals get life sentences for stealing a golf club or a videotape under a regime of “three strikes and you’re out.” And he suggests that textualism and originalism themselves inevitably involve subjective judicial choices, since the views of the constitution’s framers or the canons of statutory construction so often point in more than one direction.

While rejecting originalism and textualism, Breyer eagerly embraces another conservative tradition—that of jurists like Oliver Wendell Holmes, Louis Brandeis, Harlan F. Stone, Felix Frankfurter and Learned Hand, to whom he attributes “an attitude that hesitates to rely upon any single theory or grand view of law, of interpretation or of the Constitution,” but relies instead upon a catholic combination of “language, history, tradition, precedent, purpose and consequences.”

Now, with Samuel Alito succeeding the retiring Justice Sandra Day O’Connor, it remains to be seen who will stand at the center of the court in the future and command its vote when it is narrowly divided. With *Active Liberty*, Stephen Breyer has offered a theory of democratic pragmatism that is very likely to play a powerful role in deciding such controversies. Everyone interested in the trajectory of the new Roberts court should surely read it.

“Active Liberty: A Progressive Alternative to Textualism and Originalism?”

Harvard Law Review
June 2006
Michael W. McConnell

[Excerpt of a review of Justice Breyer’s *Active Liberty*.]

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. . . Many approaches to constitutional interpretation have been employed or suggested over the years, some closer than others to Justice Breyer’s. I have already noted the affinity between his approach and pragmatism. One approach with even stronger similarities is the “representation-reinforcement” idea proposed a generation ago by John Hart Ely. Ely thought the Constitution leaves “the selection and accommodation of substantive values . . . almost entirely to the political process” and that the document is “overwhelmingly concerned, on the one hand, with procedural fairness. . . , and on the other, with . . . ensuring broad participation in the processes and distributions of government.” Ely’s theory led him to praise progressive Warren and Burger Court decisions on reapportionment, voting rights, criminal procedure, and desegregation, while criticizing other decisions that took substantive issues out of the political process, including *Roe v. Wade*. Justice Breyer could have made his approach clearer by explaining how and why it differs from these related approaches. Justice Breyer compares his position to only one alternative, which he calls “textualism” as it applies to statutes and “originalism” as it applies to the Constitution. This is the approach most closely associated with his colleague Justice Scalia. Much hostility to textualism and originalism is based on an unrealistically rigid characterization of the

approach, and Justice Breyer’s discussion is no exception. As Justice Breyer describes the approach, judges should “focus primarily upon text, upon the Framers’ original expectations, narrowly conceived, and upon historical tradition” (p. 116). There are, admittedly, different versions of textualism and originalism, and this may be an accurate description of some. But it seems to me that Justice Breyer’s definition misdescribes the most prominent and attractive version, in three respects.

First, the definition omits the textualist-originalist commitment to deference to present-day enactments of the political branches. According to most practitioners of this view, the decisions of the people’s representatives enjoy a presumption of constitutionality and should be displaced only when they are demonstrably inconsistent with prior constitutional commitments manifested in text, history, and tradition. Thus, textualist and originalist judges do not “focus primarily” on text and history, but “primarily” on the right of the people to govern themselves through democratic institutions. If textual and historical sources are indeterminate, as they often are, judges are not free to resolve the ambiguity in favor of their own preferences, but must defer to the decisions of the legislature.

Second, I do not agree with Justice Breyer’s assumption that originalist analysis looks to “narrowly conceived” purposes. The breadth

or specificity of historical meaning is itself a historical question, and some provisions, such as those in the first section of the Fourteenth Amendment, may be very broad indeed. No less than any other approach, textualism-originalism understands that constitutional principles are not frozen in time. The task is to apply the moral-political principles of the Constitution as faithfully as possible to the circumstances of our day. Eighteenth-century Framers may not have thought to apply the First Amendment to flag burning or the Fourth Amendment to thermal imaging, but that has not stopped originalists from doing so.

Third, Justice Breyer does not acknowledge the importance of precedent to any system of legal interpretation, including the one he criticizes. To be sure, judges in the textualist-originalist camp differ among themselves regarding the weight to be given to precedent, just as is true of judges who employ other approaches. In my opinion, the doctrine of *stare decisis* is a weak link in constitutional theory across the board. All too often it is employed selectively and arbitrarily. More on that below. But most originalist judges recognize the need for a consistent, coherent doctrine of respect for settled precedent. As Hamilton wrote in *The Federalist* No. 78, following precedents is “indispensable” to “avoid an arbitrary discretion in the courts.”

Presumably Justice Breyer targets the textualist-originalist approach because of the prominence it has achieved in the last few decades as both a justification for and an objective constraint on the power of judicial review. As Justice Breyer explains, exponents of textualism and originalism “hope that language, history, tradition, and precedent will provide important safeguards against a judge’s confusing his or her personal, undemocratic notion of what is

good for that which the Constitution or statute demands” (p. 116).

Advocates of this view thus argue that it is not an ideological position, but one that safeguards the distinction between law and politics. Textualist and originalist judges, at least in principle, will on occasion vote to uphold laws they deeply disagree with, or to strike down laws they would favor, because the basis for constitutional judging (text, history, tradition, and settled precedent) is independent of their own preferences. The same is not true, even in principle, of judges who believe their responsibility is to interpret the Constitution in light of their own best sense of justice, equality, good consequences, or other normative concerns.

This is not, of course, to say that every judge claiming to follow a textualist or originalist approach will do so in an objective manner. Texts can be misread and history can be manipulated; judges are human; power corrupts; and judges may be tempted to twist the sources to make the cases come out “the right way.” The point is that in principle the textualist-originalist approach supplies an objective basis for judgment that does not merely reflect the judge’s own ideological stance. And when errors are made, they can be identified as such, on the basis of professional, and not merely ideological, criteria. Even in principle, constitutional interpretation based on the judge’s own assessment of worthy purposes and propitious consequences lacks that objectivity.

I hasten to add that few, if any, judges fit the stereotype of disregarding all law in favor of their own political preferences. Virtually all judges recognize a certain degree of constraint based on text, history, tradition, and precedent, and give play to their own values only within the remaining realm of

discretion. The real points of division relate to how strictly or loosely judges read the constraints, and whether in the remaining gray areas they defer to democratic judgment or give play to their own ideological commitments. Justice Breyer devotes the last full chapter of his book to explaining why the textualist-originalist approach is “unsatisfactory.” He lodges five major criticisms of textualism and originalism: (1) as a historical matter, the Framers “did not say specifically what factors judges should take into account when they interpret statutes or the Constitution” (p. 117); (2) nontextualist and nonoriginalist judging does not “necessarily open the door to subjectivity” (p. 118); (3) “language and structure, history and tradition . . . often fail to provide objective guidance in . . . truly difficult cases” (p. 124); (4) even if textualist or originalist methods of interpretation were “more likely to produce clear, workable legal rules. . . , the advantages of legal rules can be overstated” (p. 127); and (5) “textualist and originalist doctrines may themselves produce seriously harmful consequences” (p. 129). These are familiar points, extensively debated in the literature. What should interest us most, however, is how they connect to Justice Breyer’s affirmative position. What is the connection between active liberty and text, history, tradition, and precedent? Justice Breyer passingly concedes that textualism and originalism are “logically consistent with emphasizing the Constitution’s democratic objectives” (pp. 116–17), but he does not develop this theme. One would think that, from the perspective of active liberty, the connection to the Constitution’s democratic objectives would be the most important issue. If judges committed to the promotion of active liberty “insist[] on interpretations, statutory as well as constitutional, that are consistent with the people’s will,” as Justice Breyer claims (p.

115), we must ask how the people manifest their will. I suggest that they do so in three ways: by creating and amending the Constitution, by developing constitutional tradition, and by electing representatives who enact legislation. These correspond to the three traditional bases for constitutional interpretation: fidelity to text, respect for settled understandings, and deference to current democratic decisions. Far from being an alternative to interpretation based on text, history, tradition, precedent, and deference to democratic decisionmaking, active liberty provides theoretical support.

First, active liberty explains why it is essential for judges to pay close attention to constitutional text and history. The theory of judicial review is not that judges are more likely to make good decisions than the representatives of the people, but that the Constitution reflects the will of the people and sets boundaries for the governing authority of elected officials. The Constitution is a document with meaning and purpose, and legitimate interpretation must take its bearings from that meaning and purpose. To impute a meaning to the text that could not have been intended by the drafters and ratifiers divorces the words of the Constitution from the source that gives them authority. Attention to longstanding practice and tradition, too, serves the end of active liberty, because practices that have been adopted by many decentralized democratic decisionmakers over an extended period of time, up to and including the present, provide authoritative evidence of the popular will. And of course, for reasons already explained, judicial restraint—the principle that judges should defer to democratic decisionmaking—follows from the principle of active liberty.

