

## FOREWORD

# Justice Scalia's Originalism: Original or Post-New Deal?

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The Cato Institute's Center for Constitutional Studies is pleased to publish this 15th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended plus a look at the term ahead—all from a classical liberal, Madisonian perspective, grounded in the nation's first principles, liberty through limited government. We release this volume each year at Cato's annual Constitution Day conference. And each year in this space I discuss briefly a theme that seemed to emerge from the Court's term or from the larger setting in which the term unfolded.

A single event overshadows the October 2015 term, of course: the unexpected death on February 13, 2016, of the Court's senior member, Justice Antonin Scalia. Quite apart from its effect on the balance of the term, and its implications in this extraordinary election year for the term ahead, the untimely loss of so powerful and influential an intellect is likely to be felt for years to come. More than anyone on or off the Court, Justice Scalia worked to secure the rule of law by restoring originalism as the proper method for deciding cases. Rejecting the modern "living Constitution" and the wide discretion that approach to constitutional interpretation affords a judge, he argued brilliantly, often in scintillating dissents, that to preserve the rule of law—and, presumably, the legitimacy it entails—judges must ground their decisions in the statutory or constitutional text as understood by those who wrote or ratified it.

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Thus stated, that is the approach we have taken from the inception of Cato's Center for Constitutional Studies in 1989 and the launch of this *Review* during the October 2001 term—although in its application we have often differed with Justice Scalia. In this anniversary volume of the *Review*, therefore, affording as it does an opportunity to step back and take stock, it may be useful to explore what is behind those differences. We get a hint of that from what I wrote in this space on the occasion of the *Review*'s 10th anniversary, quoting there from our inaugural volume's foreword: "What distinguishes Cato's from other reviews, apart from its appearance soon after the term ends, is its perspective: 'We will examine [the Court's] decisions and [upcoming] cases in the light cast by the nation's first principles—liberty and limited government—as articulated in the Declaration of Independence and secured by the Constitution, as amended.'" As is well known, Justice Scalia was disinclined to draw connections between the "aspirational" Declaration and the Constitution.

Properly, textualism begins, of course, with the text, and properly ends there more often than not—but not always. When more is required to decide a case, the crucial question is where to turn, legitimately, for more. Beyond structural considerations, we have generally argued for turning to the moral, political, and legal theory that stands behind and informs the Constitution, giving its sometimes broad text the legitimacy it enjoys. Justice Scalia can be understood as having agreed, but he reads that underlying theory differently—ironically, as a modern democrat. We answer that the Framers did not give us a democracy. They gave us a republic. Their main concern was to secure liberty, sometimes by democratic means, but more fundamentally through a Constitution that, to be sure, was ratified democratically (in a fashion), but thereafter limited majoritarian rule through a host of restraints that reflect "The 'Higher Law' Background of American Constitutional Law," as the eminent legal historian, Edward S. Corwin, titled his seminal essays in the 1928–29 *Harvard Law Review*. We differ with Justice Scalia, in short, over the law itself.

It is that fundamental difference between libertarian and democratic originalism, between the original and the modern, the classical and the post-New Deal understanding of our basic law and the role of the judge under it, that I want to explore briefly here, for those labels describe not only the difference between our and Justice

Scalia's constitutional jurisprudence but between the two strands of originalism that have vied for supremacy for several decades now among classical liberals and conservatives. To do that I will draw less from Scalia's many opinions, where his approach is less systematically articulated and discerned, than from the Tanner Lectures he gave at Princeton as set forth in his 1997 *A Matter of Interpretation*. But let me begin, by way of context, with an outline of the approach classical liberals have generally followed, originally and today, touching along the way on some of the points on which we and Justice Scalia have differed. I will then look more systematically at his approach, showing in the end how it truly is modern, democratic, and, indeed, post-New Deal originalism.

### **Classical Liberal Originalism: Phase I**

We take it as given that the Constitution, its more obscure passages notwithstanding, was meant to be understood by the average American. After all, the writings of "Publius" urging its ratification appeared not in learned journals but in the newspapers of the day. And although the document was dedicated mainly to setting forth a practical plan for government, it begins, in the Preamble, by outlining the theory of moral and political legitimacy that underpins and informs that plan. In particular, all power rests initially with "We the People"; it is we who "ordain and establish this Constitution," which once ratified authorizes the government that will be instituted and empowered pursuant to it. And note especially that the government does not give the people their rights; they already have their rights, their natural rights, through which they ordain and establish the Constitution and authorize and institute the government legitimately. Indeed, far from receiving our rights from government, government receives whatever powers it has from us; through ratification, we authorize those specifically enumerated powers—and only those.

Tracking Thomas Jefferson's argument in the Declaration of Independence, the Preamble is textbook state-of-nature theory straight out of John Locke. Yet Justice Scalia has argued that, unlike in the Declaration, there is no "philosophizing" in the Constitution; and he has called the Preamble "aspirational," distinguishing its provisions from the "operative provisions" that follow. To be sure, the Preamble is aspirational, but its provisions are also "operative." They describe

how the new government is to be brought into being legitimately—through the consent of the people who declare that they “do ordain and establish this Constitution,” the further details of which are more particularly described in Article VII. And that initial consent, followed by the subsequent consent of ratification, makes the Constitution, including its Preamble, positive law.

It needs to be added, however, that many of the document’s provisions, especially after a bill of rights was appended, reflect natural law as well, or at least the natural rights strain that emerged in the 17th and 18th centuries, grounded in reason and experience and aimed at securing individual liberty under limited government. The powers the Constitution authorizes are thus limited: first, by the ends listed in the Preamble—“to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity”; second, by the subsequent enumeration of powers “herein granted,” plainly implying that not all power was therein granted; third, by the many checks on power interlarded throughout the document; and fourth, concerning the theoretical heart of the matter, by the practical limits of consent as a foundation for legitimacy. The practical difficulties of obtaining unanimity, that is, leads to majoritarianism, entailing the use of force against those who do not consent and hence limiting the legitimating power of consent.

