
A FOOL FOR THE ORIGINAL CONSTITUTION[†]

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I confess that Justice Antonin Scalia was one of my heroes. He did not seem a demigod; he was no Washington, Lincoln, or Gandhi. Justice Scalia could be too pugnacious. He could vent against colleagues in ways that seemed counterproductive. But his wit, intellect, brio, and prose — well, these were marvels to behold.

For a spell, Professor Jamal Greene was of a similar mind. In a *New York Times* op-ed written shortly after Justice Scalia's passing, Greene said that "Antonin Scalia was my hero," that he had "looked up to [the Justice] for years," and that the Justice wielded "enormous influence."¹ The praise reflected rather well on Greene. Unlike some, he perceived the virtues in an intellectual opponent. It took pluck for a liberal to confess, in public, his admiration for Justice Scalia. I suspect that some thought the op-ed was akin to a tribute to Orval Faubus.

Something happened over the spring or summer of 2016, from the pages of the *New York Times* to the pages of the *Harvard Law Review*. Greene's overflowing praise has dried up. Filling the void is a denial of Justice Scalia's influence and the claim that "[w]hether or not Justice Scalia was a bigot, his client — the law of chronic resistance to novelty — most certainly was."² Greene sheepishly implies he gave in to some temptation when he wrote for the *Times*.³ I do not know what intervention or epiphany triggered this seismic shift, but the reversal, executed over a few months, is extraordinary.

My remarks largely track Greene's. I discuss Justice Scalia's guiding lights, elements underscored in his many writings and speeches. I briefly comment on what I consider minor blemishes in his jurisprudence. I discuss his outsized influence and why it likely will endure. Finally I make a few observations about Greene's claims that

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¹ Jamal Greene, Opinion, *Liberal Love for Antonin Scalia*, N.Y. TIMES (Feb. 14, 2016), <http://www.nytimes.com/2016/02/15/opinion/what-liberals-learned-from-antonin-scalia.html> [<https://perma.cc/X6LS-388T>].

² Jamal Greene, *The Supreme Court, 2015 Term — Essay: The Age of Scalia*, 130 HARV. L. REV. 144, 148 (2016).

³ *Id.* at 144 & n.5.

originalism is “regressive”⁴ and that Justice Scalia’s critics had reason to carp that the Justice’s jurisprudence and remarks were bigoted.⁵ To get down to brass tacks, Greene’s latest pronouncements are off target. In contrast, his observations in the *Times* were spot on. Sometimes we are right the first time.

I. INFLUENCES

Where Greene discovers a two-part agenda, I perceive four influences that shaped Justice Scalia’s jurisprudence. In addition to the two strands that Greene identifies — originalism and a preference for rules over standards⁶ — I perceive deep commitments to judicial restraint and tradition.

As Greene correctly highlights, Justice Scalia is well known for his full-throated defenses of originalism. In part, this association stems from his highly influential and delightful essay, *Originalism: The Lesser Evil*.⁷ Justice Scalia also favored rules over standards, a partiality defended in *The Rule of Law as a Law of Rules*.⁸ The Justice believed that rules constrain the courts and supply predictability, whereas standards leave deep uncertainty about how judges will apply them.⁹

Though Greene ably identifies these features of Justice Scalia’s jurisprudence, I believe that he omits two more. First, Justice Scalia sought to restrain the courts.¹⁰ The preference for discerning rules in the law served that interest, for Justice Scalia believed that rules inhibit judicial lawmaking.¹¹ But the preference for rules was but one factor behind the Justice’s interest in judicial restraint. In advocating such restraint, the Justice channeled the counterreaction to the excesses of the Warren and Burger Courts. Justices on those Courts tended to see little difference between their preferences and the law, an inclination that predictably led those Justices to impose their preferences as law. Justice Scalia’s insistence on rigorous adherence to exacting standing doctrines also reflected his desire to constrain the federal courts.¹² The Justice was quick to criticize the predilection of the Supreme Court to act as a “nine-headed Caesar, giving thumbs-up or

⁴ *Id.* at 144.

⁵ *See id.* at 145–46, 148, 178–79.

⁶ *See id.* at 146, 150, 153.

⁷ Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

⁸ Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

⁹ *See id.* at 1179–80.

¹⁰ *See* Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 YALE L.J. 529, 530, 538, 566 (1997) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

¹¹ *See* Scalia, *supra* note 8, at 1179–80.

