

SECOND ANNUAL KENNEDY LECTURE

ON JUDGMENT⁺

by
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The Supreme Court's constitutional decisions have been a mixed blessing. Some of the Court's most celebrated decisions have, in the long run, done more harm than good. Mapp v. Ohio, while it might have done a certain amount of good at the time, brought with it an automatic rule of exclusion that has grossly diverted attention from the guilt or innocence of the accused. Others, like Brown v. Board of Education and Lawrence v. Texas, were watershed moments in the development of American civil rights. But what made these decisions good or bad? My most important argument will be a negative one: it had nothing to do with the original intent of those who framed or ratified the constitutional provisions in question.

The rise of originalism has brought with it an almost obsessive concern with history. Originalism seeks to substitute keenness of intellect for prudent judgment because the first is thought to be objective. The second is thought to be subjective, thereby subjecting us to the rule, not of laws, but of men. Yet the wise judge recognizes that the search for security and objectivity in history is a will-o'-the-wisp. Wisdom, not historical rigor, is the touchstone of good judgment.

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Who would not say that glosses increase doubts and ignorance, since there is no book to be found, whether human or divine, with which the world busies itself, whose difficulties are cleared up by interpretation? The hundredth commentator hands it on to his successor thornier and rougher than the first one had found it. When do we agree and say, 'There has been enough about this book; henceforth there is nothing more to say about it'?

—Michel de Montaigne¹

I.

I begin with an overture. As in an opera, the overture plays before the curtain on the main action goes up, and it is only later that the audience discerns the connection between the melodies in the overture and the work as a whole. Two episodes:

In 2007, Speaker Nancy Pelosi sought to have the House of Representatives issue a proclamation that in the early part of the last century, as the Ottoman regime was crumbling away, there had indeed been an Armenian genocide perpetrated by the Turks.² It is worth noting that in France it is a crime to deny the Armenian genocide, and in Turkey it is a crime to affirm it.³

Earlier this year a distinguished Shakespeare scholar at Columbia University, James Shapiro, published a book about the phenomenon of people promoting someone other than William Shakespeare as the author of the works attributed to him: in the Nineteenth Century and into the Twentieth, Francis Bacon, whose most renowned partisans were Mark Twain and Henry James; and in the Twentieth Century, the Earl of Oxford, whose most ardent partisan was Sigmund Freud.⁴ Shapiro's book, for some two-thirds of its length, is a straightforward and—given the Baconians' and Oxfordians' high jinks and argumentation—straight-faced account of the origins, rise and decline of each of these movements. The Baconian movement began in an outright fraud and forgery designed to lend a certain antiquity to the Baconian thesis and in its waning years descended into displays of numerological

¹ MICHEL DE MONTAIGNE, *Of Experience*, in THE COMPLETE ESSAYS OF MONTAIGNE 815, 817 (Donald M. Frame trans., 1958).

² Carl Hulse, *As Turks Object, Genocide Motion Falters in House*, N.Y. TIMES, Oct. 17, 2007, at A1; Charles Krauthammer, *Pelosi's Armenian Gambit*, WASH. POST, Oct. 19, 2007, at A21; Steven Lee Myers & Carl Hulse, *Vote by House Panel Raises Furor on Armenian Genocide*, N.Y. TIMES, Oct. 11, 2007, at A1.

³ See Angelique Chrisafis, *Turkey Warns France Over Armenian Genocide Bill*, GUARDIAN (London), Oct. 11, 2006, (Int'l Pages), at 19; Charles Fried, Op-Ed., *Getting at the Truth*, BOS. GLOBE, Dec. 13, 2006, at 11A.

⁴ See PETER GAY, *READING FREUD: EXPLORATIONS AND ENTERTAINMENTS* 10–11 (1990); JAMES SHAPIRO, *CONTESTED WILL: WHO WROTE SHAKESPEARE?* 1, 130, 141 (2010).

prestidigitation.⁵ The principal early exponent of the Oxfordian thesis was one J.T. Looney—whose name we are told is properly pronounced to rhyme with boney (or bologna)—a priest in the English Church of Humanity, whose book, *Shakespeare Identified*, had so impressed Freud that he pressed it on to his patients and colleagues.⁶

The last part of Shapiro's book sets out in such a cool and systematic way the facts of how Shakespeare's works were publicized and published that in the end one is left to wonder how any serious person could have been drawn into what in retrospect appears to be cult-like commitments to far-fetched and implausible theories. Shapiro's book is a work of intellectual history of the sort that might be written about the rise and fall of bloodletting as a widely respected cure for a remarkable array of ailments: the friend of John Adams and Thomas Jefferson, distinguished Philadelphia physician Benjamin Rush was an ardent adherent who released torrents of blood from among the founding generation.⁷

What struck me in this gripping and hilarious tale is its intersection with, of all things, the Supreme Court of the United States, or at least a number of its Justices. In 1987, Justices Brennan, Stevens and Blackmun presided over a moot court in which the issue was the authorship of the plays attributed to Shakespeare.⁸ The three justices in their seriatim opinions ruled that the Oxfordians had the burden of proof and had failed to carry it. More striking than the report of this bit of high-toned fun is Shapiro's presentation of reports from reputable media that Justices Brennan, Blackmun and Stevens later openly repented of their earlier agnosticism and had come to conclude that the Earl of Oxford was indeed the likely author of Shakespeare's plays.⁹ And in this conviction they were joined by Justice Antonin Scalia. It is also reported—to their credit—that Justices Kennedy and Breyer are Stratfordians.¹⁰

⁵ SHAPIRO, *supra* note 4, at 10, 117–18, 149.

⁶ *See id.* at 169; GAY, *supra* note 4, at 18.

⁷ *See* B.R. HERGENHAHN, AN INTRODUCTION TO THE HISTORY OF PSYCHOLOGY 498 (6th ed. 2009); *see generally* ALYN BRODSKY, BENJAMIN RUSH: PATRIOT AND PHYSICIAN (2004).

⁸ *See* WARREN HOPE & KIM HOLSTON, THE SHAKESPEARE CONTROVERSY: AN ANALYSIS OF THE AUTHORSHIP THEORIES 107–10 (2d ed. 2009); Charles Champlin, *Shakespeare Shaken by Moot Court*, L.A. TIMES, Sept. 29, 1987, § 6 (Calendar), at 1; James Lardner, *The Authorship Question*, NEW YORKER, Apr. 11, 1988, at 87, 88; David G. Savage, *High Court Won't Filch from Bard his Good Name; Zounds! Much Ado About Poetic Justice*, L.A. TIMES, Sept. 26, 1987, at A2; Amy E. Schwartz, *Three Justices, a Poetry-Starved Crowd and Shakespeare*, WASH. POST, Oct. 14, 1987, at A19.

