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THE FOUNDING FATHERS SAID I AM NOT SUBJECT TO TERM LIMITS*

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I. INTRODUCTION

Justice Antonin Gregory Scalia served on the United States Supreme Court for almost thirty years. Prior to his death, he was the longest serving Justice on the current Supreme Court. Due to the life terms afforded to Article III judges by the Constitution, Justice Scalia was able to serve on the Court for 10,732 days.¹ Justice Scalia firmly believed that justices on the Supreme Court should not be subject to term limits.

My encounters with Justice Antonin Scalia resulted in many sleepless nights while I attended law school. The Constitutional Law Professor² at my school required that his students brief all assigned cases, including the concurrences and dissents. Justice Scalia's frequent dissents deprived me of much sleep because they were often as lengthy as the majority opinions. However, I always appreciated his

* Justice Antonin Gregory Scalia died on February 13, 2016. Our Country lost a great American. We are forever thankful for his service to this Country.

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¹ Justice Scalia also served on the United States Court of Appeals for the District of Columbia Circuit from August 17, 1982 until he took his seat on the Supreme Court on September 26, 1986. *Antonin Scalia Biography*, OYEZ, https://www.oyez.org/justices/antonin_scalia (last visited May 22, 2016).

² Professor Gary M. Shaw teaches Constitutional Law at Touro Law School. He has been a member of the Touro Law Center for over thirty-two years. Professor Shaw has published several articles on Constitutional Law. *See, e.g.*, Gary Shaw, *Due Process in American Military Tribunals after September 11, 2001*, 29 TOURO L. REV. 29 (2012); Gary Shaw, *The Constitution of Belarus: A Good First Step Towards the Rule of Law*, 6 TOURO INT'L L. REV. 125 (1995).

witty style and criticisms of the Court.³

On October 13, 2014, at a luncheon hosted by the Federalist Society's New York City Lawyers Chapter at the New York Athletic Club, I met the Man who was responsible for my prolonged law school assignments.⁴ The night before this event, I studied many of Justice Scalia's opinions and dissents, as if he were going to cold call and question me on trivial details. My family, friends, and colleagues typically consider me a reserved, quiet, and timid person. However, at the luncheon, something possessed me to ask Justice Scalia about whether Supreme Court justices should be subject to term limits—a question known to get him worked up.

The organizers of the event went around requesting written questions from the attendees. At the time I was a third-year law stu-

³ See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 700 (Scalia, J., dissenting) (expressing his disapproval of the majority's opinion that a professional sport is a place of public accommodation under Title III of the Americans with Disabilities Act of 1990). Scalia sarcastically noted that the Supreme Court had no basis on which to determine whether certain rules are non-essential to the game of golf. *Id.* He expanded on his criticism of the majority's interpretation of golf rules by stating:

If one assumes, however, that the PGA TOUR has some legal obligation to play classic, Platonic golf – and if one assumes the correctness of all the other wrong turns the Court has made to get to this point – then we Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power 'to regulate Commerce with foreign Nations, and among the several States,' to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a "fundamental" aspect of golf.

Id. (internal citations omitted).

The dissent concluded with Justice Scalia's comments on the progressive nature of the majority's ruling. *Id.* at 704. He believed that the Court's ruling would only afford additional benefits to competitors with disabilities. *Id.* Accordingly, "organizations that value their autonomy" will now have to defend necessary regulations in their respective sport, now that the courts have started reviewing rules of sports for "fundamentalness." *PGA Tour, Inc.*, 532 U.S. at 704.

⁴ Luncheon with Justice Scalia, THE FEDERALIST SOCIETY, (Oct. 13, 2014), <http://www.fed-soc.org/events/detail/luncheon-with-us-supreme-court-justice-antonin-scalia>.

dent, and had just finished reading *The Liberty Amendments*⁵ by conservative radio show host Mark Levin. So I wrote down, “do you believe in term limits for Justices of the Supreme Court,” on an index card, and returned it to one of the event organizers. The organizers casually screened all the questions provided by the attendees. I thought my question would absolutely not be selected. It was one of the first questions asked!

