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Constitutional Democracy and the Third Branch

*Diarmuid F. O'Scannlain**

Professor Eastman, distinguished judges and academics, and friends:**

Thank you for the privilege of speaking before such a distinguished audience. I am deeply honored and moved by the Claremont Institute's Reagan Jurisprudence Award. I am especially proud to receive it in the name of President Ronald Reagan because of his commitment to our fundamental constitutional principles—indeed, to those same founding principles that the Claremont Institute strives to sustain in American public life.

I am also personally indebted to him as well because he appointed me to this Article III judgeship. I think he might well be pleased to know after having telephoned me that morning in August, 1986, that I was faithful to his trust in naming me to the Ninth Circuit, although I was almost rude to him when he called me at home one day to be assured that he “had my permission” to sign my nomination and to send it on to the Senate.

As many of you know, President Reagan would never nominate an Article III judge with whom he had not personally talked. It was 7:30 in the morning in Portland, Oregon when the phone rang downstairs, where my wife, Maura, was preparing breakfast, and I was upstairs just finishing my shower. She shouted up the stairs that the phone call was for me, to which I responded, “Who is it?” She said, “I think it's the press.” To which I responded, “Tell them I'll call them back.” Well, the White House

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** This Address was delivered at Chapman University Dale E. Fowler School of Law on September 15, 2018, as the Constitution Day Address for the Claremont Institute for the Study of Statesmanship and Political Philosophy.

operator overheard my wife's side of the conversation and said, "Madam, it's the Press . . . ident of the United States calling." Whereupon Maura shouted, "Dear, it's President Reagan." "I think I'll take that call," I said, and thus began a delightful conversation with one of the most considerate public officials that I have ever known.

I

Because we are gathered here to celebrate Constitution Day, and because this particular event draws inspiration from President Reagan's jurisprudence, I believe it would be fitting to begin my remarks by returning to some of his.

Just over thirty years ago, speaking from the East Room of the White House, President Reagan presided over the swearing-in ceremony for Chief Justice William Rehnquist and Justice Antonin Scalia. He elaborated on the Founders' vision of an "independent" judicial branch: "For [the Founders]," he said, "the question involved in judicial restraint was not—as it is not—will we have liberal or conservative courts? They knew that the courts, like the Constitution itself, must not be liberal or conservative. The question was and is, will we have government by the people?"¹

Today, I would like to reflect on this timeless puzzle: How can a counter-majoritarian institution like the federal judiciary—an institution filled with judges whose appointing Presidents long ago left office, one that enforces laws written by long-dead drafters, and one that from time to time strikes down statutes written and passed by the people's representatives—how can that institution possibly be in service of "government by the people?" The answer, I will suggest, is in the textualist and originalist judicial methodologies which, I believe, are *compatible* with democratic self-governance and uniquely *promote* government by the people.

II

A

Let's start with the increasingly ascendant approach to statutory interpretation: Textualism. Judges have looked to the words of legal instruments to determine their meaning for a

¹ Ronald Reagan, *Remarks at the Swearing-in Ceremony for William H. Rehnquist as Chief Justice and Antonin Scalia as Associate Justice of the Supreme Court of the United States* (Sept. 26, 1986), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES 1268 (1986).

long while. Justice Joseph Story's 1833 *Commentaries on the Constitution*, for example, wrote of that document:

[E]very word . . . is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. . . . [Constitutions] are . . . fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense: and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.²

Textualism as a theory of interpretation is of more-recent vintage, largely developed in response to the perceived excesses of the Warren Court and popularized by Justice Scalia.³ But, in method, textualism channels Justice Story. As Justice Scalia explained: Judges should look to “the intent that a *reasonable person* would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”⁴ Though the terminology might be new, the tools are older than Justice Story and older even than the Constitution.⁵

How, then, does textualism reinforce democratic processes? Primarily because textualism respects the “legislative bargain”—the deal struck among legislators with competing interests and competing constituencies.⁶ Passing legislation is a messy and haphazard business, one that Justice Neil Gorsuch recently described as “the art of compromises.”⁷ So, to a judge looking for some high-minded, purposive reading of the statute, such incongruities and idiosyncrasies might look instead like *inconsistencies*. But a statute's foibles are not necessarily flaws, and so textualists enforce the law that the parties managed to pass—not the one that *some* of them, in the *Court's* view, might have wanted.