⁹ *See* Jess Bravin, *Justice Stevens Renders an Opinion on Who Wrote Shakespeare's Plays*, WALL ST. J., Apr. 18, 2009, at A1 (noting that Justices Scalia and Stevens support Oxford, but that Justices Kennedy and Breyer favor William Shakespeare); John Orloff, Letter to the Editor, *No Denying a Genius at Work*, L.A. TIMES, Apr. 19, 2010, at A14.

¹⁰ *See* Bravin, *supra* note 9 (reporting that Justice Scalia agrees with Justice Stevens).

My reason for telling you all this will appear later.

II.

The Supreme Court's constitutional decisions have been a mixed blessing. Some of those decisions have in the long run been quite bad for the country. *Mapp v. Ohio*¹¹ may have done a certain amount of good at the time, but because it carried with it an automatic rule of exclusion—exacerbated by the “fruit of the poison tree”—it imposed a rigidity on American criminal procedure, and grossly diverted attention from the issue of guilt or innocence. In a moment I will add *Miranda v. Arizona*¹² to my list, but mention here only the difference that evidence excluded under *Mapp* is almost invariably physical evidence, not statements, so that weapons and even corpses are forever subtracted from the determination of whether a defendant killed.¹³ Among the decisions that have made our country better are *Stone v. Powell*¹⁴ and *United States v. Leon*,¹⁵ but only because they loosened the rigors of the *Mapp* rule: *Stone v. Powell* because it declined to impose those rigors in collateral review—the unspoken premise was necessarily that a *Mapp* violation was not such a blot on the underlying criminal conviction that it had to be extirpated even after the normal procedures had in an otherwise unexceptionable way run their course;¹⁶ and *United States v. Leon* because it recognized the rules of search and seizure had become so complicated that not every violation of them should lead to suppression of the evidence and loss of the prosecution.¹⁷

Another decision, famous and celebrated, that has probably done more harm than good is *Miranda v. Arizona*. The evils against which it was directed—abuse and coercion, abuse sometimes amounting to torture—are certainly far greater than those to which *Mapp* was addressed, as they attacked the bodily integrity and dignity of the physical person and not the sometimes quite metaphysical privacy rights protected by the Fourth Amendment.¹⁸ (There is, of course, overlap, where the Fourth Amendment right relates to seizure and detention of the person rather than intrusions on property or on the circular notion of “reasonable expectation of privacy” as applied to various kinds of snooping—the most tenuous being external thermal imaging of a building that might reveal

¹¹ 367 U.S. 643 (1961).

¹² 384 U.S. 436 (1966).

¹³ See *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (“The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a result of an unlawful invasion.”).

¹⁴ 428 U.S. 465 (1976).

¹⁵ 468 U.S. 897 (1984).

¹⁶ *Stone*, 428 U.S. at 493–95.

¹⁷ *Leon*, 468 U.S. at 922 (holding that an officer's good faith reliance on a facially valid warrant cannot justify the substantial costs of exclusion).

¹⁸ See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966).

“at what hour each night the lady of the house takes her daily sauna and bath.”¹⁹) But abuse and coercion had already been constitutionally condemned and confessions obtained by them excluded. What *Miranda* did was to add an at best arguably effective prophylactic routine more appropriate to legislation than to a statement by a court pronouncing constitutional principles.²⁰ Fortunately, the rigidities of *Miranda* have been continuously softened, most recently just last Term in *Berghuis v. Thompkins*,²¹ a case that promises to take the law closer to something like what it was before *Miranda* by requiring the detainee to invoke affirmatively the rights recited to him in the *Miranda* warning.²²

All those decisions and many others like them have turned the criminal process into a kind of irrational obstacle course, and turned it away from a rational and reasonable inquiry into who committed a criminal offense and how they should be punished. But the Supreme Court has done many things that have made us a better and more humane society. I think of the cases forbidding the death penalty for minors,²³ for mentally retarded persons,²⁴ for persons convicted of non-homicide offenses,²⁵ and again just last Term in *Graham v. Florida*²⁶ precluding a sentence of life imprisonment without possibility of parole for juveniles convicted of a non-homicide offense.²⁷ I wonder how long it will be before the death penalty is eliminated entirely, as so many of the irrational and irksome impediments to criminal investigation and adjudication have developed in its shadow.

Stepping way from matters of criminal procedure, in addition to the sanctified decisions in *Brown v. Board of Education*²⁸ and *Loving v. Virginia*,²⁹ the Supreme Court has done many things that have given our country a distinctly libertarian cast. I would cite *Planned Parenthood v. Casey*³⁰ and *Lawrence v. Texas*³¹ as prime examples and will here celebrate them further. Our free speech jurisprudence is distinctive and distinguished. It is thanks to the Supreme Court that many Americans now find it unthinkable that a person could be punished for sexually explicit speech or for stating opinions that disparage groups, religions, and the government itself. Yet, this liberality in speech is a marvel and a

¹⁹ *Kyllo v. United States*, 533 U.S. 27, 38 (2001).

²⁰ *See, e.g.*, OFFICE OF LEGAL POL’Y, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION, at i, iii, v (1986).

²¹ 130 S. Ct. 2250 (2010).

²² *Id.* at 2264.

²³ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

²⁴ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

²⁵ *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665 (2008).

²⁶ 130 S. Ct. 2011 (2010).

²⁷ *Id.* at 2034.

²⁸ 347 U.S. 483 (1954).

²⁹ 388 U.S. 1 (1967).

³⁰ 505 U.S. 833 (1992).

³¹ 539 U.S. 558 (2003).

scandal to most of our sister constitutional democracies. It is in this tradition that the much vilified *Citizens United v. FEC*³² decision should be understood. There is undue attention to what I think is a distraction in the opinion: whether corporations have free speech rights.³³ To my mind the case is just a further extension of the wonderful proposition in *Buckley v. Valeo* that,

the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.³⁴

It is not a matter of saying who has a constitutional right to be free of government restrictions on speech, but whether government has any business at all shutting down broad swaths of expression because of who is doing the speaking. It is not as if certain government-certified speakers and corporations are or are not among them, but whether government has any business here at all. The decision protects not corporate speakers—that would be absurd—but free debate.