¹² *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

thumbs-down to whatever outcome, case by case, suits or offends its collective fancy.”¹³

The final strand emphasized tradition.¹⁴ “[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.”¹⁵ As this quote suggests, Justice Scalia often wielded existing traditions as a shield, one meant to inhibit the judicial creation of new rights. In certain substantive due process cases, like the dispute over a right to physician-assisted suicide,¹⁶ the absence of a tradition supporting the existence of a right led him to reject the claimed right. Yet there also was the prospect that the Justice would endorse traditional rights that the Court had not previously recognized. With respect to the right to keep and bear arms, arguments from tradition led Justice Scalia to endorse the notion that the right applied against the states.¹⁷ Regarding habeas corpus, the Justice cited tradition repeatedly in declaring that captured citizens who allegedly waged war against the United States had a constitutional right to be released or to be criminally charged.¹⁸

These four jurisprudential influences sometimes worked in concert, pointing to a single answer. Yet it could not always be so. In *NLRB v. Noel Canning*,¹⁹ a broad reading of the Recess Appointments Clause grounded on tradition lost out to the Clause’s original meaning.²⁰ In *McIntyre v. Ohio Elections Commission*,²¹ though there was a powerful case that the First Amendment protected anonymous political speech, Justice Scalia sided with the progressive tradition that permitted the state to ban anonymous speech.²² The Justice’s penchant for rules sometimes seemed to get the better of his fidelity to the original Constitution;²³ his steadfast refusal to consider whether congressional delegations of vast rulemaking authority were unconstitutional delega-

¹³ *Dickerson v. United States*, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting).

¹⁴ See generally David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991).

¹⁵ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

¹⁶ See *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Justice Scalia joined Chief Justice Rehnquist’s majority opinion).

¹⁷ See *McDonald v. City of Chicago*, 561 U.S. 742, 791–92 (2010) (Scalia, J., concurring).

¹⁸ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–69 (2004) (Scalia, J., dissenting).

¹⁹ 134 S. Ct. 2550 (2014).

²⁰ See *id.* at 2592, 2595–97 (Scalia, J., concurring in the judgment).

²¹ 514 U.S. 334 (1995).

²² See *id.* at 371–85 (Scalia, J., dissenting).

²³ See Greene, *supra* note 2, at 163–65; see also Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014) (arguing that Justice Scalia’s strong preference for rules over standards is not always consistent with the original meaning of the Constitution).

tions of legislative power comes to mind.²⁴ Yet when it came to gun rights, originalist readings of the Constitution trumped concerns about judicial restraint.²⁵ Because Justice Scalia, like most everyone, had multiple commitments, he sometimes was forced to choose amongst them.

The recurrence of certain themes perhaps implied that Justice Scalia regarded other considerations as beyond the pale. But the Justice was not content to leave this conclusion to implication. He was quite vocal about his *bêtes noires*, those Mephistophelian ideas that he considered infernal. These were devils that he sought to slay on every occasion.

The Justice had at least two black beasts. First, he rejected the claim that the meaning of laws could drift or change without a formal change in text. This opposition made him dead set against the theory of the living Constitution. He was certain that something could not become unconstitutional (or constitutional) merely because political views or moral sensibilities had changed. Hence he liked to exclaim that the Constitution was not living but “dead, dead, dead.”²⁶ Second, and in keeping with his opposition to a living Constitution, the Justice combated the tendency of judges to read their preferences into the law. “Now the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law.”²⁷ Judges were meant to be agents, applying law enacted by others. The Constitution never authorized them to impose their own morality under the guise of enforcing those laws.²⁸

II. NO APOLOGIA

The Justice seemed ever faithful to the principle that the Constitution was dead. I do not believe that he ever discovered a novel right on the grounds that modern morality or society demanded it. Nor do I believe he ever read a right out of the Constitution merely because he thought it had outlived whatever usefulness it might have once had. Whatever legal conclusions the Justice drew, he was apt to say that his reading of the law had always been the right one, whatever the Court might have said in the past. It had not become right with the passage

²⁴ See Calabresi & Lawson, *supra* note 23, at 483–85, 489–90.

²⁵ See *McDonald v. City of Chicago*, 561 U.S. 742, 908–10 (2010) (Stevens, J., dissenting) (asserting that Justice Scalia’s originalist majority opinion abandoned judicial restraint).