I believe the textualists' respect for this legislative bargain promotes democratic self-rule. Consider, first, the perspective of the forward-looking political actor who hopes to pass a new law, or to fix an old one. Passing such legislation, he or she knows, will require the investment of considerable political and financial capital. Party leaders, for instance, might need to make the vote a matter of party discipline, or to offer a seat on a committee to some recalcitrant dolt. Likewise, citizens and interest groups can spend money or make calls to urge the passage of the legislation—all of which expend time

² See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 451 (1833); see also Diarmuid F. O'Scannlain, *Joseph Story, the Natural Law, and Modern Jurisprudence*, HERITAGE FOUND. (Feb. 3, 2014), https://thf_media.s3.amazonaws.com/2014/pdf/HL1239.pdf (discussing Justice Story's theory of natural law).

³ See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641–50 (1990).

⁴ ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997).

⁵ See STORY, *supra* note 2, § 400 (quoting Blackstone).

⁶ John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431 (2005).

⁷ *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2016).

and treasure. But textualism promises the legislator a return on investment: Expend your resources, and the third-branch will enforce this hard-earned text; your handiwork will govern until someone else puts as much effort in to change it as you did.

Relatedly, textualism ensures the democratic legitimacy of a court's decision, and it reinforces the accountability of the political branches. When judges enforce the text that Congress wrote, the case is decided at the politicians' directive. Sticking to the script is not only fair to the parties, but it reinforces the basic democratic principle that elected officials are responsible for the policies and practices of the government. If you don't like the law or its application, then you know whom to blame: Congressmen, unlike federal judges, can be thrown out of office.

These advantages of textualism perhaps partially explain its rapid ascendance in the broader legal culture. But we also have to thank Justice Scalia's charismatic persistence that Congress means what it says and says what it means. Just a few years back, Justice Elena Kagan claimed that he "taught everybody [] to do statutory interpretation differently."⁸ Because of him, she claimed, "we're all textualists now."⁹ And as I've argued elsewhere, one of his most-lasting legacies will likely be that he prodded judges to ask not what the statute *should* say, but what it *does* say.¹⁰

Despite textualism's ascendance among lawyers, politicians and commentators often seem not to understand the basic distinction between the lawmaking role of the political branches and the interpretive role of the courts. Justice Gorsuch, you will recall, was harangued during his Senate hearings for a dissent he wrote on the Tenth Circuit.¹¹ Then-Judge Gorsuch would have sided with a trucking company that fired a driver for abandoning his broken-down vehicle in subzero temperatures. "It might be fair to ask whether [the company's] decision was a wise or kind one," he wrote. "But it's not our job to answer questions like that. Our only task is to decide whether the decision was an illegal one."¹²

⁸ Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

⁹ *Id.*

¹⁰ See Diarmuid F. O'Scannlain, "We Are All Textualists Now": *The Legacy of Antonin Scalia*, 91 ST. JOHN'S L. REV. 303 (2017).

¹¹ Michelle Mark, *Al Franken slams Gorsuch over 'absurd' dissent in frozen-trucker case: 'It makes me question your judgment.'* BUS. INSIDER (Mar. 21, 2017), <https://www.businessinsider.com/senators-grill-gorsuch-over-absurd-dissent-in-frozen-trucker-case-2017-3> [<http://perma.cc/9PEM-G6XY>].

¹² *Transam Trucking, Inc. v. Admin. Review Bd.*, No. 15-9504, 2016 WL 3909526, at *7 (10th Cir. July 15, 2016) (Gorsuch, J., dissenting).

Whether right or wrong on the merits, Justice Gorsuch precisely described the only legitimate ground for his decision. Critics of such principled textualism don't just misunderstand the role of the federal judge, but they also fail to see the pro-democratic benefits of the textualist approach.

B

Textualism's cousin, originalist constitutional interpretation, gets regularly maligned as somehow deeply anti-democratic—the traditional name for the objection being the “dead hand” problem.¹³ The objection goes something like this: The Constitution claims to speak for “We the People,” but “We did not adopt the Constitution, and those who did are dead and gone.”¹⁴ Originalism, they say, does not secure a “government of laws and not of men,” but a government of the dead and not of the living.

