CHAPTER 8

The Supreme Court: Originalism and Textualism

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Introduction

The Supreme Court of the United States was established by the Judiciary Act of 1789.[1] Only in the last 40 years or so, however, has originalism and textualism become a methodology supported by the Court. Examining the reasons behind such a diversion from tradition is perhaps a job best left to historians. In this essay, which considers the Court's recent embrace of originalism and textualism and history and tradition to support its decisions in a wide variety of areas of the law, I attempt to imagine how the subject of this *Festschrift*, the esteemed historian Bill Urban, might approach such an analysis, in contrast to justices who are not trained in the rigors of historical analysis.

Professor Urban

Professor Bill Urban taught at Monmouth from 1966 to 2015 and is the author of nearly two dozen books on subjects such as East European history and the history of warfare. He served as an editor of the *Journal of Baltic Studies* and was the recipient of Monmouth's prestigious Hatch Award for Distinguished Scholarship and Research. The William L. Urban History Prize was established at Monmouth in 2015 to reward excellence in research by history students.

Although I never personally had a class with Professor Urban as a Monmouth College student during the 1980s, I was greatly impressed by the man and his work. My wife, Ann Marie nee Stites, was a Monmouth history major and therefore took numerous classes from him. In reading articles and other materials written by Urban, I have always been impressed by the academic rigor he exercised in producing his works, at times learning the ancient language to better understand the original text of the documents and works he was covering.

We're all textualists now

In an often cited statement, Justice Elena Kagan, a liberal thinker who has been an associate justice on the Supreme Court since 2010, observed "we're all textualists now."[2] The remark was an homage to her colleague, Associate Justice Antonin Scalia.[3] Many of Kagan's current colleagues have referenced this statement in claiming that textualism is embraced by conservatives and liberals alike.[4]

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[1] The Judiciary Act of 1789, September 24, 1789, ch. 20, 1 Stat. 73.

[2] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) https://www.youtube.com/watch?v=dpEtszFT0Tg.

[3] Antonin Scalia would pass away on February 13, 2016, not long after the statement was made by Elena Kagan.

[4] See= Tobia 2023: 245,

A few years after making her "textualists" comment, Kagan recanted, stating, "Some years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong."[5] She appears to have recognized that with those few words, she had given conservatives fodder to assert that textualism was the way to go.

Being a Textualist

Much scholarly attention has been paid to what it means to be a textualist.[6] A good working definition of the term is:

> Textualism is a mode of legal interpretation that focuses on the plain meaning of the text of a legal document. Textualism usually emphasizes how the terms in the Constitution would be understood by people at the time they were ratified, as well as the context in which those terms appear. Textualists usually believe there is an objective meaning of the text, and they do not typically inquire into questions regarding the intent of the drafters, adopters, or ratifiers of the Constitution and its amendments when deriving meaning from the text. They are concerned primarily with the plain, or popular, meaning of the text of the Constitution. Nor are textualists concerned with the practical consequences of a decision; rather, they are wary of the Court acting to refine or revise constitutional texts.[7]

What is Originalism?

Textualism looks specifically to the language. Closely connected, but slightly different, is the idea of originalism. Steven Calabresi, one of the co-founders of the Yale chapter of the Federalist Society,[8] has described originalism as:

> Originalism is a theory of the interpretation of legal texts, including the text of the Constitution. Originalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law. The original meaning of constitutional texts can be discerned from dictionaries, grammar books, and from other legal documents from which the text might be borrowed. It can also be inferred from the background legal events and public debate that gave rise to a

[5] *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (quoting Kagan, *2015 Scalia Lecture Series*).
[6] See, e.g., O'Scannlain 2017.
[7] Constitution Annotated, Intro.8.2 Textualism and Constitutional Interpretation, available at https://constitution.congress.gov/browse/essay/intro.8-2/ALDE_00001303/#ALDF_00015956.
[8] The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. See https://fedsoc.org/about-us.

