LECTURES

THE 2019 HIGGINS DISTINGUISHED VISITOR LECTURE:

THE SUBVERSIVE SIDE OF TEXTUALISM AND ORIGINAL INTENT

by
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I am very glad to be with you today and much appreciate the invitation of Dean Johnson and the Law School to spend a week here at Lewis & Clark as the Higgins Fellow. I am also very grateful to my good friend of more than 30 years, former Dean Klonoff, who I know had something to do with it.

Bob and I first met in the mid-1980s, working in the Solicitor General's Office under Solicitor General Charles Fried. Then, in the early 1990s, after leaving the SG's Office, we worked together for over a decade in private practice at Jones Day. Bob left Washington in 2004 to try out academia at University of Missouri-Kansas City, while staying working more or less full time at Jones Day—a typical high-energy Klonoff thing to do. Then, of course, in 2007, he came home to Lewis & Clark and Portland, as your Dean. So, for Bob and I, it has been a long time on opposite sides of the continent, and it is proving truly wonderful to have this chance to catch up.

I am also very excited about the chance to work with your great faculty and with many of you in classes around the law school. Bob has told me a fair amount about the atmosphere here, and about many of the people I would be meeting, and it is certainly proving to be everything he cranked it up to be. On top of that, along with this great experience comes a respite from living at the heart of the inferno of extreme craziness that has settled on Washington DC since January 20, 2017.

I am especially glad for the opportunity to talk with you tonight about some ideas I have been mulling over for a number of years. What I have been thinking about relates to our Supreme Court, and to changes in the way we think about law that have occurred in my time as a lawyer. As you will hear, some of those thoughts cause me some concern.

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Specifically, I want to talk tonight about textualism and original intent, or as some prefer to call it, original meaning. These doctrines are well familiar to you, as, over the past 40 years, both have won an important place in our law and in modern law school education.

Textualism, of course, is the commonsense idea that when you are dealing with a legal text, whether a statute, regulation, or constitutional provision, the words of that text are central. The text of the law is where you always begin in trying to determine what a provision means in the context of a given case. It comes at the start of any well-conceived statutory interpretation brief. And sometimes, when the text is quite clear and unambiguous, it is where the discussion ends. This much, I think, is very hard to argue with, and no one much does today. As Justice Kagan has said, "today we are all textualists."[1]

Original intent or meaning is a parallel principle in the context of constitutional provisions, which commands attention not only to the words of that document, but to any evidence that gives insight into what the words used by the Founders meant at the time they were written. The evidence may be contemporaneous dictionaries or treatises suggesting how certain legal principles were understood at the time, or contemporaneous cases that applied the principles. Originalism is much less often invoked than textualism, applying as it does just to constitutional provisions, and given the inherent difficulties of assessing the specifics of how certain expressions were understood over 200 years ago. But assuming there is compelling evidence that certain words had a particular clear meaning for those who wrote the Constitution, few would seriously argue that evidence of original meaning should not be considered.

So, these doctrines are very prominent in our law, and as a result, they are much discussed both in oral arguments and in the opinions of our Supreme Court.

Even more notable, though, is how rarely either of these doctrines alone provides a consensus basis for the resolution of cases before that Court. Much more often, text and meaning end up being part of a much larger discussion. Even in cases where the Court may be in substantial agreement on the outcome, perceived ambiguities in the text or the sketchy nature of most original meaning evidence mean that these considerations are at most a piece of the puzzle, and end up being discussed alongside more subjective issues such as context, purpose, and consequences. There are several reasons for this.

First and foremost is the Supreme Court's highly selective certiorari jurisdiction. The Court grants only one percent of petitions that parties file, and most of the time it does so because the lower courts are sharply divided on an important question of law.[2] Our federal judges and most of our high court state judges today are pretty capable people. Thus, when multiple judges disagree about the proper understanding of a governing legal rule, it says a lot about the difficulty of the point

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[1] *In Scalia Lecture, Kagan Discusses Statutory Interpretation*, HARV. L. TODAY (Nov. 25, 2015), https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/ ("I think we're all . . . textualists now in a way that just . . . was not remotely true when Justice Scalia join[ed] the bench."); *see* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1090 (2001) ("We are all textualists.").

[2] *See* SUP. CT. R. 10.

of law at issue and suggests that there are substantial credible arguments on both sides. That will rarely be true where the statute has an obvious, plain meaning or there is one-sided evidence of a clear, original intent.