In this connection, I have my doubts about the correctness of *Davis v. FEC*,³⁵ and believe the decision in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*³⁶ is just plain wrong. In that case, Arizona chose to increase matching funds to opponents of self-financing candidates.³⁷ But if my reading of *Citizens United v. FEC* is correct, then this is just an example of “more speech.”³⁸ After all, *Buckley* spoke about “restricting” the speech of some, and the Arizona scheme (like the “Millionaire’s Amendment” to the Bipartisan Campaign Reform Act struck down in *Davis*³⁹) restricts no one’s speech. Arguing in terms of the chilling effect on the self-funding candidates’ speech buys into the very premise that was used to justify the expenditure limits in FECA that *Buckley* rejected: that more speech somehow “silences” and therefore violates the rights of the disfavored speaker.⁴⁰

³² 130 S. Ct. 876 (2010).

³³ *Id.* at 899–902

³⁴ 424 U.S. 1, 48–49 (1976) (internal quotation marks omitted).

³⁵ 128 S. Ct. 2759 (2008).

³⁶ 131 S. Ct. 2806 (2011).

³⁷ *Id.* at 2813–16.

³⁸ See Brief of *Amici Curiae* Former Elected Officials in Support of Respondents at 7–8, 15, *Ariz. Free Enter. Club's Freedom Club PAC*, 131 S. Ct. 2806 (Nos. 10-238 & 10-239) (I was counsel of record, joined by Clifford Sloan).

³⁹ See *Davis*, 128 S. Ct. 2759.

⁴⁰ *Buckley v. Valeo*, 424 U.S. 1, 48–49, 104–05 (1976) (holding that expenditure limitations on major parties “enhanc[ing] the ability of nonmajor parties to increase their spending relative to the major parties” was constitutional because “the First Amendment . . . was designed to secure the widest possible dissemination of

More controversially, I think the Supreme Court's decisions on affirmative action—especially *City of Richmond v. J.A. Croson Co.*⁴¹ and *Adarand Constructors, Inc. v. Peña*⁴²—made us a better country by restraining the disposition of government to divide us up and categorize us not as individual human beings and not by the identities we choose for ourselves but in terms that bureaucracies, politicians, social engineers, and what I would call racial entrepreneurs would choose for us.

Now what makes me think that some of these decisions were good for the country and others bad? What are my criteria, other than that I just like some and not others? How do I know what is good and what is bad judging? My most important argument will be a negative one: it is not a matter of which of these decisions did or did not accord with what could even plausibly be attributed to the original intent of those who framed and ratified the constitutional provisions in question.

Let me take two recent decisions, both of which I think were very bad for the country: *Boumediene v. Bush*, which among other things held that the constitutional right to invoke the writ of habeas corpus extended to foreign nationals held by American authorities outside the United States,⁴³ and *District of Columbia v. Heller*, which held that the Second Amendment conferred an individual right on Americans to keep and bear arms.⁴⁴

In *Boumediene*, both Justice Kennedy for the Court and Justice Scalia in dissent canvassed the history of the writ in English legal history up until 1789 and reached similar conclusions: that the history offers no definitive conclusion that the English writ did or did not run to foreigners held outside the realm, considerable attention being paid to its application *vel non* in Scotland, Hanover, and the Channel Islands—although Justice Scalia in dissent vigorously noted that “petitioners have failed to identify a single case in the history of Anglo-American law that supports their claim to jurisdiction,”⁴⁵ and concluded:

Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war. . . .

....

information from diverse and antagonistic sources”) (internal quotation marks omitted).

⁴¹ 488 U.S. 469 (1989).

⁴² 515 U.S. 200 (1995).

⁴³ 128 S. Ct. 2229, 2262 (2008).

⁴⁴ 128 S. Ct. 2783, 2797 (2008).

⁴⁵ *Boumediene*, 128 S. Ct. at 2305 (Scalia, J., dissenting). *But see id.* at 2251 (Kennedy, J., opinion of the Court) (“Both [the petitioners’ and the Government’s] arguments are premised, however, upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions.”).

America is at war with radical Islamists. The enemy began by killing Americans and American allies abroad On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D.C., and 40 in Pennsylvania. It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.⁴⁶

This is strong stuff, but it is the peroration to a perfectly standard analysis of practice and precedent that concludes that in this state of the evidence of history up until 1789, and in light of precedents and practicalities, at the very least the Court owed respect and, in the end, dispositive deference to the judgment of the two other branches of government that had determined that the procedures in the 2005 Detainees Treatment Act were adequate, necessary, and proper to deal with persons the military considered to be enemy aliens detained at the Naval base at Guantanamo.⁴⁷

In the same Term, indeed just two weeks later, in an opinion by Justice Scalia, the Court ruled for the first time since its adoption in 1791 that the Second Amendment conferred a right upon individuals to keep and bear arms and was not limited to the maintenance of militias to which the first clause of the amendment refers.⁴⁸ The Court relied almost exclusively on arguments based on historical evidence purporting to show that such was the original understanding of the Second Amendment.⁴⁹ There were no Supreme Court precedents to support this reading of the Amendment, a few stray precedents pointing the other way, and a mountain of authority in state and lower federal courts dismissing the personal-right interpretation.⁵⁰ There was an even more massive mountain of both federal and state legislation and practice the

⁴⁶ *Id.* at 2293–94 (citations omitted).

⁴⁷ *Id.* at 2296–2303.

⁴⁸ *Heller*, 128 S. Ct. at 2797.

⁴⁹ *Id.* at 2790–2818. *See also* Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 *Nw. U.L. Rev.* 923, 926 (2009).

⁵⁰ *See, e.g.*, *United States v. Miller*, 307 U.S. 174, 178 (1939) (stating that the “declaration and guarantee” of the Second Amendment “must be interpreted and applied . . . in view” of its “obvious purpose” of protecting state militias); *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (declaring that the Second Amendment right to bear arms is not absolute and can be regulated by the states); *United States v. Milheron*, 231 F. Supp.2d 376, 378 (D. Me. 2002) (stating that the Second Amendment “endorse[s] a collective right to bear arms, linked to the preservation of a well-regulated militia”).

other way.⁵¹ And finally there was the considered—though contested—judgment that stringent firearm regulation is necessary to protect the lives of law-abiding citizens.⁵² To paraphrase Justice Scalia in *Boumediene*, gun-control advocates were sure that “people will die as a result of this decision.”⁵³ Yet the Court gave no deference to the legislative and executive branches not only of the national government but also of many state and local governments.

