

Bury the Dead Constitution, and *Heller* Too

by Philip R. Schatz



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Justice Scalia was undoubtedly a great man, much loved by his colleagues, friends, and family. Let us celebrate the qualities that made him unique. Dedication to church and family, intellectual curiosity, a vibrant sense of humor. Let us speak no ill of him. *De mortuis nil nisi bonum.*

But let us not, in praising the man, celebrate the constitutional doctrine of originalism that he trumpeted. Justice Scalia said, “The only good Constitution is a dead Constitution.”¹ He said, “It’s not a living document. It’s dead, dead, dead.”² Let us take him at his word. A dead Constitution can serve only the dead. Let us bury his dead Constitution with him.

The doctrine of originalism posits that the Constitution was frozen in time, and that the words of the Constitution mean what they meant in 1789, when the Constitution was first enacted. That is just—to search for the proper legal term—nutty. Or, as Scalia might put it: Applesauce!³ Argle-bargle!⁴ Humbug!⁵

It’s not nutty because it’s rooted in the text of the Constitution. All good constitutional analysis starts with the text. It’s nutty because it’s impossible, illogical, and, in the end, hypocritical.

It’s impossible because language is imperfect, because the words of the Constitution meant different things to different people in 1789, and because the framers used generalized language in part because they would not have been able to get agreement on the specifics. The sweeping terms of the Constitution are not self-defining. Dumpster diving through dictionaries for cherry-picked definitions is a practice full of value-laden, result-driven choices, as Second Circuit Chief Judge Robert Katzmann noted in the context of statutory interpretation.⁶ “Dictionaries are mazes in which judges are soon lost,” says Seventh Circuit Judge Richard Posner, “[a] dictionary-centered textualism is hopeless.”⁷ And text-based analysis is not literal interpretation. “Enormous crimes, and egregious follies, have been committed under the pretended sanction of literal interpretation,” observed Francis Lieber.⁸ “Literal interpretation is a most deceptive term; under the guise of strict adherence to the words, it wrenches them from their sense.”

It’s illogical because it would elevate the framers’ language over the framers’ intent. The prevailing mode

of constitutional interpretation when the Constitution was drafted was “loose,” in keeping with the Anglo-American common law tradition. The great Chief Justice John Marshall, who had been intimately involved in Virginia’s ratification fight, held in 1819 that a Constitution is not a body of laws and “requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”⁹ “[W]e must never forget that it is a *Constitution* we are expounding,” he said.¹⁰ The framers intended that judges, insulated from the political fray, would flesh out the general terms to secure justice, tranquility, the general welfare, and other blessings of liberty to each new generation. The concept that future generations would be held hostage to the founding generation would be anathema to the founders. Thomas Jefferson wrote to James Madison from Paris that the dead have no powers or rights over the living.¹¹ Noah Webster, writing as Giles Hickory, said that future generations should not be slaves to the views of the framers.¹² Modern opinion is much the same: We “want[] judges to enforce Constitutional values that We the People *today* find admirable and useful.”¹³

Finally, originalism is hypocritical, because although its proponents claim to be result-neutral, the methodology exists because it yields results that are, for the most part, reliably conservative, if not reactionary. It tends to freeze the machinery of government at a time when white men ruled the country. Poor people, women, and people of color had no vote. Homosexuality was criminalized. Private discrimination was not only tolerated, it was institutionalized.

Originalism is, in essence, a firebreak against progress, the perfect doctrine to cement past privileges, protect historical biases, and prevent redressing past wrongs. The so-called original meaning is manipulated, consciously or unconsciously, to reach the desired result. This is what Judge Posner calls “motivated reasoning,” “the form of cognitive delusion that consists of credulous acceptance of the evidence that supports a preconception and preemptory rejection of evidence that contradicts it.”¹⁴

A classic example of such delusional analysis is

District of Columbia v. Heller,¹⁵ which disallowed the District of Columbia's ban on handgun ownership. On originalist terms, *Heller* is impossible to justify. (Don't get me started on how it violated long-standing principles of federalism or restraint.) The Second Amendment is the only constitutional amendment that contains a preamble limiting its scope to "well-regulated militias." The militias were a sop to the anti-federalists and the slave-holding class who feared that the federal government would refuse to put down slave insurrections. For *over 200 years*, the amendment protected only that collective militarized right; the leading Supreme Court case before *Heller*, *United States v. Miller*,¹⁶ recognized that the amendment was rooted in "the Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress." Former Chief Justice Warren Burger, no liberal stooge, said the idea that the Second Amendment protected individual ownership of firearms is "one of the greatest pieces of fraud, I repeat the word fraud, on the American people by any special interest group that I have ever seen in my lifetime."¹⁷ *Heller* abandons conflict as well as precedent. Of course, *Heller* contains layers and layers of historical dressing. But as Judge Posner notes, the sort of "law office history" underlying *Heller* is "not evidence of disinterested historical inquiry; it is evidence of the ability of well-staffed courts to produce snow jobs."