Active liberty could also help to provide a consistent theory of precedent. For all the

attention to stare decisis in debates over Supreme Court nominees, political scientists tell us that, “[o]verwhelmingly, Supreme Court justices are not influenced by landmark precedents with which they disagree.” Many of the Court’s most celebrated decisions—*Brown v. Board of Education*, for example—involved the overruling of prior precedents. But it is also true that many decisions, even some that were questionable or controversial when rendered, have become part of the fabric of American life; it is inconceivable that they would now be overruled. Examples might include protection against sex discrimination under the Equal Protection Clause, application of the Equal Protection Clause to the federal government, expansion of the Commerce Clause to permit federal regulation of intrastate commercial activity, or prohibition of gross malapportionment of state legislative districts. The staying power of these holdings is not attributable to the bare fact that the Supreme Court decided them, for other decisions of equally long standing remain controversial and subject to reconsideration. The difference, I think, lies in the fact of overwhelming public acceptance. Whatever may have been their original legal merit, these decisions have been accepted by the nation. Legislatures do not pass laws in defiance of these decisions; commentators do not attack their reasoning (except as an academic exercise, which serves a different purpose than provoking their reconsideration); people have forgotten

they ever were controversial.

This overwhelming public acceptance constitutes a mode of popular ratification, which gives these decisions legitimacy and authority under the theory of active liberty. Attention to the theory of active liberty thus may lead in a direction Justice Breyer did not intend. He set out to describe and defend an approach to constitutional interpretation that would not be bound by text, history, and tradition, but also would not be based solely on whether the consequences “are good or bad, in a particular judge’s opinion” (p. 120). In many ways, the attempt is admirable. Justice Breyer’s commitment to judicial restraint, his respect for differing opinions, his modesty, his practicality, and his rejection of utopianism are all welcome additions to the public debate over the role of the judiciary.

But ultimately, his effort falls short. On the one hand, he asks judges to place greater emphasis on effectuating the people’s will. On the other hand, he asks them to give greater emphasis to purposes and consequences than to text, history, and tradition. But in republican government, text, history, and tradition are the objective manifestations of the people’s will. Justice Breyer’s insistence that active liberty provides the linchpin for constitutional interpretation, examined carefully, offers more support for the approach he criticizes than for the approach he espouses.

“How Should Judges Judge?”

Commonweal

December 16, 2005

Bernard G. Prusak

Supreme Court Justice Stephen Breyer's elegant little book [*Active Liberty*] has gotten a lot of press. The reason for the buzz is that the view of constitutional interpretation that he puts forth directly challenges the view of the Court's most outspoken conservative, Justice Antonin Scalia. Scalia has long argued that his view of how the Constitution should be interpreted, which he calls “originalism,” is most consistent with a democratic system of government and best protects against what he takes to be “the main danger in judicial interpretation of the Constitution,” namely, that “judges will mistake their own predilections for the law” (see Antonin Scalia, *Originalism: The Lesser Evil*, University of Cincinnati Law Review 57/3, 1989). “Originalists” hold that the meaning of the Constitution should be understood as fixed. So, for example, the amendments to the Constitution mean what they meant when they were ratified, and no more. The job of a judge is to resolve questions of law by determining and applying the original meaning of the constitutional text in question. Breyer presents a liberal reply to Scalia and others.

There is much that is compelling in Breyer's argument, and it is to be hoped that his book will be widely read. In the end, though, it is difficult to escape the impression that he has made matters too easy for himself. Breyer mostly ignores here the “culture war” controversies like abortion and gay rights that currently dominate public discourse about the Court. In a way, this is all for the better. With all the Sturm und Drang over questions of individual rights, questions of

the common good hardly make the papers. Breyer draws attention to these questions, and so deserves praise. Nevertheless, he needs to write another chapter for the second edition of this book. More precisely, he needs to explain and justify what his view of constitutional interpretation implies for the controversies that divide us.

Ironically, the title of Breyer's book, *Active Liberty: Interpreting Our Democratic Constitution*, could serve Scalia just as well for a book of his own. Breyer and Scalia share a commitment to what the nineteenth-century French philosopher Benjamin Constant called the “liberty of the ancients.” In Breyer's definition, it is “the freedom of the individual citizen to participate in the government and thereby to share with others the right to make or to control the nation's public acts”—hence Breyer's term “active liberty.” Constant contrasted the liberty of the ancients with the liberty of the moderns. To be “modern,” in Constant's lexicon, is to value first and foremost “the enjoyment of security in private pleasures” (or, “peaceful enjoyment of private independence”). From this perspective, “liberty” is the name for “the guarantees accorded by institutions to these pleasures.” These guarantees have traditionally included the rule of law; freedom of expression, association, and religion; and property and voting rights.

Neither Breyer nor Scalia is in the least opposed to modern liberty in this sense. Instead, they both acknowledge that the Constitution guarantees individual rights. Both also want to maximize the opportunities for the people to rule

themselves, that is, to exercise ancient or active liberty. Where they part ways is on the means to this end. To advance active liberty, Scalia wants judges to limit themselves to protecting the rights unambiguously articulated in the Constitution and leave all else to the will of the people as expressed by legislators and other elected officials. In his estimation, originalism best serves this end. To advance active liberty, Breyer wants judges to read the Constitution in light of what he takes to be the “basic constitutional purpose: creating and maintaining democratic decision-making institutions.” In his estimation, originalism in fact risks “undermin[ing] the Constitution’s efforts to create a framework for democratic government” by “placing weight upon eighteenth-century details to the point at which it becomes difficult for a twenty-first-century court to apply the document’s underlying values.” Countering originalism, Breyer claims that judges “should recognize that the Constitution will apply to ‘new subject matter . . . with which the framers were not familiar.’” The job of the judge then (quoting Learned Hand) is to “reconstruct the past solution imaginatively in its setting and project the purposes which inspired it.” In Pauline language, the letter kills, but the spirit gives life; Breyer chooses life. For him (to use Pauline language once more) the Constitution is a covenant of a free people. It is old, but always open to the new by virtue of its enduring values.

Thus stated, Breyer’s view of constitutional interpretation, exercised by unelected judges, seems almost to invite the danger that Scalia fears: that “judges will mistake their own predilections for the law.” Breyer agrees that judicial “subjectivity” is a danger, but he vigorously disputes the charge that rejecting literalism invites subjectivity, noting that the relevant

constitutional values or purposes “limit interpretive possibilities.” He also disagrees with Scalia about the “main danger” to be feared in interpreting the Constitution. For Breyer, this danger is interpreting the Constitution in such a way that it no longer “helps to resolve problems related to modern government”—thus “we the people” are not served here and now.

Basically, Breyer’s book can be seen as a development of his impassioned dissent in a 2002 federalism case, *Federal Maritime Commission v. South Carolina State Ports Authority*. He also shows the implications of his view of constitutional interpretation for campaign-finance reform and affirmative action, among other disputed questions. Still, his case against originalism and for his own view is clearest and most compelling in his discussion of federalism, the proper division of powers among the federal and state authorities.

The opinion of the Court in *Federal Maritime* was written by Justice Clarence Thomas, another Originalist. The question before the Court was whether state sovereign immunity—in particular, immunity from complaints by private parties—precludes federal agencies like the Federal Maritime Commission (FMC) or, say, the Environmental Protection Agency (EPA) from adjudicating a private party’s complaint against a state. Under the Shipping Act, the FMC was granted the authority to investigate complaints of violations of the Act. The agency decided to do so through an adjudicative process somewhat similar to court proceedings. The Court ruled against the FMC.

What is interesting about this case is that the Constitution says nothing one way or another about administrative adjudications. For, as Thomas observes, “The framers, who

envisioned a limited federal government, could not have anticipated the vast growth of the administrative state” and did not anticipate administrative adjudications at all. So what is the Originalist to do here?

Thomas invokes the rule of an 1890 case, *Hans v. Louisiana*, that “the Constitution was not intended to ‘rais[e] up’ any proceedings against the states that were ‘anomalous and unheard of when the Constitution was adopted.’” He then notes “strong similarities” between administrative adjudications and civil litigation. The Eleventh Amendment is the key constitutional text in Thomas’s argument. This amendment, ratified in 1795, stipulates that “the judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by citizens of another state. . . .” From here, Thomas’s reasoning to his conclusion can be expressed in a syllogism: There are strong similarities between administrative adjudications and civil litigation. Civil litigation by a private party against a state is unconstitutional under the Eleventh Amendment. Therefore, administrative adjudications by a private party against a state are unconstitutional under the Eleventh Amendment.