Also, in constitutional law cases, the very nature of constitutional issues usually demands reasoning more complex and subjective than just reading the plain text or identifying an apparent original meaning. Retired Justice David Souter gave a wonderful speech at the 2010 Harvard Commencement, the year after he retired, in which he explained why what he called a "fair reading,"[3] or plain meaning approach, is inadequate to resolve most constitutional cases. He noted that the constitutional principles that govern so many of the Court's cases—like equal protection, due process, free speech, freedom from unreasonable searches and seizures, and the powers granted to the Government to facilitate effective government—are open-ended and lack precise textually-defined limitations. And they are often in tension with each other, so that the outcome in a given case is very likely to demand a balancing or accommodation between two or more constitutional principles.[4]

He also observed that, in giving meaning to these splendid constitutional generalities, the perspective of historical experience is often critical. To illustrate, he invoked *Brown v. Board of Education*'s reversal of the separate but equal ruling of *Plessy v. Ferguson*.[5] *Plessy*, he said, considered the "formal equality of an identical railroad car" to be "progress," when viewed against "the revolting background of slavery" that all the justices had lived through.[6] By 1954, judges who lacked that background but had experienced the world of the intervening half century "found a meaning in segregating the races by law that the majority of their predecessors in 1896 did not see. . . . [Its] only . . . possible meaning [was] . . . the judgment of inherent inferiority on the part of the minority race."

Thus, Justice Souter concluded, and I think he is plainly correct, experience is an essential element in the resolution of difficult constitutional issues. That is due in no small part to the fact that the world of today differs in so many respects from the world that the Founders knew and presents issues that transcend anything within their contemplation or any fair application of the words they used.[7]

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[3] David H. Souter, *Harvard Commencement Remarks*, HARV. GAZETTE (May 27, 2010), https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/.

[4] *Id.* He discussed as an example the instance of the Pentagon Papers case, where the First Amendment's protection of free speech supporting the right to publish had to be reconciled with the constitutional powers of the government to provide for the security of the nation, and of the President to manage foreign policy and command the military.

[5] *Id.* (citing Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954)).

[6] Souter, *supra* note 3.

[7] Many Supreme Court decisions confront the need to determine the extent and character of protections that the Constitution provides in circumstances presented in today's world that had no close antecedent in the Founding era. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2211–12 (2018) (determining whether the Fourth Amendment protects cell-site location information, which is the property of a third-party cell service provider, and which can be used to provide detailed information about a cell phone user's whereabouts whenever the phone is turned on); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759–60 (2014) (considering whether a for-profit corporation may claim the protection of the Free Exercise Clause to bar compelled funding of medical services objectionable to the owners of the corporation); Citizens

This point is perhaps best illustrated in some of the cases where the Court has relied on original meaning arguments in recognizing new constitutional rights hitherto unknown to the law. You are all familiar with the *Heller* case recognizing a private right to bear arms under the Second Amendment,[8] and many of you also know the *Apprendi-Blakely-Booker* line of cases, announcing a constitutional right to a jury trial on factual questions that can increase a defendant's maximum possible prison sentence.[9] Both of these historic discoveries have raised numerous hard, judgmental questions about how the new right is to be applied in modern circumstances to which the Founders never gave a thought.

But my favorite for sowing confusion and requiring the Court to clarify itself repeatedly is the 2004 *Crawford* decision dealing with the Confrontation Clause. In *Crawford*, the Court jettisoned a common law-based standard that made the right of confrontation inapplicable to evidence falling within a well-established hearsay exception under the Federal Rules of Evidence.[10] In its place, it substituted the notion that the Founders were focused primarily on outlawing the civil law method of ex parte affidavits as evidence in a criminal trial.[11] From this it derived the idea that the Clause demanded confrontation of any evidence of a "testimonial" character.[12] The difficulty is that there is substantial room to disagree about what this means and how it should apply in various modern contexts. And the upshot has been that in the decade after *Crawford*, the Court found it necessary to decide nine more cases to try to clarify the meaning of the new Confrontation Clause standard.[13] Four of them were by majorities of only five votes.[14]

With regard to statutes, the rarity of Supreme Court decisions based on a straightforward plain meaning application results from a combination of factors. Statutes are often the product of compromise and varying levels of legislative attention to detail, and thus often they are genuinely ambiguous. Sometimes litigation outcomes turn on the meaning of a term that is left undefined.[15] Whatever the

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United v. Fed. Election Comm'n, 558 U.S. 310, 318–19 (2010) (analyzing whether the First Amendment allows regulation of corporate political expenditures to generate expressive political media material).

[8] District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

[9] United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 303 (2004); Apprendi v. New Jersey, 530 U.S. 466, 469, 474 (2000).

[10] *See* Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

[11] *See id.* at 50–51.

[12] *Id.* at 59, 61.