Originalists have a series of responses. The first, of course, is that the dead hand argument fails *any* form of law, or at least anything short of rule by continuous and unanimous consent. I've been on enough three-judge panels over the last thirty-two years to know that *that* won't work. However, I don't want to focus on the *reductio ad absurdum* response to the dead hand problem. Instead, I want to make the positive case that this “rule of the dead” is *good* for the “rule of the living.”

Indeed, the Constitution's foundational nature sets in place the *structural* and *electoral* pre-requisites of democratic governance. In this age when the Court is better known for its decisions in *Roe v. Wade* and *Obergefell* than it is for *Myers v. United States* and *Noel Canning*,¹⁵ we often forget that the Constitution pays careful attention to the unglamorous details of nation-building—for instance, how many votes does it take to demand that the Senate or the House record the “Yeas and Nays of the Members?”¹⁶ Likewise, while we simply assume the requirements of bicameralism and presentment, the Founders carefully calibrated this system of lawmaking.¹⁷

¹³ Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998); Reva Siegel, *Heller and Originalism's Dead Hand*, 56 UCLA L. REV. 1399, 1405 (2009).

¹⁴ Siegel, *supra* note 13, at 1399.

¹⁵ *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (same-sex marriage); *Myers v. United States*, 272 U.S. 52 (1926) (presidential removal authority); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (recess appointments).

¹⁶ See U.S. CONST. art. I, § 5, cl. 3. Note: A one-fifth vote will suffice. *Id.*

¹⁷ See generally *INS v. Chadha*, 462 U.S. 919, 946–51 (1983).

With these and many other such rules, the Constitution determines *who* gets to act on behalf of the nation, *what* they may do, and *how* they have to go about it. And settling those preliminary structural questions frees up today's political actors to focus on the questions of the day. Judge Michael McConnell offers a useful analogy: "The rules of basketball do not merely *constrain* those who wish to play the game, but also make the game possible."¹⁸ Speech without grammar is gibberish, and democracy without structure is mob rule. The Founders wrote the rules of the game in 1787, and their rulebook makes democratic politics possible in 2018.

But such response to the dead hand problem does not *entirely* dispense with the objection. The judicial branch, of course, has the authority to "say what the law is,"¹⁹ and when the Constitution's higher law conflicts with an act of Congress or a state legislature, then the Supremacy Clause—to say nothing of our oaths of office—dictate that such law must be set aside. The "rules of the game" response to the dead hand problem cannot easily explain cases like *Brown v. Board*,²⁰ or *West Virginia v. Barnette*,²¹ or even *Heller*.²² In these cases, the judge's role is quite simply to declare the will of elected officials null and void. How can judicial review be anything but a constraint on the right of the people to govern themselves?

Well, perhaps the best response is that we embrace the rule of the dead so as to affirm the possibility of the people's living sovereignty. With language echoing the Declaration of Independence, Chief Justice John Marshall explains as much in *Marbury v. Madison*: "The basis on which the whole American fabric has been erected" is that "the people have an original right to establish, for their future government, such principles as . . . shall be most conducive to their happiness."²³ But because the "exercise of this original right is a very great exertion," and because it neither "can [] nor ought [] be frequently repeated," the principles "are deemed fundamental" and are "designed to be permanent."²⁴ Put simply, We the People have the right to establish fundamental political commitments—like the freedom of speech and religion, or the equality of persons of every race. Enshrining these principles is a "very great exertion," and so those commitments cannot be rendered

¹⁸ Michael McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1130 (1997).

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁰ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (school desegregation).

²¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (enjoining enforcement of regulation requiring students to say the Pledge of Allegiance).

²² *District of Columbia v. Heller*, 554 U.S. 570 (2008) (firearms for self-defense in the home).

²³ *Marbury*, 5 U.S. (1 Cranch) at 176.

²⁴ *Id.*

impermanent by *any* mere agent of the government—whether that agent be an unelected judge or an elected legislature.

C

These democratic benefits of faithful adherence to the written law, whether a congressional statute or the Constitution itself, should seem especially salient today, when judicial nominations have become so contested, so bitter, and so focused on the nominees' *political views*. For instance, Senator Cory Booker grabbed headlines when he suggested that supporting Judge Brett Kavanaugh's nomination made you "complicit in evil."²⁵ And of course, as I'm sure you all recall, there were the sordid anti-Catholic insinuations against Judge Amy Coney Barrett.