²⁶ Clare Kim, *Justice Scalia: Constitution Is “Dead,”* MSNBC (Oct. 2, 2013, 10:03 PM), <http://www.msnbc.com/the-last-word/justice-scalia-constitution-dead> [<https://perma.cc/RS3Z-6UWQ>].

²⁷ Scalia, *supra* note 7, at 863.

²⁸ See *The Originalist: Justice Antonin Scalia*, CAL. LAW. (Jan. 2011), <http://ww2.callawyer.com/story.cfm?eid=913358&evd=1> [<https://perma.cc/ZZS9-X4A4>]. In this interview, Justice Scalia stated his view that people who advocated a given legal position should “[p]ersuade [their] fellow citizens it’s a good idea and pass a law. That’s what democracy is all about. It’s not about nine superannuated judges who have been there too long, imposing these demands on society.” *Id.*

of time or changes in personnel or morality. While perceptions of the law might change, the meaning of a fixed law remained fixed.

Far more challenging was the task of separating judicial preferences from the law. It is difficult to list rulings that ran athwart of his personal convictions because Justices ordinarily do not reveal the latter. Still it seems that Justice Scalia sometimes successfully sidelined his predilections. Though he voted to strike down a state law banning the desecration of the American flag on the grounds that the law was unconstitutional,²⁹ he apparently wanted to jail “sandal-wearing, scruffy-bearded weirdo[es] who” burnt the flag.³⁰ His votes in *Crawford v. Washington*³¹ and *Apprendi v. New Jersey*³² seemed triumphs of originalist principle over policy considerations.

Yet, like the rest of humanity, Justice Scalia was fallible. In thinking about this possibility, reconsider the Justice’s enduring devotion to rules, judicial restraint, and traditions. I am inclined to think that it was a misstep for the Justice to give significant, independent weight to these considerations. It is a slip up in the same way that it would be to employ cost-benefit analysis to make educated assessments about optimal constitutional policies and then decree that the Constitution somehow incorporates these policies. It is a blunder in the same way that it is to treat notions of “justice” or the “separation of powers” as freestanding values in constitutional interpretation.

I suppose someone devoted to these values — rules, judicial restraint, traditions — might respond that the Constitution implicitly incorporated them. Assuredly the Constitution does, in the limited sense that particular provisions reflect and embody a respect for tradition or a preference for rules or judicial restraint. But saying that the Constitution is a product of these (and many other) values is different from saying that the Constitution authorizes interpreters to draw upon them as a means of discerning meaning. These values do not appear to permeate every nook and cranny of the Constitution. Nor are they lenses meant to color our reading of the Constitution. Hence a judge who continually refracts the Constitution through these values is apt to

²⁹ *Texas v. Johnson*, 491 U.S. 397 (1989).

³⁰ Scott Bomboy, *Justice Antonin Scalia Rails Again About Flag-Burning “Weirdoes,”* NAT’L CONST. CTR.: CONST. DAILY (Nov. 12, 2015), <http://blog.constitutioncenter.org/2015/11/justice-antonin-scalia-rails-again-about-flag-burning-weirdoes> [https://perma.cc/584T-B4ZQ].

³¹ 541 U.S. 36 (2004) (Justice Scalia wrote the majority opinion holding that admitting into evidence a recorded statement from a witness who did not testify at trial due to marital privilege violated the Confrontation Clause).

³² 530 U.S. 466 (2000) (Justice Scalia joined the majority in holding that the Constitution requires a separate finding by a jury at a standard of beyond a reasonable doubt as to any fact that increases a criminal penalty beyond the statutory maximum; in this case the petitioner faced an addition to his sentence for the allegedly racially motivated nature of his firearm possession for an unlawful purpose).

acquire a distorted perception, reading standards as rules and imposing restraint where none was imposed.

Despite my mild reproach, I would like to suppose that Justice Scalia came close to the ideal of separating predilection from law. It is easy for the professor to be a purist and insist upon the isolation, and then segregation, of the irrelevant from the relevant. It is far harder for the judge to be so meticulous and unsullied. For the scholar, nothing much of consequence, other than ego, turns on her purity. For the judge, it is much the opposite. A judge's decisions affect flesh and blood. Judges decide whether people may attend school, go to jail, or keep arms.

