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Justice Scalia: Affirmative or Negative?

Stephen M. Griffin

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My focus in this essay is on Justice Scalia's distinctive contributions to constitutional theory,[1] especially the theory of constitutional interpretation. It could be said that in terms of words on the page, Justice Scalia wrote relatively little on constitutional theory, especially in comparison to Judge Robert Bork,[2] someone who Justice Scalia was often compared with in the 1980s. Yet there is no doubt that Scalia's writings were enormously influential, especially with respect to his advocacy of the version of originalism known as original public meaning.[3]

In understanding Scalia's approach to constitutional theory, I suggest we should take inspiration from a key formative experience he had in college as detailed in Bruce Allen Murphy's lengthy, well-researched biography.[4] Murphy's

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1. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties (June 14, 1986) *in* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK, 101 (1987) [hereinafter Scalia, Address]; 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 (Amy Gutmann ed., 1997) [hereinafter Scalia, Common-Law Courts]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) [hereinafter Scalia, Originalism]; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

2. There is no real counterpart in Scalia's writings to Bork's lengthy treatment of themes in constitutional theory. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); ROBERT H. BORK, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

3. Scalia's influence is attested to by two recent biographies that I will be drawing on in this essay. JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA (2009); BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE (2014).

4. *See* MURPHY, *supra* note 3.

book, which is indeed somewhat one-sided to Scalia's detriment, was not well received by certain legal academics,[5] but it struck me that this critical reaction ignored some valuable insights Murphy carefully developed over the course of reviewing nearly the entirety of Scalia's life.

Consider Scalia's pugnacious argumentative style, one of his widely acknowledged traits. As Murphy recounts, in 2011 Linda Greenhouse raised the "puzzle" of Scalia repeatedly savaging his fellow Justices in his opinions to little effect, saying she couldn't "think of an example of one of Justice Scalia's bomb-throwing opinions ever enticing a wavering colleague to come over to his corner."[6] She wondered, "what does this smart, rhetorically gifted man think his bullying accomplishes?"[7] For his part, while of course Scalia did not see himself as a bully, he readily admitted that he loved to engage in disputation simply for the sake of argument.[8]

Greenhouse might be less puzzled after reading the part of Murphy's biography that describes Scalia's exceptional success as an intercollegiate debater.[9] As a member of the top team fielded by Georgetown's justly famous Philodemic Society in the early 1950s, Scalia participated in competitive policy debate, sometimes known as "NDT" debate after the National Debate Tournament that ends the year. I have some familiarity with this sort of debate, having participated in it (albeit two decades after Scalia) for four years at the University of Kansas.[10]

The sort of debate in which Scalia and I participated is basically an intellectual team competition centered around a policy resolution whose merits are debated all year long. Each

5. *See, e.g.*, Justin Driver, *How Scalia's Beliefs Completely Changed the Supreme Court*, THE NEW REPUBLIC (Sept. 9, 2014), https://newrepublic.com/article/119360/scalia-court-one-reviewed-justin-driver; Steven G. Calabresi & Justin Braga, *The Jurisprudence of Justice Antonin Scalia: A Response to Professor Bruce Allen Murphy and Professor Justin Driver* (Feb. 24, 2015) (unpublished book review), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569336.

6. MURPHY, *supra* note 3, at 433 (quoting Linda Greenhouse, *Justice Scalia Objects*, N.Y. TIMES (Mar. 9, 2011), http://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects/).

7. MURPHY, *supra* note 3, at 433.

8. *Id.* at 374.

9. *Id.* at 22–27.

10. I am pleased to identify some influential legal academics who were also exceptional NDT debaters, especially in the 1960s and 1970s. They include Laurence Tribe, Stewart Jay, Erwin Chemerinsky, Lawrence Solum, and Frank B. Cross. I am sure there are other examples!

team must be prepared to advocate both on the "Affirmative" side of the resolution by proposing a specific plan of action and the "Negative" side, criticizing in detail whatever plan the other team defends. All debates at tournaments, whether they are preliminary or elimination rounds, are scored by judges.

Success in competitive debate depends on skillful advocacy and in-depth research, which often leads to an appreciation of arcane policy details. The resolutions I debated were quite general, allowing for a multitude of possible Affirmative plans. We became familiar with nuclear war targeting strategy and the possibility of global climate change years before such ideas became common currency. The overarching purpose of debate is education in the art of rhetoric or persuasive argument. This is a purpose that Scalia, who already possessed an excellent classical education before college, no doubt understood quite well.

