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SYMPOSIUM
THE PRESS AND THE CONSTITUTION 50 YEARS AFTER NEW YORK TIMES V. SULLIVAN

KEYNOTE ADDRESS

ORIGINALISM AND HISTORY

Justice John Paul Stevens (Ret.)[*]

The notion that a jurisprudence of "original intent" will constrain the discretion of judges who seek to impose their own policy preferences on the law has often been attributed to a speech delivered by Edwin Meese, then-Attorney General of the United States, to an American Bar Association audience on July 9, 1985. In that speech the Attorney General was particularly critical of Supreme Court opinions relying on the Due Process Clause of the Fourteenth Amendment as a basis for requiring the states to adhere to specific provisions of the Bill of Rights. "[N]owhere else [he said,] has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation."[1] He endorsed then-Justice Rehnquist's dissenting statement in *Wallace v. Jaffree* that "it is impossible to build sound constitutional doctrine upon a mistaken understanding of

[*] Associate Justice (Ret.), United States Supreme Court. This Essay is the text of a speech delivered at the University of Georgia School of Law on Nov. 6, 2013.

[1] Edwin Meese, U.S. Attorney General, Address at the House of Delegates of the American Bar Association (July 9, 1985), *available at* http://www.justice.gov/ag/aghistory/meese/1985/07-09-1985.pdf.

constitutional history."[2] It was after criticizing what he regarded as the Court's misuse of history that Meese announced that it would be the policy of the Reagan Administration to press for a "Jurisprudence of Original Intention": "Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was. This is not a shockingly new theory; nor is it arcane or archaic."[3]

Presumably Attorney General Meese's criticism of the doctrine of incorporation would apply to Justice Alito's recent decision to rely on substantive due process rather than the Privileges or Immunities Clause as the basis for holding that the Second Amendment limits the power of the City of Chicago to control the sale and use of handguns.[4] Meese's comments on original intent are somewhat ambiguous. As I read his speech, he seemed to place more emphasis on the motivation of lawmakers than on the community's understanding of recently enacted laws. At least I think that is how the legal community so interpreted his speech when it was delivered. Over the years, however, I believe scholars advocating adherence to a jurisprudence of original intent have given more attention to the understanding of readers of newly enacted legal text than to the motivation of the authors of the text. As an example of that approach, in his opinion for the five Justices in the majority in *District of Columbia v. Heller*—which as you know held that the Second Amendment protects the right to keep a handgun at home for the purposes of self-defense[5]—Justice Scalia devoted over fourteen pages to a discussion of what scholars and others had to say about the Second Amendment during the decades after it was adopted.[6] On the other hand, my dissent gave greater emphasis to a comparison of the text that James Madison had drafted with the proposals that he had rejected.[7] I thought—and still think—that the text merely responded to the States'

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[2] *Id.* (quoting Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting)).
[3] *Id.*
[4] *See* McDonald v. Chicago, 103 S. Ct. 3020, 3030–31 (2010).
[5] 554 U.S. 570, 635 (2008).
[6] *Id.* at 605–19.
[7] *Id.* at 656–63 (Stevens, J., dissenting).

narrow concern about possible federal disarmament of state militias rather than to a broader interest in protecting an unmentioned individual interest in using guns for purposes of self-defense. In other words, I applied what I think of as the original version of the jurisprudence of original intent rather than the more modern version. I sometimes wonder if my understanding of the correct reading of the Second Amendment's brief constitutional text would have had a better chance of prevailing if the original version of the doctrine of original intent had been endorsed by the Justices in the majority.

Today I do not plan to reargue the merits of the Court's rejection of the interpretation of the Second Amendment that had prevailed in the federal judiciary for decades both before and after the Court's unanimous decision in *United States v. Miller*.[8] Instead, I shall identify some of the problems associated with the use of history when interpreting legal text, and explain why a particularly lucid comment by Justice Scalia in a statutory construction case may well provide more guidance to judges confronting novel constitutional issues than the so-called jurisprudence of original intent. My conclusions are twofold: first, history is at best an inexact field of study, particularly when employed by judges; second, the doctrine of original intent may identify a floor that includes some of a rule's coverage, but it is never a sufficient basis for defining the ceiling.

I shall begin with a personal memory of an event that occurred in December of 1939, when I was a junior in college at the University of Chicago.