These continuous encounters with reality, these brushes with the living, help explain why no judge can entirely separate law from predilection. Justice Scalia's humanity perhaps explains why he once admitted to being a "faint-hearted originalist."³³ Even though he supposed that the Eighth Amendment's original meaning did not ban floggings, he suggested that he would find such beatings unconstitutional.³⁴ Later, he snatched this concession back,³⁵ recognizing that it posed a problem, at least for his standing amongst originalists.³⁶ I was a silent censor, aghast at the concession. But perhaps no one should have to apologize for being human.

Justice Scalia once said that "[t]he judge who always likes the results he reaches is a bad judge."³⁷ It can equally be said that any jurist who unswervingly sided with the law and steadfastly sidelined personal preferences would not be a human but an angel or automaton. Our benches lack both angels and automatons.

Justice Scalia well understood this last point. He harbored no illusions that judges, originalist or otherwise, would invariably eschew their moral or political preferences. As he put it, "[a]voiding this error [mistaking personal preferences for the law] is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely."³⁸ On another occasion, he wrote that "[s]ociety's moral beliefs necessarily affect its constitutional perceptions in general There is no need to apologize for the phenomenon In any case, it is useless to rail against the phenomenon because it is inevitable."³⁹ What is true for society in general is no less true for the judges who

³³ Scalia, *supra* note 7, at 864.

³⁴ *Id.* at 861, 864.

³⁵ MARCIA COYLE, *THE ROBERTS COURT* 165 (2013).

³⁶ See Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006).

³⁷ Kim, *supra* note 26.

³⁸ Scalia, *supra* note 7, at 863.

³⁹ Antonin Scalia, *Morality, Pragmatism and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y 123, 123 (1986).

are part of it. A jurist's moral beliefs necessarily affect her constitutional perceptions.

Nonetheless, there was a marked difference between acknowledging this inevitable weakness and attempting to make a virtue of a vice by applauding judges who yielded to their predilections. Justice Scalia claimed that whereas living constitutionalism nourished and celebrated the judicial proclivity to mistake moral convictions for the law, originalism sought to constrain that tendency, making originalism the lesser evil.⁴⁰

III. LEGACY

Justice Scalia was quite influential and will, I predict, remain so. He was not pivotal in the way that Justices Sandra Day O'Connor or Anthony Kennedy often were. After all, he was not often in the middle of the Court. Nor was Justice Scalia influential in the sense that he altered the way the current Justices perceive the Constitution. The approaches of the current Justices were largely shaped long before they ascended to the Supreme Bench. When Professor Greene sets this as a benchmark for influence, he sets a standard too lofty. Good behavior tenure virtually guarantees that no Justice will march to the tune of a colleague, or, for that matter, anyone else. As Brutus put it, federal judges "are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself."⁴¹ The fact that Justices Anthony Kennedy, Stephen Breyer, and many others contested the sometimes enchanting, and sometimes ferocious, arguments of Justice Scalia is neither here nor there, for Justices can resist, contest, or promulgate almost anything.

Justice Scalia was influential in other senses. He changed the Court. His colleagues on the Court knew that they had to gird their opinions with references to text and original meanings, for that would perhaps take some of the sting out of an assertion that they were creating, rather than interpreting, the law. One study found that, within the Supreme Court, Justice Scalia's opinions enjoyed a higher citation rate than those of any other Rehnquist-era Justice, save for Justice John Paul Stevens.⁴² His adherence to originalism also altered the way lawyers argue before the Court. Advocates understood that they had to cite the text and make claims about the Constitution's original

⁴⁰ See Scalia, *supra* note 7, at 863.

⁴¹ *Antifederalist Nos. 78–79: The Power of the Judiciary (Part I)*, in THE ANTIFEDERALIST PAPERS 222, 223 (Morton Borden ed., 1965).

⁴² Frank B. Cross, *Determinants of Citations of Supreme Court Opinions (And the Remarkable Influence of Justice Scalia)*, 18 SUP. CT. ECON. REV. 177, 190 & tbl.3 (2010).

meaning in their briefs and arguments. Citing precedent and policy arguments was insufficient.