The kind of talent Scalia displayed and his extraordinary success in competitive debate has its downside. Debaters can fall into the trap of supposing that the "take no prisoners" techniques that spell success in debate tournaments will transfer readily to other contexts. Scalia's obvious enthusiasm for argument for its own sake plausibly led him to make this assumption.[11] I think we can profitably use this hypothesis to analyze some of Scalia's well-known theoretical moves.

One valuable point Murphy hits on is that the key to winning debate rounds is not simply to use good arguments to win once or twice, but to systematically develop and advance the "*unanswerable argument*."[12] How does one do this? One available pathway is to deploy preemptive arguments. In debate, a preemptive argument is one structured to answer (or avoid) the most likely objections *before* they are made. Once the opposing team duly makes the obvious objection, they can be made to look foolish in rebuttal.[13]

Justice Scalia consistently resorted to preemptive arguments in making his most well-known contributions to constitutional theory. That is, he sought to occupy the argumentative terrain in such a way so that counter-

11. *See* BISKUPIC, *supra* note 3, at 303–05.

12. MURPHY, *supra* note 3, at 23.

13. I should make it clear that I am not objecting to preemptive arguments as such. Rather, I am arguing that Justice Scalia used preemptive arguments in ways that worked to hinder the progress of constitutional theory.

arguments could not get off the ground. Before I discuss some examples, we should observe that one alternative to making preemptive arguments is to genuinely engage with opposing points of view. Scalia never showed much interest in following John Stuart Mill's admonition that in addressing the controversies of the day, one should always attempt to refute the strongest possible version of the opposing position.[14] By the way, Mill's advice is most assuredly not followed in intercollegiate debate. In assessing Scalia, we should keep in mind that debate is a *competitive* activity and debaters are not in the habit of helping their opponents.

Scalia's advocacy of originalism as original public meaning, which was novel at the time, is an excellent example of the use of preemptive argument. As Murphy describes, when Scalia presented the idea of original public meaning in a 1986 speech, he did not specify how this interpretive method worked.[15] He rather used the logical possibility of original public meaning to occupy the argumentative terrain in a way that highlighted the deficiencies of original intent as an alternative. Originalism understood as original intent was under heavy attack in the 1980s by respected legal academics.[16] Scalia used the idea of original meaning to shift the argumentative ground given the widely acknowledged difficulties of determining the collective intent of the framers of the Constitution.

From a college debate perspective, we might say that Scalia was using a preemptive argument in the negative. Scalia's 1986 speech was more about pointing out the flaws in the opposing perspective than in advancing an affirmative case. The somewhat-overdrawn contrast Scalia presented was between approaches to interpretation that relied on publicly verifiable evidence of constitutional meaning versus approaches that invoked, as Scalia put it, "what the Framers might secretly have intended."[17]

The contrast was questionable for reasons constitutional scholars already appreciated at the time Scalia presented his ideas. Arguing in 1988 for the original intent approach, for example, respected constitutional scholar Richard Kay provided

14. JOHN STUART MILL, ON LIBERTY 98–99 (Gertrude Himmelfarb ed., 1974).

15. MURPHY, *supra* note 3, at 125–26.

16. *See, e.g.*, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990).

17. Scalia, Address, *supra* note 1, at 103.

some reasons why there was little real difference between original meaning and original intent:

> As a practical matter, an approach which relies on ordinary meanings will usually result in the same interpretation that would follow from original intentions adjudication. We expect the constitution-makers to use words according to ordinary usage at the time of enactment. The best evidence of the enactors' intent is the language they used. Indeed, in many cases, any other conclusion is so unlikely that an explicit reference to extrinsic evidence of intent is unnecessary. Certainly, when most readers agree that a particular clause or phrase means one thing, the burden of persuasion ought to be on the advocate of some other meaning. Such a presumption is fully consistent with original intentions adjudication and a convenient rule of administration.[18]

So Scalia was exaggerating a bit by stressing the "secret" nature of the framers' deliberations at Philadelphia. To be sure, as Scalia noted, the content of Madison's notes of the Philadelphia Convention was not known until 1840.[19] Yet it is also unlikely that the framers used one set of meanings for the words in the Constitution at Philadelphia and then substituted another during the ratification debates. The framers could rely on their Philadelphia deliberations being secret, but they also knew they would have to defend their handiwork openly. After all, their signatures were on the document. This meant that it was likely any problems with discovering the original intent of the framers did not flow from the secret character of the Philadelphia deliberations and thus would transfer over to the quest for original public meaning. Yet Scalia, using preemptive argument to shift the focus of the debate, made it appear through the artful use of rhetoric that the two approaches were sharply different.

