Guns and Judges – Antonin Scalia and the Right to Bear Arms

Selden Lecture – 3 May 2018

On the 4th of April 1939, Jack Miller's dead body was found on the bank of Little Spencer Creek in North Eastern Oklahoma. He had been shot four times with a .38 revolver. The .45 automatic found near his body had been fired three times.[1]

Miller was a thug. Born in about 1900 he was in trouble from an early age. In 1924 he accidentally killed a man. He engaged in petty crimes until about 1934 when he joined the O'Malley gang. The "depression was the golden age of mid-western bank robbery"[2] and the O'Malley gang committed many of them. They robbed banks in Missouri, Arkansas, Kansas and Illinois. Miller was usually a back-up driver, but he lacked discipline, and got himself into trouble by engaging in some freelance robberies.

The O'Malleys had been pursued by the FBI and the Oklahoma State Police for some time. Their spree was coming to an end. On 3 May 1935 they hit the City National Bank of Fort Smith, Arkansas and stole about $22,000. It was to be their last big robbery. In Brian Frye's account of this he describes the capture of the gang in the style of Dashiell Hammett:

> "The police arrested Cooper as a likely suspect and struck gold. Cooper ratted out Gilmour, who was already on the lam. … Gilmour sang too, fingering the rest of the gang. The police pinched O'Malley and Heady in Kansas City, where they'd rented a swanky pad. …"[3]

Miller was also picked up but he didn't observe the twisted honour of criminal gangs. He quickly confessed to his role and offered to give evidence for the State. In the trial, he identified the defendants as co-conspirators and detailed their involvement in the robbery.

This wasn't the first time he was to give evidence against former companions. His evidence contributed to a large number of dangerous men being imprisoned. And it may very well be

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[1] "Auto of slain gang member found burned", *The Oklahoman*, 7 April 1939.
[2] Brian L. Frye, 'The peculiar story of *US v Miller*' (2008) 3 *NYU Journal of Law and Liberty* 48.
[3] Ibid 55.

that it was his decision to give that evidence that led to his death. But why am I telling you about this man? Someone who might, at best, rate a footnote in the history of the criminal gangs of mid-west America. Let me explain. About 12 months before he died, Arkansas and Oklahoma State Police stopped Miller and his companion, Frank Layton, outside Siloam Springs in Arkansas. They had an unregistered, short-barrelled shotgun in the car and the police reasonably believed that they were making preparations for an armed robbery. Miller and Layton were arrested and charged with violating the *National Firearms Act* 1934.

Some historians venture that the attempted assassination of Franklin Roosevelt in 1933 led to the statute's enactment in 1934. It taxed the manufacture, sale, and transfer of short-barrelled rifles and shotguns, machine guns, and silencers. It also required registration of concealable firearms and prohibited interstate transportation of unregistered concealable firearms. On its face it was as an act designed to raise revenue, but it was intended to discourage the possession and use of covered firearms. It wasn't the first time that legislation restricting the ownership and transportation of firearms had been placed before Congress. The then Attorney-General spoke of federal regulation of pistols as being part of the national government's next step in the war against crime. But, the expansion of gun control began to be met with opposition. Some of that opposition was based on the provisions of the Second Amendment.

Both Miller and Layton pleaded guilty when the indictment against them was first presented. They appeared before a Federal judge with the quintessentially American name of Heartsill Ragon. Judge Ragon had been a prominent member of, and congressman for, the Democratic Party. While in Congress he was an advocate of Federal gun control and had introduced a Bill prohibiting the importation of guns in violation of State law. He suggested that Miller and Layton withdraw their plea and he arranged for a lawyer to represent them. The hearing was brief. Judge Ragon's decision was even briefer. There is reason to believe that he may not have been completely faithful to his judicial oath in the manner in which he dealt with this case. It has been argued that he engineered the case so that the validity of the *National Firearms Act* could be confirmed.[4]

His decision consisted of three, short paragraphs. In the first he recited the charge. In the second he recited the elements of the demurrer raising contravention of the Second Amendment to demonstrate invalidity. And in the third he said, without any further reasoning, that he was of

[4] Frye, above n 2, 63.

the opinion that the statute was invalid in that it violated the Second Amendment. Many of you will be aware of at least part of the second amendment. It was proposed by James Madison as part of a series of amendments and was, in its original form, to be the fourth amendment. Its historical background will be considered later.