How does one account for the discord between these two decisions that are in my view alike in their tendency to harm the interests of the people of the United States? A study of the opinions points to one salient difference: in *Boumediene*, it was acknowledged all around that the English legal history and thus the evidence of the original intent of the framers was either indeterminate or inferential, while in *District of Columbia v. Heller* (and again last summer in *McDonald v. City of Chicago*) the Court majority concluded that the historical evidence—which again included much pre-revolutionary English legal history—firmly supported the conclusion that at the time of the adoption of the Amendment those voting to ratify it would have understood it to confer a right on individuals and not just a right tied to the maintenance of citizen militias referred to in the Amendment’s first clause.⁵⁴ But then Justice Stevens, in dissent in *District of Columbia v. Heller*, and Justice Breyer in *McDonald v. City of Chicago*, were just as firmly convinced that the historical evidence pointed in the other direction.⁵⁵

I do not, however, condemn *Boumediene*. I merely disagree with it. *Boumediene* reached the wrong conclusion, but by a proper route. *Heller*, on the other hand, traveled a mistaken path to a sadly mistaken and harmful conclusion. The villain of my piece is originalism, a mistaken and sometimes incoherent doctrine that has time and again led the Court down the garden path to disastrous conclusions. Another example

⁵¹ See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3105 (2010) (Stevens, J., dissenting) (stating that the vast majority of states have historically regulated some aspects of gun possession).

⁵² See *Heller*, 128 S. Ct. at 2851 (Breyer, J., dissenting).

⁵³ *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting) (“[This decision] will almost certainly cause more Americans to be killed.”). See also Joan Biskupic & Kevin Johnson, *Supreme Court Ruling Tilts Law Against Limits on Guns*, USA TODAY, June 29, 2010, http://www.usatoday.com/news/washington/judicial/2010-06-28-gun-rights-supreme-court-ruling_N.htm.

⁵⁴ *McDonald*, 130 S. Ct. at 3042 (“[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty”); *Heller*, 128 S. Ct. at 2792 (“The phrase ‘keep arms’ was not prevalent in the written documents of the founding period . . . , but there are a few examples, all of which favor viewing the right to ‘keep arms’ as an individual right unconnected with militia service.”).

⁵⁵ *Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting); *McDonald*, 130 S. Ct. at 3121–22 (Breyer, J., dissenting).

from a recent Term is *Melendez-Diaz v. Massachusetts*,⁵⁶ a decision that will surely cause great harm and accomplish very little good—all in the name of the supposed original understanding, this time of the Sixth Amendment's confrontation clause.

III.

What are the grounds for, why the fascination with Clio as the sacred keeper of the keys of constitutional truth, when she has in fact been such an uncertain, almost whimsical guide? The most frequently offered explanations can be briefly summarized this way:

First, our government and its authority to govern us depend on the consent of the governed, and as that consent is embodied in the words of the Constitution, legislators, executive officers, and judges, if they do not want to stray beyond the legitimate bounds of their commissions, must remain faithful to those words either (and there is some controversy here) as they were originally intended by those who wrote them,⁵⁷ or how they would at the time have been understood by those to whom the words were presented for their approval.⁵⁸

Second, by a joke Justice Scalia likes to tell.⁵⁹ Two campers wake up from their sleeping bags one morning to find a huge grizzly bearing down on them. One stops to put on his sneakers. The other asks why he is wasting time doing that. "You can't outrun that bear." "No," was the response, "but I can outrun you." Maybe history is not such a sure guide to constitutional interpretation, but it is better than the alternatives, all of which—it is implied—are more or less explicit versions of the unacceptably subjective "living constitution" variety.

⁵⁶ 129 S. Ct. 2527 (2009). Since this lecture the Court has finally begun its retreat from this disastrous course. See *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

⁵⁷ See, e.g., Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 353–54 (1988); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971); Edwin Meese III, Attorney Gen., Speech Before the American Bar Association (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 9–10 (The Federalist Soc'y, 1986); Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 925 (1996). See generally Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

⁵⁸ See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 625–28 (1999) (discussing original public meaning).

⁵⁹ Justice Scalia has told this joke on many occasions. See, e.g., Dahlia Lithwick, *The Surrendered Court: Maybe America Doesn't Want an Immobilized Judicial Branch After All*, SLATE (Apr. 22, 2010, 6:16 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/the_surrendered_court.html (discussing Justice Scalia's Henry J. Abraham Lecture at the University of Virginia Law School). See also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (defending originalism generally as the preferred method of constitutional interpretation).

Now there have been responses, if not refutations, to the first—let us call it “legitimacy”—argument; too many to count.⁶⁰ I promise you I will not rehearse them today. I concentrate instead on the running shoes or “you can’t beat something with nothing” argument. My contention is that Justice Scalia’s running shoes have such big holes in them and the laces are so hopelessly tangled that we are better off trying to outrun the grizzly barefoot.

Consider the gun cases. One can only be impressed by the seriousness and depth of the historical inquiry displayed in the majority opinions and the dissents in both *Heller* and *McDonald*. Without doing more research than I am inclined to do and particularly without consulting the primary and secondary sources on which the writing justices rely, I cannot decide who has the better of it on either the original intent ground or the original meaning of the Second Amendment. Even less can I decide who has the better of it on the application of the Second Amendment to the states through the Fourteenth Amendment. Indeed, given the high seriousness of the opinions, I doubt that I could come to a responsible and firm conclusion even if I did do all that work. And that is just my point. It is not that I am not a professional historian and therefore unqualified by training and certification to arrive at secure conclusions on such controverted issues; that would somehow make constitutional truth depend on historical truth and historical truth depend on who had the right degrees, professional standing, and official accreditation.⁶¹ And to embrace that kind of bureaucratization of historical truth would display a profound ignorance of the nature of scholarly inquiry.

An illuminating analogy comes to mind, familiar to me for many reasons. It originated in the Ninth Circuit, and I had the good fortune to argue it both there (on remand) and in the Supreme Court: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁶² In that famous case, the Supreme Court rejected the longstanding *Frye* rule, which held that an expert may only testify to a scientific proposition if that proposition was generally

⁶⁰ See, e.g., LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 300 (1988); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 23, 25–26 (Jack N. Rakove ed., 1990); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225–26 (1980); Kermit L. Hall, *The Bill of Rights, Liberty, and Original Intent*, in CRUCIBLE OF LIBERTY: 200 YEARS OF THE BILL OF RIGHTS 8, 14, 21 (Raymond Arsenault ed., 1991); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 697 (1987); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL’Y 311, 311 (1996) (“No approach to interpretation is self-justifying. . . . In that sense, personal judgments are unavoidable.”).