He also swayed those outside the Court. According to Professor Frank Cross, Justice Scalia's opinions issued during a ten-year period on the Rehnquist Court were cited far more frequently by lower courts than those of any other Supreme Court Justice during the same period.⁴³ Justice Scalia also shaped the course of state constitutional law by helping to usher in jurists with the same bent, like Michigan Supreme Court Justice Joan Larsen.⁴⁴ His opinions inspired (or delightfully maddened) students and lawyers, who saw the Justice as either a kindred spirit or a worthy intellectual foil.⁴⁵

In the legal academy, Justice Scalia enjoyed outsized influence. A 2012 ranking of law review articles lists Justice Scalia's *The Rule of Law as a Law of Rules* as the thirty-sixth most cited article on record.⁴⁶ If we tally how many articles were written about Justice Scalia, using that as a proxy for his relative significance, it seems that many scholars were consumed with him. Some 206 articles reference "Scalia" in their titles. This number dwarfs the totals for the other Justices with whom Justice Scalia served over the past two decades.⁴⁷

⁴³ *Id.* at 178, 191 & tbl.4.

⁴⁴ Justice Larsen served as a law clerk to Justice Scalia early in her career. See Joan L. Larsen, Opinion, *What I Learned from Justice Scalia*, N.Y. TIMES (Feb. 16, 2016), <http://www.nytimes.com/2016/02/16/opinion/what-i-learned-from-justice-scalia.html> [<https://perma.cc/HD6U-EUAG>].

⁴⁵ For an example of one who found in Justice Scalia a kindred spirit, see David Lat, *Justice Scalia and Me: A Love Story*, ABOVE L. (Feb. 14, 2016, 3:48 PM), <http://abovethelaw.com/2016/02/justice-scalia-and-me-a-love-story> [<https://perma.cc/4CY3-RCZN>] (describing how the author, upon reading Justice Scalia's dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), burst into applause).

⁴⁶ Fred R. Shapiro & Michelle Pearse, Essay, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 tbl.1 (2012).

⁴⁷ The table below represents the findings and search terms employed on HeinOnline.

TABLE I. REFERENCES IN JOURNAL ARTICLE TITLES BY JUSTICE

JUSTICE	HITS	SEARCH TERM
Scalia	206	"Scalia"
Rehnquist	107	"Rehnquist" NOT "Rehnquist Court"
Stevens	67	"Justice Stevens" OR "Justice John Paul Stevens"
Breyer	57	"Breyer"
O'Connor	54	"Justice O'Connor" OR "Justice Sandra Day O'Connor"
Kennedy	49	"Justice Kennedy" OR "Justice Anthony Kennedy"
Thomas	49	"Justice Thomas" OR "Justice Clarence Thomas"
Ginsburg	42	"Justice Ginsburg" OR "Justice Ruth Bader Ginsburg"
Roberts	27	"Chief Justice Roberts" OR "Chief Justice John Roberts"
Souter	25	"Souter"
Sotomayor	23	"Sotomayor"
Kagan	21	"Kagan"
Alito	18	"Alito"

Different search terms were used for each of the Justices to avoid false positives such as article titles referencing "the Rehnquist Court" or other uses of a Justice's last name when not referring to that Justice. This approach, granted, is still a rough estimate.

Justice Scalia's tight embrace of originalism influenced many professors, including Greene. Greene is an extraordinary scholar. Many of his best pieces focus on originalism; he has eight that reference originalism in the title.⁴⁸ Can there be a better acknowledgment of originalism's place in the legal academy than a respected scholar like Greene's taking the theory seriously?

To be clear, originalism has not triumphed, for the idea of a living Constitution has not been consigned to the ash heap of history.⁴⁹ Yet because originalism has acquired some prominent converts,⁵⁰ some scholars hyperbolically claim that "we are all originalists now,"⁵¹ and a liberal Justice admitted the same.⁵² Theories of the living Constitution seem to be on the back foot.

Was Justice Scalia's time on the bench originalism's high-water mark? Only time will tell. But I think not. Originalism has yet to show signs of faddishness. To the contrary its impact has mushroomed in judicial⁵³ and

⁴⁸ See Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683 (2012); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978 (2012); Jamal Greene, *Guns, Originalism, and Cultural Cognition*, 13 U. PA. J. CONST. L. 511 (2010); Jamal Greene, Essay, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325 (2009); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009); Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517 (2011); Jamal Greene et al., Essay, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

⁴⁹ But see William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (claiming that American legal practices are originalist).