United States v Miller

The unusual nature of the case against Miller did not end there. At that time the United States could appeal criminal cases involving a constitutional question directly to the Supreme Court. That was done. Mr Gutensohn, the lawyer who had been appointed by Judge Ragon to appear for Miller on a pro bono basis did not take part in the appeal to the Supreme Court. He was involved with a number of other things, not least his contested appointment to the Arkansas State Senate. The Clerk of the Supreme Court wrote to him suggesting that he could submit a type-written brief or, if that did not suit, the hearing could be adjourned so that he could appear. Mr Gutensohn replied by telegram: "Suggest case be submitted on Appellants brief [STOP] Unable to obtain any money from clients to be present and argue case [STOP]. Paul E Gutensohn."[5]

The case came before the Supreme Court on the 30th of March 1939 with only the appellant appearing and with no submissions from the respondent. The decision was given about six weeks later. It was a unanimous decision written by a judge who is known for at least two things. He was one of the laziest lawyers ever appointed to the court and he was probably the worst human being ever appointed to that court.

Mr Justice McReynolds

James Clark McReynolds had been the Attorney-General in the administration of President Wilson. His appointment relieved Wilson of a cantankerous presence in his cabinet but thrust it upon the United States Supreme Court. McReynolds routinely ranks among the least effective or worst judges in the court's history. He was possessed of a wide range of biases and prejudices. He was a racist, a sexist and an anti-Semite. During the welcome ceremony for Benjamin Cardozo to the court in 1932, McReynolds joined the Bench but opened a newspaper and appeared to be reading it while at the same time muttering audibly "another one". He would not employ people who smoked or drank alcohol or were Jewish. He would not employ a

[5] Frye, above n 2, 67.

woman and he would not employ a man who was either married or engaged. He thought men who wore wrist watches or red ties were effeminate. In 1938 when Charles Hamilton Houston, a man acknowledged by many as a brilliant lawyer, appeared in the Supreme Court, McReynolds turned his back on the lawyer and stared at the back wall of the courtroom. Charles Hamilton Houston was black.

The only member of the Court to whom McReynolds would defer was the Chief Justice, Charles Evans Hughes. Robert Jackson, who was later to be appointed to the Court described him as a man "who looks like God and talks like God".[6]

Oliver Wendell Holmes, a man who had been a member of a State militia and had later fought in the Civil War, had a generous view of McReynolds. But one of his frequent correspondents, Harold Laski, the British political theorist and economist, was not so generous. Holmes and Laski corresponded with each other for nearly twenty years and their collected letters fill two volumes. In one letter to Holmes, Laski said: "McReynolds and the theory of a beneficent deity are quite incompatible."[7]

United States v Miller – the decision

Justice McReynolds was given the responsibility of writing the opinion for the court.[8] His decision, while longer than that of Judge Ragon, is not convincingly argued. It consists of a series of quotations from many sources including Blackstone and Adam Smith. Early in the opinion he says:

> "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than 18 inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."[9]

He then refers to the Constitution's provisions relating to the ability of Congress to call forth a militia and to grant significant powers with respect to it, and says:

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[6] Ryan Coates, 'In Defence of the Court's Integrity: The Role of Chief Justice Charles Evans Hughes in the Defeat of the Court-Packing Plan of 1937' (2014) 3 *History in the Making* 17.
[7] Mark De Wolfe Howe (ed), *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916-1935* (Harvard University press, 1953), 493.
[8] 307 US 174 (1938).
[9] 307 US 174 (1938), 178.

> "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."[10]

This was followed by a brief, and selective, examination of some of the history of provisions made in earlier statutes about the possession of arms. After a few pages they come to an abrupt halt with the stark and unreasoned conclusion: "We are unable to accept the conclusion of the court below and the challenged judgment must be reversed."[11]

This was a poorly constructed decision and one which left open many arguments of interpretation. But judges of the eminence of Charles Evans Hughes, Hugo Black and Felix Frankfurter agreed with him. It may well be that the members of the court did nothing more than apply what was then the well accepted view of the Second Amendment.

The decision received very little consideration after that. Various laws relating to gun control were strengthened or weakened according to the government of the particular States in which the legislation existed. After the assassination of Martin Luther King Jnr and Robert Kennedy in 1968, President Johnson convinced Congress to enact the *Gun Control Act* 1968. It established a substantial and complicated system of licensing. It also prohibited certain classes of people from purchasing or possessing guns – people such as criminals, fugitives from justice, or those dishonourably discharged from the military. A decade later, after the assassination attempt on Ronald Reagan, further gun laws were introduced, including the *Brady Bill* – named after President Regan's wounded press secretary – which required background checks. Under the next administration, President Clinton achieved a ban on assault weapons as part of a larger measure. *Miller*, though seldom referred to, remained the law for another seven decades.

