JUSTICE SCALIA'S EQUITABLE CONSTITUTION

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For twenty years, Justice Antonin Scalia has been the Supreme Court's most influential and outspoken conservative. Witty, passionate, and often acerbic, Scalia has consistently defended an approach to judging that emphasizes judicial restraint, majoritarian values, an "original meaning" jurisprudence, and a "textualist" approach to statutory interpretation that highlights the importance of clear, determinate legal rules. In a recent book,[1] Ralph Rossum argues that Scalia employs a similar textualist approach in constitutional adjudication. Scalia himself has claimed that "[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[2] In this article, I argue that Scalia is not in fact a constitutional "textualist." Although Scalia does adopt a clear and basically consistent textualist approach in statutory interpretation, his approach to deciding constitutional cases is very different.

This article is organized in the following way. In Part I, I explain the fundamental elements of Scalia's purportedly textualist approach. In Part II, I examine Scalia's justification for this approach. Part III explains why, *pace* Rossum and Scalia himself, Scalia is not in fact a true constitutional textualist. In Part IV, I argue that Scalia's *de facto* approach to constitutional adjudication is a form of traditional "equitable interpretation" that Scalia claims to reject. Finally, in Part V, I argue that Scalia's version of equitable interpretation is flawed and often fails to respect the core judicial values he claims to prize.

I. SCALIA'S CONSTITUTIONAL TEXTUALISM

As we have seen, Scalia describes himself as a "textualist" in matters of both constitutional and statutory interpretation. Textualism, as Rossum characterizes it, is an

> "original meaning" approach that accords primacy to the text and tradition of the document being interpreted and that declares that the

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1. RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION (2006).

2. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997) [hereinafter *Scalia Essay*].

> duty of the judge is to apply the textual language of the Constitution or statute when it is clear and to apply the specific legal tradition flowing from the text (i.e., what it meant to the society that adopted it) when it is not.[3]

Several clarifications of this description are in order. First, Scalia claims that he looks for the "original meaning" of constitutional and statutory language, not the original "intentions" of those who wrote, ratified, or voted for the law.[4] By "original meaning," Scalia means "a sort of 'objectified' intent," the intent that reasonable, informed people at the time would have gathered "from the text of the law, placed alongside the remainder of the *corpus juris*."[5] If the language is clear in context, judges must apply that clear conventional meaning, even if that reading conflicts with the probable intentions or general purposes of the lawmakers.[6] If the language is ambiguous or otherwise unclear in context, judges must seek to discover and enforce what Scalia calls the original "import" of the language—how a hypothetical reasonable citizen would have understood the words at the time of the law's enactment. Often, as Scalia notes, this original import will be expressed by means of what Ronald Dworkin calls a "clarifying translation"—an alternate statement of the law that expresses more precisely how the law was originally publicly understood.[7] For example, Scalia argues, historical research shows that the Eighth Amendment's prohibition of "cruel and unusual punishments" was originally understood to prohibit only "punishments *generally thought cruel* at the time"[8] the Amendment was ratified (1791). This clearer and more precise principle expresses what Scalia regards as the "original meaning" of the clause.[9] And it is this original meaning, he argues, that is the touchstone of correct constitutional interpretation today.[10]

Second, Scalia is careful to distinguish his preferred form of textualism from "strict constructionism" and other excessively literalistic approaches to interpretation, such as the old "plain-meaning rule" of statutory interpretation, which failed to recognize the crucial role of context in determining meaning.[11] In

3. ROSSUM, *supra* note 1, at 2. It should be noted that this usage of "textualism" may be somewhat broader than normal. In recent legal scholarship, "textualism" is often viewed solely as a theory of *statutory* interpretation. *See, e.g.*, Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 347–48 (2005); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3–4 (2001); Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2063 (2005); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3–5 (2006).

4. *Scalia Essay*, *supra* note 2, at 16.

5. *Id.* at 17.

6. *Id.*

7. Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 117 (Amy Gutmann ed., 1997).

8. Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 145 (Amy Gutmann ed., 1997) (emphasis added) [hereinafter *Scalia Response*].

9. *Id.*

10. *Id.*

11. *Scalia Essay*, *supra* note 2, at 23.

Scalia's view, a "text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[12] In fact, as we shall see, Scalia often reads constitutional provisions in distinctly non-literal ways.[13]

Finally, Scalia qualifies his textualism in one important respect. Although, like all originalists, Scalia holds that in general "no tradition can supersede the Constitution,"[14] he does acknowledge that in some instances well-established precedent will override even clear textual meaning.[15] One prominent example is the Due Process Clause of the Fourteenth Amendment. Scalia claims that "[b]y its inescapable terms,"[16] the Clause guarantees only process. Yet Scalia accepts the long-established "incorporationist" view that the Clause makes binding on the States most provisions of the Bill of Rights, and thus has a clear substantive import.[17]

To illustrate this purported textualist approach, let us look at how Scalia applies it to three extensively adjudicated Clauses: the Free Speech Clause, the Free Exercise Clause, and the Equal Protection Clause.

The First Amendment Free Speech Clause declares that "Congress shall make no law . . . abridging the freedom of speech."[18] How, as a self-professed "textualist," does Scalia interpret the Clause?

First, Scalia claims, a threshold question must be asked: is the Clause "clear in context"[19]—that is, such that it admits of only one plausible interpretation in the social, linguistic, and legal context in which it was enacted?[20] If so, then that reading must be adopted.

Scalia readily admits that the Free Speech Clause is *not* clear in context: there was considerable controversy in, and immediately after, the founding period about

12. *Id.*

13. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 116 (2005).

14. Rutan v. Republican Party of Ill., 497 U.S. 62, 95 n.1 (1990).

15. *Scalia Response*, *supra* note 8, at 138–40; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–62 (1989) [hereinafter *Lesser Evil*].

16. *Scalia Essay*, *supra* note 2, at 24.

17. Albright v. Oliver, 510 U.S. 266, 275 (1994).

18. U.S. CONST. amend. I.

19. *Scalia Essay*, *supra* note 2, at 17.

20. The phrasing here is deliberately vague, because Scalia nowhere explains when precisely a law is "clear in context." One prominent textualist, John F. Manning, contends that "[w]hen most of the relevant community would agree on the meaning of a text as applied to a particular fact situation, that text is considered clear in context." Manning, *supra* note 3, at 17. This condition, however, is plainly too weak. Is a school rule prohibiting "revealing" clothing "clear in context" if 51% of the school community would consider sleeveless T-shirts "revealing"? Elsewhere, Manning has said that a constitutional text is "clear and precise" if "almost any reader familiar with the linguistic and cultural conventions of the society that adopted the text would recognize the precise judgment in question after reading the text in context." John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1708 (2004) [hereinafter *Eleventh Amendment*].

how the Clause should be interpreted.[21] The Clause is thus "ambiguous" rather than "clear." This means that we must move to the second level of textualist analysis, the level of what Scalia calls "objectified intent."[22] Here we ask how a typical informed American would have interpreted the Clause in 1791. Did he, for instance, understand it as an absolute prohibition of any congressional regulation of speech (Madison's view)?[23] Or did he understand it as enacting the traditional common-law conception of "freedom of speech," which prohibited government from instituting any system of licensing or prior restraint, but did not bar subsequent prosecution for speech considered harmful or dangerous (John Marshall's view)?[24] In short, what "clarifying translation" would a typical informed American of the time have provided of the Clause, if he had been asked?

Scalia concedes that historical inquiries of this sort are often difficult, especially for busy judges, who may not have either the time or training to do the job very competently.[25] Indeed, Scalia admits that this is the "greatest defect" of textualism and other forms of originalist jurisprudence.[26] Yet this is a price that must be paid, Scalia argues, for all other theories of constitutional adjudication have even more serious defects.

