

From Retrenchment to Reversal to Revolution: These are Not Scalia Justices but a Return of the Four Horsemen

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While billed as jurists in the mold of the late Justice Antonin Scalia, the two newest members of the U.S. Supreme Court, Justices Neil Gorsuch and Brett Kavanaugh, differ in a key aspect to their jurisprudence. While all three espouse originalism as the appropriate means to judicial decision-making, Justice Scalia adopts a more restrictive view of originalism. Namely, Justice Scalia asserted that when investigation of the Constitution or relevant text is exhausted, the role of the judge is completed. Justices Gorsuch and Kavanaugh however practice a much more activist form of originalism that insists judges must render decisions even after a textual analysis deems lacking. This work suggests that instead of being molded in the image of Scalia, the newest justices more resemble the jurisprudence of the Four Horsemen of the Supreme Court's history in the first half of the twentieth century. The theoretical underpinnings for this more activist originalism are investigated with implications of this research being introduced through the concept of judicial deference and the current *Kisor v. Wilkie* case.

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In the second debate of the Presidential general election of 2016, candidate Donald Trump clearly stated, “I am looking to appoint judges very much in the mold of Justice Scalia” (Graves, 2017, January 31). This was a remark that would be repeated throughout the campaign and into the first months of Mr. Trump’s Presidency. With the selection of Neil Gorsuch and Brett Kavanaugh conservative commentators have effused praise on the selections as being exactly that. Just this month the Washington Times reported, “Two years into his term, Justice Neil M. Gorsuch has exceeded those conservatives’ expectations, carving out a role as a superb writer and careful advocate for the originalist approach to the Constitution that Scalia helped pioneer. “Being a true originalist, he’s probably a little more Scalia than Scalia,” said Curt Levey, president of the Committee for Justice. “He’s more than lived up to Trump’s promise” (Sawyer, 2019, April 7). Not to be undone, Justice Brett Kavanaugh was believed to likely be considerably more conservative than departing Justice Anthony Kennedy, and would fall to the left only of Justice Clarence Thomas but was also described as a justice in the model of the late Antonin Scalia. It is still too early for any initial assessment of Justice Kavanaugh’s impact but based on his comments made this session in oral argument, conservative commentators may be writing identically about Kavanaugh as a clone of the late Antonin Scalia. But these commentators would be missing a key difference.

While Gorsuch and Kavanaugh are expected to be the center of the conservative wing of the Supreme Court for several decades to come, they do differ from Justice Antonin in one clear and important aspect. Long one of the great proponents of originalism, Justice Scalia espoused that wherever the text of the Constitution or the statute under consideration does not provide the guidance necessary to make an appropriate judicial decision, the justice should adopt judicial restraint (Scalia, 1989). (Whether Scalia followed his own admonition is left for debate.) To this end, judges should refrain from using their discretion to render a decision but should leave such decisions to the other ‘political’ branches, namely Congress and the President. An early look at the writings and philosophies of the two newest members of the U.S. Supreme Court suggest they do not accept this limitation on judicial decision-making. Instead they both adopt a much more activist judicial decision-making model. This approach, I argue, is much more aligned to the justices that delayed the imposition of the New Deal in the 1930s, the so-called ‘Four Horsemen.’ Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter, frequently joined by Justice Owen John Roberts, adopted a more activist approach I believe Justices Gorsuch and Kavanaugh favor in stifling the actions of President Roosevelt. This present work argues that while Justices Gorsuch and Kavanaugh share much with Justice Scalia, the key activist difference missing in Scalia’s opinions can be found in their

predecessors from several generations ago. If true, the willingness of the newest justices on the Supreme Court to go beyond the originalist interpretation of the Constitution and various statutes in rendering their opinions allows for a much greater impact than those of Justice Scalia and may result in a more pronounced conservative swing in the judicial temperament of the Supreme Court. In effect, while Justice Scalia was able to lead a retrenchment in the jurisprudence of the nation's courts, Justices Gorsuch and Kavanaugh are poised to lead a revolution.