⁵⁰ See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

⁵¹ See, e.g., Jeffrey Rosen, *Originalist Sin: The Achievement of Antonin Scalia, and Its Intellectual Incoherence*, NEW REPUBLIC, May 5, 1997, at 26; accord Lawrence B. Solum, *We Are All Originalists Now*, in *CONSTITUTIONAL ORIGINALISM: A DEBATE 1* (Robert W. Bennett & Lawrence B. Solum eds., 2011). For an argument that originalism is the law, see Baude, *supra* note 49.

⁵² See *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf> [<https://perma.cc/2XDE-ZNBT>] (statement of Elena Kagan, Solicitor Gen. of the United States) ("[W]e are all originalists.").

⁵³ According to a Westlaw search, below are the numbers of cases in the federal courts referring to both the "Constitution" and either "original meaning" or "historical understanding," organized by five-year period of publication.

TABLE II. FEDERAL CASES MENTIONING BOTH THE "CONSTITUTION" AND EITHER "ORIGINAL MEANING" OR "HISTORICAL UNDERSTANDING" BY FIVE-YEAR PERIOD

YEAR RANGE	NUMBER OF CASES
1981-1985	28
1986-1990	27
1991-1995	52
1996-2000	54
2001-2005	74
2006-2010	71
2011-2015	155

academic⁵⁴ circles over the past thirty years. As a new generation of lawyers more thoroughly exposed to originalist thought comes to the fore, it seems likely that originalism will endure. As people continue to advance, defend, refine, and disparage the theory, Justice Scalia's memorable defense of it will remain prominent and extend his influence over originalists and their critics.

Regardless of whether originalism recedes or continues to surge, Justice Scalia will enjoy a richly deserved eminence for the foreseeable future. He was often quotable, in an era when casebooks must condense judicial opinions. He also served as a counterpoint to the sensibilities of most constitutional law professors, thereby providing a useful contrast. Students want a clash of ideas, not a catechism. Finally, Justice Scalia — through his impressive arguments and memorable turns of phrases — inspired many to take up the originalist flag, including thousands of lawyers he barely knew or never met. His opinions, books, and articles guarantee him an enduring sway.

IV. RESISTANCE & BIGOTRY

As noted, Greene is a keen student of originalism and of Justice Scalia. It is thus strange to see him link originalism to opposition to change, claim that Justice Scalia's agenda consisted of "chronic resistance to novelty," and assert that the Justice's "symbolic purpose was to speak for the law's intolerance of social change."⁵⁵ Further, it is puzzling to read that originalism's rivals merely wished for the Constitution "to appear to be open to novel forms of contestation" and favored the "promiscuity of the law."⁵⁶ Most discouraging is Greene's openness to the charge that Justice Scalia might have been a bigot.⁵⁷

⁵⁴ According to a HeinOnline search, below are the numbers of law review articles referring to "originalism" in their text, organized by five-year period of publication.

TABLE III. LAW REVIEW ARTICLES MENTIONING
"ORIGINALISM" IN THEIR TEXT BY FIVE-YEAR PERIOD

YEAR RANGE	NUMBER OF ARTICLES
1981-1985	48
1986-1990	280
1991-1995	512
1996-2000	765
2001-2005	921
2006-2010	1624
2011-2015	1986

⁵⁵ Greene, *supra* note 2, at 148.

⁵⁶ *Id.* at 182.

⁵⁷ *Id.* at 146, 148, 178.

Greene equates skepticism toward new rights claims to a rearguard action against progress.⁵⁸ This is balderdash. Before a court, both parties can easily cast their arguments in the language of rights. Notwithstanding the ancient concept of nuisance, I can claim a novel constitutional right to use my property as I see fit, including a right to emit noxious fumes. In response, my neighbor can assert a constitutional right to be free of such poisonous pollution. In that clash of constitutional rights, is the judge inescapably opposed to social progress? After all, however she rules, the judge will be rejecting a novel constitutional claim. Furthermore, as Judge Robert Bork liked to point out, whenever a litigant asserts a constitutional right against the government, the latter may reply that it seeks to vindicate the right of the majority to legislate.⁵⁹ My point is not to belittle novel constitutional rights claims but to underscore that rejection of them cannot be equated to resistance to progress.

