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♦ TBA BRIEFINGS ♦

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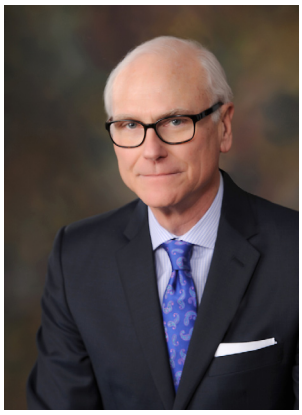

By Jim Rankin

President's Column

"Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot, 'T is the same thing in the Chancellor's conscience."
John Selden, *Table Talk* (1689).

Saturday, February 13, 2016, Justice Antonin Scalia was found dead of natural causes at a hunting ranch in Texas. All but the most partisan individual recognizes the profound contribution Justice Scalia made to the Supreme Court and our understanding of constitutional law. He was a man of great learning, intellectual curiosity, and by all accounts, warmth and generosity. Most TBA members have seen recent television pieces where politicians, reporters, and lawyers who knew Justice Scalia have recalled their personal relationship with the man as a jurist and as a person. Almost every interview I have seen has mentioned Justice Scalia's jurisprudential philosophy of originalism.

All lawyers have heard the term originalism—or textualism—with reference to constitutional analysis but few actually delve into what the terms actually mean. Here, I endeavor to remain with the majority of lawyers and avoid an in-depth analysis of the jurisprudential theory. Nevertheless, with the passing of this remarkable public servant, some consideration of originalism is warranted. Justice Scalia defined originalism in these words: "The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted."
Session Three: Religion, Politics and the Death Penalty, Pew Research Center Forum, January 25, 2002.

While Justice Scalia is the best known originalist to young lawyers, he was not the original proponent of the idea. That honor probably belongs to the late Judge Robert Bork. In 1971 Robert Bork—then a Yale Law School professor—published an article entitled "Neutral Principles and Some First Amendment Problems," Bork, Robert H. (1971), Iss. 1, *Indiana Law Journal*, Vol. 47: Article 1. Professor Bork's article was intended to address the potential for jurisprudential chaos resulting from what he saw as judicial activism. Professor Bork put the issue in these words: "A legitimate court must be controlled by principles exterior to the will of the justices."
Id. at p. 6.

Bork, like Scalia, was nominated to the United States Supreme Court by President Ronald Regan. Unlike Scalia, Bork's nomination was rejected by the Democratic controlled Senate by a 58-42 margin. The vote came after hearings before the Judiciary Committee dominated by Senators Biden, Metzenbaum, and Kennedy.

On September 15, 1987, responding to Senate Judiciary Committee Chair Joe Biden's question about Supreme Court cases nominee Judge Bork would seek to change [on the ground that the earlier case did not tie to the original meaning of the Constitution], Judge Bork responded in these words:

> Mr. Chairman . . . I don't know how many should be reconsidered. I can discuss with you the grounds upon [which] . . . I would reconsider them. Let me [discuss notes for a talk I gave] . . . [I]n response to another speaker, [I said a] non-originalist decision, by which I mean a decision that does not relate to a principle or a value the ratifiers enacted in the Constitution, could be overruled. [But] the very next paragraph states that the enormous expansion of the commerce power —Congress' power under the Commerce Clause of the

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> Constitution—is settled and it is simply too late to go back and reconsider that even though it appears to be much broader than anything the framers or the ratifiers intended. . . [S]tare decisis or the theory of precedent is important and in fact I would say to you that anyone who believes in original intention (as the means of interpreting the Constitution) has to have a theory of precedent because this nation has grown in ways that do not comport with the intentions of the people who wrote the Constitution. The Commerce Clause is one example. . . I cite to you the legal tender cases. Scholarship suggests . . . that the framers intended to prohibit paper money. [A]ny judge who would say that we ought to go back to the original intent, [regarding specie] really ought to be accompanied by a guardian rather than sitting on the bench.