This work is structured as follows: first, a brief introduction of the justices under consideration will be undertaken. The background of any individual, judges not withstanding, is influential to their decision-making. This was perhaps most clearly stated by Justice Sonia Sotomayor in October 2001, as she delivered an invited lecture at UC Berkeley School of Law. Her remarks kicked off a symposium organized by the students of the Berkeley La Raza Law Journal entitled "Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation." Entitled "A Latina Judge's Voice," Judge Sotomayor's remarks discussed the importance of a judge's personal background in the process of judging. Most famously she stated, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life" (Johnson, 2009, June 2). Without an understanding of where each justice comes from we cannot truly understand where they wish us to go. Second, I will discuss the meaning of originalism and conservative textual analysis underpinning many of the judicial options of the justices under consideration. While frequently regarded as a unity in the general public, it is clear from judicial academics and the justices themselves originalism is a spectrum of interpretative tools. Where one finds one's self on this spectrum has significant impact on the rulings that are rendered. Next, I will discuss two differing areas of interpretation, the meaning of liberty and the limits of deference which will outline the true differences in approach to the new Gorsuch/Kavanaugh model of interpretation.

Context Matters – Upbringing Colors Interpretation

A half century ago, Joel Grossman wrote, “Those who attempt to explain judicial behavior in terms of the backgrounds of the judges share with historians the problem of never knowing precisely how the past has influenced the present. But even allowing for these failings, background studies have made a contribution by systematically exploring an important dimension of judicial behavior” (1966: 1562). I agree. Where you come from has an influence on who you are and the decisions you make. The difficulty, as noted by Grossman, is in knowing what influence in the past is determinative in the future. Without a clear understanding of this relationship, the best one can do is impart an understanding of the upbringing of an individual and look for patterns of decision-making in the future. I shall feign an attempt to do so here.

I begin first with Justice Antonin Scalia. Born at the height of the Great Depression, Scalia grew up an only child, the son of Salvatore Eugene Scalia and the former Catherine Panaro. Remarkably, he was also the only offspring of his generation from the entire Scalia and Panaro families. None of his mother's six siblings had a child. Neither did his father's only sibling, a sister. So "Nino," as he was called, became the center of attention for two tight-knit, striving Italian immigrant families. His father had come to America knowing little English, had earned a Ph.D. at Columbia University, and had spent three decades teaching Romance languages at Brooklyn College. Scalia grew up in a multi-ethnic neighborhood of Queens in New York City. By all accounts, like many first generation immigrant parents, Antonin's father demanded much from his only son. The son did not let him down. He was valedictorian at New York's Xavier High School, first in his class at Georgetown University, and a magna cum laude graduate of Harvard Law School. His family, and especially his father, indoctrinated in his conservative values framed in a Roman Catholic identity of communalism and altruism. While humility is an unlikely attribute to be described to the late Justice, it is an essential element of the Jesuit instruction he received at Xavier and Georgetown. As such, it can be read in his opinions limiting the reach of judicial decision-making to its proper role as understood by Scalia.

If Antonin Scalia is a product of the social milieu of NYC in the mid-twentieth century, his precursors on the Supreme Court could not be more different. Each of the so-called Four Horsemen of the Supreme Court experience a more rural and outskirts upbringing. Pierce Butler was born to Patrick and Mary Ann Butler, Catholic immigrants from County Wicklow,

Ireland. His parents emigrated as a result of the Irish potato famine in the late 1840s. The couple settled in Pine Bend (now Rosemount), Dakota County, Minnesota. Their son Pierce Butler was the sixth of nine children born in a log cabin. Butler graduated from Carleton College, where he was a member of Phi Kappa Psi Fraternity. He read for the law and was admitted to the bar in 1888. He married Annie M. Cronin in 1891. He served as county attorney in rural Ramsey County in the 1890s before he became a chief attorney for the railroad industry. It was in this role in advocating for the powerful rail road industry in both the United States and Canada that molded Butler into a firm advocate of laissez-faire economics and pro-expansive capital. During his nomination to the court he led his Canadian firm to an approximate \$12 million dollar verdict, one of the largest of its kind to that point in Canadian law. Justice Butler was the epitome of an aggressive corporate attorney and is appropriate for his position he used the law not as an arbiter of justice but a policy tool to benefit his private clients. As such, he saw his role once he was elevated to the Supreme Court as applying divining the underpinnings of the Constitution to the policy ends of laissez faire that had guided his private practice.

