CHAPTER 2

Scalia's Rugged Originalism

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Abstract Throughout the nineteenth century and beyond, a "naïve" originalism pervaded Court thinking. That changed when legal realists urged the Court to exercise judicial restraint and defer to elected branches of government. The Court exercised restraint from the late New Deal until *Brown* (1954). Since then jurists have broadened the discretion available to their own branch by identifying a "living Constitution," which changes with judicial decisions. To counter that view, Antonin Scalia constructed a rugged originalism that combines textual analysis with a search for original meaning while maintaining respect for the legislative branch and the principle of *stare decisis*.

Keywords Antonin Scalia · Original meaning · Living Constitution
Judicial review

The Scalia project cannot be understood apart from its place in the tradition of constitutional interpretation. Antonin Scalia both synthesized and advanced beyond earlier interpretative approaches in order to combat a contemporary approach he found pernicious. By coupling legal realism

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with an older naïve originalism, and by calling attention to the text as the source of meaning, Scalia constructed an originalism rugged enough to battle those who said they were interpreting a "living constitution."

Scalia was not the first jurist to interpret the Constitution in ways consistent with its original meaning. A "naïve" originalism pervaded Court thinking throughout the nineteenth century, and, as that century came to an end, the doctrine was used and abused to exercise enormous judicial power. In response, legal realists, accusing jurists of asserting raw power, urged the Court to exercise restraint by deferring to the elected branches of government. Judicial restraint doctrine dominated Court thinking from the late New Deal until the transformative *Brown* decision handed down by the Warren Court in 1954.[1] Since then, jurists have broadened the discretion available to the courts by identifying a living Constitution that changes in meaning over time. Scalia countered that view by constructing an alternative we shall characterize as "rugged originalism," an approach to constitutional interpretation that combines textual analysis with a search for original meaning while maintaining a respect for the legislative branch and the principle of *stare decisis*.

When in a jocular mood, Scalia enjoyed shocking his audience by declaring: "The only good Constitution is a dead Constitution," because then its meaning would remain unchanged. "The problem with a living Constitution, in a word, is that somebody has to decide how it grows … And that's an enormous responsibility in a democracy to place upon nine lawyers."[2] Upon reflection, he changed "dead Constitution" to an "enduring Constitution." Its meanings are conserved by traditional practices, which may be modified by legislative enactments. But when jurists can abruptly change the meaning of a constitution on their own hook, they endanger the life of a democratic republic.

Naïve Originalism

Rugged originalism differs from the naïve originalism of the nineteenth and early twentieth centuries. Early jurists grounded their decisions—or at least said they did—in the Constitution as written. In *Marbury v. Madison* (1803), John Marshall quotes directly from the Supremacy Clause of the Constitution when exercising for the first time the Court's right of judicial review.[3] In *McCullough v. Maryland* (1819), he declares a law unconstitutional only after giving the Necessary and Proper Clause the following meaning:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.[4]

Marshall's interpretation of the Constitution in each decision is open to question, but, indisputably, the Chief Justice rests his case on the Constitution's original meaning.

That Constitution continues to be the Court's apparent guide well into the twentieth century even when the Court is straying into distant territory. In *Lochner* (1908), both the Court's majority and its minority claim to be interpreting the original meaning of the Fourteenth Amendment's Due Process Clause.[5] Rufus Peckham says the clause "would have no efficacy and the legislatures of the States would have unbounded power… [if they could exercise] arbitrary interference with the right of the individual to his personal liberty… [to enter] contracts."[6] In his persuasive dissent, John Harlan has better cause to be just as originalist: "[T]he New York statute… cannot be held to be in conflict with the Fourteenth Amendment, without enlarging the scope of the Amendment far beyond its original purpose."[7] In a second dissent, Oliver Wendell Holmes identifies original meaning with traditional practice:

> The liberty of the citizen to do as he likes … is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.[8]

As the *Lochner* majority opinion illustrates, Court confidence in its ability to discern original intent was open to abuse. In *E. C. Knight* (1895), Melville Fuller found a Pennsylvania company *not* engaged in the kind of "commerce among the states" that Congress could constitutionally regulate under the Commerce Clause,[9] even though the company was selling the sugar throughout the country.[10] Since it produced the staple only within Pennsylvania, the company was said to be engaged only in intrastate, not interstate commerce. But drawing a distinction between sugar's production and its sale is rather like distinguishing between the pitcher's wind-up and throw. Disaster looms if the two are not synchronized. A plain reading of the Commerce Clause does not allow for such tortured separations. Naïve originalism had acquired a license to write law through the concoction of legal fantasies.