⁶¹ For a history of professionalization in the historical profession, see PETER NOVICK, THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION (1988).

⁶² 509 U.S. 579 (1993).

accepted in the scientific community.⁶³ The *Frye* rule was attacked by the plaintiffs in that case—and by many others, including some of their distinguished *amici*—as representing a kind of frozen, indeed bureaucratic, notion of scientific truth that was quite inimical to the very nature of scientific inquiry: that it be open, tentative, and susceptible to continuous revision.⁶⁴ My argument, which the Supreme Court accepted, was that the expert should not be limited to testifying only to propositions that had attained general acceptance in the scientific community, but rather that the expert's testimony must be based on the methods and criteria of scientific inquiry: that the propositions be published to other scientists so as to be susceptible to their comments and critiques, that they be susceptible to refutation, and that they be tested in the crucible of scientific debate.⁶⁵ Here is how Justice Blackmun responded to the criticism of this rule, which the Court adopted:

Petitioners and, to a greater extent, their *amici* exhibit a different concern. They suggest that recognition of a screening role for the judge that allows for the exclusion of “invalid” evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth. It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.⁶⁶

In *Daubert*, the plaintiffs were suing the manufacturer of Bendectin, a substance used to control morning sickness in pregnancy, which they claimed had caused their son's birth defects.⁶⁷ The issue on which the plaintiffs' experts wished to testify was that Bendectin was indeed a likely cause of those defects.⁶⁸ The ultimate decision on remand was that the

⁶³ *Id.* at 589; *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

⁶⁴ *Daubert*, 509 U.S. at 596–97.

⁶⁵ *Id.* at 592–94.

⁶⁶ *Id.* at 596–97 (internal citations omitted).

⁶⁷ *Id.* at 582.

⁶⁸ *Id.* at 583.

plaintiffs' experts had not followed the methods of science and therefore that their opinion testimony was not scientific knowledge, as required by the Federal Rules of Evidence.⁶⁹ The *Dauberts* lost and that decision is now *res judicata*. But consider what would happen if a few years later evidence widely seen as conclusive had developed that Bendectin was indeed a strong causative factor in birth defects. It would be madness for the courts to exclude that evidence in another case on the strength of the *Daubert* decision. This is the difference between *res judicata* and *stare decisis*. For Justices Scalia and Kennedy, surely *Heller* and *McDonald* are meant to have precedential effect, not just, in Justice Blackmun's words, "the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past."⁷⁰

The inappropriateness of making a constitutional judgment depend on historical judgments is nicely illustrated by the strange case of the historian, Michael Bellesiles.⁷¹ In 2000, Bellesiles published a book, *Arming America: The Origins of a National Gun Culture*, that purported to show that, in colonial revolutionary times and beyond, Americans possessed far fewer guns than had previously been assumed—and that, therefore, the notion that at the time of the drafting and ratification of the Second Amendment guns were a usual item of furniture in American households was wrong.⁷² The book was based on what purported to be a detailed study of wills and other documentary evidence and was awarded the Bancroft Prize, which among professional historians is the equivalent of the Fields Medal in mathematics. Well, the National Rifle Association and supporters of the "personal right" theory of the Second Amendment were not at all pleased and went to work on the underlying evidence.⁷³ It soon became clear that there were serious flaws in the data, and when Bellesiles was asked to produce his field notes he demurred, stating that they had not been digitalized and that his handwritten notes had been destroyed in a flood in his office.⁷⁴ In 2002, the history faculty at Columbia University withdrew the Bancroft Prize, and after a review by

⁶⁹ *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317–19 (9th Cir. 1995).

⁷⁰ *Daubert*, 509 U.S. at 597.

⁷¹ See PETER CHARLES HOFFER, *PAST IMPERFECT: FACTS, FICTIONS, FRAUD—AMERICAN HISTORY FROM BANCROFT AND PARKMAN TO AMBROSE, BELLESILES, ELLIS, AND GOODWIN* 141–71 (2004); see also Patricia Cohen, *Scholar Emerges from Doghouse*, N.Y. TIMES, Aug. 4, 2010, at C1; James Lindgren, *Fall From Grace: Arming America and the Bellesiles Scandal*, 111 YALE L.J. 2195 (2002) (book review).

⁷² See MICHAEL A. BELLESILES, *ARMING AMERICA: THE ORIGINS OF A NATIONAL GUN CULTURE* (2000).

⁷³ Robert F. Worth, *Historian's Prizewinning Book on Guns is Embroiled in a Scandal*, N.Y. TIMES, Dec. 8, 2001, at A13.

⁷⁴ *Id.*; REPORT OF THE INVESTIGATIVE COMMITTEE IN THE MATTER OF PROFESSOR MICHAEL BELLESILES 7 (2002) available at http://www.emory.edu/news/Releases//Final_Report.pdf.

Emory University, Bellesiles resigned his professorship there.⁷⁵ I retell this sad story because I would ask, assuming that somehow the personal-right thesis had held sway before 2000 (which it did not), would the constitutional law then have changed with the publication of Bellesiles's book; and would it have changed again in 2002 when Bellesiles's prize was withdrawn and he resigned his professorship? Of course not.

Although constitutional truth is certainly related to historical truth—as it is to moral truth, to precedential truth, and to legal truth—the relation cannot be one of dependence and demonstration, as was assumed in the warring opinions in *Heller* and *McDonald*. And the reason is that constitutional truth (I like that way of putting it, even if you don't) is of a different sort than historical truth, or for that matter scientific truth—whether it be about the teratogenic properties of Bendectin,⁷⁶ the psychological effect of state-compelled segregation on black youngsters' self-esteem,⁷⁷ or the correct understanding of the Second Amendment.⁷⁸ It is not that the Justices are not professional or certified or competent historians—the canvas of primary and secondary materials in the several opinions would certainly be awarded a high grade in any graduate school seminar paper.⁷⁹ It's just that all this effort was used for a purpose and to support a conclusion that is foreign to historical and scholarly work in general: the definitively correct interpretation of the Second Amendment.