Although Scalia has never provided a precise statement of the "original meaning" of the Free Speech Clause, he has claimed that the "bedrock principle" of the Clause is that "government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."[27] As he sees it, the Clause does not bar general laws regulating conduct that are not specifically directed at expression, such as laws that outlaw destruction of draft cards.[28] Scalia thus rejects the whole "incidental impact" track of modern free-speech analysis, claiming that original meaning ordinarily trumps precedent when they conflict. Moreover, because the First Amendment by its words applies only to "speech," Scalia generally rejects modern cases suggesting that the Amendment protects "expressive conduct" as well as speech.[29] The only exception he makes involves laws that prohibit expressive conduct (e.g., flag-burning[30] or cross-burning[31]) precisely because of its communicative attributes.

Scalia adopts a similar approach in interpreting the Free Exercise Clause of the First Amendment, although his departure from textual language here is more striking. The Free Exercise Clause declares: "Congress shall make no law . . .

21. *See generally* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

22. *Scalia Essay*, *supra* note 2, at 17.

23. James Madison, *Report on the Virginia Resolutions*, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 143 (Philip B. Kurland & Ralph Lerner eds., 1987).

24. John Marshall, *Report on the Minority on the Virginia Resolutions*, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 138 (Philip B. Kurland & Ralph Lerner eds., 1987).

25. *Lesser Evil*, *supra* note 15, at 856–57.

26. *Id.* at 856.

27. McIntyre v. Ohio Elections Comm'n., 514 U.S. 334, 378 (1995).

28. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576–77 (1991) (Scalia, J., concurring).

29. *Id.*

30. Texas v. Johnson, 491 U.S. 397 (1989); *Barnes*, 501 U.S. at 577.

31. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

prohibiting the free exercise" of religion.[32] Finding that this language is "ambiguous" rather than "clear," Scalia asks what import the Clause would have had to a reasonable and well-informed citizen at the time it was ratified.[33] Recognizing, perhaps, how hotly debated this issue is among constitutional historians,[34] Scalia offers no complete clarifying translation, but does suggest that the Clause "means, first and foremost, the right to believe and profess whatsoever religious doctrine one desires."[35] More controversially, Scalia also claims that the Clause, as a matter of original meaning, does not prohibit government from enforcing generally applicable laws that conflict with individuals' religious beliefs or practices.[36] This is another illustration of Scalia's view that original meaning generally overrides precedent, since the Supreme Court has occasionally upheld religion-based exemptions from otherwise generally applicable laws.[37] Since the Free Exercise Clause speaks explicitly of the free *exercise* of religion (as opposed to mere belief), it also provides a clear example of Scalia's willingness to drift far afield from the apparent textual meaning of constitutional language he considers to be "ambiguous."

Scalia's treatment of the Fourteenth Amendment Equal Protection Clause differs markedly from his treatment of the Free Speech and Free Exercise Clauses. On the face of it, the Equal Protection Clause would seem to be a paradigmatic example of a law that is *not* "clear in context." Not only is the language broad and expansive, but entire forests have been felled by historians arguing for sometimes radically divergent views of the Equal Protection Clause's original understanding.[38] Curiously, however, Scalia declares that the Equal Protection Clause is *not* ambiguous, but speaks in clear, express terms.[39] According to

32. U.S. CONST. amend. I.

33. Kiryas Joel v. Grumet, 512 U.S. 687, 751 (1994) (arguing that "fidelity to the longstanding traditions of our people" should be the foremost principle of Free Exercise and Establishment Clause jurisprudence).

34. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603 (2005).

35. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990); City of Boerne v. Flores, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring in part).

36. *Smith*, 494 U.S. at 877.

37. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

38. *See, e.g.*, JACOBUS TENBROECK, EQUAL UNDER LAW 222 (1965) (arguing that the Equal Protection Clause was intended to guarantee equality with respect to all fundamental or natural rights, including some but not all rights enumerated in the Bill of Rights); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 169–92 (1977) (arguing that the Equal Protection Clause was intended only to prevent statutory discrimination with respect to the relatively narrow class of civil rights enumerated in the 1866 Civil Rights Act); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 117–20 (1986) (contending that the Equal Protection Clause was meant to guarantee equal treatment with respect to all fundamental rights of United States citizens, including all rights enumerated in the Bill of Rights).

39. Rutan v. Republican Party of Ill., 497 U.S. 62, 95 n.1 (1990).

Rossum, for Scalia, the clear meaning of the Clause is that State "laws that treat people differently because of their race are invalid."[40] On this reading, the Clause prohibits only state-sponsored *racial* discrimination, and does not apply at all to classifications based on gender, sexual orientation, age, marital status, and so forth. This understanding of Scalia, however, is a mistake. What Scalia says is that in his view, "the Fourteenth Amendment's requirement of 'equal protection of the laws,' combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid."[41] This is to say that the Equal Protection Clause prohibits racial discrimination, not that it prohibits *only* racial discrimination. In fact, Scalia has made clear in a variety of contexts that he does *not* believe that the Clause applies only to race.[42] So far as I can determine, Scalia has never explicitly stated what he considers to be the "unambiguous" original meaning of the Equal Protection Clause, and obviously it would be very difficult to do so given the generality of the language and the many competing interpretations of the Clause, both at the time of its enactment and more recently. By declaring the Clause to be "clear," Scalia is able to avoid awkward inquiries into the original public understanding of the Clause, which may well have been narrow.

To summarize, the key elements of Scalia's constitutional textualism may be stated as follows:

> 1. In deciding constitutional cases, judges should seek to discover and apply the "original meaning" of the relevant provisions (except when this meaning is overridden by controlling or effectively irreversible precedent).
>
> 2. The "original meaning" of a constitutional provision is its original textual or conventional meaning, understood in context.[43]
>
> 3. If the language of a provision is clear in context, no further inquiries are needed; the language must be applied in its ordinary or conventional meaning.
>
> 4. If the language of a provision is unclear in context, judges should seek to determine and apply the "objectified" public meaning of the

40. ROSSUM, *supra* note 1, at 157.

41. *Rutan*, 497 U.S. at 95 n.1.

42. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 567–69 (1996) (acknowledging that the Equal Protection Clause prohibits certain kinds of State discrimination against women); Lawrence v. Texas, 539 U.S. 558, 601 (2003) (acknowledging that the Equal Protection Clause prohibits discrimination against homosexuals absent a rational basis). *See also Scalia Response*, *supra* note 8, at 148 ("I certainly do not assert that [the Equal Protection Clause] permits discrimination on the basis of age, property, sex, 'sexual orientation,' or for that matter even blue eyes and nose rings.").

43. Scalia acknowledges that legal terms of art—"Bill of Attainder," "ex post facto law," "life and limb"—should be understood in their technical sense, not their "ordinary meaning" if this diverges from their established legal meaning. *See* Moskal v. United States, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) (making a similar point about legal terms of art in statutory interpretation).

> provision. This objectified meaning is determined by asking what clarifying translation a reasonable, appropriately informed citizen of the time, if asked, would have provided for the provision.

Now that we have a clear picture of the main features of Justice Scalia's constitutional textualism, let us see how he seeks to justify it.

II. SCALIA'S DEFENSE OF CONSTITUTIONAL TEXTUALISM

Scalia defends his textualist approach at two levels. First, because he claims that it is the *original* textual meaning of the Constitution that is binding, he offers a general defense of an originalist approach to constitutional interpretation.[44] Second, because he holds that it is the original *textual meaning* of the Constitution that is controlling, he defends this textualist form of originalism against "intentionalists" or "purposivists" who give greater weight to the specific intentions or general purposes of constitutional drafters, framers, ratifiers, citizens, voters, or supporters.[45]

Scalia argues for originalism on several grounds. First, he contends, it is the only theory that is consistent with the American practice of judicial review.[46] In a constitutional democracy, judicial review by unelected judges is acceptable only if the judges are clearly applying *law*, rather than their own subjective judgments or personal policy preferences.[47] But an alleged legal standard is truly law only if it is "an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."[48] And the only way the Constitution can be "law" in this robust sense, Scalia claims, is if the original meaning is regarded as fixed and authoritative.[49]

Second, Scalia argues that originalism is the only theory that is consistent with the basic purpose of a constitution—namely to prevent change by future generations.[50] By constitutionalizing various rights and liberties, the Framers sought to insulate them from the ordinary vicissitudes of politics. Only originalism, he argues, guarantees that future generations will not contract the scope of cherished liberties with the endorsement of activist judges.[51]

Finally, Scalia argues that originalism is superior to all nonoriginalist theories, because there is no agreement, and no prospect of agreement, about *which* version

44. *Scalia Essay*, *supra* note 2, at 38–47.