Whereas Justice Butler cut his teeth and grew to prominence in private practice, Justice Sutherland, also appointed to the Supreme Court in 1922 rose up through western Republican politics. Born in England but raised in Utah, George Sutherland embodied the western libertarian, anti-government influence spirit that still is present in the state's politics. For Sutherland, he found a tool in the expansion of substantive due process emanating out of the Fifth and Fourteenth Amendments to suppress the growing public desire to restrain the excesses of capitalism in the industrial revolution. Freed from the influence of the rapidly growing city tenements of the east coast and upper mid-west, Sutherland could envision a more rural nation in an idyllic Jeffersonian utopia. Like Butler, Sutherland's upbringing did not involve interaction within a large city political milieu but instead centered in the extraction and farming business community of the west. As a result of this upbringing and his willingness to read limits not explicitly written into the constitution, Justice Sutherland strongly believed the Constitution protected private property rights through the extension of liberty. This was a clear

extension of the Constitution beyond its text. It serves as a precursor for the writings of the newest justices on the Supreme Court.

Perhaps Justices Butler and Sutherland's activist approach to the law would have been present nonetheless but upon their elevation of the Supreme Court they were quickly courted by two sitting justice that helped guide their jurisprudence. While Willis Van Devanter and James Clark McReynolds were not friends (Van Devaanter renounced his membership with a private club just to get away from the irritating McReynolds!), in their own separate ways they guided the socialization of Butler and Sutherland onto the Supreme Court. Similarly to Sutherland, Van Devanter also begin his legal career in the thinly populated west by opening a practice in Cheyenne, Wyoming. Looking to expand his firm he quickly became active in Republican politics and was appointed Chief Justice of the Wyoming Territorial Supreme Court in 1889 just after turning thirty-years-old. Van Devanter was a pro-finance, anti-regulation chief who believed the best place for the distant federal government was back in DC. Perhaps one of the least well-known justices on the Supreme Court, Van Devanter still remained in his seat for over a quarter of a century after being appointed by President Taft. While his writings are not enshrined in many legal texts, he did constitute a key vote behind the aggressive use of the Constitution to limit government intrusion into the free market by following the lead of Sutherland and McReynolds.

Finally, James Clark McReynolds represents the leader of the early twentieth century 'Four Horsemen of the Supreme Court.' While appointed by Democrat Woodrow Wilson prior to WWI and subsequent to serving as Wilson's successful trust-busting Attorney General, McReynolds immediately presented an obstacle to his appointer and the coming Presidency of Roosevelt as the chief protagonist in preventing the array of New Deal programs to take full effect. As noted below, McReynolds became the primary author in pushing the Supreme Court to reject FDR's attempts to stem the Great Depression. His ardent anti-government stance stems from his upbringing in rural Kentucky. Born to a former Confederate army surgeon, McReynolds excelled in his education graduating top of his class from Vanderbilt University and Virginia Law school (Shoemaker, 2004). While it is not clear what the most important influences are for McReynolds we do know he studied under John B. Minor, at Virginia Law. Minor is

described as, "a man of stern morality and firm conservative convictions" (Hall, 2004). Disliked by other members of the Supreme Court, McReynolds was described by Chief Justice Taft as "selfish to the last degree ... fuller of prejudice than any man I have ever known ... one who delights in making others uncomfortable. He has no sense of duty ... really seems to have less of a loyal spirit to the Court than anybody" (Mason, 1964). While his misogyny, bigotry, and anti-Semitism are well known, it cannot be denied that McReynolds had enormous influence on the Supreme Court and those around him. He became the center of the conservative wing of the Court and successfully held it together through the first phase of the New Deal. Perhaps his personal irascibility or his deep conviction in favor of the free market lead McReynolds to be the chief author of the Supreme Courts most aggressive uses of substantive due process. First in support of civil liberties (see *Meyer v. Nebraska* 262 U.S. 390 (1923), and *Pierce v. Society of Sisters* 268 U.S. 510 (1925)) but then a decade later in the battle with the popular FDR's New Deal, McReynolds expands the role of the Justice to instill a clear policy objective through his writings and opinions. We shall see a similar attitude in the Supreme Courts newest members.