Judicial Restraint

As *E. C. Knight* was being written, legal realists were taking aim at this kind of formalistic reasoning. Arcane distinctions between intrastate and interstate commerce barely concealed the economic interests the justices were seeking to serve, they said. Jurists did not find the law but imposed it in service to those in power. Realists concluded that jurists should leave law-making to the elected representatives of the people in all but extreme circumstances. As Harvard Law Professor James Thayer put it, judges should affirm a law unless its unconstitutionality is "so clear that it is not open to rational question."[11]

The doctrine was not accepted by the Court until the New Deal when it provided a justification for the Court's "switch in time that saved nine."[12] The "switch" is often attributed to Charles Evans Hughes, even though he was not the most conservative of the justices on the Court, for it is his opinions—perhaps because he was the Court's pivotal justice—that sharply reveal the shift in thinking taking place amid the turmoil invoked by President Franklin Delano Roosevelt's court-packing plan. In *Schechter* (1935), Hughes draws "a necessary and well established distinction between direct and indirect effects" on interstate commerce.[13] "Direct effects are illustrated by the railroad cases we have cited, as, *e.g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce," but fixing the hours and wages of employees of poultry workers is not.[14] Unless the distinction is maintained, "the federal authority would embrace practically all the activities of the people."[15] But when Roosevelt proposes to add more judges to the Court, Hughes' alters his Commerce Clause jurisprudence.[16] Exercising a restraint not practiced in *Schechter,* Hughes defers to the Congress he had so recently snubbed: "We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act."[17] Labor relations could now be regulated. "[A]cts which directly burden or obstruct interstate or foreign commerce … are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes."[18]

Even without a court-packing law, Roosevelt was able to consolidate his new majority on the Court within months.[19] The Court became so deferential to the legislative will that a majority, which included Robert

Jackson and Felix Frankfurter, two of Roosevelt's most esteemed appointees, overlooked the Due Process Clause when it found no constitutional objection during World War II to the Administration's decision to confine Japanese citizens living on the West Coast within Montana-based relocation centers.[20] Conservatives also learned to defer to Congress, and the Court achieved unanimity in 1964 when it affirmed the authority of Congress under the Commerce Clause to ban segregation in public accommodations.[21] Still later, Chief Justice John Roberts shows even greater deference to the legislative branch when he construes a congressional law to mean exactly the opposite of what it says.[22] He declares central elements of the Obama Administration's Affordable Care Act to be constitutional after finding that an unconstitutional fee imposed on the non-insured was not a fee but a tax, even though Congress had specifically stated it was not a tax, for only if it were a tax would it be constitutional.[23]

Living Constitution (Non-originalism)

Such judicial restraint nearly eviscerates the Court's power of judicial review. For decades New Deal liberals welcomed this development—until a new group of liberal justices came to embrace a polar opposite of view. According to their conception of constitutional interpretation, known as living Constitution doctrine, the judiciary is permitted wide scope for overturning legislative enactments. Who developed this new doctrine? What is its rationale? The answers to these questions remain unclear. The living constitution was born, but its parentage—and also its legitimacy—is obscure.

Origins of the Living Constitution

Some trace the baby's DNA to Holmes when, in *Missouri v. Holland* (1920), he says the Constitution "called into life a being the development of which could not have been foreseen [and]…must be considered in the light of our whole experience."[24] The phrase seems apposite, but the Justice, far from limiting the authority of the elected branches, is upholding a treaty Congress had approved. In *Brown*, Earl Warren has a better claim to be the dogma's progenitor, when he uses contemporary psychological findings to help him determine the meaning of the Equal Protection Clause. Black children develop a sense of inferiority, he says,

when they attend legally separate schools.[25] Warren uses psychological research to distinguish the *schools* of Topeka, Kansas from the *railroads* of Louisiana found constitutional in *Plessy* (1896).[26] Presumably, black children acquire a sense of inferiority only in class, not when riding the train. By respecting *stare decisis*, the Court reached unanimity in a difficult case, but the Chief Justice would have been better advised to rule that the Equal Protection Clause mandates a color-blind Constitution, as Harlan said in his *Plessy* dissent.[27] Warren's opinion, though politically understandable, drifts off into a realm he need not have entered. Yet the decision itself is quite consistent with the Constitution's requirement that "no state shall …deny to any person within its jurisdiction the equal protection of the laws."[28]