It was apparent that Justice Scalia opposed term limits for justices of the Supreme Court.⁶ In typical Justice Scalia fashion, he boisterously answered that he did not believe Supreme Court justices should be subject to term limits. I do not recall exactly what his explanation was because at the time he was answering my question, I was concerned about his discovering that I was the one who authored the question.

After meeting Justice Scalia, I began to wonder why he believed Supreme Court justices should not be subject to term limits. Is it because the Framers of the Constitution intended lifetime appointments for Article III judges? In part, yes. But there is more to why Justice Scalia was against term limits for justices of the Supreme Court. His view on term limits for justices was consistent with his subscription to originalism.⁷

There are several branches of originalism. This piece will evaluate Justice Scalia’s rationale for why Supreme Court justices

⁵ MARK R. LEVIN, *THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC* 49-71 (2013). Mark Levin believes that “no person may serve as Chief Justice or Associate Justice of the Supreme Court for more than a combined total of twelve years.” *Id.* at 49.

⁶ *Supreme Court Justice Antonin Scalia: Court Shouldn’t Invent New Minorities*, NY DAILY NEWS (Aug. 20, 2013, 11:21 AM), <http://www.nydailynews.com/news/politics/supreme-court-justice-antonin-scalia-court-shouldn-invent-new-minorities-article-1.1431659> (“Scalia dismissed the idea of term limits for Supreme Court justices, asking, ‘Who is drooling on the bench?’”). On January 7, 2016, Justice Stephen Breyer mentioned term limits for Supreme Court justices was a topic he and Justice Scalia disagreed on.

Justice Breyer said he’d be in favor of a term limit, but only if it was a long enough period that those appointed wouldn’t immediately be thinking about their next job Such a move might be politically tough to pull off. . . . But many conservative commentators, including U.S. Senator and presidential candidate Ted Cruz, have supported such a notion.

Sara Randazzo, *Justice Breyer on Term Limits, Differences with Justice Scalia and More*, WALL ST. J. (Jan. 7, 2016, 3:52 PM), <http://blogs.wsj.com/law/2016/01/07/justice-breyer-on-term-limits-looking-beyond-u-s-shores-and-differences-with-justice-scalia/>.

⁷ Black’s Law Dictionary defines “Originalism” as the “[t]he theory that the U.S. Constitution should be interpreted according to the intent of those who drafted it and adopted it.” BLACK’S LAW DICTIONARY 1133 (8th ed. 2004).

should not be subject to term limits through the lens of original intent—a branch of originalism. Generally, judges determine original intent by attempting to ascertain the meanings of provisions the way they were understood when they were first drafted and ratified.⁸

II. ORIGINALIST VIEWS ON TERM LIMITS

On September 26, 1986, President Ronald Reagan formally announced the induction of Antonin Scalia into the Supreme Court of the United States.⁹ Interestingly, in his speech President Reagan mentioned our Founding Fathers' debates about whether Justices should have life terms. Pursuant to Article III of the United States Constitution “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”¹⁰ In other words, Article III judges can hold office for life so long as they do not engage in behavior that constitutes grounds for impeachment.¹¹ It is apparent from the language of Article III that the Founding Fathers intended for judges to receive life terms.

In our three-branch government system the courts of justice are the defenders of a limited Constitution. For the courts of justice to be the defenders of a limited Constitution against “legislative encroachments,” the independence of the judges is essential.¹² Alexan-

⁸ David F. Forte, *The Originalist Perspective*, in THE HERITAGE GUIDE TO THE CONSTITUTION 21-27 (David F. Forte, Matthew Spalding eds., 2014).

⁹ President Ronald Reagan, *The Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House* (Sept. 26, 1986), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 95-96 (Steven G. Calabresi ed., 2007).

¹⁰ U.S. CONST. art. III, § 1.

¹¹ See generally *Nixon v. United States*, 506 U.S. 224 (1993). Walter L. Nixon Jr. was a former Chief Judge of the U.S. District Court for the Southern District of Mississippi. *Id.* at 226. He was found guilty of making false statements to a grand jury and eventually sentenced to prison. *Id.* As a result of his misconduct, he was impeached. The Supreme Court heard this case on the issue of

whether Senate Rule XI, which allows a committee of Senators to hear evidence against an individual who has been impeached and to report that evidence to the full Senate, violates the Impeachment Trial Clause, Art. I, § 3, cl. 6. That Clause provides that the ‘Senate shall have the sole Power to try all Impeachments.’