The two newest members of the Supreme Court, Neil Gorsuch and Brett Kavanaugh, are creatures of the Beltway. Neil Gorsuch's family relocated from Colorado at an early age when his mother was appointed head of the EPA in 1981 by Ronald Reagan. While her tenure was brief and tumultuous, Neil and his mother now divorced, remained in the tight elite social circle of DC with Neil attending Georgetown Prep and matriculating to Columbia University and then Harvard Law School. As such, Gorsuch was involved in the topsy-turvy world of national politics and was strongly influenced by the treatment his mother underwent while serving the Reagan administration. Clerking on the DC Circuit and twice for the Supreme Court including Justice Anthony Kennedy, Gorsuch is a creature of the Washington conservative elite through the Federalist Society. His appointment to the Tenth Circuit in Denver returned him to his mountain roots and reaffirmed his libertarian conservatism.

Justice Brett Kavanaugh followed a similar path to Gorsuch. Also a student at Georgetown Prep, attending elite educational institutions, in this case Yale, and clerking on the federal circuit, here with Walter Stapleton of the U.S. Court of Appeals for the Third Circuit and then with Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit before a brief stint in the

Solicitor General Office and a clerkship with Justice Kennedy. Now well-known due to his contentious Supreme Court confirmation hearings, Kavanaugh was never a child of want but instead one of privilege. Influenced by the Reagan Presidency and the aggressive use of the courts and law to restrain government action, both Gorsuch and Kavanaugh mirror the approach found in the Four Horsemen of the twentieth century. Lacking the upbringing of Scalia results in a pairing of conservative justices willing to go beyond restrained originalism and the textual analysis of the Constitution and relevant statutes. Instead, they are prepped to move the Court and the country far farther to the right than Justice Scalia was ever willing to go.

Originalism – Why Can't We All Agree?

'Originalism,' the once unconsidered but now de rigueur conservative legal philosophy is not a one-size-fits-all concept. Instead, nuance and difference is scattered among those who adopt this legal philosophy. For this work, there is a key difference that must be stressed in these differing interpretations and applications. This difference is centered on what a judge or justice should do once the interpretation of the text has been exhausted. To begin, let me define originalism as understood by Justice Antonin Scalia and what I believe the differing opinion of originalism is by Justices Gorsuch and Kavanaugh. Originalism requires that when one interprets any legal text, whether it be the Constitution, a statute, a contract, or a Supreme Court precedent, one must give the words of the text one is interpreting their original public semantic meaning. This means consulting dictionaries, grammar books, and newspapers published at the time the legal text became law. This contrasts from those who believe it is appropriate for judges to consult the original intent that animated the adoption of a clause. For a true originalist but only the original semantic public meaning of the words of the text matter. As Steve Calabresi has written, "[I]aws adopted by dead people bind us but their unenacted intentions do not" (2015, 18). Scalia stated in 1996,

The theory of originalism treats a constitution like a statute, giving the constitution the meaning that its words were understood to bear at the time

they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because I am first of all a textualist and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the Framers of the U.S. Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words. . . . The words are the law. I think that's what is meant by a government of laws, not of men. We are bound not by the intent of our legislators, but by the laws which they enacted, laws which are set forth in words, of course (Scalia, 1996).

While both Justices Gorsuch and Kavanaugh would likely agree to this defining of originalism, what is left unsaid by either Calabresi or Scalia is what should be done if an answer is not provided. For Justice Scalia, a judge or justice is limited. It is not in their proper role to use their discretion to interpret into a text what should be done. Instead a justice should restrain this activist urge and instead consciously leave it to the 'political' branches to render a decision. For to take the more activist route, the judge moves beyond his role and humility in our system of government and uses the Constitution as a policy making tool.