I

During the Christmas break my parents, one of my brothers, and I drove from Chicago to Florida to visit my oldest brother, Ernie, who then lived in Fort Myers. On our way we stopped for the night in Atlanta, where the recently released movie version of Margaret Mitchell's best-selling book, *Gone with the Wind*, was playing. My dad was able to get us four seats in the balcony. I have a vivid, but apparently somewhat inaccurate, memory of a

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[8] 307 U.S. 174 (1939).

scene showing the devastation of Atlanta inflicted by Union troops under the command of General Sherman. As I remember the scene, when a solitary wounded soldier appeared and background music played the song, "Dixie," the emotional reaction in the theater audience was so intense that I was afraid even to whisper a comment lest my accent reveal the fact that Yankees were in the audience. While research by Aaron Zelinsky, my present law clerk, has convinced me that my memory of the scene in the movie is somewhat muddled, I am sure that my appraisal of the emotional reaction of the audience was accurate. The audience was deeply moved by the portrayal of what for them was a tragic episode in their defeat in the "War of Northern Aggression."

That incident is relevant for two quite different reasons. First, the flaws in my recollection demonstrate that even eyewitness testimony about historic events may be inaccurate. Despite the clarity of my recollection of the intensity of the emotion that pervaded the theater, I am uncertain about the exact scene that produced that effect. Second, the reaction of the theater audience convinced me that their appraisal of the actual event portrayed in the movie might be distorted by the depth of their emotions. Margaret Mitchell's understandable bias in favor of the defeated participants in the Civil War may also have colored her understanding of events that provided the background for her story, and in turn influenced the thinking of millions of readers less familiar with the history of the period than she.

One of the themes of her story—indeed, a theme that has colored the country's appraisal of events in the defeated states during the decade after the Civil War—is a belief that Republican candidates who won popular elections during Reconstruction were incompetent and corrupt. For example, she has no kind words for Rufus Bullock, the Republican governor of Georgia during the first four years of Reconstruction. As she wrote:

> A week before Scarlett and Rhett announced their engagement, an election for governor had been held. The Southern Democrats had General John B. Gordon, one of Georgia's best loved and most honored citizens, as their candidate. Opposing him was a Republican named Bullock. The election had lasted three days

> instead of one. Trainloads of negroes had been rushed from town to town, voting at every precinct along the way. Of course, Bullock had won.[9]

And here is her description of Governor Bullock's administration during Reconstruction:

> But far and above their anger at the waste and mismanagement and graft was the resentment of the people at the bad light in which the governor represented them in the North. When Georgia howled against corruption, the governor hastily went North, appeared before Congress, and told of white outrages against negroes, of Georgia's preparation for another rebellion and the need for stern military rule in the state.[10]

Finally, Mitchell describes the end of Bullock's administration:

> That October Governor Bullock resigned his office and fled from Georgia. Misuse of public funds, waste and corruption had reached such proportions during his administration that the edifice was toppling of its own weight. Even his own party was split, so great had public indignation become. The Democrats had a majority in the legislature now, and that meant just one thing. Knowing that he was going to be investigated and fearing impeachment, Bullock did not wait. He hastily and secretly decamped, arranging that his resignation would not become public until he was safely in the North.[11]

The historical discussion in the novel does not tell us what happened to Governor Bullock after he resigned. This excerpt from a more recent history of Georgia describes those subsequent events:

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[9] MARGARET MITCHELL, GONE WITH THE WIND 842 (1936).
[10] *Id.* at 905.
[11] *Id.* at 984.

> In 1876 Bullock returned to Georgia and stood trial on various charges of corruption, conspiracy to defraud the state, and malfeasance. After the prosecution failed to substantiate its case and two Atlanta juries declared him not guilty, Bullock remained in Atlanta and became one of the city's most prominent citizens. He was president of Atlanta's first cotton mill, president of the English-American Loan Company, senior warden of St. Philip's Episcopal Church, president of the Atlanta Chamber of Commerce, president of the city's Commercial Club, vice president of the Capital City Club, and a member of the high-society Piedmont Driving Club. His significant role in organizing the Atlanta Exposition of 1895 included persuading Booker T. Washington to give a keynote address and acting as master of ceremonies for the opening day speeches.[12]

Another history of Georgia sheds light on the source of Bullock's unpopularity during reconstruction:

> After the war, Bullock entered politics as a Republican, which earned him many enemies among former Confederates and KKK members. On the strength of the black vote, he beat Confederate General John B. Gordon for governor in 1868. He used his northern business connections to attract investment, building railroads, schools, and industry. His support for black political rights—one man, one vote—made him the most hated man in Georgia among whites. Democratic charges of corruption finally ended his governorship. He fled the state but returned, was acquitted of all charges, and became one of Atlanta's most prominent post-war citizens.[13]

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[12] Russell Duncan, *Rufus Bullock (1834–1907)*, NEW GEORGIA ENCYCLOPEDIA (Aug. 20, 2013), http://www.georgiaencyclopedia.org/articles/government-politics/rufus-bullock-1834-1907.