45. For discussions of competing theories of "intention-voting" in originalist theory, see GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 34–36 (1992); KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 192–95 (1999).

46. *Lesser Evil*, *supra* note 15, at 854.

47. *Id.*

48. *Id*. *Cf*. *Scalia Response*, *supra* note 8, at 136, 147.

49. *Id.* For a similar argument, see ROBERT BORK, THE TEMPTING OF AMERICA 145–46 (1990).

50. *Scalia Essay*, *supra* note 2, at 40; *Scalia Response*, *supra* note 8, at 135–36.

51. *Lesser Evil*, *supra* note 15, at 855–56; *Scalia Essay*, *supra* note 2, at 40; *Scalia Response*, *supra* note 8, at 135–36.

of nonoriginalism should be adopted in its place.[52] Over the past few decades, a host of nonoriginalist theories have enjoyed their brief day in the sun,[53] but none has been widely accepted. Only originalism, he argues, provides a clear, fixed standard upon which agreement is ultimately possible.[54]

In addition to his general defense of originalism, Scalia offers a number of arguments for his claim that it is the original *textual meaning* that is binding in constitutional adjudication. Several of Scalia's arguments for textualism apply mainly or exclusively to statutory interpretation, but some are relevant in constitutional law as well.

For starters, Scalia argues, sticking to publicly available textual meaning is fairer than appealing to unenacted extra-textual intentions or purposes.[55] By appealing to publicly accessible conventional meaning, textualism respects the requirement, often said to be an ingredient in the ideal of the rule of law,[56] that persons subject to the coercive power of the State be given fair notice when that power is likely to be employed.[57]

Moreover, adhering closely to textual meaning reduces the risk of arbitrary judicial discretion by politically unaccountable judges.[58] In constitutional matters, evidence of extra-textual "intentions" is often exiguous or unclear, and "purposes" can often be defined at various levels of abstractness.[59] As a result, permitting judges to override textual meaning by appealing to extra-textual intentions or purposes serves as an open invitation to judicial subjectivity and policymaking.[60]

Furthermore, the very notion of collective framers' (or legislative) intent is largely a myth, Scalia argues.[61] In the vast majority of cases that come before courts, the relevant lawmakers were "blissfully unaware of the *existence*"[62] of the relevant interpretive issue, and so had no specific intent on how it should be resolved. And even in cases where lawmakers did have specific intentions or relevant general purposes, there are notorious problems in aggregating such intentions or purposes where they diverge or only partially overlap.[63]

52. *Lesser Evil*, *supra* note 15, at 855; *Scalia Essay*, *supra* note 2, at 44–45.

53. *See generally* BORK, *supra* note 49, at 187–221 (discussing the nonoriginalist theories of Alexander Bickel, Laurence Tribe, John Hart Ely, Ronald Dworkin, Michael Perry, David A.J. Richards, Paul Brest, Duncan Kennedy, and William Brennan, among others).

54. *Scalia Essay*, *supra* note 2, at 44–46; *Lesser Evil*, *supra* note 15, at 855.

55. *Scalia Essay*, *supra* note 2, at 17.

56. *See, e.g.*, LON FULLER, THE MORALITY OF THE LAW 63–65 (rev. ed. 1969); ANDREW ALTMAN, ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 5 (2d ed. 2001).

57. *See, e.g.*, McBoyle v. United States, 283 U.S. 25, 27 (1931); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 258 (1981).

58. *Scalia Response*, *supra* note 8, at 132.

59. *Lesser Evil*, *supra* note 15, at 856–57.

60. *Scalia Response*, *supra* note 8, at 132.

61. *Scalia Essay*, *supra* note 2, at 32–34; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

62. *Scalia Essay*, *supra* note 2, at 32 (emphasis in original).

63. *See* BASSHAM, *supra* note 45, at 82–90; WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 216–17 (2000).

These are Scalia's main arguments for according privilege to textual meaning in constitutional adjudication. As noted above, Scalia offers a number of additional arguments for a textualist approach in *statutory* interpretation. Most notably, Scalia argues that courts have a constitutional duty to construe Federal statutes textually, because only the statutory text survived the constitutionally prescribed processes of bicameralism and presentment,[64] and that textualism saves time and expense by largely excluding excursions into legislative history.[65] To some extent, analogous arguments might be offered in support of constitutional textualism.[66] But because Scalia himself has never advanced such arguments, I shall not consider them here.

III. SCALIA'S *ERSATZ* TEXTUALISM

Scalia claims to be a "textualist" in constitutional adjudication, and Rossum, while noting occasional inconsistencies,[67] takes him at his word. There is no doubt that Scalia is the "real McCoy" in statutory interpretation. In interpreting statutes, he consistently sticks closely to ordinary meaning (frequently citing dictionaries for that purpose[68]) and rarely appeals to legislative history. In constitutional law, however, Scalia's approach is markedly different[69]—so different, in fact, that it is not truly textualist at all.

The term "textualism" is used in a variety of senses outside the law. In religion, it refers to a mode of theologizing that adheres strictly to, and bases its doctrine upon, the text of Scripture.[70] In literary theory, it refers to the poststructuralist view that language and culture constitute or construct the world, and consequently,

64. Bank One Chicago v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring); Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment).

65. *Scalia Essay*, *supra* note 2, at 36–37.

66. Clearly, no non-question-begging argument can be made that the Constitution itself requires judges to be constitutional textualists, for no such conclusion is fairly inferable from the Constitution's text. Even if it were, it would be question-begging to assume the validity of a textualist approach as a way of proving its validity. Scalia, however, might argue that the Constitution requires the *amendments* to be interpreted textually, because Article V, on any plausible reading, textualist or otherwise, does prescribe a procedure (in fact, two) by which proposed amendments can become law. Scalia might argue that only validly proposed and ratified words, not unenacted intents or purposes, can survive this procedure. For a similar argument, see *Eleventh Amendment*, *supra* note 20, at 1701–02.

67. These are most notable in Scalia's acceptance of Court doctrine on incorporationism, state sovereign immunity, Congress's enforcement power under § 5 of the Fourteenth Amendment, and expressive conduct. *See* ROSSUM, *supra* note 1, at 32–33, 125.

68. For a list of cases in which Scalia has cited dictionaries, see ROSSUM, *supra* note 1, at 209–12.

69. I am not alone in noting this discontinuity. *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?,* 96 MICH. L. REV. 1509, 1515–22 (1998) (book review); Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 686–87 (1990).

70. *See* 2 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 3274 (Oxford Univ. Press 1971).

as the slogan goes, "there are only texts."[71] As Caleb Nelson has documented, there is a smattering of uses of the term "textualism" in legal sources prior to the last quarter of the twentieth century,[72] but it was Stanford Law School Professor Paul Brest who popularized the term in his classic article, *The Misconceived Quest for the Original Understanding* (1980).[73] Brest there distinguishes two forms of textualism, both of which are varieties of constitutional "originalism" (a term he coined in that article).[74] "Strict textualists" are wooden literalists who purport "to construe words and phrases very narrowly and precisely"[75] and largely without regard to their social or linguistic context. "Moderate textualists" are quasi-literalists who take "account of the open-textured quality of language and read[] the language of provisions in their social and linguistic contexts."[76] In practice, Brest notes, moderate textualism may produce outcomes very similar to those that emerge from nonoriginalist approaches.[77] The key difference, he claims, lies in how the two theories deal with precedent.[78] For moderate textualists, the text is decisive when it speaks clearly and cannot be overridden by any amount of conflicting precedent, no matter how well entrenched that precedent may be.[79] Nonoriginalists, in contrast, treat the constitutional text as "presumptively binding and limiting, but as neither a necessary nor sufficient condition for constitutional decisionmaking."[80] In the final analysis, Brest concludes, no form of textualism is defensible, because modern constitutional doctrine has strayed so far from the constitutional text that returning to a textualist approach would effectively gut all modern "fundamental values" and "representation-reinforcing" caselaw—an outcome he regards as a *reductio ad absurdum*.[81]