In contrast to Justice Scalia, Justices Gorsuch and Kavanaugh matching the activism of the predecessors of the Four Horsemen would take the leap and use their discretion to advance a conservative agenda not explicitly read into the text or original understanding of those texts. These justices would do this through several aspects of the Constitution. The first and perhaps the most historically important is the concept of liberty enshrined in the fourteenth amendment and made operationable by the adoption of a substantive due process expansion of the concept of liberty. This work argues that for the Four Horsemen and now for Justices Gorsuch and Kavanaugh, the presumption of liberty trumps all else in judicial decision-making.

Originalism, Liberty, and Discretion – Where the Words Stop, the Policy Making Begins

A differing understanding of originalism can result in very disparate results. This work argues that while nearly all of the recent members of the conservative wing of the Supreme Court profess to adopt an originalist approach to interpreting the Constitution and relevant texts, the

originalism of Antonin Scalia is fundamentally different from that of Justices Gorsuch and Kavanaugh. To understand this difference it is important to see where this difference is encased in the Constitution. Justices Gorsuch and Kavanaugh would adopt the following basis for an activist view of originalism. For these justices, Lockean natural rights theory underpins and provides the context for the Declaration of Independence and then for the Constitution's Preamble as well, both of which concern the legitimacy of government. In essence, Locke argued that when we come out of the state of nature and into civil society, we give up certain rights—mainly, but neither entirely nor exclusively, the right of self-enforcement, Locke's police power. Other rights are maintained by the citizens in the social contract. Maintaining this belief, we gave very little of our executive or enforcement power up to the federal government in the federal constitution. Instead, Gorsuch and Kavanaugh would argue save for the right of self-defense, we gave most of it up to the states, calling it the general police power. Once the Fourteenth Amendment was ratified, however, individuals could invoke that panoply of federal rights against state violations, because Section 1, by implication, gave federal courts jurisdiction over such complaints, and Section 5 gave Congress enforcement jurisdiction as well.

But Gorsuch and Kavanaugh would like to adopt an expansive view of the limitations suggested by the Tenth Amendment to the Constitution. For these jurists, in a case involving the application of federal law to a U.S. citizen, the federal government should have the burden of proof in establishing that it is acting within its enumerated powers. For originalists, the federal government is quite simply not a government of general powers the way the state governments are. Its ends are enumerated and thus limited. Seen in this lens, the past three generations of jurisprudence allowing the expansive growth of federal general power has been in error. Instead there should be a presumption of liberty. If the federal government has no power with respect to a given object, individuals are free concerning that object. (States may act limited by the conscriptions of their own constitutions).

This work suggests that Gorsuch and Kavanaugh would continue the work of Scalia is restraining the broad interpretation of three key components of the Constitution. These include the powers delegated to Congress under the Taxing Clause, the Commerce Clause, and the Necessary and Proper Clause. This attempt at retrenchment lead by Scalia has largely been

unsuccessful s witnessed by the continued intrusion of federal power into a multitude of areas. This failure is not from a lack of effort but because Justice Scalia and those joining his opinions have been constricted by their adoption of judicial restraint when the ability of the text under consideration has been exhausted.

I argue Justices Gorsuch and Kavanaugh would suggest Scalia has denied that the Ninth Amendment means what it plainly says on its face, which is that there are other, unenumerated, rights that are constitutionally protected above and beyond the rights mentioned in the first eight amendments. Scalia, based on his opinions, would argue in essence, the Ninth Amendment is “void for vagueness” and as such is not applicable in Constitutional law. To these newest Justices the void-for-vagueness argument against the Ninth Amendment is mistaken because of our primary tradition of liberty. They would argue that in ignoring the actual text of the Ninth Amendment, Justice Scalia is abandoning textualism in a context where he fears that there will be no sure rules to guide judicial discretion. For Scalia, judges should be restrained wherever the text of the Constitution calls for unguided judicial discretion. The newest justices would argue that by embracing a Frankfortian view of judicial interpretation, Justice Scalia is, in fact, rejecting textualism and originalism. Gorsuch and Kavanaugh argue the Constitution is full of clauses that give judges discretion, like the Fourth Amendment ban on “unreasonable” searches and seizures or the Eighth Amendment ban on “excessive” fines and bail. By setting an unnecessary limit on judicial decision-making, Justice Scalia has limited the ability of the Supreme Court to return the Constitution to its *Lochner*-era days. Gorsuch and Kavanaugh will publicly assert judges should not legislate from the bench, and they should not make up new constitutional rights out of thin air, but, and this is essence of their more activist form of originalism, they *are* obligated by their oath of office to enforce the standards in the Constitution as well as the rules when these allow for judicial discretion. Standards are provisions in a legal text like “unreasonable” or “excessive” that plainly delegate discretion to judges.