Thus, for those several reasons, the Constitution, from its inception, established a clear presumption for individual liberty and against collective undertakings. And those presumptions, for and against, were reinforced further by the addition of the Bill of Rights two years later. That addition made explicit what was implicit in the Necessary and Proper Clause, that it would be “improper” not only for Congress to intrude on the powers of the other branches but on state power as well, as the Tenth Amendment implies, or to violate our retained rights, enumerated and unenumerated alike, as the prior nine amendments provide.

A few words are needed on the Ninth Amendment, of course, since many conservative textualists, including Justice Scalia, have either ignored it or argued it away. As the amendment says, in effect, the previously enumerated rights do not exhaust the rights we have against the federal government. And as it states expressly,

that enumeration of rights “*shall not be construed to deny or disparage others retained by the people*” (emphasis added). Clearly, we cannot “retain” what we do not first *have* to be retained—the natural rights we had in the state of nature, which we retained when we constituted the federal government, rights that are now recognized as positive legal rights through the amendment.

The history behind the amendment only buttresses that reading. In particular, Alexander Hamilton, James Wilson, and others opposed adding a bill of rights, arguing that one was both unnecessary and dangerous: unnecessary because, by operation of the doctrine of enumerated powers, no power was given to violate rights; and dangerous because it would be impossible to enumerate all of our rights, but the failure to do so would imply, by the *expressio unius* canon of construction, that only those rights that were enumerated were meant to be protected. To address that problem, the Ninth Amendment was written.

Yet if the modern conservative view of the amendment were correct—that enumerated rights alone were meant to be protected—that would imply that during the two years when we had no bill of rights, we had no rights against the federal government save the few found in the original Constitution. Or if the response is, with Hamilton and Wilson, that all of our rights were protected by the doctrine of enumerated powers, does that mean that by adding a bill of rights we actually *lost* rights—all the rights previously protected under the enumeration of powers but now lost due to the inability to enumerate them all?

Far sounder it is to read the Ninth Amendment’s text for what it says: We have vastly more rights than can be enumerated in a bill of rights, and it falls to judges, instructed neither to “deny” nor “disparage” them, to derive those rights from the Constitution’s libertarian premises when adjudicating challenges brought against majoritarian legislation. Except where legislative discretion is appropriate, as in line-drawing contexts concerning, say, nuisance, risk, and the like, it does not fall to democratic majorities to do that “derivation” by legislating away the very rights that are at issue before the court.

Thus, to complete this summary of the Framers’ Constitution, with the Ninth and Tenth Amendments we have a recapitulation of the moral, political, and legal vision that was first set forth in the Declaration and the Constitution’s Preamble. The Ninth Amendment makes

it clear that we have both enumerated and unenumerated rights against the federal government. The Tenth Amendment makes it equally clear that the federal government has only those powers we have delegated to it, the balance, save for those denied to the states, being reserved to the states or to the people. In sum, it is a vision of individual liberty under constitutionally limited government.

### **Classical Liberal Originalism: Phase II**

But while the powers of the federal government were “few and defined,” James Madison wrote in *Federalist 45*, the powers reserved to the states were “numerous and indefinite”—and therein lay the problems ahead, stemming especially from the Constitution’s oblique recognition of slavery to achieve union among the states. The Framers knew of course that this “peculiar institution” was inconsistent with their founding principles. They hoped it would wither away in time. It did not. It took a civil war and the ratification of the Civil War Amendments to bring slavery to an end. But textually, those amendments did more—much more.

We come thus to our first great “constitutional revolution”—accomplished legitimately by constitutional amendment—the reordering of the original division of powers, or federalism. As the Court had held in *Barron v. Baltimore* in 1833, the guarantees contained in the Bill of Rights applied only against the government created by the document to which it was appended, the federal government. The Civil War Amendments changed that. In particular, the Fourteenth Amendment, for the first time, provided for federal remedies against states that violated their citizens’ rights. Section 1 defined federal and state citizenship and then said that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

As both textual and contextual evidence makes clear, the Privileges or Immunities Clause was meant to be the principal font of substantive rights under the amendment. Unfortunately, in the infamous *Slaughterhouse Cases* of 1873, barely five years after the amendment was ratified, the Court effectively eviscerated the clause. There followed an uneven, episodic Fourteenth Amendment jurisprudence that remains unsettled to this day, its roots in that decision. Had that

clause been properly interpreted and applied, rights good against the federal government, including natural rights protected under the Ninth Amendment as outlined above, would have been good against state governments as well, save for those rights peculiarly related to distinct federal or state functions. (To illustrate that final point, an ordinary criminal suspect, assuming there were no federal connection such as the crime having taken place on federal property, would have immunity from federal prosecution, there being no general federal police power, but not from state prosecution, since the general police power is reserved to the states.)

With the Privileges or Immunities Clause no longer available, courts turned to the less substantive Due Process and Equal Protection Clauses. The effort most often was to try to discern and shoehorn rights under what came to be called “substantive due process,” which Justice Scalia and others have called an oxymoron. For read narrowly, as many conservatives do, the Due Process Clause guarantees simply that a person will not be deprived of life, liberty, or property *without due process of law*. But the word “law” there is ambiguous, as is especially clear when the substantive law is egregiously unjust. It might refer narrowly to the legal process that is due for determining if the relevant substantive law applies. Or it might refer also to the substantive law that is applied. To illustrate the difference in an area presently ripe with litigation, a person who starts a business sometimes faces a notorious state “convenience and necessity” law that enables an already existing competitor to object to the competition, prompting the state to bring an action against the start-up. Under a narrow reading of the Due Process Clause, the main question will be simply whether the new entrant falls under the law—he gets only the *process* that is due. Recently, however, several courts have given the clause a broader reading and asked whether the substantive law itself is consistent with due process since it restricts, for no legitimate reason, the fundamental right to earn a living in the relevant field.