[13] Ohio v. Clark, 135 S. Ct. 2173, 2177 (2015); Williams v. Illinois, 567 U.S. 50, 56–58 (2012); Bullcoming v. New Mexico, 564 U.S. 647, 657–58 (2011); Michigan v. Bryant, 562 U.S. 344, 348–49 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307 (2009); Giles v. California, 554 U.S. 353, 355 (2008); Whorton v. Bockting, 549 U.S. 406, 421 (2007); Davis v. Washington, 547 U.S. 813, 817 (2006) (consolidated with an Indiana case).

[14] These cases include *Williams*, 567 U.S. at 55; *Bullcoming*, 564 U.S. at 650; *Bryant*, 562 U.S. at 347; *Melendez-Diaz*, 557 U.S. at 306.

[15] For example, in Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1300–01 (2017), the question was whether the City of Miami was an "aggrieved party" able to sue and assert violations of the Fair Housing Act. Similarly, in Samsung Elecs. Co. v. Apple Inc., 137 S. Ct. 429, 432 (2016), the outcome turned on whether, for purposes of determining damages for design patent infringement, the term "article of manufacture" means an entire smart phone or just a component

textual difficulties may be, the Court's selectivity in granting cases because of lower court disagreements means that a lot of these poorly drafted statutes tend to come before it. These cases can't be resolved by an exercise of pure textualism, so a range of other factors—context, statutory purpose, legislative history, and consequences—necessarily come into play. The ultimate resolution, most of the time, involves competing collections of arguments offered on both sides, none of which can be said to be categorically correct or incorrect. Deciding these cases can only be done by making a judgment about which set of arguments, which both have something to be said for them, is the more persuasive.

All of this sounds pretty mundane, and indeed it is. But what I want to share with you tonight is something that is a bit less mundane. It concerns the history that brought these doctrines to prominence over the last 40 years. Having lived through a good part of that history, first as a government lawyer in the 1980s, and then as an appellate practitioner in private practice, I think there are a few important points to be made about it:

First, the prominence today of textualism and original meaning as undisputedly important tools of legal reasoning, in the form I have described them, was achieved in no small measure by a campaign based on false premises;

Second, that campaign of false premises has itself had a profound impact, well beyond the prominence that those two doctrines have achieved today;

Third, that impact has been the miseducation of our citizenry, producing gross misunderstandings about what judges, and especially our Supreme Court Justices, actually do, thereby generating disrespect and distrust toward our legal system.

To explain what I mean, let me take you back to the Justice Department in the early 1980s after Ronald Reagan took office. It was a remarkable place of ideas, full of many bright people, with aspirations and ideals to change America in ways they thought would make it better. It included people like John Roberts and Samuel Alito, who started their careers there as assistants to the Attorney General, the Solicitor General, and in the Office of Legal Counsel. Many of them were among the founders and early members of the Federalist Society, which came into existence in 1982. Indeed, the Federalist Society's James Madison necktie was quasi-official attire within the department.

A central focus of the new leadership at the Justice Department was on criticism of "judicial activism" that was thought to have corrupted our legal system and undermined our democracy. Much of the blame was ascribed to Chief Justice Earl Warren, who had left office in 1969. As Richard Nixon had before him, Reagan made a campaign issue of Warren Court cases like *Miranda*, which Reagan believed afforded criminal defendants protections articulated nowhere in the Constitution, to the detriment of decent law-abiding Americans. No less importantly, though, like Reagan during the campaign, the Department's new leadership was focused on developments during the 1970s under the then-Chief Justice, Warren Burger, who Nixon had appointed in 1968. Prominent among Reagan's targets was the 1973 *Roe*

part. And in McDonnell v. United States, 136 S. Ct. 2355, 2365 (2016), the case turned on whether arranging a meeting constituted an "official act" for purposes of bribery under the Hobbs Act and violation of Honest Services statute. In all three instances, the relevant statute provided no definition or other language that addressed these issues in anything close to express terms.

v. Wade decision, and civil rights cases involving forced bussing and numerical, quota-like remedies for historic discrimination.

Much of the early energy of what I will call the Reagan Revolution in the Law, thus went into litigation at all levels, to roll back perceived activist decisions, especially in the areas of civil rights, abortion, and criminal procedure. The success of these efforts was mixed, and much of what conservatives tried to push for—reversal of *Miranda* and *Roe*, for example—did not come to pass.[16] But the law did move incrementally to the right as the decade progressed, mostly through Supreme Court cases placing limits on the consequences of those earlier cases. That movement was aided greatly by new Court appointments—O'Connor in 1981, Scalia in 1986, Kennedy in 1988, and the 1986 elevation of Rehnquist to Chief Justice.[17] Rehnquist proved to be a well-liked and skillful leader with a knack for assembling surprising coalitions for conservative outcomes.