Decisions like Thomas’s in this case raise the question of whether originalism really does protect against judicial subjectivity (or, as it is often called today, “judicial activism”). One might wonder just how strong the analogy is between civil litigation and administrative adjudications. Beside similarities, there are notable differences. Further, the text of the Eleventh Amendment bears explicitly on “the judicial power of the United States,” which executive-branch agencies like the FMC do not exercise. It might then be considered strange that Thomas, an Originalist, extends the scope of

the amendment beyond its plain meaning. More generally, times having changed since the eighteenth century, it is no wonder that an eighteenth-century text would not speak explicitly to all our questions. In such a case, originalism, strictly speaking, is useless. The judge cannot be an Originalist here because there is no text here to apply. Instead, the judge must decide what basic purposes moved the framers. In the end, this is what Thomas does: he prioritizes the framers’ fear of “encroachments by the federal government on fundamental aspects of state sovereignty, such as sovereign immunity.” But why should fear about an overbearing federal power in the eighteenth century rule us in the twenty-first? Other purposes might be claimed to be more central to the Constitution, which is what Breyer claims.

Two sentences from Breyer’s dissent nicely summarize his argument in *Active Liberty*:

Even if those alive in the eighteenth century did not “anticipate the vast growth of the administrative state,” they did write a Constitution designed to provide a framework for government across the centuries, a framework that is flexible enough to meet modern needs. . . . An overly restrictive judicial interpretation of the Constitution’s structural constraints (unlike its protections of certain basic liberties) will undermine the Constitution’s own efforts to achieve its far more basic structural aim, the creation of a representative form of government capable of translating the people’s will into effective public action.

As Breyer also observes in his dissent, restrictive interpretations of federal powers

threaten the common good. For such interpretations may undercut “many laws designed to protect worker health and safety,” including the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, and the Solid Waste Disposal Act. Thomas’s precise aim may be to roll back the power of the federal government to what it was before the New Deal—the aim of advocates of the so-called Constitution-in-Exile. One way or the other, however, he cannot claim merely to be applying the Constitution in its original meaning. In the Court’s recent federalism cases, it is the originalists who can be accused of being “activist judges.” (That is a development that senators should ask the current Supreme Court nominee, Judge Samuel A. Alito, about.) Still, to reiterate, Breyer needs to extend his argument.

Originalism has become the rallying cry for opposition to a series of disputed decisions since the 1960s over the regulation of contraception, abortion, and most recently, homosexual relations. These decisions include, most important, *Griswold v. Connecticut* (1965), *Eisenstadt v. Baird* (1972), *Roe* (1973), *Carey v. Population Services International* (1977), *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), and *Lawrence v. Texas* (2003). What all these decisions have in common is that they find a right nowhere enumerated in the Constitution: to “marital privacy,” to decide “whether to bear or beget a child,” to terminate a pregnancy, and to engage in intimate conduct with another person of the same sex. Since *Roe*, these rights have been justified under the Due Process Clause of the Fourteenth Amendment, ratified in 1868, which prohibits a state from depriving “any person of life, liberty, or property, without due process of law.”

Since the late nineteenth century, the Court has recognized that the Due Process Clause “guarantees more than fair process,” as former Chief Justice William Rehnquist wrote in *Washington v. Glucksberg* (1997). In other words, it is settled law that the clause is not only about legal process, but about what is due to persons in our democracy. But there, agreement more or less comes to an end.

For anti-originalists, what is protected by the Due Process Clause is open to development as our understanding of what is essential to liberty evolves. From this perspective, the Due Process Clause, because of the generality of its language, is unlike most of the instructions and prescriptions that we give in our daily lives. These instructions typically have a precise and limited purpose. For example, if I tell my students on Monday to write a two-page paper for Friday, the meaning of my utterance on Friday is the same as it was on Monday. And it would be silly (if not incomprehensible) for my students to claim that its meaning had changed over the course of the week. Yet, consider the maxim, “To thine own self be true.” If I say it to somebody today, it is true that, at least in a sense, its meaning will be the same thirty years from now as it is today. But I do not pretend to know what this maxim will mean concretely for this person thirty years from now, and it would be silly and in fact contradictory for me to insist that it must mean that she do with her life then exactly what she should do with her life now. Similarly, according to the anti-originalists, it would be senseless for the Court to insist that the Due Process Clause must mean concretely the same today as it did in 1868. Further, to insist as much would run counter to the spirit of the amendment, which after all was incorporated into the Constitution in

order to spread what the preamble calls “the blessings of liberty.” Because times have changed since 1868, so should our understanding of what is due to persons in our democracy. In Justice Anthony Kennedy’s words in *Lawrence*, it must now be recognized that “liberty presumes an autonomy of self that includes” not only “freedom of thought, belief, expression,” as has traditionally been acknowledged, but “certain intimate conduct,” which has come to be realized only over the past half-century.

By contrast, for originalists, the claim that what is protected by the Due Process Clause is open to development as “our” understanding of what is essential to liberty evolves runs counter to the spirit of self-government in a representative democracy. In his dissent in *Casey*, Scalia finds his opposition to recognizing a right to abortion on “two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.” Accordingly, “The states may, if they wish, permit abortion on demand,” but they are not required to do so under the terms of the Constitution. Instead, he holds that the question of the permissibility of abortion ought “to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”

On the questions of abortion and gay rights (think gay marriage), a strong case can be made that it is Scalia, not Breyer, who is the defender and advocate of “active liberty.” (Breyer voted with the majority in *Lawrence*.) For it is Scalia who holds that “we the people” ought to have the right here to decide what should and should not be legal. Breyer claims to find “in *the Constitution’s democratic objective . . .* a source of judicial authority and an

interpretive aid to more effective protection of ancient and modern liberty alike” (emphasis added). Yet he does not explain how or why prioritizing “the Constitution’s democratic objective” would result in the protection of “modern liberty,” that is, freedom from government regulation. To the contrary, it may seem that giving priority to the Constitution’s democratic objective would mean a reluctance to extend individual rights beyond those enumerated in the Constitution. Breyer also writes that, “from a historical perspective, one can reasonably view the Constitution as focusing upon *active liberty*, both as important in itself and as a partial means to help secure individual (modern) freedom” (emphasis added). But again, how would promoting “active liberty”—that is, the liberty of the ancients—serve as a means to help secure modern liberty? There are possible answers to this question—it may be argued, for example, that refusing to recognize the right of gay persons to have sexually intimate relationships demeans and disenfranchises these persons—but Breyer does not give any. That is a shame because these answers need both elaboration and case-by-case evaluation.

The legal philosopher Joel Feinberg observed some years ago that originalism seems to imply “a deep skepticism about the existence of moral rights.” For originalists refuse to recognize the existence of rights not explicitly articulated in the Constitution, as if there were nothing outside of the text. This is ironic because, judging by the Declaration of Independence, the founding fathers and framers of the Constitution themselves firmly believed that persons possess moral rights before the institution of government and its codification in a constitution. For the Declaration holds it to be self-evident that government is instituted in order to secure, among other unnamed rights, the inalienable rights of life, liberty,

and the pursuit of happiness. It would then make sense to read the Constitution, in particular the Ninth Amendment, as seeking to protect our rights whether they are named or not. (The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.") It can further be observed, though, that the Court's liberals and libertarians seem to share a similar skepticism. Consider the claim in the opinion of the Court in *Casey* that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery

of human life." Here a deep skepticism about truth is made to found our rights in general and the right to terminate a pregnancy in particular. So a suggestion: Maybe what is needed to bring peace, or at least civility, to our culture wars is that our jurists become more philosophical again. We do not want to be ruled by philosopher-kings, but we should want our Supreme Court justices to be able to argue in the highest terms. We should also anticipate the second, expanded edition of Breyer's book.

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“The Philosopher-Justice”

The New Republic
September 19, 2005
Cass R. Sunstein

I.

William H. Rehnquist has died, and John G. Roberts Jr. has been nominated to replace him, and another nomination is still to come: it is an understatement to say that the Supreme Court is in a period of transition. The change of personnel is taking place among conservatives of one kind or another, according to the wishes of a deeply conservative president. Yet all this must not obscure the fact that conservatism on the Court is about to encounter a serious challenge. With this small but important book, [*Active Liberty*,] Justice Stephen Breyer emerges as a leading theorist of constitutional interpretation on the highest bench in the land. At last there has appeared a direct and substantial challenge, within the Court, to the constitutional thought of Justice Antonin Scalia, who has long offered an ambitious and forceful account about how to approach the Constitution and laws of the United States. For the next decade, I think, much of the intellectual battle, within the Court and within the nation, will have to be conducted with close reference to the conflict between the starkly different constitutional theories of Scalia and Breyer. The impact of President Bush's appointments notwithstanding, liberalism is finally, at the level of ideas, pushing back.