Antonin Scalia – his life before the Supreme Court

Antonin Gregory Scalia was three years old when Miller was decided. He had been born in March 1936 to Salvatore, who had emigrated from Sicily in 1920, and Catherine, a first generation Italian American. Salvatore and Catherine came from large families. Together, in their generation, there were nine siblings. But, of them, only Salvatore and Catherine had a child and they had but one.

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[10] 307 US 174 (1938), 178.
[11] 307 US 174 (1938), 183.

Antonin was named after his grandfather but was soon to become, and remain, known by the diminutive, Nino. As an only child, and with childless uncles and aunts, he did not want for attention. Nino was educated at public schools at the primary level but was then enrolled at Xavier High School, a Jesuit run secondary school. At that institution, students wore military-style uniforms and saluted both senior class men and faculty members.

Scalia was immensely successful, winning the gold medal for class excellence in each of his years. He did his undergraduate studies at Georgetown University which has been described as an "American, Catholic, Jesuit institution of high learning".[12] Scalia's biographers all remark upon the effect that this evangelistic Jesuit Catholicism, combined with his parents' traditional Catholicism, had on the evolution of Scalia as a young man.

Upon graduating he gave some thought to entering the priesthood but rejected it because he "decided He was not calling me".[13] After some thought about becoming an academic, Scalia decided to study law. The 1950s was a time of great friction along the constitutional fault lines of the American republic. That friction was generated, not insubstantially, by two protagonists on the Supreme Court – Felix Frankfurter, the conservative former professor from Harvard, and William Douglas, the liberal former professor from Yale.

With the debate between those two giants of the era raging, Scalia entered Harvard Law School in September 1957. The curriculum was dominated by two casebooks. Both of them had been written by disciples of Mr Justice Frankfurter and advanced the philosophy of judicial restraint and neutral principles.

> "We … were taught that if one used the right method, it would yield the right answer. If it happened that one side tended to win fairly routinely, this was incidental, merely the product of the methodology."[14]

That approach, probably[15] informed by Professor Herbert Wechsler's critique[16] of the Supreme Court's decision in *Brown v Board of Education*, [17] laid the cornerstone for Scalia's theories

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[12] Georgetown University, 'The Jesuit Tradition', <https://msb.georgetown.edu/about/jesuit-tradition>.
[13] Bruce Murphy, *Scalia - A Court of One* (Simon and Schuster, New York, 2014).
[14] Peter B Edelman, "Justice Scalia's Jurisprudence and the Good Society: shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s" *Cardozo Law Review* (1990-1991), 1799.
[15] Murphy, above n 12, 38; Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* (Sarah Crichton Books, New York, 2009), 28.
[16] Herbert Wechsler. "Toward Neutral Principles of Constitutional Law", (1959) 73 *Harvard Law Review* 1.
[17] 347 US 483 (1954).

for working in the law.[18] He had great success at Harvard – not least meeting and then marrying Maureen in 1960. They had nine children.

I need, at this point, to compress his biography into a few sentences. After Harvard he worked in a Cleveland law firm for six years before becoming a professor at the University of Virginia. In 1971 he commenced working in the Office of Telecommunications Policy and continued in various government positions during the Nixon and Ford administrations. He returned to teaching during the Carter presidency and, while at the University of Chicago, became one of the first faculty advisers of the Federalist Society. In 1982 President Reagan appointed him to the United States Court of Appeals for the District of Columbia Circuit a court widely viewed as a stepping stone to the Supreme Court. That proved to be so, when, four years later, he was appointed by President Reagan to that Court. His appointment was confirmed by the Senate by a vote of 98 to nil. One should not draw from that, that his appointment was viewed by all members of the Senate with equanimity. There is much to support the view that the Senators were simply exhausted after the bruising confirmation battle over the appointment of William Rehnquist as Chief Justice. In 1993, at the confirmation hearing for Justice Ginsburg, Senator Biden (later to be Vice President and who was then chairman of the Senate Judiciary Committee) said: "the vote that I most regret of all 15,000 votes I have cast as a senator" was "to confirm Judge Scalia" — "because he was so effective."[19]

He preferred to be right – rather than influential

Let me take you through a necessarily abbreviated survey of Justice Scalia's time on the Supreme Court. You will not find many cases in which he has written the majority opinion. Even when he agreed with the majority, there were many occasions when he felt compelled to differ on some aspect. But he was not a great dissenter in the same way that John Harlan II was. He voted with the majority in 75% of the cases decided by the Court between 1986 and 2014. He wrote 270 majority opinions and 324 concurrences.[20] But, in any article or book about Justice Scalia you will most often find references to his dissenting opinions – not because he always dissented – but because of the way he expressed his dissent.