The most significant cause of today's political angst, I suspect, is the well-known Supreme Court cases that removed political questions from the democratic process without even a basis in the Constitution's text and structure. *Roe v. Wade*, the most egregious case of judicial fiat, compelled Professor John Hart Ely, who was anything but a right-wing hack, to say: "[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."²⁶ If the Supreme Court can do that, who needs Congress?

But mandated social change at the ukase of the Supreme Court doesn't *only* take politics away from the politicians; it also compromises judicial independence, because it turns courtrooms into partisan battlegrounds when those political battles *should* be happening across the street in the United States Capitol.

Nevertheless, I have hope that the courts will return to their proper role. With Justice Gorsuch, another principled textualist and originalist has joined court. And I also hope that one day these methodologies can be the default commitment of appointees of *both* political parties. After all, textualism and originalism are methodological commitments that *can*, and *should*, transcend political parties.

For instance, Yale Law School Professor Akhil Amar, described by the *New York Times* as a "liberal originalist," argued long before *Heller* that the Constitution included a personal right to keep a gun

²⁵ Igor Bobic, *Cory Booker Suggests Supporting Brett Kavanaugh Makes One 'Complicit' In Evil*, HUFFINGTON POST (July 26, 2018), https://www.huffingtonpost.com/entry/cory-booker-brett-kavanaugh-complicit-evil_us_5b59dce2e4b0fd5c73cbb0e [<http://perma.cc/RBG2-327R>].

²⁶ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973).

in one's home for self-defense²⁷—though some originalists, of course, might read the Second Amendment more broadly than he. He also testified on Judge Kavanaugh's behalf and has praised him for his "studious" attention to "the Constitution's original meaning."²⁸ To take another example, Justice Kagan often writes careful textualist opinions for the Court that show her methodological seriousness.

My point is *not* to say that originalism and textualism mean that judges will always agree on the meaning of the text. But shared methodologies offer a neutral and a-political basis for good-faith disagreement.

III

So far, then, I have advanced the argument that textualism and originalism are not just *compatible* with democratic self-rule, but rather that they're *good* for it.

To illustrate that point, let me briefly discuss a few of the Court's cases from last term. In these decisions, the Supreme Court reinforced the Constitution's structural and electoral protections. Fair warning: These are technical, structural, *lawyerly* opinions that may also, for the non-lawyers, be intensely soporific.

A

The first case is *Lucia v. SEC*.²⁹ There, the Court considered whether Administrative Law Judges (or, "ALJs" as they're called) at the Securities and Exchange Commission were "officers of the United States" or simply employees. The question mattered because Article II prescribes only two mechanisms by which a person can be appointed to an "office": First, the default rule is that a person must be nominated by the President and confirmed by the Senate; second, Congress "may by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments."³⁰ No one argued that the ALJs had been appointed in accordance with Article II. So by applying past precedent, the Court concluded that the ALJs were "officers of the United States" that were subject to the strictures of the Appointments Clause. Therefore, it vacated the order from the administrative adjudication.

²⁷ See, e.g., Akhil Reed Amar, *Second Thoughts*, NEW REPUBLIC (July 11, 1999), <https://newrepublic.com/article/73718/second-thoughts> [<http://perma.cc/6ZNW-9WU8>].

²⁸ See, e.g., Akhil Reed Amar, *A Liberal's Case for Brett Kavanaugh*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/brett-kavanaugh-supreme-court-trump.html>.

²⁹ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

³⁰ U.S. CONST. art. II, § 2, cl. 2.

Lucia reinforces the Constitution's pro-democratic structural protections. As Justice Thomas's concurrence elaborated, the Appointments Clause "maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for the bad ones."³¹ In other words, the Constitution sets in place structural rules that make sure that elections matter: If the Department of Defense, or Housing and Urban Development, or the Environmental Protection Agency is behaving badly, then you know it's the President's fault. Here, the Court issued a seemingly anti-democratic decision; it declared null a congressionally approved method of hiring ALJs. But the Court did so in order to further the Constitution's higher mandate: Meaningful accountability within the executive branch as expressed in the text itself.