Although Brest cited no contemporary examples of actual flesh-and-blood textualists, the distinctions he drew were reasonably clear and helpful. Shortly thereafter, however, things got murkier. In 1975, Thomas Grey introduced the term "interpretivism" as a label for the type of constitutional theorizing practiced by Justice Hugo Black (and occasionally by Justice White).[82] "Interpretivists" like Black, said Grey, believe that "the only norms used in constitutional adjudication must be those inferable from the text—that the Constitution must not be seen as licensing courts to articulate and apply contemporary norms not demonstrably expressed or implied by the framers."[83] Since Black had stressed the priority of

71. *See* RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 139–59 (1982).
72. Nelson, *supra* note 3, at 347 n.3.
73. 60 B.U. L. REV. 204 (1980).
74. *Id.* at 204.
75. *Id.*
76. *Id.* at 223.
77. *Id.* at 237.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 238.
82. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975).
83. *Id.* at 706 n.9.

the text in constitutional decisionmaking, it became common in the 1980's to equate "interpretivism" with "textualism."[84] Unfortunately, it also became common in that decade to equate Grey's "interpretivism" with Brest's "originalism."[85] This tended to blur Brest's nice color-coded distinctions, inasmuch as textualism, as Brest had made clear, is at most a sub-variety of originalism and not identifiable with it.

The debate over textualism took a new turn in 1990 when William N. Eskridge, Jr. published his influential article, *The New Textualism*.[86] Eskridge's article focused on the text-centered approach to statutory interpretation defended by Scalia, Judge Frank Easterbrook, and other so-called "new textualists." Eskridge's work (often done in collaboration with Philip P. Frickey) sparked an outpouring of high-quality scholarship on the intellectual premises of statutory interpretation.[87] Largely as a result of Eskridge's work, "textualism" came to be regarded primarily, if not exclusively, as a theory of statutory interpretation, rather than as a theory of constitutional adjudication as had previously been the case.[88]

As the scholarly debate over "the new textualism" has proceeded over the past decade and a half, the line between textualism and rival approaches to statutory interpretation, notably purposivism and intentionalism,[89] has become fuzzier. Defenders of the new textualism have stressed that it is not committed to "literalism" or "strict constructionism;"[90] that language is meaningful only in context;[91] that textualism does not categorically preclude resorting to legislative

84. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE 25–38 (1982); LESLIE FRIEDMAN GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY 41–66 (1991).

85. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, chs. 1, 2 (1980); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 10–11 (1982); Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 445–46 (1984). For a very different use of "textualism," see Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 683 (1985).

86. William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

87. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION (3d ed. 2001); KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS (1999).

88. *See supra* note 3 and all sources cited therein.

89. Roughly speaking, purposivists hold that statutes should be interpreted so as to fulfill their broad purposes, whereas intentionalists hold that they should be interpreted so as to fulfill the legislature's actual or hypothetical specific intentions on the interpretive matter at issue. *See generally* ESKRIDGE, FRICKEY & GARRETT, *supra* note 63, at 213–22; LIEF H. CARTER & THOMAS F. BURKE, REASON IN LAW 78–91 (7th ed. 2005).

90. *Scalia Essay*, *supra* note 2, at 23; John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434 (2005).

91. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists*?, 106 COLUM. L. REV. 70, 75 (2006); Nelson, *supra* note 3, at 348; Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1028 (1998); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64 (1994).

history or other extra-textual sources;[92] and that textualism recognizes the legitimacy of appeals to legislative "purposes" when statutory language is ambiguous.[93] As a consequence, some legal scholars have questioned whether there is any longer a meaningful difference between textualism and its main rivals. One theorist, in fact, has declared that "we are all textualists in an important sense."[94]

In any important debate, whenever one side declares "We are all *x* now," it is a pretty safe bet that the debate has taken a wrong turn—or that someone is trying to pull a fast one. As it was in the 1990s when "We are all originalists now"[95] became the rallying cry of many long-time liberal critics of originalism, so it is now with the debate over textualism. Defenders of textualism are surely correct that there can be "moderate" forms of textualism that are not committed to any narrow or crabbed literalism. They are correct that textualists can (within limits) consistently take account of context, purpose, interpretive canons, and even legislative history. But there are conceptual and linguistic constraints on what can properly count as a "textualist" theory. One obvious constraint is *stare decisis*. If a judge claims to be a textualist but routinely subordinates text to precedent, that judge is *eo ipso* not a practicing textualist. Another limit is imposed by language. If a judge professes to be a textualist but routinely claims to discover "meanings" that diverge widely from anything the text actually *says*, that judge is also not a genuine textualist. Both kinds of constraints come into play with respect to Justice Scalia's constitutional jurisprudence.

Space does not permit more than a cursory discussion of the point about precedent, so let me just pose the issue as a homework assignment for Scalia fans. Scalia, as we have seen,[96] readily acknowledges that in constitutional cases he sometimes follows precedent rather than original meaning. As Cass Sunstein has argued, a fully consistent application of

> an originalist approach of the sort favored by Justice Scalia would have very dramatic consequences. . . . Such an approach may well, for example, mean that *Brown v. Board of Education*, the cornerstone of modern equal protection doctrine, is wrong; that *New York Times Co. v.*

92. *See, e.g.*, Nelson, *supra* note 3, at 360; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 448 (1990) (conceding that "[i]ntelligent, modest use" of legislative history "can do much to bring the execution [of the statute] into line with the plan").

93. *See, e.g.*, John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 693 (1999) (noting that modern textualists "routinely use purpose to resolve ambiguity"); Nelson, *supra* note 3, at 355; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2408 (2003).

94. Molot, *supra* note 3, at 43. *Cf.* Siegel, *supra* note 91, at 1057 ("In a significant sense, we are all textualists now.").

95. Laurence H. Tribe, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 67 (Amy Gutmann ed., 1997) (quoting Ronald Dworkin). *Cf.* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 558 (1997) (arguing that "[f]or most participants in the continuing debates, the question is emphatically not whether the original understanding is controlling; it is how the original understanding is best understood").

96. *See supra* note 15 and accompanying text.

> *Sullivan*, the cornerstone of modern free speech doctrine, is also wrong; that the Establishment Clause does not apply to the states; that affirmative action raises no serious issue; that the federal government can discriminate on the basis of race and sex however it wishes; that nearly all sex discrimination by the states is acceptable; that, in short, most of modern constitutional law, . . . now taken as symbolic of our nation's commitment to liberty under law, and, for the last decade in particular an inspiration for constitution-making and constitution-building all over the globe, is illegitimate and fatally undemocratic.[97]

Scalia avoids such unhappy consequences by "adulterat[ing]" his strong originalist brew with a generous admixture of *stare decisis*.[98] No workable theory of adjudication, he claims, can hope to "remake the world anew"[99] or ignore the value of stability. This is not to say that Scalia is notable for his respect for precedent—in fact, quite the opposite. It remains true, however, that in a very high proportion of constitutional cases, Scalia's starting point is a doctrine based on precedent rather than on any plausible original meaning.[100] Often, Scalia will try to roll back some precedent-based doctrine to something *closer* to the original understanding,[101] but only infrequently does he argue that the Court should return all the way. He defends this strategy by noting that "*stare decisis* is not *part of* my originalist philosophy; it is a pragmatic *exception* to it."[102] Nevertheless, it remains true that in a *very high proportion* of cases, Scalia's starting point is a doctrine based on precedent rather than text. My homework assignment for Scalia defenders is simply this: can one be a genuine "textualist" if one's starting point is only rarely the text?

It is the second kind of constraint—that imposed by language—that I want to stress here. As Scalia claims, textualists need not be literalists, for words have determinate meaning only in context, and texts can be used for many purposes (e.g., allegory, metaphor, or irony) other than to convey literal information. A Biblical "textualist" need not hold that Jesus was speaking literally when he said to his disciples, "I am the vine, you are the branches" (John 15:5). But textualists cannot accept readings that depart widely from textual meaning—that is, from

97. Sunstein, *supra* note 95, at 563–64.

98. *Lesser Evil*, *supra* note 15, at 861.