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[18] Murphy, above n 12, at 38.
[19] Adam Liptak, 'Antonin Scalia, Justice on the Supreme Court, Dies at 79', *New York Times* (online), 13 February 2016, < https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.
[20] Richard L. Hasen, *The Justice of Contradictions: Antonin Scalia and the Politics of Disruption* (Yale University Press, 2018).

There are two broad matters which must be borne in mind when considering what Justice Scalia wrote and the way he wrote it. First, is the way in which majorities are formed on that court. Secondly, is originalism – his theory of constitutional interpretation.

It is obvious that, in order to form a majority, five judges must agree on the result. In all the time he was on the Court there was one member who was regarded as the "swing vote". In many constitutional cases, there would be four conservative judges on one side and four liberal judges on the other. It was the swing vote which would decide the case. When Scalia was appointed, he replaced William Rehnquist as an Associate Justice because Rehnquist had been appointed Chief Justice to replace Warren Burger. The swing vote was Sandra Day O'Connor. Upon her retirement that role was assumed by Anthony Kennedy. To be the swinging voter on the Supreme Court affords considerable power and, one might think, would lead to careful and respectful arguments designed to win the judge over to one side or the other. Justice Scalia may have made careful arguments but he certainly didn't do it respectfully.

Occasionally, in an appeal court, disagreements bubble to the surface and there is direct reference to, and contradiction of, another judge's reasons. The duelling decisions of McHugh J and Kirby J in *Al-Kateb v Godwin*[21] provide a rare example of that type of conduct in this country. Sometimes, a judge will be satisfied with a short dyspeptic diatribe as when Starke J started a judgment with this tart observation:

> "This is an appeal from the Chief Justice, which was argued by this Court over nine days, with some occasional assistance from the learned and experienced counsel who appeared for the parties. ... This case involves two questions, of no transcendent importance, which are capable of brief statement, and could have been exhaustively argued by the learned counsel in a few hours." [22]

Some judges are wont to express themselves in language which is more colourful than the norm. Justice Scalia was one of them.

Selected parts of his opinions are often quoted as examples of his use of language and sense of humour. But the humour has a harsh and, sometimes, bitter tone. I accept that sometimes what he said can be enjoyed as a guilty pleasure and, from this distance, the schadenfreude may have a more innocent flavour. But to say, as he did, these things about the considered opinions of your colleagues is both irresponsible and demeaning:

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[21] [2004] HCA 37; (2004) 219 CLR 562.
[22] *Federal Commissioner of Taxation v Hoffnung & Co Ltd* (1928) 42 CLR 39, 62.

- "nothing short of ludicrous"
- "beyond the absurd"
- "entirely irrational"
- "not passing the most gullible scrutiny"
- "nothing short of preposterous"
- "has no foundation in American constitutional law, and barely pretends to"
- "so unsupported in reason and so absurd in application [as] unlikely to survive"

In a speech he gave in 1994 he said:

> "It's always more fun to write dissents if we are talking about just sheer fun because you just right for yourself. You know you can be as outrageous as you like because you don't care if anybody joins you or not."[23]

His attitude was made clear in an interview for *New York* magazine in 2013:

> "Q. While your opinions are delectable to read, I'm wondering: Do you ever regret their tone? Specifically, that your tone might have cost you a majority?
> A. No. It never cost me a majority. And you ought to be reluctant to think that any justice of the Supreme Court would make a case come out the other way just to spite Scalia. Nobody would do that. You're dealing with significant national issues. You're dealing with real litigants—no. My tone is sometimes sharp. But I think sharpness is sometimes needed to demonstrate how much of a departure I believe the thing is. Especially in my dissents. Who do you think I write my dissents for?
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> Q. Law students.
> A. Exactly. And they will read dissents that are breezy and have some thrust to them. That's who I write for."[24]

His dissents, and the footnote wars he waged, were not designed to cajole his colleagues into accepting his views. He didn't care. He was driven to be right rather than influential. And his excoriating disagreements with the two swing judges exemplified that. In *Webster v Reproductive Health Services*[25] Scalia saw an opportunity to overturn the famous abortion rights decision in *Roe v Wade.*[26] It did not happen, and Scalia unleashed his verbal weapons