[13] *Rufus Bullock*, TODAY IN GEORGIA HISTORY, http://www.todayingeorgiahistor.org/content/rufus-bullock (last visited Apr. 5, 2014).

It is also relevant to note that John B. Gordon, Bullock's unsuccessful Democratic opposing candidate in 1868—who is described by Margaret Mitchell as "one of Georgia's best loved and most honored citizens"—has been tentatively identified as the leader of the Ku Klux Klan in Georgia during the years after the Civil War. The fact that the Klan's activities were shrouded in so much secrecy has not only prevented historians from positively confirming that identification, but also explains why ambiguity characterizes so many important historical events.

The lack of knowledge about the activities of the Ku Klux Klan persisted for many years after the retirement of John B. Gordon. Indeed, in 1982 Elbert Tuttle, one of our great judges recalled that when he had moved to Atlanta and began practicing law in the early 1920s, "in order to successfully try a case before a jury in Fulton County, it was necessary to associate a lawyer who had some close connection with, if not a member of, the Ku Klux Klan."[14] From that comment, it is reasonable to infer that the Klan not only had an influence on election outcomes, but also on the administration of justice.

Perhaps the most important of those events was the contest between the New York Democrat, Samuel Tilden, and the Ohio Republican, Rutherford B. Hayes, in the Presidential election of 1876. Two well-respected historians, William H. Rehnquist and C. Vann Woodward, have written books covering the settlement of the dispute over the outcome of that election. Quotation of just one paragraph from each of those books will show that even the most qualified historians may interpret important events quite differently.

Tilden won a majority of the popular vote, but may not have been the favored candidate of a majority of the eligible voters. In his book, *Centennial Crisis*, Rehnquist quotes this dispatch written by a U.S. Marshall in Mississippi on the eve of the election:

> I am in possession of facts which warrant me in saying that the election in the northern half of this State will be a farce. Colored and white Republicans will not be allowed to vote in many of the counties. The Tilden

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[14] ANNE EMANUEL, ELBERT PARR TUTTLE: CHIEF JURIST OF THE CIVIL RIGHTS REVOLUTION 51 (2011).

> clubs are armed with Winchester rifles and shotguns, and declare that they will carry the election at all hazards. In several counties of my district leading white and colored Republicans are now refugees asking for protection. . . . A reign of terror such as I have never before witnessed exists in many large Republican counties to such an extent that Republicans are unable to cope with it. If it were not for rifles and shotguns this State would give Hayes and Wheeler from 20,000 to 30,000 majority.[15]

That example in the Rehnquist book identifies the very real possibility that events like the Colfax massacre in Louisiana had, indeed, created a reign of terror in the South.

Woodward's book, in contrast, does not even mention that possibility. There is no discussion of violent behavior by white supremacists that might have deterred voting by former slaves in Mississippi. Instead, Woodward uncritically reports: "The Southern states were expected by all save the more hopeful Republicans to line solidly up behind Tilden. All except three of them, Florida, South Carolina, and Louisiana, were reported to have piled up safe Democratic majorities . . . ," and that, "[i]n popular votes Tilden, according to official returns later, led his opponents by more than a quarter of a million."[16]

There are similar gaps in our knowledge about the real decisionmaking process in other parts of the country; for example, the records of how New York City and Kansas City were governed when Tammany Hall and the Prendergast Machines were in control are undoubtedly incomplete. When areas of uncertainty apply to the work of the most disinterested and best qualified historians, lawyers, and judges who are not specially trained in that field must exercise caution whenever they are asked to apply a so-called jurisprudence of original intent to the process of interpreting the Constitution. Indeed, I think that was Attorney General Meese's real message when he made this concluding

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[15] WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 89–90 (2004).

[16] C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 17 (1966).

comment on the jurisprudence of original intent: "This is not a shockingly new theory; nor is it arcane or archaic."