The liberty asserted by conservative justices is enshrined in multiple locations in the U.S. Constitution. Among these are Article I, Section 9 which protects against federal bills of attainder; ex post facto laws; the granting of titles of nobility; and direct taxes that are not

apportioned according to the census. In addition, Article I, Section 10, protects liberty from state officials by banning bills of attainder, ex post facto laws, and laws impairing the obligation of contracts. But the vehicle that is adopted by jurists within active originalist philosophy most commonly appears, of course, in Section 1 of the Fourteenth Amendment. That section provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (U.S. Const. amend. XIV, § 1).

The Fourteenth Amendment grew out of an attempt by Congress to constitutionalize the Civil Rights Act of 1866, which President Andrew Johnson had vetoed as unconstitutional but Congress had overridden. The Reconstruction Congress, remembering the then-recent Dred Scott Case, feared the Supreme Court might strike down the Civil Rights Act of 1866 as unconstitutional, and so they drafted the Fourteenth Amendment to codify and broaden the Act's protection of civil liberties. The 1866 act read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding (21 Civil Rights Act of 1866, 14 Stat. 27–30 (1866)).

The Civil Rights Act of 1866 was focused on the protection of common-law rights of state citizenship, using federal enforcement powers to guarantee those rights to all U.S. citizens. It

follows *a fortiori* that the Privileges or Immunities Clause of the Fourteenth Amendment protects privileges or immunities of state citizenship as well as those of national citizenship. This for activist originalists is nothing less than the original meaning of the Fourteenth Amendment. That amendment goes beyond the Civil Rights Act of 1866 in that it protects not only against “abridging” or “shortening” or “lessening” certain listed state common law rights but also against “abridging” all the privileges or immunities of state citizenship. Thus, states are not only forbidden to “abridge” the common law rights listed in the Civil Rights Act of 1866, they are also forbidden to “abridge” rights under state constitutional law and state statutory law. This is the original meaning of the Privileges or Immunities Clause. Of course, this was not enshrined in the majority opinion of the Slaughter-House cases (83 US 36 (1873)). In their opinion, a citizen's "privileges or immunities," as protected by the Constitution's Fourteenth Amendment against the states, were limited to those spelled out in the Constitution and did not include many rights given by the individual states. The dissenters in Slaughter-House instead asserted that Section 1 went much farther and insisted that the full panoply of various rights contained in the multitude of state constitutions. If so, and I believe this is how Justices Gorsuch and Kavanaugh would view the case, Section 1 of the Fourteenth Amendment becomes a powerful engine of liberty because it guarantees the equal citizenship of all citizens. It does not bar only race discrimination. If this argument is adopted, as I believe Justices Gorsuch and Kavanaugh want it to be, liberty of contract and liberty to choose one's own occupation, for example, are constitutionally protected under the original meaning of the Slaughter-House Cases. This is a revival of the Lochner-era jurisprudence of heightened scrutiny concerning private property rights and freedom of contract.

The question then remains why Justice Scalia, a bedrock conservative and icon of the conservative movement for the past half century, thought that the right to enjoy liberty and to seek and obtain happiness and safety subject to just laws enacted for the general good of the whole people was meaningless. One cannot know for sure but one reason may be that Scalia believed that judges should defer to the ‘political’ branches unless those branches had made ‘a clear mistake.’ The presumption of constitutionality, which the Supreme Court gives to legislation, is the descendant of this clear-mistake rule. Justices Gorsuch and Kavanaugh, if

pressed, would argue this is not a true originalist interpretation of the privileges or immunities clause. Instead the clause should be interpreted as incorporating and protecting a wide array of personal rights and liberties, chief among these private property and freedom of contract.