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[23] *A Look Back: 1994* , 51 Gonzaga L Review 583 at 598
[24] Jennifer Senior, 'In Conversation: Antonin Scalia', *New York* (online), October 6 2013, <nymag.com/news/features/antonin-scalia-2013-10/>.
[25] 492 US 490 (1989).
[26] 410 US 113 (1973).

against O'Connor saying that her reasoning could not be taken seriously and was irrational. He maintained his attacks on her to such an extent that, on one occasion, after reading a draft Scalia dissent attacking O'Connor, Chief Justice Rehnquist called Scalia to admonish him: "Nino, you are pissing off Sandra again … Stop it!"[27]

His criticism of Justice Kennedy was no less severe. In *Obergefell v Hodges*[28] – the same sex marriage case – he said of Justice Kennedy's majority opinion:

> "If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."[29]

Yes, his writing is sharp and it arrests the attention. But, in his attacks on what was nearly always the majority, he undermined the standing of the court of which he was a member. His criticism was sometimes *ad hominem* but, of greater concern, were his assertions that the majority was usurping judicial power. In *Obergefell* he said that the majority opinion was "a naked judicial claim to legislative—indeed, *super-legislative*—power; a claim fundamentally at odds with our system of government".

As Hasen has argued:

> "It is impossible to say whether Scalia's coarsening rhetoric contributed to the decline [in the public's opinion of the court], but it certainly could not have helped. His constant claims that the majority's decisions were illegitimate, and not even true acts of judging, served as a model for populist denunciations of elitist Court decisions."[30]

He had, at a time when the profession was increasingly concerned about civility among lawyers, set exactly the wrong example.[31]

The fury with which he often wrote was generated to a large extent by his unswerving belief that there was only one way to interpret the Constitution. He had a general theory of construction called "originalism". But, before I deal with that, let me make two preliminary

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[27] Hasen, above n 19, 73.
[28] 135 S. Ct. 2071 (2015)
[29] 135 S. Ct. 2071 (2015), 7 of Scalia's opinion, footnote 22.
[30] Hasen, above n 19, 75.
[31] Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal* (2000) 22 *University of Hawai'i Law Review* 385.

points. First, there is in the United States a degree of reverence for the founding documents – the Declaration of Independence, the Constitution and the Bill of Rights – which is not present or easily understood in this country. The wisdom ascribed to the Founding Fathers is regularly reinforced by both politicians and judges with almost religious intensity. Secondly, the legal and constitutional battles fought from the 1950s to the late 1960s still loom large in the American mind. From 1953 to 1969 Earl Warren was Chief Justice of the Supreme Court and was seen by many conservatives as a liberal interventionist. There was a view held by many on the Republican side that his court had led America away from its origins. In particular, he was never forgiven by a large cohort, especially in the south, for the court's decision in *Brown v Board of Education* – the case which forced desegregation in schools. Billboards like this were spread across many of the southern states.

Originalism was seen as the means of winding back the constitutional clock. Some of its proponents, like Robert Bork, proposed that interpretation was to be controlled by the original intent of the framers of the Constitution. Scalia moved from that. For him, originalism was the idea that the meaning of a constitution is fixed at the time it is adopted and it cannot be changed through judicial interpretation. Thus, the Second Amendment means what it meant when it was adopted in 1791 and the Fourteenth Amendment means what it meant when it was adopted in 1868.

For him, the Constitution means what it meant to "intelligent and informed" people at the relevant time:

> "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[32]

Unsurprisingly, this view did not appeal to the liberal judges on the court. Justice William Brennan described it as "arrogance cloaked as humility". It was also inconsistent with a view long held by many, and best expressed by Judge Learned Hand when he said:

> "It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[33]

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[32] Antonin Scalia, et al, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997), 34.
[33] *Cabell v Markham* (1945) 148 F 2d 737, 739.