To catch my meaning, compare *Heller* and *McDonald* to Justice Kennedy's decisions in *Roper v. Simmons* and, last Term, in *Graham v. Florida*. In *Roper v. Simmons* and *Graham v. Florida*, the Court took the language of the Eighth Amendment barring "cruel and unusual" punishment to invite a factual inquiry into contemporary standards and practices.⁸⁰ And even at that, the doctrine and decisions are inextricably related to judgments of value and principle. After all, the very decision to refer to contemporary standards is itself a controverted and interpretive one. But getting past that, it is not as if the controversy about the difference between standards, contemporary with the framing or

⁷⁵ *Columbia's Board of Trustees Votes to Rescind the 2001 Bancroft Prize*, COLUMBIA NEWS (Dec. 16, 2002), http://www.columbia.edu/cu/news/02/12/bancroft_prize.html; Cohen, *supra* note 71, at C1.

⁷⁶ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 582 (1993).

⁷⁷ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

⁷⁸ See *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). See also *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

⁷⁹ Many professional historians, however, have taken a less sanguine view of the Court's use of history in a wide range of other opinions. See, e.g., LEVY, *supra* note 61, at 300; Eric Foner, *The Supreme Court's Legal History*, 23 RUTGERS L.J. 243 (1992); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155; Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 840 (1997); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 227–228 (1988).

⁸⁰ See *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2023, 2034 (2010).

contemporary with the present dispute, was one the resolution of which at last landed you in a safe place, a resting place of objective fact (historical or contemporary). The sharp disputes between majority and dissent about what the contemporary evidence shows are manifestations of how unavoidably value- and principle-laden is the task of identifying the contemporary consensus.⁸¹ But at least the decisions in the contemporary-standards mode announce their own revisability on their face—although Justice Scalia would not be wrong if he pointed wryly to the fact that the revisions all seem to be in one direction: left.

It is not just that real history—like real science, or even real social science, if there is such a thing—is tentative and revisable. There are some historical judgments that it would be astonishing to see revised (Congress voted to declare independence on July 2, 1776—July 4 as the date the official text of the declaration was adopted and promulgated is a bit less certain), just as there are some scientific theories that it would be astonishing to learn have been revised—Newton’s laws of motion (oops!).⁸² It is also true that decisions are overruled, the Court changes its mind. The two propositions—propositions of historical and constitutional truth—have an inherently different semantic valence. Legal judgments wear a fundamentally performative aspect⁸³—once courts have spoken (even a five-to-four vote) what they have said *is* the law, just as when in the right context I say, “I promise,” and then I am bound; or “I do,” and then I am married. No statement by historians can have that kind of force; not even the decision of the Columbia history faculty to withdraw Michael Bellesiles’s Bancroft prize thereby falsified his thesis.

Now recall Nancy Pelosi’s proclamation. I have no doubt that there was an Armenian genocide, and few historians doubt it.⁸⁴ But what does it add to have an official proclamation? It is not that it is false, but rather that it is what philosophers of language call a category mistake. Government proclamations, like statutes and court judgments, are performatives; they accomplish something. Even official government apologies for some dreadful event—the internment of Japanese-Americans during World War II—accomplish something: they apologize. And the appropriation for reparations certainly does: it allows money to be paid. But an official proclamation by the House of Representatives about something that happened almost a century ago in which we were not at all implicated can accomplish nothing and can add nothing to our

⁸¹ Compare, e.g., *Roper*, 543 U.S. at 564–67 (opinion of the court), *with id.* at 604–15 (Scalia, J., dissenting).

⁸² See generally JOYCE APPLEBY ET AL., *TELLING THE TRUTH ABOUT HISTORY* (1995); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

⁸³ Richard Fallon puts in a word what I was aiming at in a little essay written after I had returned to teaching after several years on my state’s supreme court. See Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL’Y 807 (2000).

⁸⁴ See *The Armenian Genocide*, in 1 *ENCYCLOPEDIA OF GENOCIDE* 61 (Israel W. Charny ed., 1999).

conviction that this dreadful event took place. After all, if there were truly serious doubt about it, what in the world would a proclamation voted by 435 men and women, most of whom are entirely ignorant of the facts and incompetent to judge historical controversy, possibly add to resolve that doubt?

Now take the Shakespeare authorship controversy. I am not at all shaken in my conviction that the plays attributed to Shakespeare were indeed (largely) written by him when I learn that not only Justices Blackmun and Brennan but also Justices Stevens and Scalia (the two principal protagonists in *Heller* and *McDonald*) had become partisans of the Earl of Oxford. Should I be? Should anyone be? The reason that the moot point I alluded to at the beginning of this lecture was such fun—and was intended to be fun—is that everyone involved presumably understood that anomaly, a *category mistake*, is the essence of a good joke. And the joke there was just what I have been pointing at: emitting a performative about what could only be a statement of fact. It is as if a court had decreed by a vote of five to four that it had been an unusually hot summer, or more anomalously still that it was, at the time of the pronouncement, an uncomfortably hot afternoon.

Now I have spoken of the Eighth Amendment cases—which Justice Kennedy regularly gets right—in which something like this is just what the Court seems to be doing, and it isn't particularly funny. But these cases are more like those Justice Blackmun identified in his opinion in *Daubert*: a court is not in a performative way decreeing what is scientific, or medical, or sociological truth. Rather it is doing the best it can to establish a matter of fact that is an element in its decree, in its performative judgment, and that aspect of its judgment remains open to debate in quite a different way from the way that, say, the Court's decision in *Lawrence v. Texas*⁸⁵ (another case Justice Kennedy got right) remains open to debate. One might put it this way: the Court's statement about the degree of consensus on, say, the justice of punishing by death non-homicide crime, may be true or false, but its judgment—like its judgment to make its conclusion dependent on the supposed fact of such a consensus—is either right or wrong. And just as Justice Blackmun noted in *Daubert*, the Court's ruling explicitly opens itself to revision in the next case if the factual element appears to the Court to have changed. That element in the ruling by its own terms cannot be *stare decisis*, only *res judicata*.⁸⁶

⁸⁵ 539 U.S. 558 (2003).

⁸⁶ This is just what we have seen in a number of the Eighth Amendment cases. *See Roper*, 543 U.S. 551 (execution of persons convicted of crimes committed before their eighteenth birthday); *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of mentally retarded persons).

IV.

Back to Justice Scalia's running shoes. Are we remitted to originalism because there is nothing better? If the grizzly is the bugbear of subjectivism, can we outrun him by embracing some version of originalism? Can we thus substitute a question of fact for a dispute about value and thereby attain objectivity and with it judicial legitimacy? The standard critique of the several forms of originalism tell us that we cannot outrun the grizzly bear using originalism any better than in our bare feet. My argument is our laces would be tied together and we would not be running at all. So what is the alternative?