In addition to containing the Privileges or Immunities Clause, the Fourteenth Amendment also has a Due Process Clause and an Equal Protection Clause. These clauses have been drafted into service to do some of the work the Privileges or Immunities Clause was meant to do. The original meaning of the Due Process Clause of the Fourteenth Amendment was that the clause protected procedural rights against the executive. The Supreme Court has developed an elaborate body of substantive due process case law, which incorporates the Bill of Rights against the states and which protects unenumerated liberties like liberty of contract and the right to privacy. Instead of housing the substantive due process renderings of the Supreme Court in the privileges or immunities clause, the modern Court has used the Due Process and Equal Protection clauses (for an interesting looking at these dueling positions related to civil liberties, see Justices Kennedy and O'Connor's opinions in *Lawrence v. Texas*, 539 U.S. 558). Citing the substantive due process decisions in the privileges or immunities clause has the clear impact of allowing Justices and judges the ability to use their discretion to protect the liberty contained in the Constitution. The final clause in Section 1 of the Fourteenth Amendment provides that no state shall deprive any person of the equal protection of the laws. Together with the Privileges or Immunities Clause, the Equal Protection Clause is a ban on governmental discrimination on the basis of class. It bans layering of rights together with the Privileges or Immunities Clause, which forbids the states from making laws that give African-Americans an abridged or shortened or lesser grant of rights than are enjoyed by white Americans. Under these two clauses, no state could adopt a system of European feudalism where some people are born lords while others are born serfs; no state could adopt the Hindu caste system under which some people are born Brahmins while others are born "untouchables"; no state could give more privileges or immunities to its white citizens as a matter of their birth than it gives to citizens of every other race and color; no state could give more privileges or immunities to one religion than it gives to another or discriminate on the basis of religion in any way; no state could set up a gender hierarchy whereby people who are born male have greater rights than

people who are born female; no state could set up a sexual-orientation hierarchy whereby people who are born heterosexual have greater rights than those who are born lesbian, gay, bisexual, or transgender. For Gorsuch and Kavanaugh, the privileges or immunities clause and the equal protection clause are powerful sources of support for liberty against governments that want to pass class legislation that arbitrarily gives greater status to a select few. While most view these portions of the Constitution as a tool to read civil liberties into Constitutional protection, conservative originalist activists can use this utility to scale back much of the government expansion of the twentieth century. For Gorsuch and Kavanaugh, Section 1 of the Fourteenth Amendment protects unenumerated liberties from state intrusion by allowing justices to use their discretion to extend these protections. This final step of broad discretion is one that Scalia would not take but I strongly believe Gorsuch and Kavanaugh are willing to do so. For the newest members of the Supreme Court the text of the original Constitution, the text of the Bill of Rights, and the text of the Fourteenth Amendment as they originally understand it are very libertarian. For Gorsuch and Kavanaugh and others who share their activist originalist mindset, the mistake made by the restricted originalists on the Supreme Court such as Scalia is that they have been too unwilling to push the originalist interpretation of the Constitution to allow for a broad expanse of judicial discretion.

Judicial Deference – Putting Activist Originalism on Display

This present work argues that there is a fundamental difference between originalism as understood by the late Antonin Scalia and the originalism as practiced by the newest justices on the Supreme Court, Gorsuch and Kavanaugh. The difference resides in how a justice should render a decision after the lessons of the textual analysis of the document under question is complete. A restrained or restricted originalist, as I believe Justice Scalia professed to be, would allow the two elected political branches to answer this question. For this version of originalism, the role of the judge ends once the lessons of the text is exhausted. In contrast, an activist originalist, as Justices Gorsuch and Kavanaugh are would then find the authority of judicial discretion contained in the Constitution to render a decision beyond the words of the text

under consideration. Evidence of this difference can be seen in the jurisprudence surrounding judicial deference.