A second major focus of the Reagan Revolution was the selection of judges who would support and implement a restrained and careful approach to the law. Through his eight years in office, President Reagan appointed nearly 400 federal judges, including Judges O'Scannlain and Leavy on the Ninth Circuit.[18]

But the most ambitious effort of the Reagan Revolution went beyond rolling back bad decisions or appointing judges. It focused on a very public effort to re-educate lawyers, judges, and, more generally, the public, about the difference between legitimate and illegitimate avenues of legal and judicial thinking. The administration's legal thinkers saw that it would not be enough to get some decisions reversed and to put some "reliable" judges on the bench who would come and go. The real problem would be addressed only by changing the way people thought about the law, and by somehow policing adherence to principles that would foreclose improper activism in the future.

It was this effort, with the coordinated support and evangelism on law school campuses by the Federalist Society, that did so much to bring to modern prominence the doctrines of original intent and textualism. These doctrines were presented as the essential answer to the perceived urgent problem that judges had been regularly transcending their legitimate function by "making law." There were, after all, only two legitimate sources of law: the Constitution and the laws duly enacted by elected legislators. The judge's job was to apply these legitimate sources of law

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[16] *See* Dickerson v. United States, 530 U.S. 428, 432 (2000) (holding that *Miranda* continues to govern the admissibility of suspects' statements, despite the enactment of a federal statute intended to displace it); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (concluding that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed").

[17] *Supreme Court Nominations (Present–1789)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm#result (last visited Mar. 8, 2020).

[18] Biographical Directory of Article III Federal Judges, 1789–Present, FED. JUD. CTR., https://www.fjc.gov/history/judges/search/advanced-search (follow "Nomination / Confirmation / Commission" link; then follow "Appointing President" and select "Ronald Reagan"); *Diarmuid Fionntain O'Scannlain*, FED. JUD. CTR., https://www.fjc.gov/history/judges/oscannlain-diarmuid-fionntain (last visited Mar. 8, 2020); *Edward Leavy*, FED. JUD. CTR., https://www.fjc.gov/history/judges/leavy-edward (last visited Mar. 8, 2020).

directly, without change in any respect. People who did that job correctly were called "interpretivists."

The Department's spokesmen, and its friends in academia and the Federalist Society, were blunt and vociferous in their assertions about the grave threat to democracy posed by non-interpretivist judges. When judges went beyond the words of a governing provision, to exercise judgment or consider real life experience, they entered forbidden territory. As Attorney General Meese put it in 1985 in a major Federalist Society address on the "Jurisprudence of Original Intention":

> The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else. . . . The further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning.[19]

Or, as Professor Lino Graglia put it, "At stake is nothing less than [whether basic issues of social policy] should be decided by elected representatives of the people . . . or . . . by a majority of the nine Justices of the Supreme Court for the nation as a whole."[20]

The Department's official publications were no less apocalyptic: One of those noted that "Interpretation of the Constitution according to its original meaning is the only approach that takes seriously the status of our Constitution as fundamental law, and that permits our society to remain self-governing."[21] That is because those taking a contrary approach "transform our constitutional democracy into a judicial aristocracy, and abandon the rule of law based on a judge's subjective notions of what is best for society."[22]

The solution to this dreadful problem—and the only way to save the rule of law from judicial tyranny—was a real moonshot. It was to claim that the meaning of legal texts is objectively knowable, and particularly, that the original meaning of our Constitution's provisions as they bear on our world today can be reliably discerned through the mists of 200 years of history and changing circumstances.

Since the Supreme Court's greatest depredations had been constitutional in nature, most of the Department's effort was focused on the issue of original meaning, to show that proper constitutional interpretation could and must be done without any substantial reliance on judicial choice or judgment. The general approach was to celebrate the exceptional nature of the Founding generation, as well as the process by which the Constitution was drafted and ratified. Given what we know today, advocates said it was fair to infer that the key provisions must have meaning

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[19] Edwin Meese III, Attorney General, Address Before the D.C. Chapter of the Federalist Society Lawyers Division at 11–12 (Nov. 15, 1985) (quotations omitted), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/11-15-1985.pdf. Meese continued: "Any true approach to constitutional interpretation must respect the document in all its parts and be faithful to the Constitution in its entirety." *Id.* at 12. He concluded: "[A]n activist jurisprudence, one which anchors the Constitution only in the consciences of jurists, is a chameleon jurisprudence, changing color and form in each era." *Id.* at 14.

[20] OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 2–3 (1988) [hereinafter SOURCEBOOK].

[21] *Id.* at 3.