Adjudication is not just a judgment. It is an act. It is an exercise of power. And the virtue that those who act, and particularly those like judges who exercise power, must display is not just keenness of mind but prudence. How often have we heard it said of someone that he is brilliant and knowledgeable, but lacks judgment—that is, prudence—or that we would be glad to read that person's books or hear his lectures, but we would shudder to have him exercise power over us? What originalism seeks to do is to substitute keenness of intellect for judgment because the first is thought to be objective. The second is thought to be subjective, thereby subjecting us to the rule, not of laws, but of men. As I hope I have shown, the search for security and objectivity in history is a will-o'-the-wisp. Justices of the Supreme Court are no more competent to determine issues of constitutional history than they are to solve the bogus riddle of who wrote Shakespeare's plays. What then?

No doubt there are situations in which certain knowledge leads directly to action, as in following the steps in an instruction manual for a not very complicated gadget—always assuming, of course, that you want the gadget to work and that the trouble of the next step is worth the result. But little in real life and nothing at all in the art of governing has that quality: the factual premises are always too controverted and the conditions of their application even more so. That is why prudence is a moral virtue and not just an intellectual capacity. It requires the proper amalgam of courage, perseverance, modesty, and keenness of intellect. And, as with all moral virtues, it is best discerned, taught, learned, and celebrated through examples.⁸⁷ That is why I began with a list—far from comprehensive—of wise and prudent, and of distinctly imprudent, decisions. And their assignment to one or another category has only a random relation to whether and how they purported to be determined by history.

This is the use of example recommended by Aristotle as the best means for teaching and acquiring virtue: study the example of persons who to a high degree exhibit the virtue. My candidates for that list—inevitably controversial—are Learned Hand, Robert Jackson, Henry

⁸⁷ See generally G.E.M. Anscombe, *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1 (1958).

Friendly, and John Marshall Harlan (the younger) from among those no longer living. A list of living judges would be more controversial still and get me into water hotter than I could stand—but I admit that I have such a list in mind. One name not on my list, who might stand as an example of an imprudent judge, is Felix Frankfurter. I single him out, because a negative example will help me get to the positive. I was greatly moved to make that judgment by my colleague Noah Feldman's wonderful new book, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*, about Justices Black, Frankfurter, and Jackson.⁸⁸ Frankfurter was brilliant, irascible, a talented writer, learned, and in the grips of a theory. Nowhere is this more apparent than in his passionate and embarrassing dissent in *West Virginia Board of Education v. Barnette*,⁸⁹ the flag salute case. His theory was that propounded by one-time Dean of the Harvard Law School James Bradley Thayer, of extreme deference to the other branches of government.⁹⁰ He would have allowed judicial invalidation of legislation only when no rational basis for it was stated or could be imagined.⁹¹ This theory was somewhat unfairly epitomized as the view of the Supreme Court as lunacy commission.

The wise judge, of course, understands a lot of law, and perhaps no judge has had a more comprehensive grasp of the body of the law than Henry Friendly. This allowed him to see the implications of a decision he was called upon to make on any given day for an intricate web of other laws and other issues not apparently in question. But I want to make the connection between prudence and originalism. Thayerite minimalism touches on important truths (the respect owed the elected branches in a democracy) but it disregards the role that a more stable, less numerous body relatively isolated from daily pressures can play in umpiring disputes, vertical and horizontal, between elected bodies and assuring adherence to constitutional provisions explicitly designed to confine elected institutions.⁹² The prudent judge, warned by Thayer's caution against arrogant excess, nonetheless accepts the duty the Constitution lays on him. And he takes from originalism its caution that the duty is an exercise of judgment constrained by law, which means a regard for continuity with the past, a kind of consistency we do not expect in political judgments, the need to give reasons justifying the decision and thus promising a certain continuity into the future.⁹³

⁸⁸ NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* (2010).

⁸⁹ 319 U.S. 624, 646–71 (1943) (Frankfurter, J., dissenting).

⁹⁰ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893).

⁹¹ *Id.* at 148.

⁹² *E.g.*, U.S. CONST. amend. I (“Congress shall make no law . . .”).

⁹³ See generally Charles Fried, *Commentary, Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994).

Finally, the wise judge is aware that he acts as a judge, a role that is almost pleonastically linked to wisdom and prudence. The role of judge is older and more universal than our own republican experience. Indeed, I suggest that our constitutional system assigns a specific role to the judiciary just because of that older and more universal understanding. The Greek poet Hesiod, at the end of the eighth century B.C., writes in his *Works and Days*:

There is a noise when Justice is being dragged in the way where those who devour bribes and give sentence with crooked judgments, take her. And she, wrapped in mist, follows to the city and haunts of the people, weeping, and bringing mischief to men, even to such as have driven her forth in that they did not deal straightly with her.⁹⁴

What distinguishes the judge from other actors in the political system is that he must act according to justice, according to the law. In this respect originalism is richer than Thayerite minimalism in its willingness to act, but to act bound by law. It falls short in its excessively narrow view of what it means to act according to law. Certainly this implies knowledge of and judgment according to legal texts, but also precedents, traditions, legal principles, doctrines, and the customs and practices of courts, lawyers, and judges. These latter are something that no team of law clerks, however talented and diligent, can supply. I have argued that originalism's narrow view (like Thayerite minimalism) comes from an understandable, even admirable, desire to observe limits, to be objective rather than personal, and to be provably correct. The wise judge also tries to judge in an objective, not personal, way. That is why he presses himself to explain, to be candid, to lay out all that went into his conclusion. In explaining, he opens himself to criticism, to refutation, but he also offers up hostages to the future—today's explanation binds him to explain why today's reasons are not also good tomorrow.

It is striking that some of Justice Scalia's most powerful and convincing opinions do not depend on originalist arguments—whether

⁹⁴ Hesiod, *Works and Days*, in HESIOD, THE HOMERIC HYMNS AND HOMERICA 3, 19 (Hugh G. Evelyn-White trans., 1914). I thank Michael K. Kellogg for bringing this passage to my attention in his forthcoming book, *The Greek Search for Wisdom*. This picture of the corrupt judge bringing ruin to the city is vividly illustrated in Ambrogio Lorenzetti's frescoes in the Plazzo Publico in Siena contrasting the effects of good and bad government.