Warren need not have ventured into the land of the living Constitution, but once launched on the journey, the Chief Justice forged ahead, joining the majority in *Griswold* (1965) when it declared unconstitutional a Connecticut state law banning the sale of contraceptives.[29] As in *Lochner,* the Court majority once again discerns in the Due Process Clause the authority to limit state regulatory powers. The issue at hand is minuscule. The Connecticut law was a fossil and the plaintiffs could show no injury. Any number of judicial strategies could have been used to strike the law from the books without wandering into the meaning of the penumbras of the Ninth Amendment. But the Court seemed determined to find a new constitutional right of privacy. Though but a fetus, the living Constitution is kicking its feet.

Then arrives *Roe v. Wade*, a most consequential and enduringly controversial act of judicial legislation.[30] Here, a Constitution is so alive and active, it allows Harry Blackmun to write a new law that divides a woman's pregnancy into three trimesters, each subject to its own rules of engagement. William Brennan, a member of the *Roe* majority, defends the deed by asserting, "The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[31] It's not clear what "current problem" was being solved when the Court denied each state the authority to decide for itself the best balance between the rights of the mother and the rights of the unborn child. Such challenging ethical issues are ordinarily decided by the elected branches of government, allowing for resolutions consistent with local community values. Judicial imposition of a universal will is not obviously the preferred alternative, even when one might agree with

the substance of the Court's policy preference.[32] Certainly, Blackburn, Brennan, and their colleagues, in *Roe*, did more to damage than to secure domestic tranquility.

Yet it must be admitted that the living Constitution has had one undoubted success. It creates a sense of power in the Halls of Justice. "Five votes. Five votes can do anything around here," Brennan loved to whisper in the back halls of the Court.[33] Heady stuff, that kind of power. But is it legitimate? How do the Justices know what this growing, changing document means at any point in time? What rules guide them to reach the right interpretation? Or is it just a matter of counting up to five?

Academic Defenders

Scalia was relentless at scolding his liberal colleagues for their failure to create a set of rules that guided their exercise of the vast power the living Constitution had given them. "You can't beat somebody with nobody," Scalia insisted. "It is not enough to demonstrate that the other fellow's candidate (originalism) is no good; one must also agree upon another candidate to replace him.… As the name 'nonoriginalism' suggests (and I know no other, more precise term by which this school of exegesis can be described), it represents agreement on nothing except what [it thinks] is the wrong approach."[34]

If liberal justices have offered no explicit, developed response to this jeremiad, a number of academics have responded to Scalia's challenge.[35] The late Ronald Dworkin interpreted it "as a framework or charter of abstract aspirational principles."[36] Very nice sentiment, but it does not really give the Court much guidance. Harvard's Cass Sunstein argues for a Constitution that "embodies a political theory of deliberative democracy."[37] In his view, "much of constitutional law consists of a requirement of public-regarding justifications for what might otherwise be seen as naked preferences. This requirement helps distinguish deliberative democracy from authoritarianism, whether through majority rule or otherwise."[38] Conversations are good to have, but dictators have never been at a loss for words when justifying their deeds. Yale's Bruce Ackerman wants today's living Constitution—not the ancient one—to bind future judges.[39] We all find much to applaud in the Civil Rights Movement, but why should future judges be bound when today's judges are not? Boston University's James Fleming recommends that the judges try "thinking

for themselves about what constitutional provisions seem to refer to—like equal protection *itself* and due process *itself*, not anyone's specific *conceptions* of equal protection and due process. This thinking for oneself must be conducted with an attitude of self-criticism, seeing constitutional interpretation as a self-critical question for truth about… the Constitution."[40] The proposal sounds like a distress call for Uriah Heap.