[22] *Id.* at 4.

that is discernible today.[23] As Attorney General Meese put it in his 1985 Federalist Society address:

> Our approach to constitutional interpretation begins with the document itself. The plain fact is, it exists. It is something that has been written down.
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> . . . .
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> The presumption of a written document is that it conveys meaning. . . . We know that those who framed the Constitution chose their words carefully. . . . The language they chose meant something.[24]

The fullest articulation of how its original meaning could thus be discerned appeared in two long monographs—well over 100 pages each—that were issued by the Department's Office of Legal Policy. They were a 1987 Original Meaning Sourcebook ("Sourcebook"),[25] and a similar how-to manual for Government lawyers, the 1988 Guidelines for Constitutional Litigation ("Guidelines").[26] Much attention was devoted there to anticipating and attempting to address the responses and challenges offered by critics.[27]

Wouldn't originalism get us into the impossible business of reading minds from 200 years ago? No, because it would focus instead on determining the "public meaning" of the words as they were used back then.

What are the tools to be used in unmasking this original meaning? "Standard linguistic and grammatical rules should be used," along with "[c]ontemporaneous dictionaries, records of the ratification debates and the Philadelphia Convention, and other historic sources [which can help in ascertaining] the general and popular use of constitutional language at the time it was ratified."[28]

Wasn't it entirely possible that the Constitution, as a product of numerous compromises, might in fact sometimes lack a single relevant public meaning to be discerned? No, the response went, "[the Constitution's] wording was carefully chosen, usually after much reflection and debate, and we may reasonably presume that it conveys an ascertainable meaning."[29]

Somewhat remarkably, if ambiguities persist, the Sourcebook authors carved

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[23] Meese, *supra* note 19, at 4.

[24] *Id.* Meese also stated: "In short, the Constitution is not buried in the mists of time. We know a tremendous amount of the history of its genesis." *Id.* at 3. The Founders' lives and times, Meese noted, are "not a dark and mythical realm. . . . We know how the Founding [Fathers] lived, and much of what they read, thought, and believed. The disputes and compromises of the Constitutional Convention were carefully recorded." *Id.* at 2.

[25] SOURCEBOOK, *supra* note 20.

[26] OFFICE OF LEGAL POLICY, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988) [hereinafter GUIDELINES].

[27] *Id.* at 1–3; SOURCEBOOK, *supra* note 20, at iii-v.

[28] SOURCEBOOK, *supra* note 20, at 9–10.

[29] *Id.* at 9. In his Federalist Society address, Attorney General Meese acknowledged that the Founders were not unanimous, and that many provisions were subject to extensive debate, both at the convention and in the ratifying process. "But the point is, the meaning of the Constitution can be known." Meese, *supra* note 19, at 5. He continued: "Those who framed these principles meant something by them. And the meanings can be found." *Id.*

out a special role for the "[s]tatements made by the framers and ratifiers."[30] That is, what did those involved at the time say that it meant? While not dispositive, these extratextual statements were said to be "extremely important in determining original meaning."[31]

Why are such statements to be trusted? Because, the Sourcebook said, "[t]he founders were highly educated, familiar with the meaning of words, and skilled at using words in legal documents to achieve certain ends."[32] And they were after all making these comments "in the very context of elevating the language of the Constitution to the status of our supreme law."[33]

To a great extent, I think it is fair to say, the claim that a reliable and usable original meaning could be ascertained for all or even most Constitutional provisions rested on necessity and faith at least as much as on rational reasons to believe that it would really be possible. It also had the inherent benefit that channeling analysis into a quest for original meaning would curtail the potential for activist mischief that comes from thinking beyond the meaning of the words themselves.

The Department of Justice's deadly seriousness about the quest for original meaning is reflected in the Office of Legal Policy's Guidelines, which made the Sourcebook's principles explicitly applicable as "dos and don'ts" for Government litigation.[34] These were, the Guidelines said, "much more than mere suggestions" and "should presumptively be followed" in all litigation on behalf of the United States.[35] The Guidelines also got quite specific in offering a list of approved sources on the original meaning, some of which were not themselves original sources at all, but rather books by conservative legal scholars.[36]

Textualism as relating to statutes was also an important part of the Department's re-education effort. But it had a much longer history of public discussion. The problem of courts ignoring the textual meaning of statutes had been notably stirred up back in 1892, by the Supreme Court's decision in the *Holy Trinity* case. The Court there dealt with an act of Congress whose words created a categorical bar to the importation of contract labor from abroad.[37] But noting that America is a "Christian nation," and finding it unimaginable that Congress would take an action contrary to the interests of the Christian religion, the Court had recognized an unwritten exception for the importation of a Christian clergyman.[38] "[A] thing may be within the letter of the statute," the Court said, yet be excluded from it "because not within its spirit."[39] And *Holy Trinity* was not alone. Throughout much of the twentieth century, lower court decisions could certainly be found in which the relevant statutory text was sometimes peripheral to, or even entirely missing from, the

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30 SOURCEBOOK, *supra* note 20, at 15.