Breyer and Scalia begin with a shared appreciation of the fact that the justices of the Supreme Court are unelected and serve for life. Since the Court has the power to invalidate the decisions of the elected branches, it is not so easy to reconcile the magnitude of its power with the national

commitment to democratic self-rule. Throughout the nation's history, many of the most prominent constitutional theorists have tried to resolve this apparent contradiction. They have argued that if the Court acts in a certain way, it can coexist comfortably with democracy after all. . . .

* * *

A . . . theory of constitutional interpretation, espoused most prominently by Scalia and also favored by Clarence Thomas, is known as “originalism.” Originalists believe that the Constitution should be interpreted to mean exactly what it meant at the time that it was ratified. If the Equal Protection Clause was originally understood to permit sex discrimination, then courts should permit sex discrimination. If the Second Amendment was originally understood to forbid gun control, then courts should forbid gun control. When President Bush praises “strict construction,” many people take him to be embracing originalism. Originalists such as Scalia reject Thayer's approach, because they are quite prepared to strike down legislation that violates the original understanding. They are mystified by Ely's idea of “representation-reinforcing” judicial review. But originalists, too, prize democracy. They emphasize that the Constitution was ratified by “We the People,” who have sovereign authority, and they want to limit the discretion of federal judges, who are after all not elected. It is true that those who ratified the Constitution are long dead, and this point creates a substantial problem for originalists; but democracy is nonetheless central to

originalist thinking about constitutional law.

As a professor at Harvard Law School, Stephen Breyer specialized in administrative law and regulatory policy. Constitutional law was not his field. As a member of the Supreme Court, however, Breyer has gradually been developing a distinctive constitutional approach of his own, one that can be seen as directly responsive to Scalia and originalism. This book announces and develops that theory. In so doing, it constitutes a major challenge not only to Scalia's principles and methods, but also to the legacy of Rehnquist, with his strongly conservative inclinations. Appearing when the Supreme Court is in transition, and when the national debate about the Court and the Constitution has degenerated into a war of slogans, Breyer's timing is uncanny.

Breyer's major theme is "active liberty," which he associates with the right of self-governance. In his own judicial work, Breyer might indeed be seen as the most consistently democratic member of the Rehnquist Court: among its nine members, he has shown the highest percentage of votes to uphold acts of Congress and to defer to the decisions of the executive branch. But Breyer . . . does not believe that the Court should uphold legislation whenever the Constitution is unclear. . . . Breyer wants the courts to take an aggressive role in some areas, above all in order to protect democratic governance.

His book comes in three parts. The first builds on Benjamin Constant's famous distinction between the liberty of the ancients and the liberty of the moderns. The liberty of the ancients involves "active liberty"—the right to share in the exercise of sovereign power. Quoting Constant, Breyer refers to the hope that the sharing of that power would "ennoble" the people's "thoughts and establish among them a kind

of intellectual equality which forms the glory and power of a people." But Constant also prized negative liberty, meaning "individual independence" from government authority. In Constant's view, which Breyer firmly endorses, it is necessary to have both forms of freedom, and thus "to combine the two together."

. . . Breyer claims that the Constitution can be viewed "as focusing upon active liberty." He thinks that constitutional interpretation should be undertaken with close reference to that central constitutional purpose. In his account, the Warren Court appreciated active liberty, and it attempted to make that form of liberty more real for all Americans. The Rehnquist Court, by contrast, may have pushed the pendulum too far back in the other direction.

So Breyer believes that an appreciation of the idea of active liberty has concrete implications for a wide range of modern disputes, and the second part of his book traces those implications. He begins with free speech. An obvious question is whether the Court should be hostile or receptive to campaign finance reform. With his eye directly on the democratic ball, Breyer suggests that if we focus on the Constitution's basic structural objective, "participatory self-government," then we will be receptive to restrictions on campaign contributions. A central reason is that such restrictions "seek to democratize the influence that money can bring to bear upon the electoral process." He thinks that some of his colleagues, most prominently Rehnquist and Scalia, have been mistaken to invoke negative liberty as a rigid barrier to campaign finance restrictions. In the same vein, he insists that the principle of free speech, regarded from the standpoint of active liberty, gives special protection to political speech, and significantly less protection to commercial advertising. He

criticizes his colleagues on the Court for protecting advertising with such aggressiveness in recent years. Breyer's interpretation of freedom of speech emphasizes democratic self-government above all.

Affirmative action might seem to have little to do with active liberty. At first glance, it poses a conflict between the ideal of color-blindness and what Breyer calls a "narrowly purposive" understanding of the Equal Protection Clause, one that emphasizes the historical mistreatment of African Americans. Directly disagreeing with Scalia and Rehnquist, Breyer tends toward the narrowly purposive approach. But he also contends that in permitting affirmative action at educational institutions, the Court has been directly concerned with democratic self-government. The reason is plain: "some form of affirmative action" is "necessary to maintain a well-functioning participatory democracy." Breyer points to the Court's emphasis on the role of broad access to education in "sustaining our political and cultural heritage" and in promoting diverse leadership. Underlining those points, Breyer argues that the Court's decision to permit affirmative action made a direct appeal "to principles of solidarity, to principles of fraternity, to principles of active liberty." In Breyer's view, it should be no surprise that the Court selected an interpretation of the Equal Protection Clause that would promote, rather than undermine, the operation of democracy.

With respect to privacy, Breyer's emphasis is on the novelty of new technologies and the rise of unanticipated questions about how to balance law enforcement needs against the interest in keeping personal information private. Owing to the novelty and the difficulty of those problems, Breyer argues for "a special degree of judicial modesty and caution." He wants to avoid a

"premature judicial decision" that would risk "short-circuiting, or pre-empting, the 'conversational' law-making process." Hence his plea is for narrow and careful judicial rulings that do not lay out long-term solutions. In Breyer's view, such rulings serve active liberty, because they refuse to "limit legislative options in ways now unforeseeable." By its very nature, a narrow ruling is unlikely to "interfere with any ongoing democratic policy debate." His argument here is important, because other members of the Court, notably Scalia, have objected to such narrow rulings on the ground that they leave too much uncertainty for the future. For Breyer, such uncertainty may be a friend of democracy.

... Breyer agrees that the federal system fits with his general theme, since that system makes "it easier for citizens to hold government officials accountable" and brings "government closer to home"; but he strongly objects to the Rehnquist Court's federalism decisions. With respect to congressional enactments, he observes that "the public has participated in the legislative process at the national level," and hence the principle of active liberty calls for deference by the Court. Breyer's special target is the anti-commandeering principle. Speaking in pragmatic terms, Breyer thinks that this prohibition precludes valuable initiatives to protect against terrorism, environmental degradation, and natural disasters—initiatives in which, for example, the national government requires state officials to ensure compliance with federal standards.

Breyer also contends that an understanding of active liberty can inform more technical debates. Consider a prominent example. Should courts rely only on a statute's literal text, or should they place an emphasis instead "on statutory purpose and congressional intent"? Sharply disagreeing with the more textually oriented Scalia,

Breyer favors purpose and intent. He emphasizes that a purpose-based approach asks courts to consider the goals of “the ‘reasonable Member of Congress’—a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem.” Breyer thinks that this approach, as compared with a single-minded focus on the literal text, will tend to make the law more sensible. He also contends that it “helps to implement the public’s will and is therefore consistent with the Constitution’s democratic purpose.” Breyer concludes that an emphasis on legislative purpose “means that laws will work better for the people they are presently meant to affect. Law is tied to life; and a failure to understand how a statute is so tied can undermine the very human activity that the law seeks to benefit.”

The third part of Breyer’s book tackles broader questions of interpretive theory and directly engages Scalia’s contrary view. Breyer emphasizes that he means to draw attention to two considerations above all: purposes and consequences. Constitutional provisions, he thinks, have “certain basic purposes,” and they should be understood in light of those purposes and the broader democratic goals that infuse the Constitution as a whole. In addition, consequences are “an important yardstick to ensure a given interpretation’s faithfulness to these democratic purposes.” Breyer is fully aware that many people, including Scalia and Thomas, are drawn to “textualism” and its close cousin “originalism”—approaches that argue in favor of close attention to the meaning of legal terms at the precise time they were enacted. He knows that such people are likely to think that his own approach is an invitation for open-ended judicial lawmaking, in a way that compromises his own democratic aspirations. But he has several responses to such criticisms.