Judicial deference is perhaps the most debated topic within administrative law. As a background, Justice John Paul Stevens, writing for a unanimous majority, "If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute" (*Chevron U.S.A., Inc. v. NDRC*, 467 U.S. 837; 43 (1984). *Chevron* deference instills the further application of regulatory deference (*Auer et al. v. Robbins et al.* (519 U.S. 452, 1997). In writing for an unanimous majority in *Auer*, Justice Scalia wrote, "because the salary basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation' ... That deferential standard is easily met here." It is clear from his opinion in *Auer*, Justice Scalia is not willing to impose his own interpretation on a regulation that has been properly considered by the regulatory agency. To do so would be beyond the role of the judiciary and cross the boundaries established by the three branches.

The practice of judicial deference contained in *Chevron* and *Auer* is under attack from the right (Sheary, 2017). This attack is currently before the Supreme Court in the form *Kisor v. Wilkie*, No. 18-15. Oral argument for this case was heard on March 27, 2019 and the comments within suggest the activist originalism of both Justices Gorsuch and Kavanaugh. James Kisor served in the Marines during the Vietnam War and later filed for benefits for post-traumatic-stress disorder. In 2006, the Department of Veterans Affairs agreed with Kisor that he suffers from PTSD, but it refused to give him benefits dating back to 1983, as Kisor had requested. When it denied Kisor's claim, the VA relied on its interpretation of the term "relevant" in one of its regulations. Kisor appealed unsuccessfully to the U.S. Court of Appeals for the Federal Circuit, which deferred to the VA's interpretation of its regulation. Kisor now brings this action to challenge the failure of the judges on the circuit to use their discretion to overrule the VA.

During oral argument, Justice Breyer sums up immediately in responding to petitioner's opening statement, "But what you're doing is saying, instead of paying attention to people who know about that, but rejecting it if it's unreasonable, the judges should decide. I mean, I want to parody it, but, I mean, this sounds like the greatest judicial power grab since *Marbury versus Madison*, which I would say was correctly decided." In response, Justice Gorsuch suggests it is the judges that should be making this decision, not the agency, "[F]or the life of me, I don't know how high a level a person has to be before we're going to defer to him, or how much notice is fair, or how much expertise counts. . . I think have the most expertise on what relevant evidence is, is probably John Kane, a federal district judge of about 40 years. . . . And under the rule you propose, every agency could define relevant evidence differently."

At this point, Justice Kavanaugh steps in to suggest that allowing *Auer* deference to stand could result in multiple interpretations, "But the problem is -- the problem is that the judge, judges, could come up with an interpretation that says the agency's interpretation of the regulation is wrong, and this is a really important interpretation, has real effects on many people, and it's wrong, but, nonetheless, rule for the agency under your theory because -- and under the Chief Justice's question -- because there's some ambiguity in it and, therefore, defer to the agency, even though the judges might unanimously think it's wrong." Justice Gorsuch follows with a clear attack to *Auer*, "At any rate, a bureaucracy coming up with an amicus brief or a single-member opinion in a BIA decision involving an immigrant or, in this case, a veteran seeking benefits, who in the middle of a case is confronted with a new interpretation never seen before, all right, those -- that's the reality. And I'm not sure how that serves democratic processes or the separation of powers, as opposed to having an independent judge. The one thing you're going to know is you're going to have an independent judge decide what the law is in your case, consistent with the statute that says an independent judge shall decide all questions of law. That seems to me a significant promise, especially to the least and most vulnerable among us, like the immigrant, like the veteran, who may not be the most popular or able to capture an agency the way many regulated entities can today."

A caution must be stated – oral argument is not a final judicial opinion. But notwithstanding this admonition, it is clear from the oral argument in *Kisor* the two newest justices on the Supreme Court are ready to assert the discretionary power of their positions. These justices reject the restrictive originalism of Justice Scalia and instead through their reading of an expansive interpretation of the Ninth and Tenth Amendments of the Constitution as augmented through the provisions of the first section of the Fourteenth Amendment are ready to turn back the clock on the past eighty years of jurisprudence.

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