31 *Id.*

32 *Id.*

33 *Id.*

34 *See* GUIDELINES, *supra* note 26, at 1.

35 *Id.*

36 *Id.* at 11–13.

37 Holy Trinity Church v. United States, 143 U.S. 457, 458 (1892).

38 *Id.* at 471–72.

39 *Id.* at 459.

legal analysis. Not surprisingly, this gave rise to a well-founded and robust textualist critique.

In the 1980s, as articulated by its leading expositors—most notably Justice Scalia—strict textualism was necessary, just like original intent, to protect against unelected judges substituting their illegitimate preferences for what the legislature actually enacted. As with the Constitution, the very legitimacy of our legal system was thought to be imperiled when judges looked beyond the text, consulted their own experience, or acted in a way that involved making a judgmental choice.

And the text would nearly always be a reliable guide, it was said, because we can presume a coherent relevant meaning from the very fact that the statute was written.[40] Its writers must have had something specific in mind. And if the meaning is not clear on the face of the words, dictionaries and rules of grammar can generally illuminate that. Beyond that, Justice Scalia and Bryan Garner came to the rescue a few years ago with their book, *Reading Law: The Interpretation of Legal Texts*, with its 57 canons of interpretation alleged to produce a definitive meaning if you will just be patient enough to apply them.[41]

I do not mean to be facetious, and I certainly agree that one should start with the legal text in the quest to understand the meaning of any law. But when it comes to resolving the very difficult issues that the Supreme Court allows to be brought before it, the utility of these tools—original meaning and textualism—has been vastly oversold.

The urgent problem perceived in the 1980s, as conjured by the Reagan Revolutionaries, was to eliminate "judicial tyranny"—that perceived great offense of judges exercising judgment and making hard choices. But such hard choices will always unavoidably play a part in some decisions of any court. And for our Supreme Court, making those difficult choices is virtually its entire work.

Today's problem is that this reality—the necessity to exercise judgment and make value choices in these most important and difficult cases in our legal system—has not prevented the audacious premise of the Reagan Revolution—that judicial judgment and choice is necessarily judicial tyranny—from winning the battle of public opinion. And the profound incorrectness of this core premise—that law free of judicial judgment and choice is even possible—has been a major source of miseducation and misunderstanding, with troubling implications for the future of our country.

How has that happened? It is not just from a few speeches by Attorney General Meese in the 1980s, and a couple of treatises drafted by the Office of Legal Policy. In the intervening decades, this distrust of the exercise of judicial judgment has gone mainstream. Much of the active miseducation has been pure politics, destructively selling the appealing notion of resentment against those in positions of authority.

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40 *See* Meese, *supra* note 19, at 4.

41 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 32 (2012). The textualist spin on comments by legislative drafters is, however, markedly different than the Office of Legal Policy's take on statements by the Founders about the Constitution. While contemporaneous comments about constitutional meaning by those "highly educated" and "skilled" Founders were pronounced "extremely important" in the Sourcebook, Justice Scalia and other pure textualists have taken a quite different view of legislative history purporting to say what the authors of the statute had in mind. *See id.* at 388.

Politicians see little downside in taking judicial rulings out of context by simplistic attacks on judges for particular rulings that can be used to incite a visceral reaction. State judicial elections, in the majority of states that have them, have been fertile petri dishes for the propagation of the idea that judges who make hard choices are abusive tyrants who need to be stopped.

But unfortunately, the most persuasive miseducating messages have come from a cast of credible characters who, perhaps sometimes inadvertently, have spread that false message in their own times for their own reasons.

To reference just a few, one has to start with Chief Justice Roberts' own statement at his confirmation hearing that his job would be simply "to call balls and strikes."[42] Now that can be taken as a general reference to the sound idea that judges, like umpires, must remain impartial. But its much more obvious meaning, and the one most people took from it, is the concrete message that judging is just looking at the facts and applying clear rules—where did the ball fly over the plate and where is the strike zone?

There is the general political mantra, repeated endlessly by countless politicians, which I recall in the words of President George W. Bush, that he would pick Justices who "interpret the law, not . . . legislate from the bench."[43]

Similar messages can be found in the transcripts of all recent Supreme Court confirmation hearings, where nominees are required to kowtow to the proposition that judging on the Court is an exercise in mechanically applying, rather than in making, law.[44]

Particularly memorable was the kerfuffle that erupted during Justice Sotomayor's 2009 confirmation. Several times in speeches, she had acknowledged the place that life experience plays in a judge's role deciding real life cases. "Whether born from experience or inherent physiological or cultural differences . . . our gender and national origins may and will make a difference in our judging."[45] For added emphasis, noting the long history of judicial inaction on sex and race discrimination when courts were composed uniformly of white men, she then went a step further, and in a bit of hyperbole, said that she would "hope that a wise Latina woman, with the richness of her experience, would more often than not, reach a better conclusion than a white male."[46]

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[42] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (Statement of John G. Roberts, Jr.).

