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 A Doomed Enterprise: The Myth of Objective and Apolitical Originalism   
*Introduction*

The late Robert Bork once said, “the nations of the West are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own."[[1]](#footnote-1) Originalism, its proponents argue, establishes an objective methodology that prevents judges from applying “no will but their own.” This approach supposedly makes judicial review more democratic by restricting when a Court can “[thwart] the will of representatives of the actual people of here and now.”[[2]](#footnote-2)

This is an argument perhaps better in theory than in practice. As the debate in *District of Columbia v. Heller* itself demonstrates, originalism does not, in fact, place limits on a judge’s discretion any more than it bars subjective and value driven judgments in constitutional interpretation. Ultimately, Scalia’s and Stevens’s opinions reveal that originalism, rather than restraining judges, requires them to make nuanced, subjective, and even political decisions when “[saying] what the law is,” and thus, originalism faces the same counter-majoritarian difficulty as any other form of constitutional interpretation. The charge famously leveled by Bork against William O. Douglas, i.e. his “politics were also his law,”[[3]](#footnote-3) can be said with equal justice about originalists themselves.

*Originalism: The Theory*  
 Originalists’ desire to create an objective and apolitical methodology stems from a particular conception of democratic theory, which holds that “the background rule of democracy is that the majority rules.”[[4]](#footnote-4) To quote Bork, “the definition of democracy is that, after hearing arguments, citizens can vote their tastes and need not to bow to elite opinion.”[[5]](#footnote-5) To an originalist, the Court’s responsibility is to “read the text and discern our society's traditional understanding of that text,” leaving the “most important questions in [a] democracy” to voting “citizens [who try] to persuade one another.”[[6]](#footnote-6) The democratically legitimate way to alter the Constitution, they propose, is through Article V’s cumbersome amendment process. By contending that the Court is “selected from the aristocracy of the highly educated,” who “despite the best of intentions [enforce] the political prejudices of their own class," originalists argue that institutional aspects of the Court system make the very institution itself undemocratic, defined here as advocates of an elite “aristocracy.” [[7]](#footnote-7) Allowing the Court to make subjective and value-based decisions violates the core principles of this understanding of democracy. As originalists posit, “it is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what it is.”[[8]](#footnote-8)

Originalism attempts to prevent “unelected judges” from deciding what laws “ought to mean.” By focusing on what the words of the Constitution or law meant at the time of adoption, originalism is promoted as a politically neutral and impartial method to confine judges’ discretion.[[9]](#footnote-9) The original meaning of texts, Scalia asserts, is “often- indeed, I dare say usually… easy to discern and simple to apply.”[[10]](#footnote-10) While originalists acknowledge that the original import is not always evident, it is clear “for the vast majority” of cases.[[11]](#footnote-11) By “establish[ing] a historical criterion that is conceptually quite separate from the preferences of the judge himself,” originalism overcomes “the inevitable tendency of judges to think that the law is what they would like it to be.”[[12]](#footnote-12) Armed with this objective method, an originalist is much less likely to “mistake [his/her] own predilections for the law.”[[13]](#footnote-13)   
*Originalism: The Practice*

Scalia’s majority opinion in *Heller* is an originalist tour de force. Over sixty-four pages, Scalia discourses on what the words of the Second Amendment would have meant to “ordinary citizens in the founding generation.”[[14]](#footnote-14) He scrupulously examines eighteenth century dictionaries and every word in the Amendment, Blackstone’s Commentaries, the English Bill of Rights and colonial law, the ratification process of arms-bearing rights in state constitutions, the Amendment’s drafting history, the post-ratification to nineteenth century public understanding of the Amendment, and relevant legal scholarship. Eventually, he concludes that the Second Amendment enshrines an individual right to keep and bear arms beyond the context of service in state militias.

Stevens’ reaches the opposite conclusion in *Heller,* but does so within the same intellectual framework as Scalia. He, too, tries to determine the original meaning of the Second Amendment.[[15]](#footnote-15) Stevens deconstructs the Amendment’s words, consults dictionaries, and considers the Amendment’s drafting history. He also reviews a 1794 treatise on the meaning of words and pertinent legal scholarship. Stevens’ approach does not emulate Scalia’s in every aspect, though. For example, Justice Scalia scrutinizes how the Second Amendment was interpreted from 1791 to the end of the nineteenth century and contends that this type of inquiry is “a critical tool in constitutional interpretation.”[[16]](#footnote-16) Stevens disagrees, positing that this sort of review “shed[s] only indirect light on the question before us … [and offers] little support for the Court’s conclusion.”[[17]](#footnote-17) However, modest differences in the two opinions should not obscure a significant point: both Scalia and Stevens root their reasoning in originalism, yet both reach profoundly different conclusions on what the one Amendment meant.