Over its long history, stemming at least from Magna Carta’s Chapter 39, the Due Process Clause has been read both ways, which of course undermines a stable rule of law. Indeed, if the substantive law can be whatever a transient majority—or, as here, a special interest—wishes it to be, if there is no touchstone for that law other than an evanescent will, then the rule of law is ever at risk. There, precisely, is the basic problem with *democratic* originalism.



And that is why the Privileges or Immunities Clause was made the *first* of the Fourteenth Amendment's guarantees: to secure the substance of the matter by referencing the federal guarantees as the touchstone, the better to secure the rule of law, which has always been Justice Scalia's fundamental concern. Yet he has adamantly refused to revisit the demise of the clause, most recently when he cut short oral argument on the point in 2010 in *McDonald v. Chicago*, ultimately resting his concurrence—ironically, and despite “misgivings”—on a “long established and narrow” reading of substantive due process.

Not surprisingly, these issues come to a head most often in cases challenging something done under a state's general police power, where resort to deeply grounded, reason-based theory, not democratic will, is most needed. And that theory is readily available in the Lockean state-of-nature account, buttressed by more recent work, which stands behind the Declaration and the Constitution as amended. In essence, the police power is the “Executive Power” that each of us had in the state of nature to secure his rights and, once we leave that state, to provide certain “public goods,” narrowly defined, as economists do, by free-rider, non-excludability, and non-rivalrous consumption considerations. It is the power we yield up to government in the original position, thereafter to be exercised on our behalf, as outlined in both the Declaration and the Constitution's Preamble, as discussed above. But as such, it is bounded by the rights there are to be secured and thus is anything but unlimited—once a judge comes to grips with the classical theory of rights. When understood more broadly, however, as it often is, it becomes an open sesame for majoritarian and special interest capture of government coercion—and the source of the accompanying loss of liberty.

### **Progressivism and Its Aftermath**

Setting aside female suffrage, which would come later, the Civil War Amendments have been seen, at least in principle if not in fact, as having at last “completed” the Constitution by incorporating the grand principles of the Declaration, especially equality before the law. It would be quite some time, of course, before that goal was pursued more fully in fact. Nevertheless, the second great “constitutional revolution” was in the offing, but it would be achieved this time not by constitutional amendment but by political legerdemain.



Before the New Deal Court could do that, however, the ground had to be prepared; the climate of ideas had to shift.

That was the work of the Progressives, coming at the turn of the 19th century from the elite universities of the Northeast, but working hand in hand with populists who are always just below the surface. Looking to European political models for inspiration, and for justification to British utilitarianism, which in ethics had replaced natural rights theory, Progressives saw themselves as social engineers, dedicated to fixing all manner of social and economic problems through a wide array of government programs. Thus, the focus shifted from law as principle, crafted by judges adjudicating cases, to law as policy, crafted by legislative majorities, but more often by special interests and, eventually, executive branch agencies. At bottom, however, it was a shift from the law of reason to the law of will. There followed “the demise of the traditional doctrines of limited federal power and broad individual rights,” as Professor Richard Epstein has written in these pages. “That demise opened the door for the Progressive agenda,” he added, “which at root knew only one way to combat the social dangers against which the Progressives railed: the substitution of state-monopolies and cartels for competitive markets.” Like all of their ilk, they believed they could coercively plan human affairs better than free individuals could.

In the opening decades of the 20th century, Progressives directed their regulatory and redistributive efforts largely at the state level where they often met resistance from the Court—correctly, as in *Lochner v. New York* (1905)—but also assistance—wrongly, as in the sweetheart suit in *Buck v. Bell* (1927). Things came to a head during the New Deal, however, when they shifted their focus to the federal level. After several of the Roosevelt administration’s programs were found to be unconstitutional during its first term, the president unveiled his infamous Court-packing scheme shortly after the landslide election of 1936—his plan to pack the Court with six new members. There was uproar across the nation. Not even the heavily Democratic Congress would go along, but the Court got the message. What followed was the famous “switch in time that saved nine,” with the Court rewriting the Constitution, in effect, all without constitutional amendment.

It did so in three main steps, doubtless well known to readers of this *Review*. In brief, in 1937 the Court eviscerated the principal restraint on Congress, the doctrine of enumerated powers, reading the

General Welfare and Commerce Clauses as fonts of all but boundless congressional power to redistribute and regulate, respectively. Then in 1938 the Court crafted a bifurcated Bill of Rights and a bifurcated theory of judicial review whereby laws implicating “fundamental rights” would be strictly reviewed while laws implicating “non-fundamental rights” would be given little or no review. Written from whole cloth—in a footnote, no less—that handiwork has rightly been called the foundation of modern “constitutional law”—not to be confused with the Constitution itself. Finally, in 1943 the Court jettisoned the non-delegation doctrine, thus allowing Congress to delegate ever more of its legislative powers to the executive branch agencies it had been creating, giving us the modern executive state where most of the regulations and rules we live under today are made, by unaccountable bureaucrats rather than by accountable legislators.