[43] Press Release, White House, Remarks by the President During Federal Judicial Appointees Announcement (May 9, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010509-3.html.

[44] *See, e.g.*, *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 340 (2017) (Gorsuch stating ". . . I am trying to interpret and apply rather than alter and amend the work of the people's representatives."); *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States*, 111 Cong. 129 (2010) (Kagan stating that "judges should not be doing what the legislature ought to be doing, which is making the fundamental policy decisions for this Nation.").

[45] DOUGLAS E. EDLIN, COMMON LAW JUDGING: SUBJECTIVITY, IMPARTIALITY, AND THE MAKING OF LAW 1–2 (2016).

[46] *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the*

As you can imagine, this brought a firestorm down on her head. At the hearing, Senator Sessions went on at great length, noting that any claim "that a judge's background and experience . . . will impact their decision . . . goes against the American ideal and oath that a judge takes . . . ."[47] So did Senator Grassley.[48] But the point was most precisely stated by a law professor, Neomi Rao—who was recently nominated by Trump for the D.C. Circuit[49]—purporting to testify neither in favor nor against the nomination:

> First, Judge Sotomayor has explicitly and repeatedly rejected the idea that there can be an objective stance in judging. She has explained that every judgment requires an individual choice by the judge. . . . Second, with objectivity discarded as unrealistic, Judge Sotomayor has explained that a judge's personal background, her race, gender, and life experiences should affect judicial decisions. She has questioned the ideal that judges should transcend their personal sympathies and prejudices because by doing so men and women of color may "do a disservice both to the law and society."[50]

I will spare you further quotes from all the other recent hearings. But you may remember the most recent instance when, after all the unpleasantness last Fall, Justice Kavanaugh reassured the public at the White House swearing-in ceremony. He did so by saying that he would be an impartial umpire, would "interpret the law, not make the law," and interpret the Constitution and statutes "as written."[51] Pure hogwash, but it raised no eyebrows because it is today the overwhelming public perception of what we should expect from our Supreme Court.

Among the most troubling forms of such miseducation—from within the Supreme Court itself—has been the rhetoric of some Justices. Well knowing that virtually no cases are ever resolved in the Supreme Court based on pure undisputable text or original meaning, some Justices have nonetheless attacked their colleagues in the most vicious terms simply for using reasoning that depended on something other than the text itself.

The late Justice Scalia was famous for this. Some of you may remember the lambasting he gave the Chief Justice Roberts majority opinion in the Obamacare case in 2015, on the ground that this very complex statute actually had a simple clear plain meaning that the Court avoided only by "jiggery pokery" and "rewriting the

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Supreme Court of the United States Before the S. Comm. on the Judiciary, 111th Cong. 139 (2009) [hereinafter *Sotomayor Confirmation*] (Senator Graham reciting Sotomayor's prior quote to her).

47 *Id.* at 69.

48 "To be truly qualified, the nominee must understand the proper role of a judge in society—that is, we want to be absolutely certain that the nominee will faithfully interpret the law and the Constitution . . . [and] set aside one's own feelings . . . ." *Id.* at 16–17.

49 Carrie Johnson, *Neomi Rao, Picked for D.C. Circuit Court, Faces Scrutiny over Earlier Views on Rape*, NPR POLITICS (Feb. 5, 2019, 5:00 AM), https://www.npr.org/2019/02/05/691346383/neomi-rao-picked-for-d-c-circuit-court-faces-scrutiny-over-earlier-views-on-rape.

50 *Sotomayor Confirmation*, *supra* note 46, at 1252–53 (emphasis in original) (prepared statement of Neomi Rao).

51 *Remarks by President Trump at Swearing-in Ceremony of the Honorable Brett M. Kavanaugh as Associate Justice of the Supreme Court of the United States*, WHITE HOUSE (Oct. 8, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-swearing-ceremony-honorable-brett-m-kavanaugh-associate-justice-supreme-court-united-states/.

law."[52] Or his dissent the same year in the gay marriage case, which he termed the "furthest extension" ever of "constitutional revision by an unelected committee of nine."[53] Another example is *Bond v. United States*, from 2014, where the Chief Justice's opinion for six Justices narrowly read a criminal provision of the Chemical Weapons Act.[54] The majority concluded that the statute did not reach a woman placing chemicals on a doorknob to try to poison her husband's paramour, because that would intrude upon traditional state authority without any stated congressional intent to do so.[55] Justice Scalia, who would instead have struck down the "utterly clear" statute as unconstitutional, berated the Court for a "result-driven anti-textualism [that] befogs what is evident."[56]