99. *Scalia Response*, *supra* note 8, at 139.

100. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (accepting the incorporationist doctrine that the First Amendment applies to the states); Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (accepting the established substantive due process analysis for analyzing alleged fundamental liberty interests); United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (accepting, with qualifications, the established intermediate scrutiny test for analyzing claims of alleged governmental gender discrimination).

101. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 962 (1991) (arguing for a reversal of prior cases holding that the Eighth Amendment includes a proportionality guarantee); Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (abandoning the compelling state interest test for religion-based exemptions). *Cf. Lesser Evil*, *supra* note 15, at 861 (accepting the current view that the Eighth Amendment prohibits public lashing, while conceding that such a practice is consistent with the Amendment's original meaning).

102. *Scalia Response*, *supra* note 8, at 140.

anything the text actually *says*. A textualist must give primacy to the text and stick close to its actual words, rather than reading into it things not fairly expressed or implied. When a text is ambiguous, vague, general, or otherwise unclear, a textualist can certainly seek to clarify its import by considering context, purpose, and so forth. He can offer a "clarifying translation" that makes the meaning of the text more precise. But these clarifications must be genuine *translations*, not wholesale substitutions of one text by another. As I have argued elsewhere,[103] textualists can allow *modest* departures from a text's "letter" to achieve a closer approximation to its apparently intended or understood meaning. They can even, to a degree, allow *major* departures from textual meaning to avoid inconsistency, absurdity, or obvious slips of expression. But the gravitational force of the words, so to speak, will always impose limits on how far from a text's words a textualist can stray. An example from a non-legal context may help make this clear.

Suppose Scalia wished to apply his "textualist" approach to Jesus's challenging admonition to "resist not evil" (Matt. 5:39). How would he proceed?[104]

Assuming that he would find the saying to be "ambiguous" rather than "clear in context," Scalia would seek to determine the "objectified" public meaning of Jesus's words. To do this conscientiously, he would need to immerse himself in an enormous mass of historical and exegetical literature.[105] Suppose he does this, and concludes that, among Jesus's disciples and other hearers, there were three leading "clarifying translations" of the saying:

> R1: All violence and forcible opposition to evil is wrong, regardless of the costs or reasons.
>
> R2: Never use force without need (e.g., self-defense, protection of the innocent, lawful punishment of the guilty, or participation in a just war), and never in ways inconsistent with fundamental Gospel values.
>
> R3: If you would be perfect, be prepared when abused to suffer hardship, indignity, injury, and even death rather than to respond with violence or vengeance.[106]

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103. BASSHAM, *supra* note 45, at 26–27.

104. I do not claim that Scalia does or would apply his textualist methodology in this or other non-legal contexts. My purpose is to show that Scalia's allegedly textualist approach is not, in fact, textualist at all. Examples from non-legal contexts make it easier to see why.

105. *Cf. Lesser Evil*, *supra* note 15, at 856–57.

> Properly done, the task [of originalist interpretation] requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.

Id. Note how different this is from Scalia's virtually four-corner's approach to statutory interpretation!

106. For a discussion of these and other leading interpretations, see Gregory Bassham &

Suppose, further, that Scalia decides that a slight majority of Jesus's disciples favored R2. It follows on his "textualist" approach that R2 presumptively expresses the "original meaning" of Jesus's saying.

Clearly, something has gone wrong here. What Scalia has identified is, at best, the original *public or audiencial* understanding of Jesus's saying, not its "textual" or "ordinary" or "conventional" meaning. And now it is clear where Scalia's approach runs off the textualist rails—namely, in its treatment of "ambiguous" texts. For Scalia, once a text is pronounced "ambiguous," the words largely drop out of sight and any "clarifying translation," no matter how different from, or even at variance with, the text may count as its "objectified meaning." A true textualist would not treat words so discourteously. Even when texts are ambiguous, textualists feel the gravitational force of the words and resist readings that depart dramatically from anything the text fairly says or implies.

IV. SCALIA'S EQUITABLE CONSTITUTION

If Scalia is not a *bona fide* constitutional textualist, is there any recognized interpretive methodology he does employ? The answer, surprisingly, is that Scalia appears to practice a form of old-style equitable interpretation. Because equitable interpretation has long been out of fashion, it may be helpful to explain what it is.[107]

The sources of equitable interpretation lie in medieval casuistry and the Civil Law tradition rooted in Roman Law. The leading ideas, indeed, go back to Aristotle, who distinguished "equity" (*epiekeia*) from "legal justice" by noting that:

> [A]ll law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. . . . When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. . . . And this is the nature of the equitable, a correction of law where it is defective owing to its universality.[108]

Medieval jurists generally followed Aristotle in limiting equitable interpretation, in the strict sense, to what later came to be called restrictive equitable interpretation: the "correction" of a law, judged to be deficient by reason

David Baggett, *Resist Not Evil! Jesus and Nonviolence*, *in* MEL GIBSON'S *PASSION* AND PHILOSOPHY: THE CROSS, THE QUESTIONS, THE CONTROVERSY 247–52 (Jorge J. E. Gracia ed., 2004). The first reading is roughly Tolstoy's, the second a standard mainline Protestant reading, and the third the traditional Catholic interpretation.

107. *See generally* BASSHAM, *supra* note 45, at 2–4.

108. ARISTOTLE, *Nicomachean Ethics*, *in* THE BASIC WORKS OF ARISTOTLE 935, 1020 (Richard McKeon ed., Random House 1941).

of the generality or universality of its wording, on the presumption that the lawmaker did not intend the law to extend to the case at hand.[109] A classic example of such equitable restriction (due ultimately to Plato) is provided by Aquinas:

> [T]he law requires deposits to be restored, because in the majority of cases this is just. Yet it happens sometimes to be injurious—for instance, if a madman were to put his sword in deposit, and demand its delivery while in a state of madness, or if a man were to seek the return of his deposit in order to fight against his country. In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good.[110]

In the early modern era, this classical and medieval conception of equity as a *correctio legis generaliter latae qua parte deficit* was broadened to include cases in which a law is deficient, not because of its universality, but because of its excessive particularity.[111] Such cases were thought to call for extensive equitable interpretation: the extension of a legal rule to encompass fact-situations not within the letter of the rule, but believed to be within the *ratio* or "mischief" that motivated the lawmaker to enact it. A well-known example from American law occurs in *Baker v. Jacobs*,[112] where the court supported its decision that cigars were "victuals or drink" for purposes of a law barring successful litigants from regaling jurors with these amenities by quoting the following passage from an unnamed "old book" (Matthew Bacon's *A New Abridgment of the Law*, 1736):

> In some cases the letter of an act of parliament is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law maker present, and that you have asked him this question: Did you intend to comprehend the case? Then you must give yourself such answer as you imagine he being an upright and reasonable man would have given.[113]

109. *See* LAWRENCE J. RILEY, THE HISTORY, NATURE, AND USE OF *EPIKEIA* IN MORAL THEOLOGY 137 (1948). Extensive interpretation was recognized and practiced by medieval civilians and canonists but was not generally recognized as a form of equitable interpretation (*epikeia*). *See* JOHN ROGG SCHMIDT, THE PRINCIPLES OF AUTHENTIC INTERPRETATION IN CANON 17 OF THE CODE OF CANON LAW: A COMMENTARY 201–21 (1941).

110. THOMAS AQUINAS, SUMMA THEOLOGICA 1695 (Fathers of the English Dominican Province trans., Benziger Bros. Inc. 1947).

111. Eyston v. Studd, 2 Plowd. 459, 467, Eng. Rep. 688, 699 (1574).

112. 23 A. 588 (1891).