To correct a common misunderstanding, it was not judicial “restraint,” as often thought, that enabled the New Deal constitutional revolution, but judicial “activism” in crafting these new doctrines. What followed, however, was a period of judicial *deference*—but it was not to last. As the 1950s unfolded, a Court generally thought to be “liberal” in the modern sense of that label suddenly rediscovered its constitutional duty to police the political branches and the states, but it did so selectively. Thus, it showed no interest in reviving the doctrine of enumerated powers since Congress needed its expanded powers to bring about the liberal welfare state. Instead, the Court focused on discovering rights—some long overdue to be noticed, as in the civil rights and criminal law areas, others never meant to be among even our unenumerated rights, as with affirmative action and abortion. Meanwhile, economic liberties, including property and contract rights, remained in the non-fundamental rights ghetto.

In summary, over roughly the first two-thirds of the 20th century, Progressives, New Deal liberals, and finally modern liberals succeeded, step by step, in insinuating government into vast areas of life, socializing and regulating everything from business to employment, health care, education, housing, retirement, energy, science, even the arts. They expanded congressional, executive, and state powers far beyond anything authorized by the Constitution. And although they succeeded finally in securing certain political and personal liberties that had seldom been properly recognized and protected, other liberties, such as the economic rights we exercise

most of our waking hours, were subject increasingly to the restrictions of the growing redistributive and regulatory juggernaut. It was a far cry from the Framers' vision of individual liberty under constitutionally limited government, and it led eventually to opposition.

### The Conservative Response

All but moribund after the New Deal political revolution, conservatives and libertarians, working often together, began organizing in various ways after the Second World War. On the legal front their attention was directed to the courts once the Warren Court began ruling in the mid-1950s. Perceiving the Court as both anti-democratic and disposed toward a liberal agenda, conservatives in particular focused on the Court's "activism" in service of a "rights revolution." But their critique, like the Court's approach, was also selective. Thus, they too generally ignored the demise of the enumerated powers doctrine, believing it a lost cause. Where they differed was on the rights side. Unlike liberals, they urged the Court to protect all of the expressly enumerated rights in the Bill of Rights, not simply because they saw that as the correct approach but because a focus on enumeration, they believed, would help to check judicial activism. But for that same reason—fear of judicial activism—they dismissed the Ninth Amendment and the Fourteenth Amendment's Privileges or Immunities Clause, seeing those texts as prescriptions for liberal judicial mischief. And in that same vein they joined liberals in condemning the "activist" pre-New Deal Court that had often blocked majoritarian intrusions on economic liberty—as in the *Lochner* decision—though not for the political reasons that animated liberals but from an animus, again, toward "judicial activism."

Although "originalism" has a long history, the idea as presently understood would not come to prominence until after Attorney General Edwin Meese's American Bar Association speech in July of 1985 and Justice William Brennan's response at Georgetown University in October of that year. Earlier, however, the concern for legitimacy inherent in originalism took other, more direct forms. Thus, the conservative critique of the Warren Court's anti-democratic agenda found support in Alexander Bickel's *The Least Dangerous Branch*, published in 1962. An uneasy liberal teaching at Yale, Bickel too was reacting to what he saw as the Warren Court's excesses. He wrote thus of the "countermajoritarian difficulty" and

of the need, accordingly, for judges to indulge the “passive virtues.” Implicit in that “difficulty,” of course, was the idea that the power of judges to overturn democratic—read, majoritarian—decisions was, if not suspect, at least problematic. The constitutional presumption, in short, was for majoritarian democracy and against judicial negation. Effectively unnoticed in that brief for legitimacy was the “*majoritarian difficulty*” that so animated the Framers.

Years later, conservative legal icon Judge Robert Bork—who has written that Bickel, “more than anyone else,” taught him about the Constitution when he too was at Yale—would distill perfectly the conservative understanding of the Constitution. Invoking what he called the “Madisonian dilemma,” Bork wrote:

America was founded on two opposing principles, which must continually be reconciled: The *first* principle is self-government, which means that in *wide areas* of life majorities are entitled to rule, if they wish, simply because they are majorities. The *second* principle is that there are nonetheless *some things* majorities must not do to minorities, *some areas* of life in which the individual must be free of majority rule” (emphasis added).

That gets Madison exactly backward. America’s first *political* principle may indeed have been self-government, but its first *moral* principle—and the reason we instituted government at all— was individual liberty, which the Declaration of Independence makes plain, the Constitution’s Preamble articulates, and the Fourteenth Amendment incorporated at last against the states. That means that in “wide areas” individuals are entitled to be free simply because they are born so entitled, while in “some” areas majorities are entitled to rule not because they are inherently so entitled but because we have *authorized* them to, as a practical compromise. That gets the order right: individual liberty first, self-government second, as a means toward securing that liberty. And that, precisely, is what democratic originalism gets backwards.

### **The Libertarian Response**

Although conservatives and libertarians often joined forces in the post-war era to resist the liberal programs flowing from the New Deal political and constitutional revolution, divisions eventually

arose, including in the legal arena. Unwilling to view the demise of the enumerated powers doctrine as a lost cause, and finding the Warren as well as the Burger Courts' "rights revolution" unfocused, undisciplined, and often mistaken because mistakenly grounded, but believing also that the conservative critique was misplaced—after all, America was founded in the name of our inalienable rights—a very few of us in the classical-liberal camp in the mid-1970s began developing the foundations for what would eventually become the libertarian strain of originalism. Repairing to the nation's first principles, we sought to critique both the dominant "living Constitution" school and the conservative critics of that school. That entailed, among other things, better grounding and explicating the classical theory of rights in the state-of-nature tradition, and more fully analyzing the role of Progressivism in the New Deal's constitutional jurisprudence.

I have traced a brief history of those early developments in the introduction to a 2013 *Chapman Law Review* symposium on "The Modern Libertarian Legal Movement." Suffice it to say here that the main object of those efforts was to revive the Founders' and Framers' vision of the Constitution as amended by the Civil War Amendments and to restore their vision of the role of the courts as "an impenetrable bulwark against every assumption of power," as Madison put it when introducing the Bill of Rights in the first Congress. And I am pleased to say that our efforts have resulted in a fair measure of success.