Implicit in Scalia’s and Stevens’ originalism is the idea that there was one universally shared meaning of the Second Amendment at the time of founding. Justice Scalia, for example, posits that “there seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms” when the Amendment was written.[[18]](#footnote-18) Likewise, Justice Stevens asserts that the Second Amendment’s text and history, in conjunction with *US v. Miller* (1939), provides “a clear answer” to the question of whether the Second Amendment “protects the right to possess and use guns for non-military purposes.”[[19]](#footnote-19)   
 There is a larger point here, however. That both Justices could apply the same analytical framework to the same 27 words, yet reach diametrically divergent conclusions, itself explodes the myth of empirical originalism. The words of the Amendment meant what the Justices said they meant, neither more nor less. History is never clear. It is complicated. As the competing opinions show, inconsistencies, incomplete records, and conflicting evidence define history. As Mark Tushnet has astutely noted, “real historians are comfortable with complexity and with the co-existence at any one time of contradictory understandings of constitutional concepts.”[[20]](#footnote-20) By insisting on the existence of one objective meaning, originalism cannot accept the real contradictions and complexities of the past. “Real historians” embrace the ambiguity intrinsic in the Second Amendment and its historical record.[[21]](#footnote-21) Originalists embrace a futile and quixotic quest to resolve the irreconcilable. Or, as Scalia and Stevens do in *Heller*, they subjectively cherry-pick from the historical record to create the illusion of one objective truth.

Even if there were an original public meaning, which there is not, originalism would *still* require the subjective judgments it purports to avoid. Arthur Schlesinger Jr. observes:

All historians are prisoners of their own experience. We bring to history the preconceptions of our personalities and of our age. We cannot seize on ultimate and absolute truths. So the historian is committed to a doomed enterprise — the quest for an unattainable objectivity.[[22]](#footnote-22)

The passage of time compels historians (and judges pretending to be historians) to make value judgments. Historians’ interpretations are colored by their own lives, their goals, and their morals. This explains, at least in part, why Scalia and Stevens examine the same historical questions, sometimes even the same documents, and reach such divergent conclusions.[[23]](#footnote-23) Scalia has insisted, “history is a rock-solid science compared to moral philosophy.”[[24]](#footnote-24) Yet there is nothing “rock-solid” inherent in history. Like moral philosophy, there are few “ultimate and absolute truths.” *People* explore and expound on history*.* And people inevitably bring subjectivity, not objectivity, to the task.