For a start, originalist judges claim to follow history, but they cannot easily demonstrate that history favors their preferred method. The Constitution does not say that it should be interpreted to mean what it meant when it was ratified. The document itself enshrines no particular theory of interpretation. And if originalism cannot be defended by reference to the intentions and the understandings of the Framers, Breyer asks, in what way can it be defended, “other than in an appeal to consequences?” He knows that some of the most sophisticated originalists ultimately argue that their approach will have good consequences—for example, by stabilizing the law and deterring judges from imposing their own views. So even Breyer’s originalist adversaries are “consequentialist in an important sense.” (Rehnquist himself never squarely endorsed originalism, but his votes generally lined up with his originalist colleagues. His principles of constitutional interpretation will remain unspecified.)

Breyer also argues that his own approach does not at all leave courts at sea, for he, too, insists that judges must take account of “the legal precedents, rules, standards, practices, and institutional understanding that a decision will affect.” Those who focus on consequences will not favor frequent or dramatic legal change, simply because stability is important. But the important point is this: to oppose textualism and originalism is hardly to oppose the careful consideration of the Constitution and statutory law. One of the many services performed by Breyer’s book is that it should make it difficult, or even impossible, for critics to caricature the anti-originalist position. Moreover, textualism and originalism also cannot avoid the problem of judicial discretion. Their methods do not provide quite the unmediated and value-free inquiry that they imagine. “Which historical account shall we use? Which tradition shall we apply?” In the end, Breyer contends that

the real problem with textualism and originalism is that they “may themselves produce seriously harmful consequences—outweighing whatever risks of subjectivity or uncertainty are inherent in other approaches.” His ultimate goal is “a framework for democratic government” that will prove workable over time, and he believes that his kind of purposive approach, rooted in active liberty, is most likely to promote that goal.

II.

This is a brisk, lucid, and energetic book, written with conviction and offering a central argument that is at once provocative and appealing. It is not usual for a member of the Supreme Court to attempt to set out a general approach to his job; and Breyer’s effort must be ranked among the most impressive of such efforts in the nation’s long history. For that reason alone, the appearance of his book is an event of considerable importance. Scalia has long been traveling the country, making the argument on behalf of originalism and contending that there is no real alternative to it. Breyer demonstrates that on this point Scalia is wrong. Moreover, he does so in a way that is unfailingly civil and generous to those who disagree with him—and thus provides a model for how respectful argument might occur, even on a bench that has become polarized by unusually hot rhetoric.

. . . The textualist Scalia ridicules the resort to purposes, which, in his view, are often made up by willful judges. He believes that an emphasis on text, which is what after all has been enacted, promotes democratic responsibility, and also helps to discipline the judiciary. Textualism itself might easily be defended with reference to the principle of active liberty. Perhaps Scalia overstates

the constraints imposed by text, but Breyer underplays the risk that any judgments about “reasonableness” will be the judges’ own, in a way that disserves democracy itself. We may agree that any theory of interpretation has to be defended in terms of its consequences; but for interpreting statutes it is not at all clear that a purpose-based approach, focusing on consequences in particular cases, is preferable to a text-based approach, which asks judges to think little or not at all about consequences. Textualism might well lead to better results, all things considered. None of this means that Scalia’s approach is necessarily superior to Breyer’s. It means only that Breyer has not adequately engaged the possibility that, on his own consequentialist grounds, and with an eye on democratic goals, textualism in the interpretation of ordinary statutes might be better than an approach that explores purposes.

* * *

Certainly Breyer does not try to argue, in originalist fashion, that the actual drafters and ratifiers of the Constitution wanted to allow campaign finance reform, restrictions on advertising, affirmative action programs, and federal commandeering of state government. He argues instead that the idea of active liberty, which animates the Constitution, helps to justify these judgments. But exactly what kind of argument is that? The Framers of the Constitution also placed a high premium on “domestic tranquility,” to which the preamble explicitly refers. Would it be right to say that because domestic tranquility is a central goal of the document, the president is permitted to ban dangerous speech? Or that, if affirmative action threatens to divide the races in a way that compromises “tranquility,” color-blindness is the right principle after all? In any event, Breyer

emphasizes that the Constitution attempts to protect negative liberty, too. Why shouldn't a ban on campaign finance restrictions be seen to follow from that goal? If the answer lies in the idea of active liberty, why shouldn't we see campaign finance restrictions as offending, at once, both forms of liberty?

* * *

Recall that Breyer does not claim that legislative "purpose" is always something that can simply be found. "Purpose" is sometimes what judges attribute to the legislature, based on their own conception of what reasonable legislators would mean to do. If this is true for the purposes of individual statutes, it is also true for the purposes of the Constitution as well. When Breyer asserts that the "basic" purpose of the Constitution is to protect active liberty, so as to produce concrete conclusions on disputed questions, his own judgments about the goals of a reasonable constitution-maker are playing a central role in his assertion. Fortunately, Breyer's own judgments are reasonable; but he underplays the extent to which they are his own.

The same point bears on Breyer's enthusiasm for an inquiry into consequences. Consequences do matter; but some of the time it is impossible to assess consequences without reference to disputed questions of value. Consider the question of affirmative action, and suppose, rightly, that the text of the Constitution could be understood, but need not be understood, to require color-blindness. If we care about consequences, will we accept the color-blindness principle or not? Suppose we believe that affirmative action programs create racial divisiveness and increase the

risk that under-qualified people will be placed in important positions. If those are bad consequences, perhaps we will oppose affirmative action programs. An emphasis on consequences as such is only a start. To be sure, Breyer is not concerned with consequences alone; he wants to understand them with close reference to purposes, above all "active liberty." But as I have suggested, that idea, taken in the abstract, is compatible with a range of different approaches to constitutional law. It does not mandate Breyer's own approach.

None of this means that Breyer is wrong. . . . The problem is that he underplays the inevitable role of judicial judgments in characterizing purposes and in assessing consequences. But no approach to interpretation can avoid the interpreter's own judgments. A fuller account than Breyer has given here would specify the underlying judgments and attempt to defend them in far more detail. Such an account would have to show that courts are both willing and able to proceed as Breyer suggests; and it would also have to show that as compared with alternative possibilities, a democracy-centered approach of his preferred sort really would promote self-government, properly understood.

Active Liberty is a sketch, not a fully developed argument. But even sketches can change the way we look at things. With its modesty, its self-conscious pragmatism, and its emphasis on the centrality of democratic goals, Stephen Breyer's approach provides an eminently reasonable foundation for constitutional law. It is an approach that deserves a place of honor in national debates, now and in the future, about the role of the Supreme Court in American life.

COMMENTARY ON THEORIES OF INTERPRETATION

“Justice Grover Versus Justice Oscar: Scalia and Breyer Sell Very Different Constitutional Worldviews”

Slate

December 6, 2006

Dahlia Lithwick

If judicial confirmation hearings in the Senate were one-tenth as illuminating as last night's debate between Supreme Court Justices Antonin Scalia and Stephen Breyer at the Capitol Hilton, there would be a booming market for Supreme Court action figurines. Co-sponsored by the American Constitution Society and the Federalist Society (the Birkenstocks and bow ties of the legal universe), the debate has Breyer and Scalia whacking their way through the possibility of “justice,” the limitations of constitutional history, and, throughout the evening—the possibility of persuasion.

The justices agree more than they differ, and they agree about nothing so much as the extent to which they agree. They agree in the majority of the cases they decide, and they agree that “judicial activist” is a stupid label. They agree that religion cases are hard and that judicial minimalism is overrated. Still, when you're sitting close enough to see that Supreme Court justices actually wear *socks*, their differences are stark. From the moment he takes the stage, Justice Breyer looks outward. He shifts in his seat constantly to catch the eye of the moderator, ABC's Jan Crawford Greenburg, and then to make eye contact with individual audience members. When Scalia speaks, Breyer nods and bobs. Justice Scalia turns inward, folding up his arms and gazing raptly into the middle distance. As Breyer speaks, Scalia first smirks, then giggles, then sort of erupts with a rebuttal, usually aimed right at the tips of his shoes. Where Breyer is ever

striving to connect to the world, Scalia is happiest in his head. Throughout the debate, Breyer continues to measure, aloud, whether he and Scalia are “making progress.” Scalia laughs that Breyer's hopes for the evening are too high.

Scalia is charming and—as ever—riotously funny. For each time Breyer says his own constitutional approach is “complicated” or “hard,” Scalia retorts that his is “easy as pie” and a “piece of cake.” And if this debate mirrors a marketplace of ideas, Breyer will make the sale through the earnest personal connection of a Wal-Mart greeter, while Scalia opts for the aloof certainty of the Tiffany's salesman: “Sure, you can buy some other, cheaper constitutional theory, but really. Ew.”