Moreover, originalists of Justice Scalia's sort — those that read the Constitution as authorizing judges to enforce but few rights — are not opposed to progress, of any sort. Per the Justice's originalism, the people, through their legislatures, are free to establish or abolish abortion rights. The people are free to establish or abolish the death penalty. And the people are free to establish or abolish the welfare state and the pervasive regulation of private property. In other words, the people are free to make social and moral judgments, revise them over time, and impose them on dissenters. What Justice Scalia combated was the tendency of judges to impose *their* understandings of social and moral progress on the rest of us or on jurisdictions that stand as outliers.⁶⁰

At some level, *all* Justices oppose such impositions. If some portion of the judicial right revived the Lochnerian right to contract or held that the Constitution banned abortion, you can bet the house that Justice Ruth Bader Ginsburg would stand in fierce opposition. Even if victorious libertarian pro-lifers insisted that the recognition of their legal claims marked the progress of a maturing society and evolving standards of decency, Justice Ginsburg's recalcitrance could not accurately be equated to hostility to progress. Again, a judge who declines to honor a rights claim should in no way be seen as hostile to progress, social, moral, or otherwise.

⁵⁸ See *id.* at 183–84.

⁵⁹ Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 824 (1986) (“The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority’s legitimate right to govern. How can that be done?”).

⁶⁰ See *The Originalist: Justice Antonin Scalia*, *supra* note 28.

As for opponents of originalism, whom Greene calls “pluralis[ts],”⁶¹ undoubtedly there are some who truly desire a robust debate and who would be equanimous in the face of consistent defeat at the hands of judges wedded to multifactor tests and open to novel rights claims. But I imagine that people like Greene are few and far between. A Supreme Court that endorsed newfangled rights and, in the process, overturned *Roe v. Wade*⁶² or *Wickard v. Filburn*⁶³ would receive little praise from living constitutionalists for being “open to novel forms of contestation” and having embraced “a new constitutional *grundnorm* of mutual recognition.”⁶⁴ I suspect that most who endorse living constitutionalism do so because it has been, in the recent past, a successful mechanism for imposing certain aspects of their morality on the entire country. Should living constitutionalism become a consistent means of imposing disfavored moralities, most of its current champions would disdain, rather than esteem, novel rights claims. Most living constitutionalists are of the sunshine varietal.⁶⁵

Finally, a few words about the claim that Justice Scalia’s jurisprudence and occasional rhetorical outbursts lent credence to the view that he was bigoted. As evidence, Greene first points to Justice Scalia’s treatment of religious freedom. Greene suggests that Justice Scalia, in *Employment Division v. Smith*,⁶⁶ crafted a rule that disfavored the practices of religious minorities.⁶⁷ Yet in *Burwell v. Hobby Lobby Stores, Inc.*⁶⁸ Justice Scalia quietly abandoned the harsh rule in order to vindicate the free exercise rights of Christians, or so Greene insinuates.⁶⁹

This charge is off base. The difference between *Smith* and *Hobby Lobby* was an intervening congressional statute, the Religious Freedom Restoration Act of 1993⁷⁰ (RFRA) that (re)imposed a tougher, pre-*Smith* strict scrutiny standard meant to favor free exercise claims.⁷¹ That compelling interest standard protects *every* religious person, in-

⁶¹ Greene, *supra* note 2, at 151.

⁶² 410 U.S. 113 (1973).

⁶³ 317 U.S. 111 (1942).

⁶⁴ See Greene, *supra* note 2, at 182.

⁶⁵ Cf. Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2217 (2006) (reviewing CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)) (observing that Professor Cass Sunstein’s seeming embrace of minimalism is surprisingly shallow and contingent).

⁶⁶ 494 U.S. 872 (1990).

⁶⁷ Greene, *supra* note 2, at 178–79.

⁶⁸ 134 S. Ct. 2751 (2014).

⁶⁹ Greene, *supra* note 2, at 180.

⁷⁰ Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁷¹ Greene acknowledges this: “*Smith II* itself was the motivation for RFRA’s heightened standard for religious claims.” Greene, *supra* note 2, at 180.

cluding Hindus, Muslims, and other religious minorities. Justice Scalia well understood this. Consider *Gonzales v. O Centro Espirita Beneficente União do Vegetal*⁷² from 2006, a case that implemented the RFRA “compelling interest” test. In that case the Justice (and the Court) found that because there was no compelling federal interest justifying the suppression of a hallucinogenic tea, *hoasca*, members of the *União do Vegetal* could sip that tea in their rites.⁷³ Because RFRA was constitutional as applied to the federal government, Justice Scalia (and his colleagues) had to apply the dreaded standard that the Justice had attempted to inter in *Smith*. Similarly, in *Hobby Lobby*, every member of the Court agreed about the applicability of the compelling interest test.⁷⁴ The simple fact is that Congress rebuffed the Justice’s earlier reading of the Free Exercise Clause and found a way of bypassing *Smith*. In *Centro Espirita* and in *Hobby Lobby*, the Justice (and the Court) rightly acquiesced.