After being moribund for 58 years, for example, the doctrine of enumerated powers was at last revived in 1995 in *United States v. Lopez*. However modest the ruling, as Justice Clarence Thomas lamented in his brief concurrence, it is noteworthy at least that Chief Justice William Rehnquist began his opinion for the Court with a ringing statement little heard for decades: "We start with first principles. The Constitution creates a Federal Government of enumerated powers." He then quoted Madison's famous "few and defined" passage. And the doctrine has since grounded other decisions—most prominently the Court's 2012 rejection in *NFIB v. Sebelius* of the federal government's claim that Congress had authority under the Commerce Clause to compel individuals to purchase health insurance.

And on the rights side, as discussed more fully below, we have seen several decisions finding rights not expressly enumerated in

the Constitution but clearly consistent with the classical theory of rights that stands behind and informs the document, even if those decisions have not yet rested on the Ninth Amendment or the Fourteenth Amendment's Privileges or Immunities Clause. More important, however, these issues are back in play not only in judicial opinions but in the larger debate beyond the courts about both the Constitution and the role of judges under it—their reemergence no better evidenced than by liberal complaints about conservative “judicial activism.” Ideas matter, as the Founders, Abolitionists, and Progressives all understood.

But despite these relatively recent developments, the Rehnquist and Roberts Courts have remained largely in the grip of the post-New Deal constitutional vision: Congress's enumerated powers effectively boundless; so too for state police power; rights read unsystematically by the Court's liberals, narrowly by its conservatives. Rulings in cases testing the Court's fundamental constitutional vision have varied case by case according to whether the liberal or conservative versions of that vision, such as they are, could command the needed votes. Not surprisingly, the divisions on the Court are not unlike those in the nation over the meaning of the Constitution.

Although it is a closer call than many conservatives believe, in recent years the Court's conservatives, on balance, have hued closer than its liberals to the original understanding of the Constitution. They have given at least lip-service to the doctrine of enumerated powers, and sometimes more; they have defended all of the enumerated rights, even if the liberals have done a better if uneven and often misgrounded job on unenumerated rights; and, most important, they have offered, if not always followed, a judicial methodology, originalism, that recognizes that the proper role of the Court is to apply the law, not make it.

### **Justice Scalia's Democratic Originalism**

Having now seen, at least in outline, what we take to be the classical liberal or original understanding of the Constitution as amended, and seen along the way a few points on which Justice Scalia's originalism differs, we can take up at last the more systematic statement of his approach that he offered in *A Matter of Interpretation*, following which I will look critically at a few opinions that illustrate that approach. Actually, the book is composed of one long essay by Scalia

entitled “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,” four critiques by legal academicians, and a response by Scalia.

The title of Justice Scalia’s essay nicely captures his thesis. Concerned about the role federal courts are playing today, he argues, in brief, that the relatively free hand that common-law judges have had in deciding cases has become the norm in both constitutional cases and cases involving the statutes and regulations that have been promulgated under the Constitution, which have given us more of a civil-law system. At the core of his thesis is the contention that these judicial practices, to the extent that the decisions that follow rest on sources much beyond the constitutional, statutory, and regulatory texts, undermine the rule of law and, more important still, are inconsistent with democracy, which by implication gives them their legitimacy.

Obviously, Scalia’s main target is advocates of the “living Constitution” who encourage judges to include “the needs of society” and “evolving social values” as sources of law. But to a lesser extent he could have directed his fire at classical liberals as well insofar as we are more willing than he to reach beyond the text. Thus, the question is whether our reach—or that of modern liberals, for that matter—can be justified, whether what we and they reach for is properly considered as judges decide cases. Here I will consider his brief against the living Constitution school. In the next section I will contrast his approach and ours.

More fully, Scalia begins by noting how the first year of law school exposes students to the heady world of judge-made common law and the methods by which that law has evolved from the early Middle Ages in England. Although often thought to be a reflection of custom or the people’s everyday practices, 20th century legal realists, he believes, have shown that early on the common law evolved rather more from judicial reasoning than from observed, recorded, and applied custom, with judges “making” more than “discovering” the law, especially as they distinguished earlier cases that served as precedents and hence as law, thus making new law in the process. “What intellectual fun” answering a professor’s hypotheticals, he writes: no wonder so many law students “aspire for the rest of their lives to be judges!”

All of that would be “an unqualified good,” Scalia continues, except for the advent of democracy, lawmaking through legislation,



and the implicit separation of powers, prompting him to highlight “the uncomfortable relationship of common-law lawmaking to democracy.” He then cites an early 19th century American critic of the common law to the effect that its *ex post facto* character renders it inconsistent with the Constitution—the critic adding: “The judiciary shall not usurp legislative power, says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power.” (Just where the Bill of Rights says that is less than clear. And of course the Seventh Amendment expressly recognizes the common law.)

Still, Scalia would not abandon the common law where it remains since “an argument can be made [that it] is a desirable limitation upon popular democracy.” What he does question, however, is “whether the attitude of the common-law judge—the mindset that asks, ‘What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?’—is appropriate for most of the work that I do, and much of the work that state judges do. We live in an age of legislation, and most new law is statutory law.” Most of what he does, he concludes, is “interpret the meaning of federal statutes and federal agency regulations.”

That takes Scalia into a lengthy discussion of the appropriate principles for statutory interpretation, where his brief for textualism, including giving words their original meaning, comes rightly to the fore. With that behind him, however, he turns at last to “the distinctive problem of constitutional interpretation”—distinctive because an unusual text is involved. He cites Chief Justice John Marshall as having put the point well in *Marbury v. Madison*: Because a constitution must state matters at a certain level of generality, its details must be “deduced” from its broad principles, Marshall wrote. And for that, much as with statutes, Scalia looks not to what the original draftsmen intended but to “the original meaning of the text”—to “how the text of the Constitution was originally understood.”