In what may be the most persuasive defense of the living Constitution, David Strauss, a professor at the University of Chicago, suggests that justices follow common law practice to find the path through the judicial thicket to fundamental principles. By remaining faithful to precedent, but distinguishing current cases from previous ones, a modern Constitution can be fashioned without opening the door to unconstrained impositions of judicial desires. "The idea is to find common ground on which people can agree today. The current meaning of words [in the Constitution] will be obvious and a natural point of agreement."[41] Strauss's respect for *stare decisis* can hardly be faulted, but his use of precedent leaves the judge with great discretion. When he applies his doctrine to *Roe*, for example, he finds ample precedent in society's general agreement that women may not be forbidden from having children and medical experimentation cannot be performed without the patient's consent.[42] It is a great leap forward to get from these propositions to a rule that denies legislatures the right to forbid abortion. Further, Strauss seems quite willing to keep *Roe* intact despite the obvious lack of "a natural point of agreement."[43] If it is "common ground" that one seeks, why not leave discovery to the elected branches of government? Are they not better equipped than un-elected judges to discern the natural point of agreement? And if there is no common ground, then why not let each state find its own point of agreement that works best for it?

Whatever the merits of any or all of the academic apologists for a living Constitution, their theories have not yet had an acknowledged impact on Court thinking. None of the current justices perched on the left end of the Court bench openly say they adjudicate according to the principles of a living Constitution, much less define what those principles entail. Until these are discovered, the justices are floating on an uncharted sea, free to impose either justice or tyranny, or both, much as they please. In Posner's words: "The liberal academic theories of constitutional decision making, widely derided as mush, have little appeal to

even liberal Justices, who have been unable to project a coherent vision of a liberal constitutional jurisprudence."[44]

Constitution by Expert

To "adapt great principles" to "current problems and current needs," requires expertise as well as authority. In the Temple of the Living Constitution, the black-robed gods must have high priests who can help them right the wrongs of modern society. When jurists do not have principles to guide them, they need the advice of experts. The practice is foreshadowed in *Brown* where Warren cites psychologists to justify his distinction between schools and railroads. In *Roe,* the justices purport to have learned from medical science that a fetus is not viable until the third trimester, a judicial finding that later proves to be false. Since those seminal decisions, expert witnesses in courtrooms have become a commonplace. When judges do legislative work, they need to acquire information specific to the sphere within which they are acting.

School finance is a case in point. The appropriate level of government spending is just about the last topic one expects to be settled in a courtroom. Fiscal matters have been a legislative responsibility since colonial times. Assemblies used the power of the purse to control the authority of the King's representative, and the practice was enshrined in the revolutionary war slogan, "No taxation without representation." The Constitution specifically requires that all revenue bills originate in the legislative chamber directly elected by the people, and state constitutions have inserted similar provisions in their own constitutions. Yet courts are deciding specific levels of state expenditure.

The Supreme Court faced this question in *Rodriguez* (1973), the very year *Roe* was decided. Even at this time of broad judicial reach, the Supreme Court was unwilling to stretch a *Brown*-enlarged Equal Protection Clause to matters of school finance. Speaking for the majority, Justice Powell declared that "Education …is not among the rights afforded explicit protection under our Federal Constitution."[45] Despite this ruling, numerous state courts—from Alabama and Arkansas to Washington and Wyoming—have identified in their state constitutions a right to an "adequate" education that requires specific expenditure levels in vague constitutional phrases that stipulate an "adequate" or "thorough and efficient" educational system.[46] Interpreting the clauses as

licenses to pursue their own policy preferences, judges have conjured up exact sums of money that state legislatures must spend on schools, often with judicial rules as to where and how.

To find the remedy required by their constitutional deliberations, judges turn to consulting firms, think tanks, and university-based academics. These experts concoct various methodologies to discover the truth of the matter. One approach relies on panels of educators; a second calculates an amount based upon the latest education research; and a third draws upon actual expenditure levels in schools said to be successful. But, as one scholar has noted, "There simply is not any reliable, objective, and scientific method to answer the question of how much it would cost to obtain achievement that is noticeably better than that currently seen."[47] Still, courts are routinely relying upon this alchemy to determine the amount legislatures must allocate. Experts are spinning gold out of the breath of a living Constitution.