113. *Id*. at 588 (quoting Ryegate v. Wardsboro, 30 Vt. 746 (1858)). A notable example of extensive equitable interpretation in American constitutional law is the construction of the Eleventh Amendment in *Hans v. Louisiana*, 134 U.S. 1 (1890), and its progeny. Although by its terms the Eleventh Amendment extends state sovereign immunity only to federal lawsuits filed by citizens of other states and citizens or subjects of foreign nations, courts have extended this immunity to suits in federal or state courts filed by a state's own citizens, federal corporations, tribal sovereigns, and foreign nations. Courts have justified this dramatic expansion by claiming

While leading early-modern Continental jurists such as Hugo Grotius and Samuel Pufendorf discarded or significantly reshaped many features of medieval jurisprudence, they retained the basic assumptions of equitable interpretation.[114] These Continental authorities heavily influenced eighteenth-century English legal commentators, including Matthew Bacon, Thomas Rutherforth, and William Blackstone, the leading authorities on legal hermeneutics for American jurists in the founding era.[115] Long before the eighteenth century, however, the basic principles of medieval equity jurisprudence had taken root in the common law through the writings of English jurists such as Christopher St. Germain and Edmund Plowden, who were much influenced by medieval Continental jurisprudence.[116] By the middle of the eighteenth century, it was well-established in English law "that the most universal and effective way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it."[117]

William Eskridge has argued convincingly that equitable interpretation was widely accepted by American jurists in the founding era.[118] James Wilson taught his law students that "[t]he first and governing maxim in the interpretation of a statute, is to discover the meaning of those who made it," and that "[e]quity is synonymous with true and sound construction."[119] Alexander Hamilton argued in an important early case that "many things within the letter of a statute are not within its equity and vice-versa."[120] In fact, a number of anti-Federalist opponents

that although the language of the amendment was relatively specific, its *ratio* was general: to overturn the Supreme Court's deeply unpopular decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), and reaffirm commitment to a doctrine of broad sovereign immunity. *See generally Eleventh Amendment*, *supra* note 20, at 1665–67.

114. *See* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 190–91 (A. C. Campbell trans., M. Walter Dunne 1901) (1625); SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 30 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673).

115. WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 364 (1953).

116. *See* C. K. ALLEN, LAW IN THE MAKING 389–93 (6th ed. 1958). For an overview of the influence of Continental equity jurisprudence on English law, see Stephen A. Siege, *The Aristotelian Basis of English Law*, *1450–1800*, 56 N.Y.U. L. REV. 18 (1981).

117. Eskridge, *supra* note 69, at 1523 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *59–*62, *91). As Manning notes, equitable interpretation was not limited to particular fact-situations which a lawmaker did not or could not foresee, but permitted judges (within limits) to contract or expand legal language when there was no relevant actual intent and even, in some strands of the equitable tradition, when justice or reason demanded it. Manning, *supra* note 3, at 34–35.

118. Eskridge, *supra* note 69, at 1523–26. John Manning challenges Eskridge's argument, contending that equitable interpretation "never gained a secure foothold in the federal courts." Manning, *supra* note 3, at 9. However, nearly all the sources Manning cites date from considerably after the founding period.

119. JAMES WILSON, *Lectures on the Law*, *in* 1 THE WORKS OF JAMES WILSON 69, 75 (Robert McCloskey ed., 1967).

120. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 357 (Julius Goebel, Jr. et. al. eds., 1964). The case was Rutgers v. Waddington (N.Y. Mayor's Ct. 1784) (unreported).

of the Constitution voiced concern that federal judges would employ standard principles of equitable interpretation to expand the power of the national government, provoking Hamilton's famous defense of judicial review in *Federalist No. 78*.[121]

Beginning in the early nineteenth century, equitable interpretation gradually fell out of favor in American law, replaced by more literalistic "plain meaning" approaches.[122] There is little doubt, however, that at the time of the founding it was widely assumed that, in interpreting the Constitution's broad guarantees, courts would and should give primacy to their "spirit" or "equity," rather than to their literal meaning.

Today, the spirit of equitable interpretation is carried on by its close cousin, "purposivism".[123] Like practitioners of equitable interpretation, purposivists believe that the letter (literal or sentence meaning) of a law should yield to its purpose ("spirit") if the two conflict. Law professors who encourage their students to question whether roller skates and electric wheelchairs are "vehicles" within the meaning of an ordinance banning "all vehicles" from a park, are, in effect, teaching principles of equitable interpretation.[124]

In many contexts, it makes perfect sense to interpret texts in accordance with their spirit or purpose, rather than their letter. We say, "Drop everything and come here immediately!," without bothering to add, "Unless you're holding a baby over a bathtub, or have some other good and sufficient reason not to do as I ask."[125] When our doctor cautions us about operating "machinery" while taking a pain medication, we do not imagine this includes electric toothbrushes and pencil sharpeners. Ordinary communication would be unbearably tedious, if not impossible, if we felt we had to spell out all implicit exceptions to our general statements.

In law, of course, a higher standard of precision is generally expected than is the case in ordinary discourse. Nevertheless, for reasons that are familiar to all first-year law students, appeals to the properly controlling "spirit" or "purpose" of a law are all but inevitable in legal hermeneutics. Laws are regularly expressed in vague or general language, and often for good reasons. Lawmakers realize that there are limits to human foresight, so they write constitutions conferring power to make all laws that are "necessary and proper"[126] for carrying into execution enumerated powers. They understand the limitations of their own (and their generations')

121. Manning, *supra* note 3, at 80.

122. *Id*. at 55–56, 100–04; BASSHAM, *supra* note 45, at 6–7.

123. There are arguably slight differences between purposivism and classical equitable interpretation. For example, many contemporary purposivists would question whether specific interpretive questions should be answered by imagining a hypothetical dialogue with perhaps long-dead lawmakers.

124. *Cf*. H.L.A. HART, THE CONCEPT OF LAW 124–25 (1961).

125. Adapted from ESKRIDGE, FRICKEY & GARRETT, *supra* note 63, at 225. *Cf*. Wittgenstein's famous example: "Someone says to me: 'Shew [*sic*] the children a game.' I teach them gaming with dice, and the other says, 'I didn't mean that sort of game.'" LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33 (G.E.M. Anscombe trans., 3d ed. 1958).

126. U.S. CONST. art. I, § 8, cl. 18.

knowledge, so they write laws banning simply "toxic" substances without attempting to provide an exhaustive list of substances that count as "toxic."[127] They realize that it is often better, for educational and other purposes, to state rules at a high level of generality, so they simply say, "Remember to keep the Sabbath holy," leaving it to another to remind the textualists of his day that this does not preclude feeding hungry people[128] or rescuing stranded farm animals[129] on the Sabbath. They understand that it would be tedious and pedantic to try to spell out every meritorious implicit exception to general rules, so they enact rules such as "At the time set for beginning the game the umpire shall call 'Play'," [130] without bothering to mention imminent tornadoes, floods, bubonic plague outbreaks, and the like. They understand that it is not always possible for legislators to agree on highly detailed formulations, so they compromise on general language like "excessive bail," [131] "good behavior," [132] and "equal protection of the law." [133]

Fine and good, you may say, but what, pray, does any of this have to do with Justice Scalia? Does he not condemn purposivism root and branch? Does he not take particular delight in skewering *Church of the Holy Trinity v. United States*,[134] the *locus classicus* of anti-textualist equitable interpretation?[135]

In fact, Scalia himself endorses a form of equitable interpretation in constitutional adjudication. This emerges clearly in his responses to Laurence Tribe and Ronald Dworkin in the published version of Scalia's 1995 Tanner Lectures, *A Matter of Interpretation*.[136]

In his comment on Scalia's lectures, Dworkin had noted an obvious discrepancy in Scalia's approach to constitutional interpretation. Scalia claims that the constitutional text is the law, not any unenacted intentions or purposes of the framers or ratifiers.[137] Yet constitutional language is often broad and abstract. It speaks in "majestic generalities" of "equal protection of the laws," "due process,' "just compensation," "freedom of speech," "free exercise" of religion, "unreasonable" searches and seizures, "cruel and unusual punishments," "excessive fines," and "privileges or immunities of citizens of the United States," to cite but a few prominent examples. The language is broad, yet Scalia, as he

127. *Cf.* David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFFAIRS 105, 123–24 (1988).