Beyond those general guidelines, however, to see more precisely how constitutional originalism works we have to rely on the specific examples Scalia offers involving free speech, the death penalty, the Confrontation Clause, and more, because the balance of the article is less an explication of his approach than a sustained critique of the approach taken by advocates of the living Constitution. Thus, he writes that the Great Divide today “is not that between Framers’ intent and objective meaning, but rather that between *original* meaning

(whether derived from Framers' intent or not) and *current* meaning." The living Constitution, he continues, is "a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law." Circling back to his opening analysis, Scalia points out that "it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures."

I will return to that conclusion below, but let me first little more than mention the balance of Scalia's criticisms of the living constitutionalists' interpretive approach. Rarely, he writes, do advocates of constitutional change cite the text of the document; they cite instead Supreme Court precedents that may be far removed from the original text and understanding. As for change, the Constitution's "whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot take them away." Indeed, "perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution. *Panta rei* is not a sufficiently informative principle of constitutional interpretation."

The most common practical argument for the living Constitution, Scalia continues, is the need for flexibility, yet over recent decades the changes have mainly *limited* flexibility by foreclosing democratic options. There may be difficulties and uncertainties in determining and applying original meaning, he concludes, but they "are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution changes; that the very act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to that change is unknown and unknowable."

### **The Classical-Liberal Critique of Democratic Originalism**

Not without reason is Justice Scalia focused on the role the modern judiciary has come to play in our public affairs, for our courts have often seemed both political and rudderless, hardly comporting with the role the Framers' envisioned. At bottom, that role, as implicit in

a written constitution that separates powers and authorizes “the judicial Power,” as argued by Hamilton in *Federalist* 78 and following, and as stated by Chief Justice Marshall in *Marbury v. Madison*, is “to say what the law is.” If doing so requires or leads to change, it falls to the courts to say whether the change is properly brought about by the Court, by Congress, by an executive branch agency, by a state, or by the people through constitutional amendment.

At times, however, Scalia’s brief seems directed as much against constitutional change itself as against the living constitutionalists’ grounds for change. Yet at the end of the day the basic issue before us is not constitutional change. It is legitimacy: whether the grounds a judge cites for change are legitimately cited; and if so, whether they are sufficient as a matter of law to justify the change. The problem with the living constitutionalists’ approach is that the policy grounds they often call on judges to cite, such as the needs of society or evolving social values, are not constitutionally cognizable. They are not *law*. (None of which is to say, of course, that those same rulings could not have been properly grounded. In constitutional cases, “Right result, wrong reason” is not uncommon.)

By contrast, democratic originalism is on surer footing—at least to the extent that its advocates urge judges to ground their decisions only on law as originally understood. But therein, oftentimes, is the problem. In brief, too often they read the Constitution as leaving far more scope for majority rule, and far less room for liberty, than the Constitution does. To cut to the chase, conservative democratic originalists ground their decisions too often not on the constitutional text *as understood by those who wrote and ratified it* but *as the New Deal Court rethought it*. That is not the Framers’ Constitution. Nor is it the Civil War Framers’ amended Constitution. It is the New Deal Court’s Constitution. Justice Scalia is right to be concerned that constitutional change come about lawfully. Indeed, in his blistering dissents he has often said “This is not *law*.” Yet in his conception of democratic originalism, and often in his application of it in specific cases, as we will see more fully below, he has bought into the New Deal Court’s democratization of the Constitution.

To be fair, as a *practical* matter it is unrealistic, to say the least, to expect the Court in one fell swoop or even in a short period of time to correct the mistakes of 1937 and after. We are far down the road of constitutional illegitimacy, as Justice Thomas occasionally laments.

But as opportunities arise the Court can move us in the right direction, at least more than it has. And even when for practical reasons it cannot do so, it can in its opinions at least flag and focus on this fundamental problem more than it does because, again, ideas matter. But to do that, the Court would have to have *the Constitution* in view, not the post-New Deal Constitution, to say nothing of modern “constitutional law.”

To encourage the Court in that direction, it would be useful to conclude with just a few examples of opportunities taken and missed, focusing mainly on only a bit of Justice Scalia’s voluminous jurisprudence. I will start with powers cases, then turn to rights cases.

### *Powers Cases*

Madison rightly wrote that the powers delegated to the federal government under the Constitution are “few and defined.” And just before that, in *Federalist 41, 42, and 44*, he discussed the original understanding of, respectively, the General Welfare, Commerce, and Necessary and Proper Clauses through which the New Deal Court rendered federal powers anything but few and defined. From those clauses, primarily, the modern redistributive and regulatory state has arisen

Yet in *Lopez* in 1995 and again in *United States v. Morrison* in 2000—the two decisions that revived the doctrine of enumerated powers, albeit not the *original* understanding of the commerce power at issue in those cases, as Thomas noted—Scalia joined the majorities that found that Congress had exceeded its power. And in 1997, in *Printz v. United States*, repairing to historical understanding and constitutional structure, Scalia himself wrote for the Court, ruling that under the Necessary and Proper Clause, among other grounds, it would be improper for the federal government to “dragoon” state officials into carrying out federal functions, even if only temporarily.