Scalia said, more than once, that the Constitution was dead. In an interview conducted by Peter Robinson of the Hoover Institution, he explains what he meant by that:

> "Much of the harm that has been done in recent years by activist constitutional interpretation is made possible by a theory which says that unlike an ordinary law which doesn't change, it means what it meant when enacted and will always mean that. Unlike that the Constitution changes from decade to decade to comport with and, this is a phrase we use in our Eighth Amendment jurisprudence, we, the Court does, to comport with "the evolving standards of decency that mark the progress of a maturing society. In other words, we have a morphing constitution and of course it's up to the Court to decide when it morphs and how it morphs. That's generally paraded as the "living constitution" and unfortunately that philosophy has made enormous headway, not only with lawyers and judges but even with John Q Public."[34]

One might expect criticism from jurists who expounded the living constitutional theory but even among conservative judges he did not have universal support. Judge Richard Posner puts it this way:

> "The decisive objection to the quest for original meaning, even when conducted in good faith, is that judicial historiography rarely dispels ambiguity. Judges are not competent historians. … A dubious form of historical analysis endorsed however by some originalists is speculation about how people who lived long ago would have answered a question that had never been put to them, and could not have been because it concerned a practice or concept or technology that did not exist and was not foreseen during their lifetime."[35]

In 2012, Scalia co-authored a book with Bryan Garner – "Reading Law" – in which his views on textualism and originalism are transformed into canons of interpretation. But even there his views are challenged.

Chief Judge Frank Easterbrook, of the Seventh Circuit, said this in the foreword to that book:

> "When the original meaning is lost to the passage of time – or when it was never really there but must be invented – the justification for judges' having the last word evaporates. The alternative is choice through the Constitution's principal means of decision: a vote among elected representatives who can be thrown out if their choices prove to be unpopular."[36]

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[34] Hoover Institution, *Law and Justice with Antonin Scalia*, (16 March 2009) <https://www.hoover.org/research/law-and-justice-antonin-scalia> .
[35] Richard A. Posner, 'The Incoherence of Antonin Scalia', *The New Republic* (online), 24 August 2012, < https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism>.
[36] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012).

DC v Teller

At this point I must refer to another important player in the debate over gun rights – the National Rifle Association. It was formed in 1871 by militia and army veterans to train men to shoot safely and accurately. It did not object to the National Firearms Act, the subject of the decision in *Miller*. Its views did not change much until 1976 when a group who opposed any gun laws voted out the old guard. From that time, in ever increasing volume, it advanced the argument that the second amendment protected the right of every American to own and use firearms. Its position was not shared by everybody on the conservative side of politics. President Nixon replaced Chief Justice Earl Warren with Warren Burger who had been a critic of the Warren Court. But he did not agree with the NRA – this is what he said about the NRA's second amendment argument:

> "If I were writing the Bill of Rights now there wouldn't be any such thing as the Second Amendment. (Which says) That a well-regulated militia would be unnecessary for the defence of the States, the people's rights to bear arms. This has been the subject of one of the greatest pieces of fraud, and I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime."[37]

The campaign by the NRA was well-funded and well directed. It exercised considerable political power through its endorsements of sympathetic members of Congress.

It was in that atmosphere that Richard Heller challenged a District of Columbia law which banned handgun possession and made it a crime to carry an unregistered firearm. He wanted to own a handgun for protection in his own home. Heller won in the Circuit Court and the District of Columbia appealed to the Supreme Court. Justice Scalia was assigned the majority opinion and he used it to create what he has described as his "legacy opinion insofar as it is the best example of the technique of constitutional interpretation, which I favour … I think it is the most complete originalist opinion that I've ever written."[38]

In *District of Columbia v Heller* [39] the Court ruled by 5 to 4 that the DC law violated the second amendment. Justice Scalia's opinion runs to 60 pages – most of which is devoted to an historical analysis of the second amendment. Dissenting opinions were delivered by Justices Stevens and Breyer.

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[37] Warren Burger, *Interview at Macneil/Lehrer NewsHour by Charlayne Hunter-Gault*, PBS Television Broadcast (16 December 1991), < https://vimeo.com/157433062>.
[38] Murphy, above n 12, 390.
[39] 554 US 570 (2008).

In *United States v Miller* the Court only dipped a small cup into the well of history leading to the second amendment. Scalia lowered a bucket – a large bucket – and drew up what he wanted to prove his case. He delved into all manner of historical references, starting with the English Bill of Rights of 1689 and the glosses placed on it by William Blackstone in 1760. He saw a connection – not immediately obvious to others – between s 7 of the English Bill of Rights "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." and the second amendment. The English Bill of Rights was concerned with recognising limits on executive authority that William and Mary accepted as conditions for being offered the Crown that had been abdicated when James II fled the country. Apart from Crown the prerogatives, the English text took for granted legislative omnipotence. In contrast, the United States Bill of Rights was concerned with marking out limits to federal legislative authority.[40] In an interview in 2012, Scalia described his exploration of history as follows, referring to the Second Amendment:

> "Well that passage you read triggered, I said it triggered historical inquiry because the Second Amendment refers to it as though it, as though it were a pre-existing right. It didn't say the people shall have the right or even the government shall not take away arms but rather the right of the people to keep and bear – as though it was a pre-existing right and that triggered historical inquiry that takes you back to the English Bill of Rights which sure enough contained the right to keep and bear arms. As for the prologue… a well-regulated militia being necessary for the defence of a free state, comma, the right of the people to keep and bear arms shall not be infringed. Again if you studied history what's the connection between not taking away arms, the right of the people to keep and bear arms, and the militia, it seems very strange but historical inquiry shows you what the connect is, the way the Steward kings or Catholic kings destroyed the militia which was supposed to be all of the male citizens trained to arms, the way they destroyed the militia was not by abolishing it, they just took away the arms of all of those who opposed the Catholic kings and so there is a connection – a well-regulated militia being necessary for the defence of a free state – a militia consisting of all of the body of the citizenry, the right of the people to keep and bear arms shall not be infringed. It makes thorough sense if you understand the history."[41]

Scalia's view of history, grammar and the world led him to differ from the seven decade old decision in *Miller.* He disagreed with the view that the preamble modified the second part of the amendment. "McReynolds had interpreted the first clause as modifying the second one, providing the reason for the right to own a gun."[42] Scalia said that the prefatory clause was not

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[40] William G. Merkel, 'The District of Columbia v Heller and Antonin Scalia's Perverse Sense of Originalism' (2009)13 *Lewis & Clarke Law Review* 349.
[41] Antonin Scalia, *Uncommon Knowledge with Justice Antonin Scalia,* Hoover Institution (31 October 2012), <https://www.hoover.org/research/uncommon-knowledge-justice-antonin-scalia>.
[42] Murphy, above n 12, 386.

there to limit, but to clarify the rest of the sentence: "The former does not limit the latter grammatically, but rather announces a purpose."[43] He held that an individual had a right to keep and bear arms but did not attempt to define the limits of that right. In what is regarded by many observers as the price he paid for obtaining the vote of Justice Kennedy, he said:

> "… the right secured by the Second Amendment is not unlimited. … nothing in our opinion should be taken to cast doubt on longstanding prohibitions on that of the possession of firearms by felons and of the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."[44]

In a footnote to his opinion, he says that those measures are only examples of presumptively lawful regulation. In his examination of the particular law being challenged he noted that the inherent right of self-defence had been central to the second amendment right. Many of the critics of this reasoning, frequently point out that there was no justification for that assertion. The Second Amendment was driven largely by the fear held by many of the founding fathers that state militias could be disarmed by a central government.

More importantly, and inconsistently with his profession of original meaning, nowhere in his opinion does he answer the question: did the general public in 1791 read the amendment as he did? Was their understanding that the amendment protected a right to retain all weapons then used rather than those used by the militia?

His reasoning, while appeasing many in the gun rights lobby, infuriated some on the conservative side. Richard Posner wrote that Scalia's opinion employed "faux originalism" and he derided his historical analysis:

> "Judges are not competent historians. … A dubious form of historical analysis endorsed however by some originalists is speculation about how people who lived long ago would have answered a question that had never been put to them, and could not have been because it concerned a practice or concept or technology that did not exist and was not foreseen during their lifetime."[45]

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[43] 554 US 570, 577.
[44] 554 US 570, 626.
[45] Richard Posner, *Reflections on Judging* (Harvard University Press, Cambridge, 2013), 185.

He went further, likening this kind of argument to "motivated reasoning", the form of cognitive delusion that consists of credulous acceptance of the evidence that supports a preconception and peremptory rejection of evidence that contradicts it.[46]

One of his fiercest critics was Nelson Lund – the Patrick Henry Professor of Constitutional Law and the Second Amendment at George Mason Law School – a chair endowed by the NRA. He said:

> "The Heller case gave the Supreme Court, and Justice Scalia in particular, a rare opportunity to show why originalism deserves to be taken seriously. Unfortunately, the Court's performance is so transparently defective that it's quite possible that this decision will become Exhibit A when people seek to discredit originalism as an interpretive method."[47]

Two years after *Heller*, the Supreme Court confirmed that the second amendment applies not only to the District of Columbia, but also to each of the states.[48] Since then it has been remarkably quiet – refusing many opportunities to consider challenges to other gun laws. This has allowed lower courts to allow legislation which has, in some places, expanded gun control. In February of this year it again raised the ire of Justice Thomas who, in dissenting from a decision to refuse certiorari, said that the Court had some rights it favoured – abortion, speech, unreasonable search – and some it didn't. He said: "The right to keep and bear arms is apparently this Court's constitutional orphan. And the lower courts seem to have gotten the message."[49]