Transcription from video recording of Day 1, Part II of Bork Sen. Jud. Comm. Hearing, September 15, 1987.

Here then, we have one of the creators of the originalism theory explaining the practical application of the theory. Unfortunately, this and other quite reasonable explanations given by Judge Bork of his judicial philosophy during his Senate Judiciary hearing made no difference; he was not confirmed. Nevertheless, with this answer, we have an insight into how originalism—as a theory—must be tempered by history and economic reality.

The political context of Judge Bork's response to Senator Biden's question is perhaps best understood by considering this quote from a recent article concerning Justice Scalia's death and constitutionalism:

> Conservatives correctly say that liberals substitute policy thinking for constitutional thinking. Liberals decide what policies they want and then convince themselves to believe (or pretend to believe) that the ever-evolving Constitution mandates liberal policies and invalidates the agendas of their opponents. Conservatives have come to do the reverse. In their popular rhetoric, conservatives tend to substitute constitutional thinking for policy thinking. Defenses of the Constitution are all well and good, but unless we plan to go back to the pre-FDR understanding of the commerce clause (and we are not going back to that), the constitutional system leaves enormous room for legitimate political action and for dealing with our substantial policy problems. The federal health insurance purchase mandate in Obamacare may well have been unconstitutional, but constitution-based opposition to the left is not enough. . . [only] plausible, attractive answers to [public] concerns about health care policy, . . . will [prevent the people from] eventually turn[ing] to the left – even if the left's answers are unconstitutional.

Spiliakos, Pete, *Getting It Right With The Constitution,* First Things, February 18, 2016.

This insightful comment, though focused on political positioning, nevertheless illuminates the difficulty judges face in reconciling constitutional language with contemporary public policy and social objectives. Regardless of a judge's ideological bent, he or she must accept the fact that the judicial office is not for policy making. The office is for guarding the first principles of the Republic in the context of the rule of law. This is why originalism—as a means of tying constitutional questions to the seminal document and thereby avoiding the uncertainties of a particular judge's sense of just policy—will always matter, regardless of the fact the Judge Bork and Justice Scalia are no longer with us. But, it is just the dilemma reflected in the above quote that has engendered criticism of originalism in the context of Justice Scalia's Supreme Court opinions. Perhaps the most notable critique is that leveled by Judge Richard Posner, now retired from the Seventh Circuit Court of Appeals. In his article "The Incoherence of Antonin Scalia," *The New Republic*, August 23, 2012, Judge Posner writes:

> One senses a certain defensiveness in Justice Scalia's advocacy of a textualism . . . He is one of the most politically conservative Supreme Court justices of the modern era . . . Yet [he] claims that his judicial votes are generated by an "objective" interpretive methodology, and that, since it is objective, ideology plays no role. . . [T]ext as such may be politically neutral, but textualism is conservative. A legislature is thwarted when a judge refuses to apply its handiwork to an unforeseen situation that is encompassed by the statute's aim but is not a good fit with its text. . . In this way, textualism hobbles legislation – and thereby tilts toward "small government" and away from "big government," which in modern America is a conservative preference.

Id. at p. 2

Judge Posner's insight into Justice Scalia's possible motive may be accurate. But, by deconstructing originalism, he has deemphasized the importance of a written constitution thus overweighting analysis in favor of contemporary policy goals which may not have been legislated and, therefore, might be folly regardless of their popularity.

In 1789, our founders agreed to a collection of words that meant something then. Those words meant something then, and, I would argue, they mean about the same thing today. The words place limitations on government and by implication leave a great deal open for future policy development by Congress and the state legislatures as well as the possibility for amendment. Judge Bork's response to Senator Biden illustrates how history, economic realities, and the constitutional revolution during the New Deal have changed things. Indeed, part of that history was written at Antietam, Gettysburg, and Appomattox followed by the Thirteenth, Fourteenth, and Fifteenth Amendments. No Judge can ignore the crucible of civil war, failed reconstruction, depression, and more wars, especially when the impact of these events is reflected in constitutional amendments and legislation. Indeed, that history is how we got *Brown v. Board of Education*, 347 U.S. 483 (1954), and it is that history that validates the Supreme Court's unanimous opinion in *Brown* even though the jurisprudential analysis might not pass the test of originalism. Our

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on the Board of Directors for Friends of the Kaw and is involved in the YWCA Women's Night Out Committee, an annual fundraiser for the YWCA. Sarah has just completed a term as the TBA Young Lawyers Division President and this will be her first year as a Director.