Beyond simply “[decorating] a value judgment,” Scalia’s majority opinion in *Heller* “[conceals] a political choice,” to quote his *Planned Parenthood v. Casey* dissent.[[25]](#footnote-25) Without providing *any* historical research, Scalia cites three gun control policies that *Heller* does not strike down: gun-free zones in sensitive areas (e.g., schools), regulations on commercial sales of guns (e.g., background checks), and bans on felons owning firearms.[[26]](#footnote-26) Citing slight evidence that postdates drafting by 60 years, Scalia identifies another policy *Heller* saves: restrictions on concealed carry firearms.[[27]](#footnote-27) Referencing evidence that Nelson Lund describes as “wrong, or at best exceedingly misleading,”[[28]](#footnote-28) Scalia rescues yet another gun-control policy from unconstitutionality: prohibitions on the sale of certain types of weapons.[[29]](#footnote-29) Why? Even when a judge bases her decision on the “original public understanding,” which Scalia professes to do in *Heller*, she will have to make political choices. Apart from the historical record being equivocal, the founders never specified whether the Second Amendment applies to felons, or for that matter, never discussed machine guns and bazookas, which would not be invented for another 120 years. Scalia’s ad hoc exemptions to the Second Amendment seem to arise from a political understanding of modern America. Easy access to the most dangerous weapons would severely exacerbate gun-violence and crime, as would permitting felons to own guns or eliminating background checks. Those conclusions are *political* judgments. They are not based on what James Madison said or what “ordinary citizens in the founding generation” would define as “arms.” Nor should they be.   
 Harvie Wilkinson’s tart observation that “the Constitution’s text has as little to say about restrictions on firearm ownership by felons as it does about the trimesters of pregnancy” points to another myth of originalism.[[30]](#footnote-30) Originalism, supposedly, makes judicial review more democratic by restraining judicial discretion and fostering deference to the legislature. Originalists believe the Warren and Burger Courts were not only wrong, but also undemocratic. Decisions like *Roe* embody an “imperial judiciary” that “[forecloses] all democratic outlet” on topics “where [the Court has] no right to be, and where [the Court does] neither [itself] nor the country any good by remaining.”[[31]](#footnote-31) Yet *Heller* demonstrates that originalism itself leads to the same type of reviled “judicial activism.” The Court struck down a popular local law, which originalists argue should be done rarely. To do so, the Court relied on an abstract and unclear section of the Constitution, and as I argued earlier, used value and political judgments in the process. Recognizing a new right, the Court uprooted past precedent. The Court interjected itself into the center of a national controversy that, as Justice Breyer suggests in his dissent, would be better solved by local elected officers. In *Lawrence v. Texas* (2003)*,* Scalia affirms, “What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change.”[[32]](#footnote-32) Substitute “District of Columbia” for “Texas,” and one may have an apt summary of *Heller*. Ultimately, if *Lawrence* and *Roe* are undemocratic, then the originalist *Heller* is, too.[[33]](#footnote-33)   
*Objections and Rebuttals*   
 An originalist might respond to this paper by claiming that either Scalia or Stevens is not a true originalist. Indeed, after *Heller,* a torrent of legal scholars protested that either Scalia or Stevens missed or misrepresented the original public understanding of the Second Amendment.[[34]](#footnote-34) My thesis, the “true” originalist would insist, is a critique of the jurisprudence of two Justices, not of originalism. Scalia himself, they would note, identifies as a “faint-hearted originalist.”[[35]](#footnote-35) In candor, I have some sympathy for this objection. Parts of Scalia’s opinion are blatantly non-originalist; consider the previously discussed passage that defends bans on felon firearm ownership. However, the fact that so many have criticized the two opinions as non-originalist fortifies, rather than undermines, my argument. Originalism purports to establish an objective methodology, which is usually “easy to discern and simple to apply” and independent of the judge’s own ideology.[[36]](#footnote-36) The diversity of honest objections to the Justices’ opinions reveals that the application of originalism is inherently complicated and challenging. Moreover, the scholars’ objections generally seem to fit with their own political convictions, which suggests that subjective value judgments heavily influence, or even determine, one’s understanding of the original public meaning.[[37]](#footnote-37) With the notable exception of Posner, liberal scholars at whom I looked found fault with Scalia’s originalism, and libertarians and conservatives found fault with that of Stevens.[[38]](#footnote-38) If all the scholars raised universal complaints about the opinions, and their criticism was independent of their own political philosophy, then the “true” originalist might have a point. But that is not what happened in response to *Heller*.   
 A tributary to the above objection asserts that both Scalia’s and Stevens’s opinions are originalist, but different types. According to this school of thought, my paper unfairly conflates two very different forms of constitutional interpretation and therefore fails to recognize the superiority of Scalia’s originalism. For example, Randy Barnett has argued that Scalia’s “exemplary” opinion is “the clearest, most careful interpretation of the meaning of the Constitution ever to be adopted by a majority of the Supreme Court” and “the finest example of what is now called ‘original public meaning’ jurisprudence.”[[39]](#footnote-39) Stevens’ opinion, conversely, “largely [focuses] on ‘original intent,’” which “was discredited years ago among constitutional law professors” and is used by non-originalists to “negate … original public meaning.”[[40]](#footnote-40) I have less sympathy for this argument. It is intellectually dishonest to say Justice Stevens does not try to find the original public meaning of the Second Amendment. He consults different dictionaries from the eighteenth Century, carefully parses the semantic relationship between the words of the Second Amendment, reviews a 1794 treatise on the meaning of words, thoroughly studies the linguistics professors’ *amicus curiae* brief, and examines the omission and inclusion of words in State Constitutions. In addition, Stevens considers statements made in the actual debates of 1787 to 1789.[[41]](#footnote-41) But this is just one part of his dissent. Scalia, conversely, does not consider legislative history in constitutional interpretation and statutory construction in *Heller* or any case.[[42]](#footnote-42) Yet his evaluation of “post-ratification commentary,” or what Stevens calls “post-enactment legislative history” shares many of the same difficulties of using legislative history identified by Scalia himself in *A Matter of Interpretation*. More broadly, even if Stevens’ opinion was entirely focused on “original intent,” the theories of “original intent” and “original public meaning” are very similar. They both rely on conflicting historical records and call on judges to make subjective and political judgments. We can dismiss this objection.