The Scalia Phenomenon

In 1986, the twin gods of the living constitution—Blackmun, the author of *Roe,* and Brennan, the intellectual leader of the Court's liberal wing—were exercising great influence over their brethren. Then, as the Court opened that fall, William Rehnquist was elevated from Associate to Chief Justice and Scalia was provided his first opportunity to participate in oral argument. The second event was at least as momentous as the first. For one thing, the new justice did not obey laws of decorum that do more to stultify than facilitate thought. Scalia appropriately performed the traditional task of the Court's most junior member by holding the door used by the justices to enter the courtroom, but he then leaped into the interrogation of the government's representative by immediately posing 11 consecutive questions or comments and, after an intermission for inquiries by others, closed out the interrogation with nine additional ones.[48] In subsequent years, the justices learned to tolerate—perhaps even enjoy—the seemingly endless outpouring of quips and jibes that routinely convulsed the audience. By one count, he generated 40% of the "laughters" officially recorded by the court reporter.[49] Some of the jests were used to expose the flaccid reasoning underpinning living-constitution doctrine: "The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."[50]

None of this would have been consequential had Scalia not been in the business of fashioning a lance that could cut through the soft underbelly of the living Constitution. Scalia began with the plain meaning of the text, an approach that he, as an administrative law scholar, had long applied to statutory interpretation. The Due Process Clause, he said, "[b]y its inescapable terms … guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require," which led him to the conclusion: "It may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation."[51] Scalia had little time for those who wish to substitute the "spirit" of a law for what is explicitly said.[52] Nor, and this point is crucial, did Scalia think an interpretation of a law should be rooted in the subjective intentions or motivations of those who wrote it. "[T]he objective indication of the words, rather than the intent of the legislature, is what constitutes the law," he insists.[53] The modern propensity to base interpretations on legislative histories, rather than the plain meaning of the text, "has facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law."[54]

For Scalia, the distinction between meaning and intention was crucial. Originalism requires that one interpret the original text as it was originally understood, not according to the wishes, hopes, or expectations of those who wrote the document. Those who drafted the Constitution in Philadelphia had multiple intentions, and the intentions of most of those who ratified the Constitution are unavailable. Just as legislative histories are so ambiguous they allow judges to interpret laws in any way they please, so a search for the original intentions of the founders is a will of the wisp. Scalia did consult the "writings of some men who happened to be delegates to the Constitutional Convention" such as Alexander Hamilton and James Madison, but he did so "not because they were Framers," but because "their writings …display how the text of the Constitution was originally understood."[55]

But if meaning is the basis for interpretation, should the judge not consider the meaning of the words in the founding document in light of the nation's subsequent experience? Why should Scalia attend to the original meaning of the Constitution instead of its current meaning, as the living constitutionalist prefers? Does that not permit the kind of flexible document needed to adapt to modern times? No, says Scalia.

A constitution's "whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights is skeptical that 'evolving standards of decency' always 'mark progress,' and that societies always 'mature,' as opposed to rot."[56] The Constitution has established legislative and executive branches that could respond to change; it does not "take the power of changing rights away from the legislature and give it to the courts."[57] In other words, judges should exercise their power of judicial review to protect ancient rights, not to invent new ones.

Scalia was prudent in his exercise of judicial review. Marshall may have stretched the plain meaning of the text in *Marbury*, but that decision has become so embedded in the laws of the land that it is foolish even to consider revisiting it. Scalia never said whether he thought *Brown* fell within the same category as *Marbury,* but that implication might be read into some of his language. Yet judicial restraint for Scalia was not the same thing as abandoning *Marbury* altogether, as legal realists demanded. When legislative enactments seriously disturb the checks and balances of a federal system,[58] or interfere with procedural rights of defendants,[59] or interfere with the exercise of effective free speech,[60] Scalia looked to the original meaning of the Constitution to call a halt.