> constitutional provision. The original meaning of a constitutional text is an objective legal construct like the reasonable man standard in tort law, which judges a person's actions based on whether an ordinary person would consider them reasonable, given the situation. It exists independently of the subjective "intentions" of those who wrote the text or of the "original expected applications" that the Framers of a constitutional text thought that it would have.[9]

Supporters of the concept of originalism, particularly Justice Scalia, have argued that the term focuses on the ways in which the Court had by whole cloth created amendments to the Constitution. Critics have responded that originalism, of which there are now several versions, has led to judicial fiat, just in a different direction.[10]

History and Tradition

A third tool recently used by conservative justices on the Court has been the "history and tradition" standard.[11] It is a method of scouring the historical record by untrained historians to determine what the history of a particular issue was at the time the law was passed or earlier. Recently, in the "Trump too small" case,[12] conservative Associate Justice Amy Coney Barrett took exception to the usage of this new standard, writing in concurrence, joined by the other three female justices:

> While I agree with the Court that the names clause does not violate the First Amendment, I disagree with some of its reasoning. The Court claims that "history and tradition" settle the constitutionality of the names clause, rendering it unnecessary to adopt a standard for gauging whether a content-based trademark registration restriction abridges the right to free speech. That is wrong twice over. First, the Court's evidence, consisting of loosely related cases from the late-19th and early-20th centuries, does not establish a historical analogue for the names clause. Second, the Court never explains why hunting for historical forebears on a restriction-by-

[9] Calebresi, Steven G., "On Originalism in Constitutional Interpretation," in The National Constitution Center, available at https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation.

[10] *See, e.g.*, Chemerinsky (2000: 385) says "Justice Scalia uses [original meaning jurisprudence] selectively when it leads to the conservative results he wants but ignores [it] when it does not generate the outcomes he desires." Nichol (1999: 968), in contrast, argues that"[Originalism's] principal advocates relentlessly refuse to stick by it. Originalism works if they agree with the outcome dictated by history. If history does not lead them where they want to go, they simply reject it."

[11] *See, e.g.,* Bazelon 2024.

[12] *Vidal v. Elster,* 602 U.S. 286 (2024).

> restriction basis is the right way to analyze the constitutional question.[13]

An Example of Using Tools, Different Conclusions

A provision in the Constitution that had little precedent to guide the Court was the Second Amendment, which provides that:

> 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.[14]

In *Heller v. District of Columbia,*[15] dual historical analyses and originalism were on display, in a battle between Justice Scalia, who wrote for a five-justice majority, and Justice John Paul Stevens, who wrote a dissent.[16] Writing for the majority, Scalia announced a new canon of original intent construction, the prefatory language condition:[17]

> In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U. S. 716, 731 (1931); *see also Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.
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> The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. . . . Respondent argues that it protects 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.
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> The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose.[18]

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[13] *Idem* at 311 (J. Barrett, concurring).
[14] U.S. Const. amend. II.
[15] *Heller v. District of Columbia*, 554 U.S. 570 (2008).
[16] Justice Stephen Breyer, who joined Stevens' dissent, also issued a separate dissent.
[17] This reminds the author of this essay of those who interpreted the predictions of Nostradamus, with techniques of using anagrams, cutting off words to arrive at the meaning intended by him, etc.
[18] *Heller,* 554 U.S. 570 at 576-577.

In addressing the wording as prefatory, Scalia seems to ignore that the other Bill of Rights[19] provisions are not provided with reasons, and one wonders why normal meaning of those words and what a militia means did not control. The other Bill of Rights passed at the same time as the Second Amendment includes the dictates:

1. First: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[20]

2. Third: "Article the fifth. . . No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[21]

3. Fourth: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[22]

The First Amendment is the most direct of the Bill of Rights, and yet, even the purest First Amendment justice, Hugo Black, had limits. The Court has found a variety of ways that are limited, and yet the wording, "Congress shall make no law," suggests that all six rights packaged in that amendment are without control by Congress.[23] So how half of the language of the Second Amendment has no meaning is a mystery, one never very well explained by Scalia or by any justice or advocate subsequent.