After *Heller* Scalia continued to be as determined to rein in what he saw as the unprincipled methods of interpretation employed by others on the Court. He had allies in Justices Thomas and Alito and, on some things, Chief Justice Roberts. His preference for attacking those who disagree with him flowered again in *King v Burwell*.[50] This was one of the cases which considered the validity of the *Affordable Care Act* or "Obamacare" as it was often called. It was upheld by 6 to 3 on various grounds. Scalia dissented and was joined by Justices Thomas

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[46] Richard Posner in Keith J. Holyoak and Robert G. Morrison (eds), *The Cambridge Handbook of Thinking and Reasoning* (Cambridge University Press, 2005), 186, referring to "Motivated Thinking".
[47] Nelson R. Lund, Clark Neily, Lucas A. Powe Jr, Adam Winkler, Diarmuid F. O'Scannlain, *Civil Rights: The Heller Case – Minutes from a Convention of the Federalist Society* (2009 4 *New York University Journal of Law and Liberty* 293.
[48] *McDonald v City of Chicago* 561 US 742 (2010)
[49] *Silvester v Becerra* 583 US __ (2018).
[50] 576 US __ (2015).

and Alito. Sometimes, when a justice of that Court will emphasise a dissent by making some remarks when the decision is published. He did so, at length, in this case. He finished in this way:

> "Perhaps the *Affordable Care Act* will attain the enduring status of the *Social Security Act* or the *Taft-Hartley Act*, perhaps not, but this court's two decisions concerning the act will surely be remembered through the years. The interpretative somersaults they have performed will remain as astounding precedent cited by lawyers to confuse our jurisprudence, and these two cases will publish forever the discouraging truth that the Supreme Court of the United States favours some laws over others and it is prepared to sacrifice all the usual interpretative principles, that it is prepared to do whatever it takes to uphold and assist its favourites. I respectfully dissent."[51]

Once again, he attacked the motives and integrity of his fellow judges.

One of the last cases he heard was *Fisher v University of Texas*[52] in which the university's admissions policies and their effect on racial groups were considered. During argument, Scalia questioned whether black students admitted to top-tier schools suffer because the courses are too difficult.

This is what he said.

> "There are those who contend that it does not benefit African Americans to get them into the University of Texas where they do not do well – as opposed to having them go to a less advanced school, a slower track school, where they do well. One of the briefs pointed out that most of the black scientists in this country don't come from schools like the University of Texas. They come from lesser schools where they do not feel that they are being pushed ahead in classes that are too fast for them. You know, I'm just not impressed by the fact that the University of Texas may have fewer, maybe it ought to have fewer. You know, when you take more the number of blacks, really competent blacks, admitted to lesser schools turns out to be less and I don't think it stands to reason that it is a good thing for the University of Texas to admit as many blacks as possible."[53]

Not surprisingly, this evoked criticism from many quarters.

The argument in *Fisher* was heard on 9 December 2015. Justice Scalia could not deliver an opinion. He died on 13 February 2016. As so often seems to be the case, there were some wild

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[51] Opinion Announcement of Justice Scalia in *King v Burwell* 576 US __ (2015), 25 June 2015, Part 2 from 11:13, <https://www.oyez.org/cases/2014/14-114>.
[52] 579 U.S. ____ (2016).
[53] Justice Scalia, Oral Argument, 9 December 2015 in *Fisher v University of Texas* 579 US __ (2016) from 1:07:14, <https://www.oyez.org/cases/2015/14-981>.

rumours and conspiracy theories but there was nothing to them. He was 79, and in poor health. Only three days before his death he had seen his doctor for a rotator cuff injury but was considered too weak to undergo surgery.

Antonin Scalia was a voice, a powerful voice, for those conservatives who still railed against the decisions of the Warren Court and the social changes which followed. He was an inconsistent originalist – applying his theory as and when it suited him. He was an accomplished speaker and persuasive writer. And he used those abilities to attack his opponents, often through a dissenting opinion, and in a way which went beyond a disagreement over different viewpoints. He attacked both individuals on the court and the legitimacy of the court itself. No one doubted his exceptional ability as a lawyer, but his inability to convince his fellow justices of the rightness of his own views led him to repeated and damaging condemnation of the very institution of which he professed to be proud.