Scalia once called his doctrine "faint-hearted originalism," a misstatement often exploited by his critics. By that phrase, he meant to distinguish himself from those naïve originalists who abused the power of judicial review by declaring laws of Congress unconstitutional without carrying out the careful inquiry necessary to establish the document's original meaning. For Scalia, the meaning of the constitutional text provides a basic guideline for the jurist, but its meaning has to be carefully discerned and the application to the case at hand needs to respect principles of *stare decisis* whenever possible and due deference should be given to the elected branches of government. At times the complexity led Scalia into directions he may not have wished to have gone. But by embedding his doctrine in a larger framework Scalia gave originalism a strength and durability it would not have had otherwise—the precise opposite of faint-hearted originalism. It is an originalism rugged enough to be used in battle. It establishes, Scalia said, a "historical criterion that is conceptually quite separate from the preferences of the judge himself."[61]

Notes

1. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
2. Bruce Allen Murphy, "Justice Antonin Scalia and the 'Dead' Constitution," *New York Times* February 14, 2016, opinion page.
3. The text of the Supremacy Clause is as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. IV, cl. 2. To justify judicial review, Marshall says that "in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument." Marbury v. Madison, 5 U.S. 180 (1803).
4. McCulloch v. Maryland, 17 U.S. 421 (1819).
5. The Due Process Clause and the Equal Protection Clause are embedded in the following text of the Fourteenth Amendment to the Constitution: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1 (emphasis added).
6. Lochner v. New York, 198 U.S. 56 (1905). The Court appears to be saying that states have only the police power to regulate public safety, health, welfare, and morals. It's not clear what there is in the Due Process Clause or in any other clause in the Constitution that warrants such a conclusion, especially when the Tenth Amendment reserves to the states all powers not explicitly granted to the federal government.
7. *Lochner*, 198 U.S. at 73 (dissent).
8. Id. at 75 (dissent).
9. Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.
10. United States v. E. C. Knight Co. 156 U.S. 17 (1895).
11. James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7, no. 3 (Oct. 25, 1893): 144, quoted in Richard Posner, "The Rise and Fall of Judicial Self-Restraint," *California Law Review* 100, no. 3 (June 2012): 522.

12. The judicial switch first appears in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
13. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 546 (1935).
14. Id.
15. "Direct effects are illustrated by the railroad cases we have cited, as, *e.g.,* the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprise and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the federal government." *Schechter Poultry*, 295 U.S. at 546. But "the attempt through the provisions of the Code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power." Id. at 550.
16. Cushman argues that the "switch in time" was not driven by external political events but by changes in doctrine evolving within the court. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998). All events have multiple causes, and the justices involved may have been quite conscientious in their approach to the task at hand, but the doctrinal evolution was very likely affected by the Court's recognition that it needed to attend to its own self-preservation.
17. National Labor Relations Board v. Jones & Laughlin, 301 U.S. 30 (1937).
18. Id. at 31–32.
19. "[T]he legislative judgment… is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." United States v. Carolene Products, 304 U.S. 152 (1938). A potential exception is suggested in a note: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." Id. at 152, note 4. From this tiny seed of *obiter dicta*, a living Constitution forest will grow.

20. Korematsu v. United States, 323 U.S. 214 (1944). The Court seems to have forgotten its note 4 in *Carolene Products.*
21. Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964).
22. National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).
23. In a quite brilliant move, Roberts makes clear the Court is not giving up the power of judicial review by declaring another portion of the Affordable Care Act unconstitutional on the grounds that it is a violation of state sovereignty for the federal government to condition large subsidies to states upon compliance with federal mandates. *Sebelius*, 567 U.S. at 577.
24. Missouri v. Holland, 252 U.S. 433 (1920).
25. *Brown*, 347 U.S. at 494.
26. Id. at 495.
27. Plessy v. Ferguson, 163 U.S. 559 (1896) (dissent).
28. U.S. Const. amend. XIV, § 1.
29. Griswold v. Connecticut, 381 U.S. 479 (1965).
30. Roe v. Wade, 410 U.S. 113 (1973).
31. William Brennan, "The Constitution of the United States: Contemporary Ratification" (speech, Text and Teaching Symposium, Georgetown University, Washington, DC, October 12, 1985), quoted in Bruce Allen Murphy, *Scalia: A Court of One* (New York: Simon and Schuster, 2014), 147.
32. At the time of the decision many states had laws that permitted abortion. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 2008). Many other "victories" of the living Constitution simply apply nationally what is already in place in many parts of the country. The social goals of the justices might have been better accomplished had they allowed the electoral processes to work their will gradually.
33. Nat Hentoff, "Profiles: The Constitutionalist," *New Yorker,* March 12, 1990, 45, quoted in Murphy, *A Court of One*, 135.
34. Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57, no. 3 (1989): 855, quoted in Murphy, *A Court of One*, 164.
35. A good deal of scholarly writing is content to criticize rugged originalism without offering a defense of the living Constitution alternative. For example, three distinguished academics—Gordon Wood, Laurence Tribe, and Ronald Dworkin—replied to Scalia's Tanner lectures at Princeton. All three spent pages criticizing originalism, but offered no defense of its principle alternative, the living Constitution. A fourth, Mary Ann Glendon, suggested that judges interpret constitutions in the way