Each of the justices explains how he approaches a case: Breyer has six interpretive tools—text, history, tradition, precedent, the purpose of a statute, and the consequences. In his view, it's a mistake to ignore the last two. Scalia replies that to look at either the purpose or the consequence of a statute is to invite subjectivity and beg the question.

Scalia bristles when Crawford Greenburg quotes back a line about the “living Constitution” being “idiotic.” “You are misquoting me,” he says. “I was describing the argument in favor of the living Constitution—that it's a living organism that must grow or become brittle and snap.” And

he can't resist adding, "That *is* idiotic." He observes that there is a difference between applying the Constitution to a changing world—to television and the Internet, say—and to "morphing" old ideas to mean precisely their opposite. How could a Constitution that clearly allowed for the death penalty now explicitly prohibit it? "That's the living Constitution I am talking about, and it's the one I wish would die."

Breyer points out that the constitutional language of "cruel and unusual" is *not* clear, before chuckling, "I was making a lot more progress before." Breyer describes the job of justices as patrolling the boundaries—making certain the legislature doesn't "go too far" at the margins. The words of the Constitution "don't explain themselves," he says. Scalia retorts that the Bill of Rights itself sets out the limitations on legislatures and that a majority set out these limitations when it ratified the Constitution. Those are the real boundaries, not the boundaries invented by each new generation of jurists.

Breyer says that if the only thing that matters is historical truths from the time of the Constitution, "we should have nine historians on the court." Scalia says, "It's not my burden to prove originalism is perfect. It's just my burden to prove it's better than anything else." He adds that a court of nine historians sounds better than a court of nine ethicists.

The justices enter into a side skirmish over the high court's religion jurisprudence—a skirmish that launches Scalia into a delicious impression of the Frenchman who described to him the difference between France and America: "Justice Scalia," he minces, "France is a country with 300 cheeses and two religions. The United States is a country with two cheeses and 300 religions."

Breyer cracks up: "But why does the

Frenchman have an Italian accent?"

Both justices agree the words *activist judge* are basically useless. "An insult," says Breyer. A "conclusory label," says Scalia. Asked if he ever calls Breyer an activist, Scalia quips: "I would never call him that to his face."

Breyer selects *Brown v. Board of Education* as a case that was criticized as activist but is today recognized as a correct application of the Equal Protection clause. It's an odd choice in light of the desegregation cases argued at the court just this week. *Brown's* indisputable "correctness" has, after all, possibly laid the groundwork for its own demise.

Both justices agree that Chief Justice John Roberts' affection for narrower, unanimous cases is probably mistaken: says Scalia, "If you wanted to decide almost nothing at all and decide the case on such a narrow ground that it will be of very little use to the bar in the future, you can always get nine votes." He notes that it helps the bar not at all to have cases decided on narrow technicalities. Breyer agrees that you don't want nine votes just to have nine votes. Scalia also disputes Roberts' distaste for "boldness" in opinion writing: "The law doesn't have to be dull," he grins, explaining that he writes his dissents for the case books. "Originalism used to be an orthodoxy," he sighs. "Now, there are only two certified originalists on the court, myself and Justice Thomas." He waves his arm hopelessly at the 900 assembled lawyers. "I don't hope to persuade you. It's too late for you guys." But he says he's still hoping to win over the law students.

Here is where Breyer reveals just how much these men truly differ. Because, says he, he writes his dissents to *persuade*. His cell phone erupts here. He describes how after

finishing each dissent, he proclaims to his wife that “this time it will really persuade them.” He laughs, explaining that over time, that always changes to a hope that he’ll persuade them and then to regret that it didn’t. Scalia offers the view that nobody at Supreme Court case conferences is persuaded by the other justices. Breyer thinks his colleagues’ minds can be changed with good arguments.

Breyer celebrates the benefits of the many diverse and contrasting views at the high court. Scalia mourns the fact that they don’t all share Scalia’s views. The discussion is

broad and deep, collegial and frank. And as we always knew from oral argument, there are miles and miles separating Scalia’s elegantly simple interpretive worldview from Breyer’s murkier, more hopeful one. Stephen Breyer’s jurisprudential Grover—sweet and optimistic and eager-to-please—is working the room, confident he’ll sell us on his constitutional theory, one lawyer at a time. And Antonin Scalia’s constitutional Oscar the Grouch—frustrated and misunderstood, yet somehow more lovable for it—doesn’t even try to close the deal. He doesn’t need us to vindicate him. He’s confident history will do that.

“Alive and Kicking: Why No One Truly Believes in a Dead Constitution”

Slate

August 29, 2005

Jack Balkin

We are all living constitutionalists now. But only some of us are willing to admit it.

The notion of a Constitution that evolves in response to changing conditions didn't start with the Warren Court of the 1960s; it began at the founding itself. The framers expected that their language, not their intentions, would control future generations. They created, in John Marshall's words, a “constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”

The specific metaphor of a living, evolving Constitution arose in the 1920s to explain how a broad view of federal power that came with World War I (and later, the New Deal) was consistent with the American constitutional tradition. The Constitution's words, Justice Oliver Wendell Holmes Jr. wrote in 1920, “called into life a being” whose “development . . . could not have been foreseen completely by the most gifted of its begetters.” Hence we must interpret our Constitution “in the light of our whole experience and not merely in that of what was said a hundred years ago.”

Holmes was right: The living Constitution is central to the American constitutional tradition, so central that even its loudest critics actually believe in it. Many Americans fail to realize how much of our current law and institutions are inconsistent with the original expectations of the founding generation. A host of federal laws securing the environment, protecting workers and consumers—even central

aspects of Social Security—go beyond the original understanding of federal power, not to mention most federal civil rights laws that protect women, racial and religious minorities, and the disabled from private discrimination. Independent federal agencies like the Federal Reserve Board, the Federal Trade Commission, and the Federal Communications Commission would all be unconstitutional under the original understanding of the Constitution. Presidential authority would be vastly curtailed—including all the powers that the Bush administration regularly touts. Indeed, most of the Bush administration's policy goals—from No Child Left Behind to national tort reform—would be beyond federal power.

Conversely, a vast number of civil-liberties guarantees we now expect from our Constitution have no basis in the original understanding. If you reject the living Constitution, you also reject constitutional guarantees of equality for women, not to mention *Brown v. Board of Education* and *Loving v. Virginia*, which struck down laws banning interracial marriage. Liberals and conservatives alike would be discomfited. The original understanding cannot explain why the Constitution would limit race-conscious affirmative action by the federal government, nor does it justify the current scope of executive power.

Even the Supreme Court's two professed originalists, Justices Antonin Scalia and Clarence Thomas, believe in the living Constitution. Scalia's concurrence in *Raich*

v. Ashcroft—this term’s medicinal-marijuana case—demonstrates that he long ago signed on to the idea of a flexible and broad national power that came with the New Deal. And Thomas argues for First Amendment protections far broader in scope than the framers would have dreamed of. Both Justices joined the majority in *Bush v. Gore*, which relied on Warren Court precedents securing voting rights under the 14th Amendment. There was just one tiny originalist problem with that logic: The framers and ratifiers of the 14th Amendment didn’t think it applied to voting.

Nobody, and I mean nobody, whether Democrat or Republican, really wants to live under the Constitution according to the original understanding once they truly understand what that entails. Calls for a return to the framers’ understandings are a political slogan, not a serious theory of constitutional decision-making.

In fact, the contemporary movement for originalism began as a conservative political slogan used to attack the Warren Court’s decisions on race and criminal procedure. It mutated from a concern with the original intentions of the framers, to the intentions of the ratifiers, to how the public would have understood and applied the Constitution’s words at the time they were adopted.

Today’s originalism is hauled out to attack decisions that judges and politicians don’t like. But when it comes to decisions they do like, or would be embarrassed to disavow, the same judges and politicians quickly change the subject. In practice contemporary originalists pick and choose when they will demand fidelity to original understanding. Sometimes they even mangle the history to get to results they like.

Originalists make two standard objections to the idea of a living Constitution. The first is

that fidelity to law and a written Constitution requires fidelity to the original understanding. Anything else is not legal interpretation and is per se illegitimate. But a vast number of existing statutes and constitutional doctrines are inconsistent with the original understanding. Why are any of them law?

Some originalists argue that we should respect non-originalist precedents only if lots of people have relied on them. This doesn’t explain why those precedents are legitimate interpretations according to the theory; indeed, it suggests that legitimacy comes from public acceptance of the Supreme Court’s decisions, not from fidelity to original understanding. Moreover, this strategy allows originalists to pick and choose which rulings to keep, based on their judgments of when reliance is real or justified. So, strict scrutiny for federal affirmative action stays, but the right of privacy goes. We’ll keep presidential power on steroids, thank you, but jettison the Endangered Species Act.