To my knowledge, no one has ever followed up in a systematic way to determine whether there were positions taken on constitutional meaning at Philadelphia that were different from the positions defended by framers during the ratification debates. We should also keep in mind that when Scalia began his career, everyone—liberals and conservatives alike—resorted to the use of eighteenth-century historical

18. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 234–35 (1988) (citations omitted).

19. Scalia, Address, *supra* note 1, at 104.

evidence in constitutional argument.[20] In the 1970s and after, for example, liberals used such evidence to show that Congress had the exclusive power to decide for war and to defend the active use of judicial review to protect individual rights. As I will discuss below, this bears on Scalia's characteristic contention that the choice is between originalism and nonoriginalism, not different takes on what the historical evidence shows.

Indeed, when push came to shove, no one was interested in abandoning the evidence we inherited from Philadelphia.[21] Evidence from the deliberations at the Federal Convention is probative of constitutional meaning on multiple grounds. We respect and use this evidence because the framers themselves considered it to be relevant, because of what Michael Dorf has termed their "heroic" authority, and given that they argued over and indeed changed the wording of the Constitution during their deliberations, their handiwork shows its design and purpose.[22] Also worth mentioning here is the considerable insight, advanced by the eminent historian Jack Rakove, that at the insistence of the Federalists, state ratifiers could not condition ratification on making alterations to the Constitution. This meant that in the end, the vote taken at the ratification conventions was up or down on the whole document as opposed to working through it clause by clause in the light of proposed alternative phrasings.[23] This made the ratification conventions less useful as an authoritative source of constitutional meaning.

The distinction Scalia promoted between original public meaning and original intent was thus more apparent than real. Nevertheless, his acolytes were inspired by the notion of a "new originalism" and rebooted it on this basis.[24] I believe this had

20. For a systematic study of the use of originalism by the Supreme Court, including the Warren Court era, see FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM (2013).

21. *See, e.g.*, Scalia, Originalism, *supra* note 1, at 858. As Scalia noted in this lecture, evidence from the founding period must be used carefully. *Id.* at 856. For a highly significant reminder of this truth, see MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015).

22. Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1800–16 (1997).

23. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 107–30 (1996).

24. *See* Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185.

an unfortunate impact on constitutional theory, a point I will turn to shortly. For now, I would like to provide another important instance of Scalia's use of preemptive argument.

In one of his best known lectures, "Originalism: The Lesser Evil," Scalia went on the offensive, making an affirmative case for the original public meaning approach and arguing that it was superior to the competing approach to constitutional interpretation.[25] Here Scalia's preemptive move was to nominate "nonoriginalism" as the alternative to original public meaning. As Scalia saw it, nonoriginalism was the rejection of original meaning in favor of using contemporary social meaning to interpret the Constitution.[26] For Scalia, nonoriginalism was barely comprehensible.[27] It was clearly illegitimate because, by definition, it threw out the law of the Constitution in favor of the evolving mores of contemporary society.[28]

Scalia's nonoriginalism was always a straw man, not the least because it was based on a series of misleading comparisons. In his lecture Scalia discussed how to resolve the issue of the President's power to remove executive officers by using the method of original meaning.[29] He contrasted original meaning to some exceedingly general statements made by the constitutional scholars he called nonoriginalist to the effect that the Constitution invites us to make it relevant for today by using contemporary social values.[30] By and large, these scholars were concerned with the exceedingly difficult interpretive problems posed by the First and Fourteenth Amendments, not the more specific question of the removal power. Another problem was that Scalia compared the use of originalism in a leading Supreme Court opinion on the removal issue, *Myers v. United States*,[31] with the pronouncements of scholars addressing some of the most abstract issues in constitutional law and theory. A fairer test would have been to contrast the reasoning of *Myers* with an equally influential nonoriginalist opinion, say, *Brown v. Board of Education*.[32]

25. Scalia, Originalism, *supra* note 1.
26. *See id.* at 852–56; Scalia, Common-Law Courts, *supra* note 1, at 38.
27. SCALIA & GARNER, *supra* note 1, at 89.
28. Scalia, Originalism, *supra* note 1, at 854–55.
29. *Id.* at 856–61.
30. *Id.* at 853–54.
31. 272 U.S. 52 (1926).
32. 347 U.S. 483 (1954).