But when it came to a powers case with real bite, Scalia went the other way. (*Lopez* and *Morrison* changed little on the ground since the federal powers found unconstitutional there remained effectively replicated at the state level.) In 2005, in *Gonzales v. Raich*, the Court held that Congress’s power to regulate interstate commerce, together with its instrumental power under the Necessary and Proper Clause, enabled it pursuant to the Controlled Substances Act to prohibit Angel Raich from using home-grown medicinal marijuana that never entered commerce, much less interstate commerce, as allowed under state law enacted pursuant to a voter initiative. In his concurrence,

drawing from a host of New Deal decisions, including the infamous *Wickard v. Filburn* (1942), Scalia argued that even noneconomic intrastate activity “could be regulated as ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated’” (citing *Lopez*). Just how allowing Angel Raich to grow medicinal marijuana would undercut the federal government’s regulation of interstate commerce was never convincingly shown. The prohibition was neither necessary nor proper. In his dissent, Justice Thomas cut to the core: “By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution’s limits on federal power.” Indeed, the “law” that Scalia found is nowhere to be found in the text of the Constitution as originally understood. It is the kind of decision that gives originalism a bad odor.

The very limited inroads the Court has recently made on the New Deal Court’s rewriting of the Commerce Clause are not to be found, unfortunately, with the other main font of modern federal power, the General Welfare Clause, which is read today as authorizing Congress to spend and redistribute virtually at will. The original understanding that dominated both debate and practice until the Court’s 1936 discovery of the modern view in dicta in *United States v. Butler* was that the power of Congress to tax and spend for the general welfare was limited either to serving the enumerated powers that followed in Article I, section 8, or to ends that were truly general or national; otherwise, Congress’s powers would be effectively unlimited since money can be used to accomplish anything. In 1937, however, with the thinnest of rationales, the Court in *Helvering v. Davis* elevated *Butler’s* dicta to the holding, thus opening the floodgates to the modern redistributive state. Since then, the only question the Court has entertained is whether conditions imposed on the receipt of federal funds might be coercive, as the Court found at last in 2012 in *NFIB v. Sebelius*, with Justice Scalia co-authoring a separate joint opinion arguing that the Affordable Care Act’s Medicaid provisions did in fact coerce the states.

In sum, then, the Constitution’s main restraint on overweening federal power, the doctrine of enumerated powers, remains today almost a dead letter, thanks to the machinations of the New Deal Court and the jurisprudence that has followed. That Court unleashed

democratic majorities at best—more often, special interests—to redistribute and regulate almost at will—precisely what the original Constitution was written to prohibit. As a result, textualism that rests on that “law,” no matter how narrow, cannot claim the mantle of “originalism.”

### *Rights Cases*

Thus, until the Court is able and willing to revive the enumerated powers doctrine, liberty will have to be found on the rights side of the equation. And here there has been relatively more progress in securing both enumerated and unenumerated rights, although again, not on the proper grounds in the case of unenumerated rights. Justice Scalia’s 2008 opinion in *District of Columbia v. Heller*, holding for the first time that as originally understood the Second Amendment guarantees an individual right to have arms for defensive purposes, stands out, of course, even if there were some originalists who took exception to his opinion. In other cases too involving enumerated rights he has repaired to original understanding to uphold the right—but not always.

Although Scalia has generally been consistent in protecting property rights, for example, his opinions have not always gone to the original understanding of the relevant terms. Thus, in 1992 in *Lucas v. South Carolina Coastal Council* he upheld an owner’s right to compensation under the Fifth Amendment’s Takings Clause after a state regulation aimed at providing various public goods prohibited virtually all uses of the property, reducing its value to virtually nothing, thus leaving the owner with an empty title. The problem with the opinion, however, as Justice John Paul Stevens noted, dissenting on other grounds, was that Scalia’s “wipe-out” rule meant that owners who retained at least some uses and some value would get nothing, to which Scalia responded: “Takings law is full of these ‘all-or-nothing situations.’” A textualist, of course, should look at the original meaning of “property,” and where better to do so than in Madison’s famous essay by that name in the 1792 *National Gazette*: “In a word, as a man is said to have a right to his property, he may equally be said to have a property in his rights.” As the common law of property that informed the Framers’ understanding of the term makes clear, we own not simply the underlying fee but each of the uses that rightly go with it. Thus, compensation is due when the first of those is taken—the first stick in that bundle of sticks—not simply after the last one is taken.

But it is with unenumerated rights that democratic originalists like Scala are most at sea, and for good reason: As discussed earlier, they refuse to read the Ninth Amendment for what it says or the Fourteenth Amendment's Privileges or Immunities Clause for how it is related to all of our rights, enumerated and unenumerated alike. And yet, over the years the Court has been able to "find" a fair number of unenumerated rights, albeit on less obvious grounds, such as the Due Process Clauses or as implied by the Equal Protection Clause, and mostly against state laws or actions. Thus, the Court has found a right to freedom of contract (*Lochner*), a right to teach one's child in a foreign language (*Meyer v. Nebraska*, 1923), a right to send one's child to a private school (*Pierce v. Society of Sisters*, 1925), a right to sell and use contraceptives (*Griswold v. Connecticut*, 1965), a right to marry someone of another race (*Loving v. Virginia*, 1967), and a right to engage in same-sex sodomy (*Lawrence v. Texas*, 2003), among others—none of which is found, in terms, among the Constitution's first eight amendments.

Reaching in 1997 for a rationale for such rulings, Chief Justice Rehnquist distilled in *Washington v. Glucksberg* what has come to be the Court's approach to finding such rights. He first noted the Court's reluctance "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open ended." Moreover, "by extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action"—thus alluding to the deference to democracy that has so restrained conservative originalists over the years, as discussed earlier. Coming at last to his conclusion, however, Rehnquist writes:

Our established method of substantive due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition." Second, we have required in substantive due process cases a "careful description" of the asserted fundamental liberty interest.