Shortly after concluding that the prefatory statement about militia does not equal operative, Scalia next makes the following statement:

> As we will describe below, the 'militia' in colonial America consisted of a subset of 'the people'—those who were male, able bodied, and within a certain age range.[24]

[19] The Bill of Rights refers to the first ten amendments to the United States Constitution, insisted upon by some states in the ratification process to ensure rights were protected. The 27th Amendment, the last one ratified, was not done so until 1992, some 200 plus years from its submission as part of the original twelve amendments submitted during the first Congress in 1789.
[20] U.S. Const. amend. I.
[21] U.S. Const. amend. III.
[22] U.S. Const. amend. IV.
[23] For a historical consideration, the reader might look to the Alien and Sedition Acts of 1798, which were passed in large part to stifle speech critical of the government.
[24] *Heller*, 554 U.S. 570 at 580.

This line has always confused me in his analysis. Start with this fact- in 1789, who were really considered by the Constitution and our founders? Females? Negative.[25] In addition, militia was broader than those citizens who could vote, so hard to imagine it is a subset.[26] At the time of the Constitution, only landowning white men at least 21 years of age could vote. The Militia Act of 1792 made clear who was eligible, shortly after the Second Amendment was ratified:

> Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That each and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia, by the Captain or Commanding Officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this Act.[27]

We know at the time what a militia was and who was eligible. Not a subset at all, but broader than we the people as set forth in the Constitution.[28]

In any event, after a long historical analysis and refuting what Stevens and others have stated, Scalia closes:

> We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment's guarantee of freedom of speech in 1931,[29] almost 150 years after the Amendment was ratified, *see Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931). . . . It is demonstrably not true that, as Justice Stevens claims, . . . "for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial." For most of our history the question did not present itself.[30]

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[25] The 19th Amendment gave women the right to vote in 1920. Women could not apply for their own credit cards if married until 1974, when the Credit Opportunity Act (ECOA) of 1974 passed.
[26] Militia ages were 18 to 45.
[27] Militia Act of 1792.
[28] Scalia makes many references to the people meaning all the people.
[29] *See* footnote on Alien and Sedition Acts.
[30] *Heller,* 554 U.S. 570 at 625-626.

Stevens takes to the history and reason for Second Amendment, beginning with:

> The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.[31]

Stevens points to a case that the Court decided, *United States v. Miller*, 307 U. S. 174 (1939), considering the National Firearms Act, in which the Court found that, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."[32] Per Stevens, the Court affirmed that holding in a 1980 decision. Stevens also cited two states that included rights to hunt and defend the home that were available.[33] He wrote for his dissent:

> The parallels between the Second Amendment and these state declarations, and the Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time. Article XIII of Pennsylvania's 1776 Declaration of Rights announced that "the people have a right to bear arms for the defence *of themselves* and the state," 1 Schwartz 266 (emphasis added); § 43 of the Declaration ensured that "[t]he inhabitants of this state shall have the liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed," id., at 274. And Article XV of the 1777 Vermont Declaration of Rights guaranteed "[t]hat *the* people have a right to bear arms for the defence of themselves and the State."[34]

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[31] *Heller*, 554 U.S. 570 at 637.
[32] *Idem.*
[33] See Cotter 2017. , Daniel, *Maybe the Second Amendment doesn't quite say what so many think*, Chicago Daily Law Bulletin, October 19, 2017.
[34] *Heller*, 554 U.S. 570 at 642.

Conclusion

The citing of *Heller* is intended to show how textualism, originalism, history and tradition have been used in combination by various justices of the Supreme Court to justify their conclusions. It is not meant to dismiss outright the tools, but to call into question whether these techniques would pass the muster of a professional historian. One doubts that this methodology would uphold strict scrutiny. However, this is the approach of the current Court and, with its current make-up, it is likely it will remain the favored approach for some time. Our nation has surely evolved from what it was when it was founded and the Constitution was considered by fewer than 1,700 propertied white men during the ratification process.[35] The reality is that the current Supreme Court will continue to regularly use these three approaches to arriving at conclusions.

I am honored to be able to contribute to this celebration publication honoring one of the great professors who has made Monmouth College better than before he arrived on the campus. My analysis in this essay would no doubt have been enhanced had I had the opportunity to learn directly from a historian of Bill Urban's stature.

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[35] See Cotter 2014.