Current board members serving out their terms: Amanda Vogelsberg, Kyle Mead and Jim McEntire.

Thank you to this year's Nominating Committee members: Matthew Bergman, Richard Cram, Whitney Damron, Jeremy Graber, Ryan Hellmer, Brian Jacques, Barb Rankin, Pat Riordan, and Cheryl Whelan.

TBA Mentoring Program

The TBA administers a mentoring program for attorneys in the community.

The program is designed to target new attorneys in solo or small firm practice who seek a teaching and mentoring relationship with a more experienced attorney in his or her chosen field.

If you are interested in learning more about the mentoring program, or would like to participate as a mentor or protégé, contact Greg Lee at 357-6311.

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history informs the text of our Constitution before 1789 and into the future. I believe Justice Scalia understood and accepted that obvious fact.

The Constitution and its words are at the core of our national identity. The words of the Constitution are the essence of Americanism. This is what Judge Bork and Justice Scalia hoped to protect by advancing the idea of originalism. It seems somehow dangerous that a judge could acknowledge the words, ignore their original meaning and proceed to rule according to his or her policy preference, dressing up the process with the label "realism."

Last month, I watched a good movie, *Bridge of Spies*, starring Tom Hanks. Though the movie was flawed—leaving, as it did, the impression of moral equivalency, during the Cold War, between the position and purposes of the U.S. and its adversaries the U.S.S.R. and the D.D.R.—it did, nevertheless, present a reasonably accurate depiction of east-west spy exchanges. The movie includes the following meaningful exchange between Tom Hanks, playing the role of lawyer Bill Donovan and Scott Shepherd playing the role of CIA agent Hoffman:

> Hoffman: We don't have a rule book here.
>
> Donovan: You're agent Hoffman, yeah?
>
> Hoffman: Yeah…
>
> Donovan: German extraction?
>
> Hoffman: Yeah, so?
>
> Donovan: My name's Donovan. I'm Irish, both sides. Mother and father. I'm Irish. You're German. But what makes us both Americans? Just one thing. One, only one. The rule book. We call it the Constitution and we agree to the rules and that's what makes us Americans. It's all that makes us Americans. So don't tell me there's no rule book . . .

Though the writers and producers of *Bridge of Spies* did not intend to make a point about originalism versus the independent policy preferences of judges, the exchange quoted above is instructive about the importance of a 226 year old text.

For Justice Scalia, as was true for John Selden three hundred years before him, the length of the Chancellor's foot—or perhaps the Chancellor's feelings about the King's conscience or policy—presents far too uncertain and unknowable a measure. So, words matter.

> I think [that] '[t]he judicial Power of the United States' conferred upon this Court 'and such inferior courts as Congress may establish', must be deemed to be the judicial power as understood by our common-law tradition. That is the power 'to say what the law is' . . . not the power to change it.
>
> Antonin Scalia, J., *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) p. 549 (concurring).

Correction to the February 2016 President's Column:

In *Street*, Justice Frankfurter remained faithful to the principle of deference to the laws enrolled by elected majorities. Justice Frankfurter's dissent in *Street*, compels the conclusion he would side with those justices inclined to uphold state laws permitting governmental unions to charge anti-free-rider fees to workers, regardless of the First Amendment compelled speech claims of dissenting employees. As indicated above, during the oral arguments in the *Friedrichs* case, certain justices raised the doctrine of *stare decisis*.