More recently, Justice Gorsuch repeatedly berated counsel in the first case he heard as a Justice, disputing arguments because they went beyond the first layer of textual meaning.[57] He made repeated comments that it would "be a lot easier" if we just follow the text, and that by offering arguments that went beyond it, counsel was "mak[ing] it up."[58] While Justice Alito commented during the same argument on the extraordinary complexity of the statute, and Justice Gorsuch's view was rejected by a vote of 7-2,[59] his disdainful remarks were widely reported.[60]

So why is this boisterous assertion of distrust for complex reasoning and use of judgment a problem? Two reasons, I think.

First, this popular consensus that judges should be cookie-cutters applying mechanical rules and threaten our democracy when they exercise judgment and make hard choices, undermines trust in government. This approach to judging does not work consistently for any court and is essentially useless in the work of our Supreme Court. That Court continues to decide cases the only way it can, using complex legal reasoning, in which the key ingredient is judgment to balance competing arguments.

Delegitimizing such reasoning is hyperbolic nonsense, since there is simply no other way for the Court to do its job. But people outside the law can be forgiven for taking seriously the lesson that the Reagan Revolution has ingrained in the public mind. And teaching people that judicial judgment equals judicial tyranny is certainly no way to achieve long-term respect for our courts or our Supreme Court.

The second problem this creates is to short-circuit and prevent meaningful

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52 King v. Burwell, 135 S. Ct. 2480, 2500, 2506 (2015) (Scalia, J., dissenting).

53 Obergefell v. Hodges, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

54 Bond v. United States, 134 S. Ct. 2077, 2083 (2014).

55 *See id.*

56 *Id.* at 2095–96 (Scalia, J., concurring).

57 *See* Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1988 (2017) (Gorsuch, J., dissenting).

58 Amy Howe, *Justice Neil Gorsuch Takes the Bench, Jumps into the Fray*, SCOTUSBLOG (Apr. 17, 2017, 1:06 PM), https://www.scotusblog.com/2017/04/justice-neil-gorsuch-takes-bench-jumps-fray/.

59 *Perry*, 137 S. Ct. at 1979.

60 *E.g.*, Howe, *supra* note 58; Adam Liptak, *Bitter Fight Behind Him, Justice Gorsuch Starts Day With Relish*, N.Y. TIMES (Apr. 17, 2017), https://www.nytimes.com/2017/04/17/us/politics/justice-neil-gorsuch-supreme-court.html?module=inline; Nina Totenberg, *Justice Gorsuch Finds His 'Easier' Solution Has Few Takers On 1st Day*, NAT'L PUB. RADIO (Apr. 17, 2017, 4:30 PM), https://www.npr.org/2017/04/17/524393113/justice-gorsuch-jumps-right-into-questioning-in-supreme-court-debut.

public discussion of the qualifications of judges, and the characteristics of the judicial process, that we should demand given the role that judges actually play. Rather than having judicial nominating hearings where nominees falsely promise that they will just apply the law as it is written, we should be focusing on the attributes to be sought in candidates, so that their exercise of legal judgment will inspire public confidence. In addition to intelligence and proven sharp analytical abilities, it matters a lot that a judge has a character beyond reproach and feels empathy for the position of others. Humility and self-restraint are likewise attributes in somewhat short supply that we would do well to look for in a candidate's life experience. I will let you be the judge of how effectively the qualities of honesty, integrity, modesty, and self-restraint were considered at the most recent hearing of Justice Kavanaugh.

More generally, the premise that legitimate judging is always a purely objective process forecloses serious reflection on how the exercise of judgment and reasoned choice can be channeled and constructively constrained. The ancient virtue of prudence or practical wisdom, which they used to refer to as phronesis, was a central element of Western thought from Plato through Thomas Aquinas.[61] The word is lost to us today, and the underlying concept seems quite foreign in a world where getting to an outcome by the quickest route takes priority. Yet as an idea at the heart of classical conservatism—which is not the sort of conservatism we talk about today—we would do well to reacquaint ourselves with it. In the law, respect for precedent, and less formally, for values that have served us well in the past, are a part of that. The key insight is that value choices cannot always be avoided, but not all value choices are created equal. Discerning the difference between good choices and bad choices is a challenge that merits our attention. But before you can do that, you have to admit that judges must and should exercise judgment. And that means unlearning the central lesson of the Reagan Revolution.

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[61] *See* John Wall, *Phronesis as Poetic: Moral Creativity in Contemporary Aristotelianism*, 59 REV. METAPHYSICS 313, 314–15 (2005).