An originalist might reject my thesis on the grounds that I fail to put *Heller* in a larger context. How can originalism be subjective, political and value-based when originalist jurists reach conclusions at odds with their convictions? As an example, the hypothetical originalist could cite Scalia’s decision to join the majority opinions in *Texas v. Johnson* (1989) and *United States v. Eichman* (1990), in which the Court ruled the First Amendment protected flag burning. Scalia, self-described as “very conservative,” has noted that he does not like “sandal-wearing bearded weirdos who go around burning flags.”[[43]](#footnote-43) But, by applying the objective methodology of originalism, he reached a conclusion at odds with his politics. Having participated in over 2,000 cases, there are other examples of Scalia affiliating with liberals.[[44]](#footnote-44)   
 I would respond by making four points. First, examining Scalia’s record in the aggregate shows the flag desecrating cases are aberrational. Overall, his jurisprudence has matched his “very conservative” principles.[[45]](#footnote-45) Second, free speech issues do not always neatly correspond along a conservative-liberal divide. Third, the question the Court faced in these cases was not whether anybody liked “sandal-wearing bearded weirdos who go around burning flags.” Nobody did. Not even Brennan. Rather, the question was whether burning flags violated the First Amendment, and Scalia’s decision seems to fit with his views and values on the First Amendment. In his confirmation hearing, he defined speech as "any communicative activity."[[46]](#footnote-46) Burning the American flag communicates a message. In later remarks defending *Johnson* and *Eichman*, Scalia’s language has implied that he based his decision, at least in part, on value judgments. For example, he has insisted, “As I understand the First Amendment, you’re entitled to express contempt for the government.”[[47]](#footnote-47) The idea of “expressing contempt for the government” articulates a subjective interpretation about the meaning of an abstract clause. Notably, Scalia did not say “as Blackstone understood the First Amendment” or “as members of the founding generation understood the First Amendment” or “as the text of the First Amendment indicates.” He said, “as I understand.” I remain skeptical that Scalia’s decision in this case, and others in which he joined liberals, are not driven by his personal values. Fourth, *Johnson* and *Eichman* also highlight another myth of originalism. Richard Posner[[48]](#footnote-48) and Robert Bork[[49]](#footnote-49), among others, argue that the original understanding of the First Amendment does not prohibit flag burning. Again, originalism is not “easy to discern and simple to apply.”[[50]](#footnote-50)   
 I do not take issue with judges making subjective value judgments in constitutional interpretation. Indeed, it would be impossible for a Supreme Court Justice not to. I take issue, though, with judges hiding and misrepresenting what they do. Under the guise of an apolitical and neutral methodology doctrine, originalism gives its adherents cover to do precisely what they denounce so fervently. If it is undemocratic for unelected judges to make subjective value judgments, as originalists insist, then originalism is as undemocratic as any other form of constitutional interpretation. Originalists should stop pretending otherwise.

1. Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Washington, D.C: The American Enterprise Institute Press, 2003), 9. [↑](#footnote-ref-1)
2. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Binghamton: Bobbs-Merill Company, 1962), 17. [↑](#footnote-ref-2)
3. Wall Street Journal Opinion Board, “The Wisdom of Robert Bork,” *Wall Street Journal,* December 20, 2012, A19. [↑](#footnote-ref-3)
4. Stephen Adler, “Newsmaker: Interview with Justice Antonin Scalia and Professor Bryan A. Garner,” *Thompson Reuters*, September 17, 2012. http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters\_Content/2012/09\_-\_September/Scalia\_Reuters\_transcript.pdf, accessed December 24, 2012.  [↑](#footnote-ref-4)
5. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990), 192. [↑](#footnote-ref-5)
6. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting). [↑](#footnote-ref-6)
7. Ralph Rossum, “The Textualist Jurisprudence of Justice Scalia,” http://www.claremontmckenna.edu/salvatori/publications/RARScalia.asp, accessed December 24, 2012. [↑](#footnote-ref-7)
8. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 22. [↑](#footnote-ref-8)
9. In this paper, “originalism” refers to theory of original public meaning, not the theory original intent, unless specifically noted otherwise. [↑](#footnote-ref-9)
10. Scalia, *A Matter of Interpretation*, 45. [↑](#footnote-ref-10)
11. Antonin Scalia, “Originalism: The Lesser Evil,” Murphy et al. at 253. [↑](#footnote-ref-11)
12. Scalia, “Originalism: The Lesser Evil,” 253. [↑](#footnote-ref-12)
13. Scalia, “Originalism: The Lesser Evil,” 253. [↑](#footnote-ref-13)
14. District of Columbia et al. v. Heller, 554 U.S. 570, 53, 3 (2008). [↑](#footnote-ref-14)
15. Justice Breyer wrote a more traditional, liberal dissent, in which he analyzes evidence on urban gun violence and uses a balancing test. [↑](#footnote-ref-15)
16. Heller, 554 U.S. 570 at 32 (2008). [↑](#footnote-ref-16)
17. Heller, 554 U.S. 570 at 28 (2008) (Stevens, J., dissenting). [↑](#footnote-ref-17)
18. Heller, 554 U.S. 570 at 22 (2008). [↑](#footnote-ref-18)
19. Heller, 554 U.S. 570 at 1 (2008) (Stevens, J., dissenting). [↑](#footnote-ref-19)
20. Mark Tushnet, “More on Heller,” http://balkin.blogspot.com/2008/06/more-on-heller.html, June 17, 2008, accessed December 22, 2012. [↑](#footnote-ref-20)
21. Judges may be institutionally incompetent to be historians. Their training is in law, not history. [↑](#footnote-ref-21)
22. Arthur Schlesinger Jr., “Folly’s Antidote,” *New York Times*, January 1, 2007, A19. [↑](#footnote-ref-22)
23. Many scholars, from Sanford Levinson to Richard Posner, have accused Scalia and Stevens of law office history in *Heller*, suggesting both engage in an intentional, arbitrary and tendentious reading of the past to substantiate pre-determined positions. While I have some sympathy for this argument, I think a better explanation for the differences between the two opinions stems from historical interpretation being influenced by individual experience, personal values, objectives, and other factors. [↑](#footnote-ref-23)
24. Mary Wood, “Scalia Defends Originalism as Best Methodology for Judging Law,” *University of Virginia Law School News*, April 20, 2010. [↑](#footnote-ref-24)
25. Casey, 505 U.S. at 983 (1992) (Scalia, J., dissenting).   
    The same criticism could be leveled at different parts of Stevens’ opinion, too; I focus on Scalia here because he identifies as an originalist. [↑](#footnote-ref-25)
26. Heller, 554 U.S. 570 at 54 (2008). [↑](#footnote-ref-26)
27. Heller, 554 U.S. 570 at 54 (2008). [↑](#footnote-ref-27)
28. Nelson Lund, “The Second Amendment, Heller, and Originalist Jurisprudence,” 56 *UCLA Law Review* 1343 (2009) at 1362. [↑](#footnote-ref-28)
29. Heller, 554 U.S. 570 at 55 (2008). [↑](#footnote-ref-29)
30. J. Harvie Wilkinson III, “Of Guns, Abortions, and the Unraveling Rule of Law,” 95 *Virginia Law Review* 253 at 273 (2009).   
    Wilkinson’s analogy is not flawless. The Fourteenth Amendment does not mention “abortion.” The Second does mention “arms.” [↑](#footnote-ref-30)
31. Casey, 505 U.S. at 996, 1002 (Scalia, J., dissenting). [↑](#footnote-ref-31)
32. Lawrence v. Texas, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting). [↑](#footnote-ref-32)
33. I think originalists conceive of “democracy” incorrectly, but that is not the focus of this paper. [↑](#footnote-ref-33)