I have often cited a passage from the Islamic jurist Ahmad ibn Hanbal, who died in Baghdad in 855 AD: "The just qadi [judge] will be brought on the Judgment Day, and confronted with such a harsh accounting that he will wish that he had never judged between any two, even as to a single date. . . . [Judges] are three: two in the Fire, and one in Paradise. A man who has knowledge, and judges by what he knows—he is in Paradise. A man who is ignorant, and judges according to his ignorance—he is in the Fire. A man who has knowledge, and judges by something other than his knowledge—he is in the Fire." FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 19–20, 20 n.41 (2000) (internal quotation marks and footnotes omitted).

of the intent or meaning variety—but are applications and manipulations of, or extrapolations from existing precedents, doctrines, or principles. I am thinking of *R.A.V. v. St. Paul*⁹⁵ or *Employment Division v. Smith*.⁹⁶ Indeed the whole structure of modern First Amendment doctrine, with its three layers of scrutiny, cannot possibly be referred back to anything in its text or history, but reflects a developing jurisprudence that takes into account in an unavoidable and practical way the evident conflict between a strong protection of First Amendment rights and the practical needs of government. Justice Scalia's magnificent lone dissent in *Morrison v. Olson*,⁹⁷ the Independent Counsel case, was a brilliant extrapolation from the constitutional principles of separation of powers that are nowhere set out in the text—surely the words “the executive power” won't do it—or in the historical record. But most strikingly—and for this occasion appropriately—the monumental and irreversible decision in *Lawrence v. Texas*⁹⁸ can gather nothing at all from either the text or the historical background of the text. It must rest entirely on a strong current favoring individual liberty where no material countervailing interest is demonstrably imperiled. The developing law of pornography and the decision in *Casey*—all quite recent and all free of textualist or originalist foundations—are the true and quite recent antecedents of *Lawrence*, unless one wants to point in an originalist sort of way to a tradition of robust individual freedom, surely matched by a tradition of snooping and Puritanism.⁹⁹ The frank embrace of moral principle lurking in our constitutional tradition, but nowhere explicit in it, is what makes those decisions so strong and, I venture to predict, permanent. Indeed it is the feeble attempt to put a historical underpinning under the original abortion decision that made *Roe v. Wade*¹⁰⁰ such an easy target for its critics, and why until *Casey*, the original decision even seemed vulnerable to abandonment. In a parallel way, it was perhaps not until 1967 in *Loving v. Virginia*¹⁰¹ that a firm foundation of moral principle was put under *Brown*,¹⁰² a moral principle that no mere change in sociological evidence could undermine, and that led to the further decisions in *Bakke*,¹⁰³ *Croson*,¹⁰⁴ *Adarand*,¹⁰⁵ and *Gratz*,¹⁰⁶ and Justice Kennedy's splendid dissents in *Grutter*¹⁰⁷ and *Metro Broadcasting v. FCC*.¹⁰⁸

⁹⁵ 505 U.S. 377 (1992).

⁹⁶ 494 U.S. 872 (1990).

⁹⁷ 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

⁹⁸ 539 U.S. 558 (2003).

⁹⁹ See generally LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997); HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA (2002).

¹⁰⁰ 410 U.S. 113 (1973).

¹⁰¹ 388 U.S. 1 (1967).

¹⁰² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁰³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹⁰⁴ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

But it is not only the inappropriate use of history that led the Court astray in *Heller* and *McDonald*, doing no good and wreaking only mischief. An ungrounded—and, more importantly, unwise—reference to supposed principle without regard to text led to the debacle of the Eleventh Amendment cases, beginning with *Seminole Tribe v. Florida*.¹⁰⁹ The Eleventh Amendment, you will remember, says:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.¹¹⁰

This amendment was provoked by the 1793 decision in *Chisholm v. Georgia*,¹¹¹ a suit on a contract by a citizen of South Carolina against the State of Georgia, invoking the Court's diversity jurisdiction. The Court in *Seminole Tribe* relied principally on an 1890 decision, *Hans v. Louisiana*,¹¹² that applied the Eleventh Amendment to block a lawsuit not by a citizen of another state but of the same state, and invoking not the federal court's diversity jurisdiction but its jurisdiction to decide a question of federal constitutional law. The monstrous and dubious plant that was caused to grow from such shallow roots reached its maximum height in *Alden v. Maine*,¹¹³ in which the Eleventh Amendment, whose words I have read to you, was taken to preclude a citizen of the same state from bringing a suit based on federal law not in federal court but in state court. The impractical and anachronistic nature of this unnatural weed has many times been demonstrated.¹¹⁴ It has been pointed out that this line of cases does not foreclose suits against the states but merely requires that effective enforcement of federal law against the states must be remitted to suits brought by federal agencies.¹¹⁵ Why this is less of an affront to "the dignity and essential attributes" of state sovereignty is far from obvious. Second, the whole rhetorical structure linking a government's "dignity" to immunity from suit in federal or even its own courts ignores the century or so of developments like the Administrative Procedure Act, the Federal Tort Claims Act and the equivalent legislation

¹⁰⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

¹⁰⁶ *Gratz v. Bollinger*, 539 U.S. 244, (2003).

¹⁰⁷ *Grutter v. Bollinger*, 539 U.S. 306, 387–95 (2003) (Kennedy, J., dissenting).

¹⁰⁸ *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 631–38 (1990) (Kennedy, J., dissenting).

¹⁰⁹ 517 U.S. 44 (1996).

¹¹⁰ U.S. CONST. amend. XI.

¹¹¹ 2 U.S. (2 Dall.) 419 (1793).

¹¹² 134 U.S. 1 (1890).

¹¹³ 527 U.S. 706 (1999).

¹¹⁴ See John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2032–36 (2009).

¹¹⁵ See, e.g., Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 235 (2006).

in every state in the union, developments that put the rule of law above the puzzling abstractions of the doctrine supposed to underlie sovereign immunity. Needless to say, so impractical and anachronistic a doctrine could not be proof against myriad assaults, exceptions, and circumventions. It is not my point to detail these here, but rather to point out how a decision, which, like *Heller* and *McDonald*, is heavily loaded with historical citations and quotations, is unlikely to and does not deserve to last, while a decision like *Lawrence* that is quite bereft of such decoration is bound to last. The difference is obviously not in the depth or soundness of the historical research but in the wisdom of the decisions. As President Kennedy said in a somewhat different context: “It is much easier to make the speeches than it is to finally make the judgments.”¹¹⁶

¹¹⁶ Television and Radio Interview: “After Two Years—a Conversation with the President”, PUB. PAPERS 551 (Dec. 17, 1962). I owe this reference to Jack Goldsmith.