Having provided two examples of Scalia's use of preemptive argument, I will now move to a discussion of why I believe this rhetorical strategy had a deleterious influence on the progress of constitutional theory. As I have suggested, Scalia's first move from original intent to original meaning had the desired effect of rebooting the debate—but without much attention to whether the inquiry into original meaning was substantially different from original intent. The reason both methods were similar is that they both relied on historical evidence as a source of legal authority. This meant they were both equally vulnerable to critiques by historians launched at almost exactly the same moment Scalia introduced the idea of original meaning. Scalia's biographer Murphy draws appropriate attention to the historians' critique throughout his account of Scalia's rise to prominence as a leader of the conservative legal movement.[33]

Scalia's shift to original meaning had a noticeable and unfortunate influence on debates over executive power in the 1990s and after.[34] Under the theory of original public meaning, the task of interpreting Article II involves determining the "original" and "public" meaning of terms like "executive power." How did legal scholars carry out this project? In general, they looked for evidence concerning the semantic meaning "executive power" had for the public that read the Constitution, perhaps using a reasonable eighteenth-century person standard. I put these terms in scare quotes because the public that existed in 1787–88 as the Constitution was debated and ratified was not necessarily the same public that existed in the American colonies of the seventeenth or mid-eighteenth century. Nonetheless, executive power scholars inspired by Scalia began with those earlier periods. This is partly because they saw Locke's writings on government and Blackstone's circa-1760s treatise as providing reliable evidence of the original public meaning of executive power. These scholars then tended to use a presumption that this meaning carried forward into the critical period of the 1780s, unless there was specific evidence to the contrary. In his controversial work on war powers, for example, John Yoo tended to fix the meaning of

33. *See, e.g.*, MURPHY, *supra* note 3, at 167–68, 248–49, 391, 394–98, 410–14.

34. *Cf.* Stephen M. Griffin, *The Executive Power*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 343, 350 (Mark Tushnet, Mark A. Graber, & Sanford Levinson eds., 2015).

executive power (including the phrase "declare war") by using evidence from mid-eighteenth century England.[35] He then constructed his entire argument around the assumption that this meaning changed not at all through the Revolutionary War, the adoption of the Articles of Confederation, the critical period of the 1780s, and the writing and ratification of the Constitution.[36] This modus operandi suggests that the method of original public meaning depends on the existence of a stable baseline of constitutional meanings prior to the Philadelphia Convention. But why should this pose a problem?

Because the leading historical scholarship on the formation of the Constitution, including the work of Bernard Bailyn, Gordon Wood, Jack Rakove and many other historians, showed that the critical period destabilized the baseline for understanding the words and phrases in the Constitution, including such critically important doctrines such as federalism and separation of powers. Influenced strongly by Scalia's advocacy of the original public meaning approach, executive power scholars developed their own custom-built historiography without proper consideration of the prior seminal work of these historians.[37] Rakove's criticism of Scalia's key original meaning opinion in the Second Amendment case of *District of Columbia v. Heller*[38] serves well as a summary of the historians' critique:

> Scalia's version of originalism/textualism, as applied in this opinion, seems oblivious to the most important findings that historians from Edmund Morgan (writing on the Stamp Act) on through [Bernard] Bailyn, [Gordon S.] Wood, myself and others have argued over the last half-century: that this was a deeply creative era in constitutionalism and political thought, and the idea that static definitions will capture the dynamism of what was going on cannot possibly be true.[39]

35. JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

36. For a relevant critique of Yoo's work, see Stephen M. Griffin, LONG WARS AND THE CONSTITUTION 41–45 (2013).

37. On the other hand, some legal academics took historians seriously. *See, e.g.*, Martin Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

38. 554 U.S. 570 (2008). Scalia's opinion is arguably built on a number of preemptive moves. Most notably, he contends that the prefatory clause in the Second Amendment concerning "a well regulated militia" does not "limit or expand the scope" of the operative clause granting the right "to keep and bear arms." *Id.* at 578.