Heller has led to a cascading series of legislative and judicial idiocies that would permit children, adolescent males, suspected terrorists, domestic abusers, and the mentally ill to be armed with military-grade weaponry in shopping centers, churches, and schools (and soon, presumably, polling places). It would come as a great surprise to the framers, as well as to the Old West sheriffs who confiscated guns at the city limits, that government is powerless to prevent its citizens from being arbitrarily slaughtered while they go about their business. The Declaration of Independence holds it self-evident that we are entitled to life, liberty, and the pursuit of happiness. The preamble declares the Constitution is designed to ensure, among other things, justice, domestic tranquility, the general welfare. *Heller* is a Second Amendment suicide pact that turns these great promises into dead-letter surplusage. It sacrifices the living to the interests of crackpots¹⁸ and gun manufacturers. To say that that was the intention of the framers, *any* of the framers, even the most anti-federalist, is absurd.

If the Constitution were truly dead, then we would be truly doomed, because a dead constitution cannot answer the challenges of the day. But the Constitution is not dead. It has never been dead. "Life belongs to the living," said Goethe, echoing Jefferson, "and he who lives must be prepared for a change."¹⁹ Our framers designed our Constitution to serve the living and to accommodate change. Our great justices have breathed life into the document to answer today's challenges and enforce today's constitutional values. The originalist constitution *is* dead, but it was never our Constitution. Long live the Constitution. ☺

Endnotes

¹Bruce Allen Murphy, *Justice Antonin Scalia and the "Dead" Constitution*, N.Y. TIMES, Feb. 14, 2016, at A19.

²Tasha Tsiaperas, *Constitution a "dead, dead, dead" document, Scalia tells SMU audience*, DALLAS MORNING NEWS, Jan. 28, 2013, available at www.dallasnews.com/news/community-news/park-cities/headlines/20130128-supreme-court-justice-scalia-offers-perspective-

on-the-law-at-smu-lecture.ece (last visited April 17, 2016).

³*King v. Burwell*, 576 U.S. ___, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting); *Zuni Pub. Sch. Dist. No. 89 v. Dept. of Educ.*, 550 U.S. 81, 113 (2007) (Scalia, J., dissenting).

⁴*United States v. Windsor*, 133 S. Ct. 2675, 2705 (2013) (Scalia, J., dissenting).

⁵OK, the last one is Scrooge, not Scalia.

⁶Robert A. Katzmann, *JUDGING STATUTES*, at 43 (Oxford Univ. Press 2014).

⁷Richard A. Posner, *REFLECTIONS ON JUDGING*, at 200 (Harvard Univ. Press 2013).

⁸Francis Lieber, *LEGAL AND POLITICAL HERMENEUTICS*, at 68 (Little Brown 1839).

⁹*McCulloch v. Maryland*, 17 U.S. 316, 407 __ (1819).

¹⁰*Id.*

¹¹Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* JEFFERSON: WRITINGS at 959 (Merrill Peterson ed., Library of America 1984). As a graduate of Jefferson's fine university, I will concede that: (1) he had nothing much to do with drafting the Constitution; (2) he never gave a fig for consistency; and (3) he sometimes talked nonsense.

¹²Giles Hickory [Noah Webster], *American Magazine* (New York), December 1787, 1 DEBATE ON THE CONSTITUTION 671 (Library of America 1993).

¹³William N. Eskridge Jr. & John Ferejohn, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION*, at 438 (Yale Univ. Press 2010).

¹⁴Posner, *supra*, at 186, n. 24 and accompanying text, *citing* Daniel C. Molden & E. Tory Higgins, "Motivated Thinking," *THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING* 295-317 (Keith J. Holyoak & Robert G. Morrison eds., 2005).

¹⁵554 U.S. 570 (2008).

¹⁶307 U.S. 174, 179 (1939).

¹⁷*E.g.*, Joan Buskupic, *Guns: A Second (Amendment) Look*, WASHINGTON POST (May 10, 1995). Burger made the comment in a 1991 interview on PBS's "MacNeil/Lehrer NewsHour." In his view, and in the view of the cases prior to *Heller*, the right to bear arms belonged to the state militias.

¹⁸The Bundyesque conceit that the Second Amendment enshrines a right to rebel against our own government is anti-constitutional codswallop. Those who would resort to bullets over ballots are traitors, not patriots.

¹⁹Technically, one of Goethe's characters said it. See Johann Wolfgang von Goethe, *WILHELM MEISTER'S JOURNEYMAN YEARS* (1821), ch. 2.

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