Note first that if a right is "deeply rooted in this nation's history and tradition," it is likely to be protected already; and if it is not deeply



rooted, it is not only not likely to be protected by this methodology but likely to be before the Court seeking protection, as with the right to marry someone of another race. Note also that the two “primary features” appear to be backwards: It would seem necessary, that is, to first “carefully define” the asserted fundamental liberty interest before one can determine whether it is deeply rooted in the nation’s history and tradition. But of course a given right can be variously defined: Rehnquist defines the right found in *Griswold*, for example, not as the right to sell and use contraceptives but as the right to marital privacy. In truth, both descriptions are correct: they are simply at different levels of generality, which in a given case can make a difference, of course.

The fundamental issue Rehnquist’s analysis raises, however, takes us back to Justice Scalia’s discussion of common-law judges and their methods, which he thought “uncomfortable” in a democracy and “inappropriate” not only for statutory but for constitutional interpretation as well. Yet in the constitutional context he cited Chief Justice Marshall in *Marbury* as holding that a constitution’s details must be “deduced” from its broad principles. Well that deductive method, the common-law’s method, the “deduction” of particular rights from the Constitution’s broader background principles, is precisely what is called for here. It is doubtless true, as Scalia said, that the living constitutionalists’ key to change “is unknown and unknowable.” But it is not true that the “guideposts for responsible decisionmaking in this unchartered area [of unenumerated rights] are scarce and open ended,” as Rehnquist had it.

In fact, the guideposts are the basic principles that stand behind our founding documents, as outlined earlier and as reflected in the decisions mentioned above. Notice in particular that in each of those cases the question was whether a state statute reflecting majoritarian will, enacted under the state’s general police power, was justified, as against the claim before the Court. As discussed earlier, the police power, derived from the “Executive Power” each of us has in the state of nature, is essentially the power to secure our rights—manifesting itself sometimes as the right of self-defense, as in *Heller*. But that power is bounded, again, by the rights there are to be secured. Well what rights are being protected by the statutes at issue above? Whose rights do statutes prohibiting private schooling protect, or statutes prohibiting inter-racial marriage? From the

Progressive planners in *Lochner* to the populist moralists in *Lawrence*, these statutes come from majorities (at best) pursuing their conception of the good through the monopoly power of government at the expense of the liberty of the minority. They reflect a presumption for government and against liberty and thus are inconsistent with the nation's first principles. These are not difficult cases. These rights are easily deduced from those principles, principles that should frame the analysis of every originalist because they *are* our fundamental law.

Let me conclude with a brief dissent that Justice Scalia wrote in 2000 that draws these issues together. *Troxel v. Granville* was a challenge to Washington State's grandparent visitation statute, which authorized state courts to grant visitation rights to grandparents and others who wished to visit the children of parents who may not have wanted those visits, raising the question of whether there is an unenumerated right of fit parents to control access to their children. Not surprisingly, this case troubled conservatives: On one hand they believe in the right of fit parents to control the upbringing of their children; on the other hand, as Judge Bork wrote, they believe that in "wide areas" majorities are entitled to rule, especially at the state level, simply because they are majorities.

Here, the Court upheld the parental right, affirming the Washington State Supreme Court. Scalia dissented, however, writing that while the parental right is among the unalienable rights proclaimed by the Declaration of Independence and the unenumerated rights retained pursuant to the Ninth Amendment, that amendment's "refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people." And he went on to say that "I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right." (original emphasis)

Right there, quite clearly, is Scalia's "commitment to representative democracy set forth in the founding documents," as he went on to say, and to judicial restraint as well: democracy first, rights second, if majorities approve. Like Bork, he gets the Madisonian vision exactly backward. And his deference to democratic majorities to define

and enforce our unenumerated rights undermines the very idea of a right. Rights, by definition, are asserted defensively—not when one is in the majority but when in the minority, against a majoritarian threat, as here. To be sure, the Ninth Amendment’s “refusal” to “deny or disparage” unenumerated rights is not to affirm any one of them—no one argues that. But it *is* an instruction, directed to the branch whose *constitutional* duty it is to affirm what those *constitutional* rights are—to say what the law is. It is not an instruction to the legislative branch from which the threat to those rights most likely would come. Indeed, to leave that duty to the legislature, as Scalia does, is to leave it to a party in interest—and to reduce the Ninth Amendment to a nullity and an idle promise. That cannot be right for a textualist.

It is no accident that Scalia goes on to write: “Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since been repudiated.” Citing *Meyer* (1923) and *Pierce* (1925) as the two, he thus associates himself and his views with the New Deal constitutional revolution that “repudiated,” if not those particular holdings, then other substantive due process holdings.

Justice Scalia is indeed a post-New Deal democratic originalist. Like so many other democratic originalists, he reads the Constitution through the political prism that the New Deal justices—some cowed, some willful—imposed on the document, not through the moral vision the original Framers, and later the Civil War Framers, memorialized and the people ratified. We are invited to believe that after a century and a half of rulings otherwise, those New Deal justices finally got it right. If only the people had been asked.

## Conclusion

It is to Justice Scalia’s enduring credit that originalism is the only credible approach to judging today. But insofar as conservatives on and off the Court continue to cling to a post-New Deal “originalism” that focuses more on countermajoritarian than on majoritarian concerns they cannot really claim to be originalists. Fortunately, many conservatives are coming to appreciate that and to appreciate also that the approach they have clung to is not only inconsistent with what the Constitution envisions but largely responsible for the

massive public sector they otherwise abhor—which the Constitution was written and ratified to prevent. To be sure, there are serious practical limits on what the Court can do at this point to restore the order envisioned by the Constitution, especially on the powers side. And that may be especially true once Justice Scalia’s seat is filled. But he showed what can be accomplished through dissents. That example should inspire us all toward recovering the original constitutional vision as a prelude to recovering the Constitution itself and the liberty it promises.