34. See, e.g., Jeffrey Shaman, “The Wages of Originalist Sin: District of Columbia v. Heller,” http://www.acslaw.org/files/Shaman%20Issue%20Brief.pdf, accessed January 1, 2013; Jack Rakove, “Thoughts on Heller from a ‘Real Historian,’” http://balkin.blogspot.com/2008/06/thoughts-on-heller-from-real-historian.html, accessed December 24, 2012; Randy Barnett, “News Flash: The Constitution Means What It Says,” *Wall Street Journal*, June 27, 2008, A13; Saul Cornell, “Heller, New Originalism, and Law Office History: Meet the New Boss, Same as Old Boss,” 56 *UCLA Law Review* 1095 (2009); Lawrence Solum, “District of Columbia v. Heller and Originalism,” *103 Northwestern University Law Review* 923 (2009); Richard Posner, “In Defense of Looseness,” *The New Republic*, August 27, 2008; Nelson Lund, “The Second Amendment, Heller, and Originalist Jurisprudence,” 56 *UCLA Law Review* 1343 at 1349 (“Justice Scalia’s originalist arguments in favor of the private-right interpretation are overwhelmingly more powerful than Justice Stevens’ originalist arguments in favor of the military-service interpretation”) (2009). [↑](#footnote-ref-34)
35. Scalia, “Originalism: The Lesser Evil,” 253. [↑](#footnote-ref-35)
36. Scalia, *A Matter of Interpretation*, 45. [↑](#footnote-ref-36)
37. An originalist might claim that Stevens and other liberals do not really care about originalism and that their analyses accordingly cannot be trusted as sincere or genuine.  Yet conservatives do not have a monopoly on originalism. Some liberals, including Akhil Reed Amar, Doug Kendall, and James Ryan, sincerely identify as originalists. Before Robert Bork, there was Hugo Black, a textualist and perhaps even originalist. Moreover, from an institutional perspective, very talented lawyers compose the Supreme Court. Stevens may not be an originalist, but that does not mean that he cannot effectively advocate from a methodology that does not come organically to him. [↑](#footnote-ref-37)
38. I base this conclusion on contrasting *ultra* 33 with the authors’ public statements that indicate political preferences. [↑](#footnote-ref-38)
39. Randy Barnett, “News Flash: The Constitution Means What It Says,” *Wall Street Journal*, June 27, 2008, A13. [↑](#footnote-ref-39)
40. Ibid. [↑](#footnote-ref-40)
41. The Convention’s discussion of the Militia Clause, if anything, appears to support Stevens’ interpretation of the Amendment. See, e.g., Jack Rakove, “Thoughts on Heller from a ‘Real Historian,’” http://balkin.blogspot.com/2008/06/thoughts-on-heller-from-real-historian.html, accessed December 24, 2012. [↑](#footnote-ref-41)
42. Scalia, *A Matter of Interpretation*, 29-37. [↑](#footnote-ref-42)
43. Margaret Talbot, “Supreme Confidence: The Jurisprudence of Antonin Scalia,” *The New Yorker*, March 28, 2005, 45. [↑](#footnote-ref-43)
44. See, e.g., *National Treasury Employees Union v. Von Raab* (1989), *Maryland v. Craig* (1990), *Kyllo v. United* States (2001), *Blakely v. Washington* (2004), *Hamdi v. Rumsfeld* (2004), *Crawford v. Washington* (2004), *Granholm v. Heald* (2005), *United States v. Gonzalez-Lopez* (2006), *Cuomo v. Clearing House Association* (2009) and *Brown v. Entertainment Merchants Association* (2011). [↑](#footnote-ref-44)
45. In my research, I did not find one case on affirmative action, abortion rights, women’s and gay rights, and gun ownership in which Scalia departed from conservative orthodoxy. His jurisprudence on public displays of religion, federalism, capital punishment, and property rights have also been remarkably conservative. On rights of criminal defendants, he has been less consistent. [↑](#footnote-ref-45)
46. *Confirmation Hearing on the Nomination of Antonin Scalia to be an Associate Justice of the Supreme Court: Hearing before the Committee on the Judiciary United States Senate*, 99th Congress, 2nd Sess.,1986, 51. [↑](#footnote-ref-46)
47. Mitch Kokai, “Scalia: Originalism Not a ‘Weird Affliction,’” *Carolina Journal Online*, November 1st, 2007, http://www.carolinajournal.com/articles/display\_story.html?id=4407, accessed December 24, 2012. [↑](#footnote-ref-47)
48. Richard A. Posner, “The Incoherence of Antonin Scalia,” *The New Republic,* August 24, 2012, http://www.tnr.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism, accessed December 27, 2012. [↑](#footnote-ref-48)
49. See, e.g., Bork, *The Tempting of America*, 127-128 and Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (New York: HarperCollins Publishers, 1997), 99-101. [↑](#footnote-ref-49)
50. Scalia, *A Matter of Interpretation*, 45. [↑](#footnote-ref-50)