Similarly, *Murphy v. NCAA* is a federalism case that ensures that *state* elections matter.³² In this case, the Court struck down the provision in the Professional and Amateur Sports Protection Act that makes it unlawful for a State to "authorize" sports gambling schemes. The problem with the statute was not that it concerned some subject matter beyond the reach of Congress's enumerated powers (does anything these days?), but that it specifically "dictate[d] what a state legislature may and may not do."³³ In the Court's language, the regulations "commandeered" the organs of state government.³⁴ Such commandeering violates the Constitution: While Congress may regulate *individuals*, it has no authority to regulate directly the conduct of *states*; such a directive would be incompatible with the Constitution's system of "dual sovereignty."³⁵

Like *Lucia*, the decision in *Murphy* strikes down a duly enacted congressional statute, but it does so in the service of the Constitution's commitment to democratic self-rule. As the Court mentions, the "anti-commandeering rule promotes political accountability" because it maintains clear lines of responsibility.³⁶ When Congress regulates individuals, citizens know that Congress is to blame for bad laws; when Congress tries to regulate states who *then* regulate individuals, the lines of responsibility become blurred. Citizens must know *which* politicians to vote out of office. Similarly, commandeering would have allowed Congress to pass the costs of regulating onto the states, who then would have to fund Congress's

³¹ *Id.* at 2056 (Thomas, J., concurring).

³² *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

³³ *Id.* at 1478.

³⁴ *See generally* Printz v. United States, 521 U.S. 898 (1997) (holding that Congress may not "commandeer" state governments); *New York v. United States*, 505 U.S. 144 (1992) (same).

³⁵ *Murphy*, 138 S. Ct. at 1475.

³⁶ *Id.* at 1477.

mandate. The anti-commandeering rule, however, ensures that Congress must bear the burden for the programs it enacts. Once again, the Court's decision in *Murphy* ensures meaningful accountability for Congress.

As an aside, it's also worth noting that the majorities in each of these two cases crossed traditional ideological lines. Justice Kagan's opinion in *Lucia* was joined by each of the Republican-appointed Justices, though Justices Thomas and Gorsuch concurred in a more-detailed originalist reading of Article II. Likewise, Justice Samuel Alito's opinion in *Murphy* was joined entirely by Justice Kagan and mostly by Justice Stephen Breyer. This cross-ideological agreement is a good sign; it tends to demonstrate the Court's independence.

IV

Before I close, I would like to return again to President Reagan's speech at the swearing-in of Chief Justice Rehnquist and Justice Scalia. There, the President mentioned at least two areas of ongoing struggle to nurture and to preserve the structure of government established by the Constitution.

The *first* struggle is within the judicial branch itself, as Judges and Justices attempt to stay true to their oaths to "bear true faith and allegiance" to the Constitution. President Reagan quotes Justice Felix Frankfurter: "The highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law."³⁷ Indeed, Judges and Justices must resist the temptation to follow personal preferences over the Constitution. This temptation is especially great in hard cases, when it's important to have judges who *both* care deeply about the Constitution's text and structure *and* have the sharpest legal minds. President Reagan praised both qualities in Chief Justice Rehnquist and Justice Scalia, and he turned out to be right about both. So far, Justice Gorsuch also seems to have both qualities. He has not been afraid to write separately, and he has not been afraid to disagree with his colleagues on originalist grounds. This independence of mind will serve the Court well, and we can hope that Judge Kavanaugh, if and when he's confirmed, will share similar qualities.³⁸

The *second* struggle that President Reagan mentioned is one within the United States at large. President Reagan, at the close

³⁷ Reagan, *supra* note 1.

³⁸ Note, this Address was given prior to Justice Kavanaugh's confirmation and swearing in.

of the speech, pointed out that the entire citizenry must work to preserve the constitutional structure:

We the people are the ultimate defenders of freedom. We the people created the Government and gave it its powers. And our love of liberty and our spiritual strength, our dedication to the Constitution, are what, in the end, preserves our great nation and this great hope for all mankind.³⁹

Nurturing this dedication to the Constitution among citizens is a worthy and difficult task, but on it hangs the health of this nation's great constitutional system. I commend the Claremont Institute, and all of you in this room, for your dedication to sustaining our Founding principles, and I am honored to be recognized for my small part in this noble effort. Thank you all.

³⁹ Reagan, *supra* note 1.