II

In 1998 the Supreme Court reversed a judgment of the United States Court of Appeals for the Fifth Circuit holding that a male employee had no cause of action under Title VII of the Civil Rights Act of 1964 for sexual harassment by male co-workers.[17] In his opinion for a unanimous Court, Justice Scalia wrote:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, *and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed*."[18]

In my judgment, that perceptive comment applies to constitutional provisions and not just to statutes. A study of the original intent of legal draftsmen, or the original understanding of the relevant community, will identify the principal evil that gave rise to a new rule, but countless rules go well beyond the specific evil that was the proximate cause of their enactment. It is for that reason that a jurisprudence of original intent, though always relevant and important, can play only a limited role in the Court's adjudication of constitutional issues.

Two especially important constitutional rules—the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment—dramatically illustrate the point. The former was discussed at length by then-Justice Rehnquist in the dissenting opinion praised by Attorney General Meese in his speech about a jurisprudence of original intent. The principal target of that dissent was the Court's endorsement of Thomas Jefferson's view that the Establishment

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[17] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998).
[18] *Id.* at 79 (emphasis added).

Clause had erected "a wall of separation between church and State."[19] After identifying the source of that metaphor in a letter written by Jefferson, Justice Rehnquist began his argument with this paragraph:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.[20]

After twenty pages of interesting and unquestionably accurate historical discussion, Justice Rehnquist concluded that

> [t]he Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. . . . As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion . . . .[21]

History not only supported Justice Rehnquist's identification of the limited purposes of the Framers, but also supported an even more limited understanding of the scope of the protection afforded

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[19] Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (quoting 8 WRITINGS OF THOMAS JEFFERSON 113 (H. Washington ed., 1861)).

[20] *Id.*

[21] *Id.* at 113.

by the Clause. The paragraph in my opinion for the Court that replied to the intent-based argument used different language than Justice Scalia would later use in the sexual harassment case but also endorsed the proposition that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[22] These three sentences made that point:

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.[23]

Although the fact that non-Christians such as atheists and Jews are members of the class protected by the Establishment Clause may not have occurred to its draftsmen, it is the meaning of that law, rather than the principal concerns of its draftsmen described in the Rehnquist dissent by which we are governed. While *Wallace v. Jaffree*—the case cited by Attorney General Meese—and *Oncale*—the case involving same sex-harassment—both involved the scope of a law's protection of an individual right, the same reasoning applies to rules limiting the scope of state power.

The point is perhaps best illustrated by the Court's unanimous decision in *Brown v. Board of Education*.[24] A study of the original

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[22] *Oncale*, 523 U.S. at 79.
[23] *Wallace*, 472 U.S. at 52–53.
[24] 349 U.S. 294 (1955).

intent of the framers of the Fourteenth Amendment will not identify an interest in desegregating public schools as one of their principal concerns. Nevertheless the Equal Protection Clause—a rule by which the states are governed—imposes a duty to govern impartially that is broad enough to prohibit racial segregation in public schools. Much of our jurisprudence interpreting that rule concerns issues unrelated to the principal concerns of its draftsmen. That is why a jurisprudence of original intent cannot provide the correct answer to novel questions of constitutional law—questions such as whether the duty to govern impartially curtails a state's power to prohibit same-sex marriages cannot be answered by historians, or by judges who limit the scope of their inquiry to a study of history. A study of what earlier students and leaders have had to say about an issue will inform the judgment that the Court must make, but will not dictate the answer.

III

Let me close by identifying another issue about the scope of the duty to govern impartially. Over fifty years ago, in a case arising in Tuskegee, Alabama, the Court unambiguously condemned the practice of designing electoral districts to disadvantage racial minorities.[25] After I joined the Court, a five-Justice majority extended the prohibition against racial gerrymandering *to include cases in which* the legislators intended to enhance the political strength of the minority.[26] I have always had difficulty with those cases because I do not understand why a law designed to make different groups more equal should violate the duty to govern impartially. I am more troubled, however, by the majority's failure to apply the rule against racial gerrymanders to political gerrymanders. Tolerating that invidious practice cannot be justified even by using a jurisprudence of original intent to search for the principal concerns of our lawmakers. If, instead, we correctly define the duty to govern impartially, we would put an end to a practice that neither scholars, legislators, nor judges even attempt to defend. Courts that are capable of identifying and prohibiting racial gerrymanders are certainly able to put the

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[25] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[26] Shaw v. Reno, 509 U.S. 630, 657 (1993).

quietus on a more widespread and equally malignant evil. Thank you for your attention.