they interpret the common law, a position similar to the one offered by David Strauss (2010). Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law,* ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1997).

36. James E. Fleming, *Fidelity to our Imperfect Constitution: For Moral Readings and Against Originalisms* (Oxford: Oxford University Press, 2015), 10.
37. This is Fleming's characterization of Sunstein's thought. Fleming 2015, 85.
38. Cass R. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1993), 352.
39. "We see it as a paradigmatic achievement of popular sovereignty in the twentieth century and [we should] give full constitutional recognition to the landmark statutes and judicial superprecedents that mark its enduring legacy." Bruce Ackerman, *We the People,* vol. 3 (Cambridge, MA: Harvard University Press, 2014), 47.
40. Fleming, *Fidelity*, 22.
41. David Strauss, *The Living Constitution* (New York: Oxford University Press, 2010), 106.
42. Strauss, *Living Constitution*, 94–95.
43. Ibid., 95, 106.
44. Posner, "Judicial Self-Restraint", 548.
45. San Antonio Independent School District v. Rodriguez, 411 U.S. 35 (1973).
46. The provisions in state constitutions upon which these Court decisions are based vary from state to state. Georgia's constitution states that "an adequate public education for the citizens shall be a primary obligation of the State." Florida's constitution also refers to an "adequate" education. The most common formulation calls for the establishment of a school system that is "thorough and efficient"—a phrase found in the constitutions of Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, and West Virginia. Wyoming's constitution has it both ways, requiring the state to provide an education system that is at once "thorough and efficient" and "adequate to the proper instruction of all youth." John C. Eastman, "Reinterpreting the Education Clauses in State Constitutions," in *School Money Trials: The Legal Pursuit of Education Adequacy,* eds. Paul E. Peterson and Martin R. West (Washington, DC: Brookings Institution Press, 2007), 55–76. See also *Courting Failure: How School Finance Lawsuits Exploit Judges' Good Intentions and Harm our Children,* ed. Eric Hanushek (Stanford: Hoover Institution Press, 2006). Adequacy lawsuits have continued to enjoy success even in the wake of the 2009 recession. In a 2017 decision, the Kansas Supreme Court declared: "Under the facts

of this case, the state's public education financing system provided by the Legislature for grades K–12, through its structure and implementation, is not reasonably calculated to have all Kansas public education students meet or exceed" educational standards. Jonathan Shorman, "Kansas Supreme Court Rules School Funding Inadequate," *The Topeka Capital-Journal*, March 2, 2017.

47. Eric A. Hanushek, "The Alchemy of 'Costing Out' an Adequate Education," in Peterson and West, *School Money Trials*, 97.
48. Transcript of Oral Argument at 15:09–19:28; 22:29–24:29, Hodel v. Irving, 481 U.S. 704 (1987) 85–637. *See also* Murphy, *A Court of One*, 139–140.
49. Jay D. Wexler, "Laugh Track," *The Green Bag* 9, no. 1 (autumn 2005), 59–61; Jay D. Wexler, "Laugh Track II – Still Laughin'!" *Yale Law Journal Forum* 117 (Nov. 12, 2007).
50. Obergefell v. Hodges, 576 U.S. 622, note 22 (2015) (dissent).
51. Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in Scalia, *Matter of Interpretation*, 24.
52. Scalia, *Matter of Interpretation*, 19.
53. Ibid., 29.
54. Ibid., 35.
55. Ibid., 38.
56. Ibid., 40.
57. Ibid., 41.
58. See New York v. United States, 505 U.S. 144 (1992).
59. See Crawford v. Washington, 543 U.S. 36 (2004).
60. See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
61. Scalia, *Originalism*, 864. quoted in Murphy, *A Court of One*, 166.

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