Did Justice Scalia’s comments about affirmative action in state schools give rise to creditable suspicions of intolerance?⁷⁵ Only if one is predisposed to adopt an uncharitable reading of them.⁷⁶ People often say things capable of multiple meanings.⁷⁷ We would do well not to attribute the worst to those who challenge us. In his essay, Greene chose to take seriously the accusation that Justice Scalia was a bigot. He had the better stance in his *New York Times* piece, where he expressed robust, principled opposition to the Justice’s jurisprudence without also lending credence to kooky views.⁷⁸

To Justice Scalia’s credit, Greene’s criticisms would not have fazed him. Justice Scalia could get annoyed at times, but he had heard far worse. As his former clerk Professor Adrian Vermeule notes, the Justice was courageous in his willingness to stand up for his beliefs, even

⁷² 546 U.S. 418 (2006).

⁷³ *Id.* at 439.

⁷⁴ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

⁷⁵ See Greene, *supra* note 2, at 181–82.

⁷⁶ See Stuart Taylor Jr., *Scalia’s Poorly Worded Comment Has Merit*, REALCLEARPOLITICS (Dec. 15, 2015), http://www.realclearpolitics.com/articles/2015/12/15/scalias_poorly_worded_comment_has_merit_129030.html [<https://perma.cc/5CQ3-PARM>] (asserting that Justice Scalia’s comments are supported by research finding large racially based admissions preferences harm many students who are admitted to universities through affirmative action programs despite being underprepared for college-level coursework).

⁷⁷ Consider the remarks of Bill Clinton about then-Senator Obama. In 2008, Clinton said that a “few years ago [Obama] would have been carrying our [the Clintons’] bags.” See Ryan Lizza, *Let’s Be Friends: Two Presidents Find a Mutual Advantage*, NEW YORKER (Sept. 10, 2012), <http://www.newyorker.com/magazine/2012/09/10/lets-be-friends> [<https://perma.cc/EP65-DKJY>]. These were unfortunate remarks. Yet only a churl predisposed to finding fault would see them as evidence of racism.

⁷⁸ See Greene, *supra* note 1.

when it made him unpopular in some quarters.⁷⁹ Another clerk, Paul Clement, rightly described the Justice as a “happy warrior.”⁸⁰ Opponents might say that Justice Scalia was a cretin for originalism and a certain reading of the Constitution. And the Justice, with a beam and twinkle, might bellow, “Yes!” Justice Scalia was a fool for the Constitution and its original meaning, among other things.⁸¹

⁷⁹ Christina Pazzanese, *Death of a Judicial Giant*, HARV. GAZETTE (Feb. 15, 2016), <http://news.harvard.edu/gazette/story/2016/02/death-of-a-judicial-giant> [<https://perma.cc/9ZEK-5QXF>] (quoting Vermeule’s description of Justice Scalia as “a courageous and warm-hearted man who had such an outsized influence on the court and on American law because he was not afraid to stick his neck out”).

⁸⁰ See Paul D. Clement, Keynote Address at the Federalist Society’s 2016 National Student Symposium, at 33:54 (Mar. 4, 2016), <http://www.fed-soc.org/multimedia/detail/keynote-address-by-paul-clement-event-audiovideo> [<https://perma.cc/A5VH-HUEU>] (“[Justice Scalia] was a warrior. But he was a happy warrior.”).

⁸¹ See Michael Stokes Paulsen & Steffen N. Johnson, Essay, *Scalia’s Sermonette*, 72 NOTRE DAME L. REV. 863, 863–64 (1997). The article discusses a speech that Justice Scalia would subsequently give many times, in which he described Christians as “fools for Christ” and explained that the words “Christian” and “cretin” are etymologically related. In the speech, Justice Scalia embraced the world’s perception of Christians as “fools.” See *id.*