39. MURPHY, *supra* note 3, at 391 (quoting Jack Rakove, *Thoughts on* Heller *from a "Real Historian,"* BALKANIZATION (June 27, 2008), http://

Eventually Scalia took notice of the historians' critique and the possible danger of "law-office" history, but his response was disappointing.[40] He appealed to the stability of word meanings since the eighteenth century and noted that the Supreme Court has the help of "legions of academic legal historians populating law and history faculties at our leading universities."[41] The problem of "law-office" history, however, has to do with the *selective* use of historical evidence by lawyers and judges, motivated by the understandable pressing need to resolve specific cases.[42] One possible option that tends to be shortchanged by the adversarial process is that the historical evidence is simply insufficient to resolve the question at issue. Moreover, the general problem Scalia never addressed is the lack of familiarity of lawyers and judges with the historical context of the founding period, a context which generations of historians have labored with much success to establish. Surprisingly, in a lecture at Harvard in the wake of *Heller*, Scalia contended that given that historians of the founding period were in disagreement, lawyers with their training in interpreting texts were well qualified to adjudicate among them![43] This was perhaps Scalia's most audacious use of preemptive argument—positing that the legal method trumps history.

Scalia's second preemptive move to define the debate in terms of a stark opposition between originalism and nonoriginalism also impeded the progress of constitutional theory.[44] Throughout his writings, Scalia seemed notably alienated from the real character of the American constitutional tradition. At least from the time of the Marshall Court, that tradition has exhibited a variety of methods of interpretation, all ably attested to by legal historians.[45] The

balkin.blogspot.com/2008/06/thoughts-on-heller-from-real-historian.html.

40. SCALIA & GARNER, *supra* note 1, at 399–402.

41. SCALIA & GARNER, *supra* note 1, at 401 (citation omitted).

42. *Cf.* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 164–69 (1996).

43. *See* MURPHY, *supra* note 3, at 397, 410–14.

44. I recognize that some scholars believe the term "nonoriginalism" is unobjectionable as it simply means the rejection of originalism. But I think allowing originalists (following Justice Scalia) to define the argumentative terrain in this way grants them too much, as it in effect concedes that "nonoriginalism" is nontraditional and suggests that it offers no guidance as to how to interpret the Constitution.

45. *See, e.g.*, GRIFFIN, *supra* note 42, at 143–52.

true alternative to Scalia's view is in fact the traditional or conventionalist view, grounded in Marshall's common law approach to constitutional interpretation, that the sources of law familiar to Americans during the founding era and early republic were all legitimate starting points for methods of constitutional interpretation.[46]

Pretty clearly, what Scalia really had in mind by "nonoriginalism" was any theory capable of justifying substantive due process, a doctrine he thought wholly mistaken.[47] Even if this specific point is conceded, however, there is much legitimate constitutional interpretation, advanced throughout the entirety of American constitutional history, that has nothing to do with Scalia's narrow take on how to use historical evidence—that is, the theory of original public meaning. Certainly defining "nonoriginalism" as the alternative made it easier for Scalia to avoid a meaningful engagement with the reasoning that led Supreme Court Justices and scholars to the perspective on constitutional change usually called the "living Constitution."

Two considerations that Scalia ignored are especially relevant. First, there is the inherent difficulty of advancing constitutional amendments over the supermajoritarian barriers imposed by Article V. This difficulty is compounded by what I have described as the "reverence feedback effect," something well documented historically, which makes it politically difficult to advance even reasonable amendment proposals. Because the Constitution is not simply a law but a revered object of political identity, such proposals tend to be treated not only as critiques of a respected document, but as proclamations that America as a whole is on the wrong track.[48] Americans resist these ideas. Living constitutionalists tend to believe that with the decline of interest in making significant amendments, there has been a corresponding pragmatic imperative for the Supreme Court, working with the political branches, to fill the gap. Living constitutionalists do not understand this to be a radical position because of the second consideration: our circumstances and values have in some instances changed so dramatically over the centuries that the framers' perspective can be relevant only on a highly selective basis.

46. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

47. Scalia, Common-Law Courts, *supra* note 1, at 39.

48. GRIFFIN, *supra* note 42, at 39.

These considerations are well illustrated by *Brown* and the enormous legal and political effort required to dismantle segregation. Originalists tend to treat *Brown* as a single case about education (rather than about segregation as a whole) which poses a potential problem for their point of view.[49] Scalia is no exception in this respect, asserting that the meaning of "equal protection" is sufficiently broad "to prohibit all laws designed to assert the separateness and superiority of the white race, even those that purport to treat the races equally."[50] It's hard to know what to make of this because Scalia did not purport to do the sort of historical research into the original public meaning of "equal protection" that was necessary. But if this is the original meaning of equal protection, then we have arrived at something close to what "nonoriginalists" or living constitutionalists have always contended—that given changed circumstances, it is justifiable to read capacious phrases like "equal protection" in an aspirational spirit. That is ultimately what the Supreme Court did in *Brown* and the cases that flowed from it. As Jack Balkin argues in his seminal *Living Originalism*, once Scalia made this move to emphasizing the semantic meaning of abstract phrases such as "equal protection," the line between originalism and nonoriginalism became hair thin.[51]

Scalia's response to *Brown* was deficient in another way. The point living constitutionalists are making with *Brown* is not solely that originalism might not be able to justify important precedents that no one is interested in overturning. *Brown* and the Amazonian river of equal protection law that flows from it show that Scalia's theory of legal legitimacy is flawed. From Scalia's perspective, what should matter is that the opinion in *Brown* was not based properly on an inquiry into the original meaning of equal protection, something that presumably made it illegitimate when it was decided. If, however, the legal community treated *Brown* and its considerable progeny as not only legitimate, but with respect as involving a new understanding of what the Fourteenth Amendment meant and thus the cornerstone of a new era of judicial review (the "rights revolution"), then this showed that

49. For an up-to-date discussion of the debate between originalists and nonoriginalists on *Brown*, see Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2027–30 (2012).

50. SCALIA & GARNER, *supra* note 1, at 88.

51. JACK M. BALKIN, LIVING ORIGINALISM 100–08 (2011).

Scalia's originalism is missing something important about how legitimate constitutional change occurs within American history.

At least since *Brown*, the Fourteenth Amendment is probably most responsible for inspiring the notion of the living Constitution. Scalia made things considerably easier on himself by rejecting the substantive due process doctrine and simply positing that the original meaning of equal protection does not have bad consequences in the present. If Scalia had curbed his penchant for using preemptive arguments for a moment, he might have perceived that the scholars he described as "nonoriginalist" came up with that perspective as a consequence of wrestling with the knotty interpretive problems posed by the clauses he was so assiduously avoiding. Nonetheless, in terms of the debate over constitutional interpretation, Scalia's rhetorical strategy was a success. Scalia is certainly treated as if he made a major contribution to constitutional theory, even though it is striking how little he actually had to say about the interpretive problems posed by the Fourteenth Amendment—the problems that caused the contemporary debate in the first place.

To return to the terms of college debate, how should we evaluate Justice Scalia—better on the Affirmative side or the Negative? Some debaters are known for having an affinity for one side over the other. On the affirmative side, there is no question that Justice Scalia was successful in promoting originalism as original public meaning and, as a consequence, sparking new interest among legal academics into launching more rigorous inquiries into the historical meaning of the Constitution. Yet the evidence that Justice Scalia was more comfortable on the negative is far more striking and persuasive. Scalia often seemed fairly gloomy about the course of constitutional law as he saw it in his years on the Court.[52] But it is noteworthy that even early on, Scalia saw the role of the Constitution and the Court in mostly negative terms. Rather than understanding the Constitution as an ongoing framework for government, Scalia tended to emphasize the purpose of the Bill of Rights in preventing ideas of "progress" from restricting rights and saw American society as just as

52. MURPHY, *supra* note 3, at 221, 232, 241–42, 256.

likely to "rot"[53] over time as to advance toward a more promising future.[54]

It is a shame that Scalia tended to wrap his version of originalism around the rule of law as if the two were identical. When the Supreme Court rejected relying on any doctrinally plausible version of originalism in *Brown*, it guaranteed the end of segregation and thus a corresponding massive increase in the rule of law for African Americans. Contrary to Scalia's description of the civil rights decisions as relying on notions of a "judicial aristocracy,"[55] the Supreme Court worked to assist a democratic social movement and, together with the political branches, achieved one of the greatest constitutional triumphs in American history, a Second Reconstruction. From Scalia's perspective, however, was this a signal legal and constitutional achievement or an overdue reform motivated ultimately by political considerations? Given that Scalia seemed naturally inclined to be negative on American constitutional history, it remains unfortunately difficult to answer this question.

53. Scalia, Common-Law Courts, *supra* note 1, at 41.

54. Scalia's view on this point is criticized effectively in CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 36–39 (2001).

55. SCALIA & GARNER, *supra* note 1, at 88.