But there’s a more important problem here: Non-originalist decisions that guarantee race and sex equality, that protect free speech and the rights of criminal defendants, and that give Congress power to protect the environment and secure equal civil rights are not unfortunate errors that we are just stuck with because of “reliance.” They are some of our country’s proudest achievements. There’s something deeply wrong with a theory of constitutional interpretation that treats some of the key civil rights decisions of the 20th century as mistakes that we are stuck with. For if decisions like *Brown*, *Loving*, *Craig v. Boren*, and *Griswold v. Connecticut* are mistakes, we should read them as narrowly as possible and overturn them at the first opportunity. But that’s not how Americans regard these decisions. They are evidence of our gradual progress as a

nation. They are what make us a country conceived in liberty and dedicated to the proposition that all people are created equal.

The great irony is that living constitutionalism rests on much firmer jurisprudential foundations. Originalists are right that the Constitution is binding law, but they confuse the constitutional text—which is binding—with original understanding and original intentions, which are not. A living Constitution requires that judges faithfully apply the constitutional text, given the meanings the words had when they were first enacted, applying those words to today's circumstances. Original meaning does not mean original expected application. For example, the Constitution bans cruel and unusual punishments. But the application of the concepts of "cruel and unusual" must be that of our own day, not 1791. Living constitutionalists draw upon precedent, structure, and the country's history to flesh out the meaning of the text. They properly regard all of these as legitimate sources of interpretation. In fact, most people who call themselves originalists agree; even they don't regard original understanding as controlling in all cases.

Because the basic jurisprudential claim that original understanding is the only legitimate method of interpretation is overstated, originalists usually make a second, more pragmatic argument: A living Constitution offers insufficient constraints on judicial power. The irony of this charge is that in practice originalism doesn't provide any greater constraint. As we've seen, originalist judges pick and choose when to invoke original understanding and when to rely on existing precedents they like. Justices Scalia and Thomas, for example, haven't acknowledged in their opinions that the Congress that passed the 14th Amendment also engaged in affirmative action for

blacks; both have pushed hard for ever-greater protection of commercial speech without any evidence of the original understandings of 1791. If we want examples of judges just making stuff up to satisfy their personal predilections, so-called originalist judges offer plenty of examples.

Originalists are right: Constraining judges is important. But originalists are looking in the wrong place. Lower courts are strongly constrained by previous precedent. Constraints on the Supreme Court come from two sources—the professional legal culture and constitutional structure.

Legal culture demands that arguments depend on the familiar categories of text, history, precedent, and structure. These modalities allow considerable leeway, but they also genuinely constrain. Even though the Supreme Court chooses the most controversial cases, many, if not most, of its decisions are unanimous or include both liberals and conservatives in the majority.

The second, and more important, background constraint on the Supreme Court comes from the constitutional structures of American government. Because the court is a multimember body, centrist judges in each generation, like Lewis Powell or Sandra Day O'Connor, determine the path of doctrine, especially in the most controversial areas. In addition, new Supreme Court appointments tend to respond to the vector sum of the political forces at play at the time of confirmation. In fact, political scientists have shown repeatedly that the Supreme Court never strays too far too long from the center of the national political coalition, and when it does, new appointments tend to push it back in line. The Supreme Court held out against Franklin Roosevelt's New Deal for a few years but eventually gave in. The New Deal settlement, which Justice Scalia

himself believes in, came from overwhelming public sentiment in the '20s and '30s that the Constitution had to be interpreted in light of the needs of the time; that ours was a living Constitution.

Since the nation began, critics of the Supreme Court have argued that judges are about to take over the country and rule by fiat. It hasn't happened yet. What critics don't recognize is this: Checks and balances built into the system guarantee that the court rarely opposes the national political coalition for long, and it usually cooperates with it. It's a good bet that people who complain the loudest about the court being countermajoritarian represent at most a regional majority, not a national one. People in the political center usually get pretty much what they want.

And that brings us to the real secret of why we have a living Constitution. In the long run, the Supreme Court has helped secure greater protection for civil rights and civil liberties not because judges are smarter or

nobler, but because the American people have demanded it. When social movements like the civil rights movement or the feminist movement convince the center of the country that their claims are just, the court usually comes around. Sometimes it gets ahead of the center of public opinion, and sometimes it's a bit behind. But in the long run it reflects the national mood about the basic rights Americans believe they deserve. The great engine of constitutional evolution has not been judges who think they know better than the American people. It has been the evolving views of the American people themselves about what rights and liberties they regard as most important to them.

Rather than a set of shackles designed by long-dead slave-owners, the framers bequeathed to us a Constitution that could adapt to the needs and aspirations of each succeeding generation. Their faith in the possibilities of the future, and our enterprise in realizing that future, have made us the great and free nation we are today.

“Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, too)”

Slate

September 21, 2005

Akhil Reed Amar

Should constitutional interpreters embrace the document’s original intent or evade it? Several leading liberal scholars are urging Americans to choose Door No. 2, because the original- intent game is doomed to reach intolerably conservative—indeed, reactionary—results.

But is it? And once we reject that game, what are the proper legal rules to play by?

The present moment is a perfect time to ponder such foundational questions: The Rehnquist Court is now officially history, two new justices will soon be in place, and the Roberts hearings have introduced a new generation of channel-surfers to detailed debates about constitutional philosophy. Closer to home (i.e., the home page of this Web site), several recent *Slate* postings by Jack Balkin, Dahlia Lithwick, and Emily Bazelon have made interesting contributions to the original-intent debate.

In late August, Balkin—my Yale colleague and sometime co-author—correctly pointed out that Justices Antonin Scalia and Clarence Thomas, while proclaiming themselves faithful followers of original intent, do not always practice what they preach. For example, these two justices have consistently voted against affirmative action but have never explained how their votes can be squared with historical evidence that the Reconstruction Congress itself engaged in affirmative action.

But without more, this is merely an argument that Scalia and Thomas should be

more consistent and less hypocritical: They should respect original intent across the board—at least in the absence of some compelling legal counterargument, such as justifiable reliance on past practice or precedent.

Balkin himself has reached a wholly different conclusion: Modern constitutional interpreters, says he, should simply stop trying to heed the original intent of the men and women who ratified and amended the document. In his opinion, interpreters should focus on the text, not the original intent.

As I see it, text without context is empty. Constitutional interpretation heedless of enactment history becomes a pun-game: The right to “bear arms” could mean no more than an entitlement to possess the stuffed forelimbs of grizzlies and Kodiaks. (And if history no longer constrains, why should spelling? Maybe the Second Amendment is about the right to “bare arms” and other body parts—e.g., nude dancing.)

How about Balkin’s argument that originalism generally leads to outrageously conservative results? Another leading liberal light, Cass Sunstein, has said much the same thing of late. I disagree. The framers themselves were, after all, revolutionaries who risked their lives, their fortunes, and their sacred honor to replace an Old World monarchy with a New World Order unprecedented in its commitment to popular self-government. Later generations of reformers repeatedly amended the Constitution so as to extend its liberal

foundations, dramatically expanding liberty and equality. The history of these liberal reform movements—19th-century abolitionists, Progressive-era crusaders for women's suffrage, 1960s activists who democratized the document still further—is a history that liberals should celebrate, not sidestep.

Consider, for example, the landmark 1954 case of *Brown v. Board of Education*. Both Sunstein and Balkin say that *Brown* broke with the history underlying the Civil War amendments, which, they claim, plainly permitted racial segregation. But the 14th Amendment, ratified in 1868, undeniably demanded that government treat blacks and whites with equal respect, equal dignity, and equal protection. All Americans—black and white alike—were proclaimed equal citizens by that amendment. True, some framers of this amendment did say that some segregation laws might be permissible. But in saying this, many of them were envisioning a postwar world in which both races in general might prefer separate spaces (as most men and women today probably prefer sex-segregated bathrooms in public places). In such a world, they believed, segregation would not always be unequal.

But the Reconstructionists never said that segregation would always and automatically be constitutional. The Constitution's text does not say that all citizens are equal "except for segregation laws." Rather, it uncompromisingly demands equality of civil rights—no ifs, ands, or buts. In fact, most Reconstructionists understood that a law whose statutory preamble explicitly proclaimed whites superior to blacks would be plainly unconstitutional. The question in both *Plessy v. Ferguson* (in 1896) and *Brown v. Board* (in 1954) was thus a simple one, and simpler than these constitutional scholars might suggest: Was Jim Crow in

fact equal? Or was it instead a law whose obvious purpose, effect, and social meaning proclaimed white supremacy in deed rather than in word? For any honest observer in either 1896 or 1954, the question answered itself: Jim Crow was plainly designed to demean the equal citizenship of blacks—to keep them down and out—and thus violated the core meaning of the 14th Amendment. So, *Brown* is in fact an easy case for those who take text and history seriously. (Note, by the way, that this basic view of *Brown*—embraced by a wide range of scholars from Robert Bork on the right to Charles Black on the left—is somewhat different than the more controversial originalist theory championed by the towering judge/scholar Michael McConnell, whose ideas Emily Bazelon has recently explored.)