128. *Matthew* 12:1–8.

129. *Matthew* 12:11.

130. *Official Regulations and Playing Rules of Little League Baseball*, Rule 5.01.

131. U.S. CONST. amend. VIII.

132. U.S. CONST. art. III, § 1 (providing that federal judges "shall hold their Offices during good Behavior").

133. U.S. CONST. amend. XIV, § 1.

134. 143 U.S. 457 (1892). The case involved an 1885 statute prohibiting anyone from contracting with an alien to pay his transportation to the United States "to perform labor or service of any kind." *Id.* at 458. Using classical principles of equitable interpretation, the Court ruled that the law did not prohibit a church from importing a pastor from England. *Id.* at 472.

135. *Scalia Essay*, *supra* note 2, at 18–23.

136. *See generally Scalia Response*, *supra* note 8, at 133–43, 144–49.

137. *Scalia Essay*, *supra* note 2, at 38.

acknowledges, consistently reads the language *narrowly*.[138] In Scalia's view, for example, "free speech" only protects speech that the *founding generation* considered worthy of protection;[139] "free exercise" does not protect religious exercise at all against generally applicable laws; the Equal Protection Clause provides only minimal protection against government-sponsored discrimination outside the sphere of racial discrimination; and the Eighth Amendment prohibits only punishments that the founding generation would have considered as "cruel and unusual." How can a self-professed "textualist" consistently read *broad* language *narrowly*?

Scalia offers three arguments for his restrictive readings. First, he appeals to context. The Constitution's allegedly abstract clauses are often interspersed with many concrete and specific clauses. By the familiar canon of construction *noscitur a sociis* ("known by its companions"), words are given meaning by those around them.[140] This suggests, Scalia argues, that all constitutional guarantees were originally understood narrowly.[141]

Second, Scalia appeals to the Framers' general purpose. The "whole purpose" of a Constitution, he maintains, "is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."[142] Reading the Constitution's abstract and general provisions as broad "aspirational" guarantees would invite change rather than inhibit it. The Framers' evident purpose was "to nail down current rights, rather than aspire after future ones."[143] They sought to embed "in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to nought."[144]

Finally, Scalia argues, reading the Constitution's generally-phrased guarantees broadly would defeat another evident purpose of the Framers—their desire to implement a system of judicial review that is consistent with democratic theory.[145] Reading the Constitution's general and abstract terms aspirationally would permit unelected and life-tenured judges to act as a continuing constitutional convention and legislate their personal visions of society from the bench. There is no evidence, Scalia claims, that the Framers wished to confer such awesome undemocratic power on judges.[146]

In these responses, we see clearly the elements of equitable interpretation. The Constitution, he believes, contains many clauses that are "deficient" because of their universality or abstractness. On its face, for instance, the Eighth Amendment

138. *Scalia Response*, *supra* note 8, at 135–36.

139. *Id.* at 135.

140. For example, an airline regulation prohibiting passengers from transporting "gasoline, kerosene, lighter fluid, or other flammable substances" in carry-on luggage should not be construed as applying to twenty-year-old single-malt scotch in a wrapped and unopened box. Airlines, take note.

141. *Scalia Response*, *supra* note 8, at 135–36, 146.

142. *Scalia Essay*, *supra* note 2, at 40.

143. *Scalia Response*, *supra* note 8, at 135.

144. *Id.* at 146.

145. *Id.* at 136.

146. *Id.*

seems to prohibit all punishments that are, in reality, both cruel and unusual. But the Framers could not have really meant what they said, Scalia believes, because this would conflict with their general background purpose of limiting judicial power and freezing their own values into place. Therefore, the law must be "corrected" by reading it more narrowly (restrictively) than its words suggest. So, Scalia reads the Eighth Amendment as prohibiting only punishments that the Framers' generation *considered* cruel and unusual. And since the Framers' generation did not consider, for example, imposition of the death penalty on children[147] or the retarded[148] to be either "cruel" or "unusual," the Amendment should not be construed as prohibiting those practices today. Scalia is here appealing to the Framers' general purposes—the "spirit" of the Constitution as a whole—to "correct" provisions that are "deficient" by reason of their generality or universality. This is not "textualism." It is classic, old-time equitable interpretation.

V. WHY THE CONSTITUTION DOES NOT NEED CORRECTING

Let me conclude by responding briefly to Scalia's three arguments for his narrow reading of facially abstract constitutional provisions.

His first argument—his appeal to the *noscitur* canon of construction—is extremely weak. The *noscitur* canon ("words take meaning from those with which they are associated") is a judicially crafted common-sense rule of thumb for clarifying ambiguous statutory texts. If I say, "John made a large withdrawal from the bank," it is possible, but unlikely given the surrounding words, that the withdrawal was from a sperm bank. The canon cannot be applied in any mechanical way, for even in ordinary discourse it is commonplace to juxtapose specific and general language ("Pick up soda, beer, and anything else you would like to bring") in which the general terms are not meant to be understood specifically. It is even more problematic to woodenly apply the canon to constitutional provisions, where a word's "companions" are often located in entirely separate provisions or Articles. In addition, as Ronald Dworkin points out, virtually every State or national constitution features a similar pattern of intermingled concrete and abstract language (for readily understandable reasons).[149] Yet it beggars belief that the abstract and general terms in *all* these constitutions were intended to be interpreted narrowly. Thus, the *noscitur* argument is wholly unpersuasive.

Scalia's second argument—the appeal to what he terms "the whole antievolutionary purpose of a constitution"[150]—clearly has some force, because constitutions are plainly intended to achieve a kind of fixity and stability. Scalia, however, goes well beyond this obvious truism when he claims that the "whole

147. *See* Stanford v. Kentucky, 492 U.S. 361, 368 (1989) (surveying the historical evidence).
148. *See* Atkins v. Virginia, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting).
149. Dworkin, *supra* note 7, at 124.
150. *Scalia Essay*, *supra* note 2, at 44.

purpose"[151] of a constitution is to prevent change. Constitutions may be created for many purposes, among them "to establish justice, insure domestic tranquility, . . . promote the general Welfare, and secure the Blessings of Liberty"[152] for the Constitution's makers and their posterity. Among the plausible purposes of *our* Constitution's makers was a desire to create a strong central government,[153] to protect fundamental rights (i.e., rights that really are fundamental, not just regarded as such by a given generation), and to create a frame of government with sufficient elasticity to "endure for ages to come."[154] As Dworkin notes, as enlightened statesmen, the Framers knew perfectly well that their views, or those prevalent in their day, were not "the last word in moral progress."[155] It does them no honor to suggest that they intended to fast-freeze those views permanently in place.

Scalia's final argument for his narrow reading is that this is the only interpretive approach that is consistent with the Framers' purpose to create a system of judicial review that can be squared with democratic theory. This argument raises many thorny issues that cannot be addressed here: *Was* judicial review intended by the Framers? What is "democracy," in the most defensible analysis? Did the Framers see majority rule as the *grundnorm* of the American political system, as Scalia clearly does?[156] Did the Framers intend to closely cabin judicial discretion? If the Framers did have any or all of the foregoing extra-textual intentions and purposes, are we bound by them now?

This last question raises squarely the issue of originalism. Elsewhere, I have argued that originalism, despite its real attractions, is not a defensible theory of constitutional adjudication.[157] I shall not repeat those arguments here, but I do wish to comment briefly on Scalia's arguments for originalism before turning to the issue of judicial "subjectivity." Because I have already addressed one of

151. *Id.* at 40.

152. U.S. CONST. pmbl.

153. As Keith Whittington has recently argued, *a* central, if not *the* central, purpose of the Philadelphia Framers was "state-building"; that is, "constituting, reallocating, and expanding government power, not limiting it." Keith E. Whittington, *Recovering "From the State of Imbecility"*, 84 TEX. L. REV. 1567, 1577, 1586 (2006) (book review). This purpose clearly jars with some elements of Scalia's constitutional jurisprudence, particularly his opposition to the Court's "negative" Commerce Clause jurisprudence. *See generally* ROSSUM, *supra* note 1, at 91–98.

154. McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

155. Dworkin, *supra* note 7, at 124 (noting that the Framers were accomplished legal draftsmen, and if they "really were worried that future generations would protect rights less vigorously than they themselves did, . . . they would have taken *special* care to write concrete, dated clauses" (emphasis in original)). *Id.*

156. In a 1996 speech at the Gregorian University in Rome, Scalia declared:

> [I]t just seems to me incompatible with democratic theory that it's good and right for the state to do something that the majority of the people do not want done. Once you adopt democratic theory, it seems to me, you accept that proposition. . . . [T]he whole theory of democracy . . . is that the majority rules; that is the whole theory of it. You protect minorities only because the majority determines that there are certain minority positions that deserve protection.

ROSSUM, *supra* note 1, at 36.

157. BASSHAM, *supra* note 45, at 91–107.

Scalia's three arguments for originalism (his contention that only originalism is consistent with the basic "antievolutionary" purpose of a constitution), I shall focus on the other two arguments.

Like fellow originalist Robert Bork,[158] Scalia argues that only originalism is compatible with the Constitution being "law."[159] Nothing properly counts as "law" unless it is binding,[160] and to be binding, law must be substantially fixed, clear, and determinate. A malleable text that can be twisted and molded to suit a judge's fancy is not law. Only originalist readings, Scalia and Bork argue, can give general and abstract constitutional provisions sufficient fixity and determinateness for them to be truly binding law.

This argument is rooted in legal positivist assumptions about law that are highly debatable. According to many legal positivists, whenever law "speaks with an uncertain voice"[161] (e.g., because the law is vague, ambiguous, open-textured, overly-general, or abstract), it is not strictly "law." Judges who, in deciding cases, take imprecise terms (e.g., "vehicle") and make them more precise are making law rather than applying it.[162] Thus, all true law is clear law.

This positivist view of law is now widely rejected and fits poorly with the way both working judges and legal theorists think of the practice of legal reasoning.[163] If it were true that all law is clear law, precious little of what the Supreme Court does would count as law—including Scalia's own debatable exercises in originalist history and creative remodelings of precedent. But there is a deeper problem with Scalia's appeal to clear law—it is self-refuting.

Scalia claims that judicial review is legitimate only if judges apply *law* in striking down acts of the democratic branches.[164] Something counts as law only if it is substantially clear, fixed, and determinate. That is, only clear law is truly law. Yet Scalia's own "textualist" interpretive methodology is not clear law. On the contrary, it is deeply controversial and widely rejected. Most contemporary legal scholars would deny that judges have a legal duty to employ Scalia's textualist approach. Therefore, Scalia's textualism is not "law." Judges, Scalia claims, may employ only law in striking down laws. Textualism is not law. So, judges may not employ textualist premises in striking down laws. Scalia's argument refutes itself.

Scalia's second argument for originalism fares no better. If we reject originalism, he asks, what are we going to replace it with? "'You can't beat somebody with nobody.' It is not enough to demonstrate that the other fellow's candidate (originalism) is no good; one must also agree upon another candidate to

158. *See* BORK, *supra* note 49, at 145–46.

159. *Lesser Evil*, *supra* note 15, at 854.

160. Aquinas points out that "law" (*lex*) is derived from *ligare*, to bind. AQUINAS, *supra* note 110, at 993.

161. JOSEPH RAZ, THE AUTHORITY OF LAW 77 (1979).

162. *See, e.g.*, HART, *supra* note 124, at 124–32.

163. *See generally* RONALD DWORKIN, LAW'S EMPIRE 8–9, 37–39 (1986).

164. *Lesser Evil*, *supra* note 15, at 854; *Scalia Response*, *supra* note 8, at 136.

replace him."[165] There are endless debates among nonoriginalists and absolutely no prospect of achieving agreement anytime soon. Only originalism can provide the "consistency and predictability"[166] the law needs.

Several things may be said in response here. First, there is absolutely no prospect that judges will agree anytime soon on *originalism* as the best interpretative methodology. Despite Republican control of the White House for eighteen of the last twenty-six years, originalism remains very much a minority view on the federal bench.[167] Second, there are significant disagreements among originalists themselves.[168] Originalists argue passionately over such as issues as: Who are the "framers"? Which should have priority—text or intent? Whose intentions ultimately should matter? Which intentions should matter? (e.g., specific? general? semantic? hypothetical? extratextual?) Do collective bodies have coherent intentions? If so, how can they be "aggregated"? How much weight should be given to counter-originalist precedent? And so forth.

Finally, it is a mistake to compare the originalism versus nonoriginalism issue to a political race. In many important intellectual debates, you can "beat somebody with nobody." In the past half-century, for example, ethicists have successfully dethroned utilitarianism as the reigning ethical theory.[169] This was altogether for the good, for utilitarianism was a flawed and simplistic theory. There is no agreement, and no prospect of agreement, on which theory should replace utilitarianism. Does this mean that utilitarianism should never have been rejected? No. Though a thousand ethical flowers now bloom, ethical discourse and theorizing can proceed quite fruitfully without agreement on ultimate premises. (Case in point: the highly productive work that has been done in applied ethics over the past thirty years.) In law, it is true, there is greater need for overlapping consensus. But there have always been substantial theoretical and methodological disagreements in American law, and the ship of law has sailed on—leaky at times, full of clamorous voices on occasion, but on the whole proudly and pragmatically.

Scalia's real concern about nonoriginalism is not so much the sheer profusion of diverse nonoriginalist theories, but the risk of judicial subjectivity he sees in these approaches. In defending originalism, Scalia consistently poses a false dichotomy: either originalism (which involves very little risk of judicial subjectivity) or nonoriginalism (which in all its multifarious forms invites arbitrary and untrammeled judicial discretion). In a review of Scalia's *A Matter of Interpretation*, Cass Sunstein has effectively addressed the second horn of this

165. *Lesser Evil*, *supra* note 15, at 855.

166. *Id.*

167. Scalia has recently characterized originalists as a "small but hardy band" of judges and legal thinkers. How Appealing Extra, http://pda-appellateblog.blogspot.com/ (Feb. 13, 2003). For informative discussions of recent developments in the originalism/nonoriginalism debate, see DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM (2005); JONATHAN G. O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005).

168. *See generally* BASSHAM, *supra* note 45, at 17–37.

169. *See generally* ALASDAIR MACINTYRE, AFTER VIRTUE 62–66 (2d ed. 1984).

proposed dilemma, arguing that Scalia fails to come to terms with "the existence of reasonable, alternative, nonformalist approaches to interpretation, designed to limit judicial discretion, promote stability, and enhance democratic self-government."[170] In closing, let me speak briefly to the first horn of Scalia's dilemma—his claim that originalism leaves little room for judicial subjectivity.

Now that we have seen why Scalia's purportedly "textualist" approach to constitutional adjudication is not authentically textualist at all, we can also see why this claim is misleading. Scalia's theory, in fact, invites judicial subjectivity at many points: in determining when a constitutional provision is "clear in context"; in drawing shaky historical conclusions about "original meanings"; in determining how to "aggregate" variant original understandings in order to arrive at that *one* reading that was (or would have been) adopted by a "typical, informed citizen of the day"; in making judgments about the broad extra-textual "purposes" of the Framers (and which purposes to prioritize when they conflict); in deciding how general constitutional principles, once their "original meaning" has been determined, should apply to circumstances that may be very different from any contemplated by the Framers; in deciding what weight should be given to canons of constructions, such as *noscitur a sociis*, and how to resolve conflicts between such canons when they occur; and in making principled judgments about when, and how far, precedent should be rolled back to make constitutional doctrine more faithful to original meaning.[171]

In all these ways, Justice Scalia's constitutional jurisprudence leaves the door wide open to judicial discretion and subjectivity. It is a textbook example of the old legal realist adage—what a judge is actually doing may be very different from what he says he is doing.

170. Sunstein, *supra* note 95, at 538–57.

171. *Cf.* BREYER, *supra* note 13, at 123–24 (making some similar points about how textualism invites judicial subjectivity in statutory interpretation).