Another key originalist point that is often overlooked derives from the 15th Amendment, which was ratified two years after the 14th and reflected a far more robust vision of black rights, including equal-suffrage rules. This amendment was intrinsically integrationist, envisioning a world in which blacks and whites would work side by side at the ballot box, in the jury box, and in legislatures across the country. As the first Justice Harlan understood in *Plessy* (though many modern scholars seemed to have missed the point altogether), the enactment history of the 15th Amendment thus powerfully reinforced various 14th Amendment arguments against Jim Crow.

Yes, it's true that on today's court the two leading originalists are both conservative, but perhaps the court's most influential originalist in history was the great Hugo Black—a liberal lion and indeed the driving force behind the Warren Court. . . . It's also worth remembering that the most towering originalist scholar of the 1970s was also a

professed liberal, John Hart Ely.

In short, there are many reasons to question the idea that modern liberals should abandon constitutional history rather than claim it as their own. This short posting is not the place to present all the historical evidence that some modern anti-originalists are

overlooking—I've tried to do that elsewhere (in an article in the *Harvard Law Review* published in 2000, and, more comprehensively, in my new book being published this month). But I hope I've said enough here to convince thoughtful anti-originalists to take a second look at the Constitution's first principles.

“In Praise of Judicial Modesty”

National Journal

March 18, 2006

Stuart Taylor

During the hiatus between Supreme Court confirmation battles, we may as well settle the clash between the conservative and liberal approaches to constitutional interpretation. The battle lines are familiar. Conservatives, led by Justices Antonin Scalia and Clarence Thomas, say that the sole legitimate approach is to follow the literal text and original meaning of constitutional provisions and amendments. Justices’ policy preferences should play no role, assert conservative “originalists.” But the claim is undercut somewhat by the consistency with which the conservatives’ votes on abortion, religion, race, gay rights, and many other big issues happen to fit their policy preferences.

Liberals and many moderates prefer the “living-Constitution” approach, which has been dominant at least since the Warren Court. It involves using ancient but conveniently vague constitutional phrases to enforce “evolving standards of decency,” to promote equality, and to vindicate what sometimes-liberal Justice Anthony Kennedy likes to call “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Not surprisingly, constitutional evolution in the hands of liberals supports liberal policies.

Each school of thought is most persuasive in debunking the other. Justice Stephen Breyer skewers originalism in his 2005 book, *Active Liberty*: “Why would the Framers, who disagreed even about the *necessity* of including a Bill of Rights in the Constitution, who disagreed about the *content* of the Bill of Rights, nonetheless

have agreed about *what school of interpretive thought* should prove dominant in interpreting the Bill of Rights in the centuries to come?”

Even when the original meaning is undisputed, it is often intolerable to conservatives as well as liberals. Many Framers did not see the flogging or even the execution of a 12-year-old for theft as “cruel and unusual punishment,” for example. And nothing in the text or original meaning of the Constitution was designed to bar the federal government from discriminating based on race (or sex). This has not stopped Scalia or Thomas from voting to strike down federal racial preferences for minorities. Nor have they hesitated to invoke debatable interpretations of the Constitution to attack laws regulating campaign finance and imposing monetary liability on state governments.

The living-Constitution approach may be even more problematic, because it has cut a wider swath through democratic governance with even less basis in the written Constitution.

If the Constitution is an “invitation to apply current societal values,” as Scalia has asked, “what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? . . . A democratic society does not, by and large, need constitutional guarantees to ensure that its laws will reflect ‘current values.’ Elections take care of that.”

Consider *Roper v. Simmons*, last year’s decision barring the death penalty for any

murder committed before the killer's 18th birthday. This would have been good legislation, in my view. But it was bad constitutional law.

Justice Kennedy's claim for the 5-4 majority that modern Americans had reached a "consensus" that no juvenile murderer should ever get the death penalty was bogus: A majority (20) of the 38 states with the death penalty still allowed such executions. Kennedy's reliance on the laws of almost all foreign nations against the juvenile death penalty was a fig leaf for his personal moral preferences. So was his twisting of the relevant literature on juvenile psychology to suggest misleadingly that minors are incapable of mature moral reflection. And as Judge Richard Posner of the federal appeals court in Chicago points out, Kennedy was tellingly selective in his attention to social-science literature: He ignored the studies suggesting that the death penalty may deter some would-be killers and thus save lives.

In a variation on the living-Constitution approach, Breyer argues in *Active Liberty* for interpretations designed to promote "participatory self-government" by voters. But Breyer's support for the 1973 decision that ended participatory self-government on abortion—*Roe v. Wade*—casts doubt on his seriousness. Especially since his book does not even mention this, the biggest and most controversial decision of the past 60 years.

The bottom line is that nonadherents understandably see originalism and living constitutionalism alike as smoke screens for imposing the justices' personal policy preferences.

This is not healthy. How might we avoid the worst excesses of each approach?

The best answer is judicial modesty, in the sense of great hesitation to second-guess

decisions by other branches of government. Embraced in general terms by then-Judges John Roberts and Samuel Alito during their Supreme Court confirmation hearings, the judicial-modesty approach is expounded more fully in a November 2005 *Harvard Law Review* article by Posner, a prolific and ideologically eclectic legal scholar.

Posner begins by puncturing the myth that judging can ever be completely apolitical. In constitutional cases, he shows, the Court is *unavoidably* "a political body . . . exercising discretion comparable in breadth to that of a legislature." The most sincere attempt at "lining up the facts alongside the constitutional text" usually provides no more objective a basis for preferring one outcome to another than for "preferring a margarita to a cosmopolitan."

Next Posner explains that the justices would look and act less like political manipulators if they "acknowledged to themselves the essentially personal, subjective, and indeed arbitrary character of most of their constitutional decisions." Such self-awareness is rare among justices, Posner says, because it "would open a psychologically disturbing gap between their official and their actual job descriptions."

Instead, "cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court justices are at risk of acquiring exaggerated opinions of their ability and character."

The path of wisdom would be to acknowledge that "the law made me do it" is usually no more than a "rationalization for the assertion of power" of an essentially political nature, Posner adds. Justices who understood this would probably be "less aggressive upsetters of political and policy apple carts than they are."

Judicial modesty also converges with a pragmatic focus on what will be the actual consequences of a proposed decision. Three of Posner's examples—cases in which “the law” did not dictate any particular outcome—are illustrative.

First, he applauds the 5-4 decision (over a liberal dissent) in 2002 to allow Cleveland to finance vouchers enabling low-income children to leave failed public schools for mostly Catholic private schools. The major disputes underlying the case—over whether the Cleveland experiment would work well for children and whether it would lead to sectarian conflict—turned on factual projections beyond the Court's competence.

“Actual social experiments are necessary to generate the data needed for intelligent constitutional rule-making,” explains Posner. “The pragmatist wants to base decisions on consequences, and it is very difficult to determine the consequences of a challenged policy if you squelch it at the outset.”

Second, Posner deplores as “injuriously unpragmatic” the unanimous 1998 ruling against President Clinton in the Paula Jones lawsuit: “It should have been obvious to the justices that forcing the president to submit to a deposition in a case about his sexual

escapades would be political dynamite that would explode and interfere with his ability to perform his duties.”

Third, Posner shows sympathy for Justice Breyer's solo, split-the-difference approach in two 5-4 decisions last June involving displays of the Ten Commandments. In one, Breyer joined liberals in invalidating the recent, locally controversial installations of Decalogue plaques in two Kentucky courthouses. (“I have no settled view” on that decision, Posner notes.) In the other, Breyer joined conservatives in upholding a Ten Commandments monument on the grounds of the Texas state Capitol, where it had stood for 40 years, amid various secular monuments, with little ado.

Many critics (including me) have faulted Breyer's hairsplitting for leaving the law unclear. Not so Posner: “Compromise is the essence of democratic politics and hence a sensible approach to dealing with indeterminate legal questions charged with political passion. . . . To give a complete victory to the secular side of the debate (or for that matter to the religious side) could be thought at once arrogant, disrespectful, and needlessly inflammatory.”

Amen. Or, if that offends you, right on.