Id. The Court concluded that the controversy was nonjusticiable because the Impeachment Clause granted the Senate the sole power to try all impeachments. *Id.* at 228-38.

¹² The FEDERALIST NO. 78, at 473 (Alexander Hamilton) (Bantam Classic ed., 1982).

der Hamilton explained in *Federalist No. 78* that:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, *yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act.* But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.¹³

Hamilton believed that a life term breathed life into judges'

¹³ *Id.* at 476-77 (emphasis added).

“independence.” He recognized that elected representatives would be under pressure to serve their constituents. Eventually the pressure of a majority can overwhelm representatives to the extent that they submit to “inclinations” that are “incompatible” with the provisions of the Constitution. Judges, as the guardians of the Constitution, should not be subject to pressures of pleasing a faction to secure their tenure. To safeguard the Constitution from impulsive reactions to change or even replace it, judges should be free from external pressure. At its core, a life term provides immunity against any backlash from the people, because judges will not be terminated from office on account of an unpopular decision. Therefore, those appointed and confirmed as judges must exercise “judicial restraint.”¹⁴

Justice Scalia supported his belief that justices ought not to have term limits with his originalist view of Article III, Section I—which is explained by *Federalist No. 78*—in which Hamilton drew a distinction between the roles of representatives and judges in this republican government. Hamilton acknowledged that the judges’ role of defending against “legislative invasions . . . instigated by the majority voice,” is crucial to the survival of this republic.¹⁵ Justice Scalia took his role of defending against “legislative invasions” very seriously.

Representatives, unlike judges, do not receive lifetime appointments. Instead the people elect them to fixed terms.¹⁶ In 1992 Arkansas voters adopted Amendment 73 to their State’s Constitu-

¹⁴ See *supra* note 9 at 97. President Reagan was impressed with Chief Justice Rehnquist and Associate Justice Scalia’s displays of judicial restraint. He commented:

For [the Founding Fathers], 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? And this is why the principle of judicial restraint has had an honored place in our tradition. Progressive, as well as conservative, judges have insisted on its importance—Justice Holmes, for example, and Justice Felix Frankfurter, who once said, ‘The highest exercise of judicial duty is to subordinate one’s personal pulls and one’s private views to the law.’

Id. at 96-97.

President Reagan indicated that the Justices demonstrated “judicial restraint” in their opinions. *Id.* at 97. He put a lot of weight on the principle of “judicial restraint” in nominating the Justices. *Id.*

¹⁵ See *supra* notes 9-11.

¹⁶ U.S. CONST. art. I.

tion.¹⁷ Amendment 73 limited the terms of state elected officials; deemed persons who served three or more terms in the United States House of Representatives from Arkansas, ineligible for reelection; and made persons who served two or more terms in the United States Senate from Arkansas also ineligible for reelection.¹⁸ The majority held that the Constitution prohibits States from implementing additional congressional qualifications to those already enumerated in the Constitution.¹⁹ Justice Scalia joined the dissent that favored the implementation of term limits on United States representatives and senators.²⁰ The insinuation that Justice Scalia had succumbed to a “legislative invasion by a majority voice” was undermined by his reasoning that States are free to exercise all powers not withheld by the Constitution—and because the Constitution is silent on the issue of prescribing eligibility requirements for Representatives and Senators—States have the power to implement eligibility requirements on Representatives and Senators.²¹

It is clear from the position he took in *U.S. Term Limits, Inc.* that Justice Scalia viewed representatives as dispensable. One might ask, how Justice Scalia justified imposing term limits on representatives, when he was a lifetime appointee. The answer is simple. If the Founding Fathers intended for representatives to have unlimited terms, then Alexander Hamilton would not have drawn a distinction between the roles of representatives and judges in *Federalist* No. 78.

An originalist will look to the Founding Fathers to determine the original intent of the Constitution. This is no different with the issue of whether judges should have term limits. To make the case that judges should not be subject to term limits, an originalist like Justice Scalia need only cite to the *Federalist Papers* and Article III of the Constitution.

III. NOT ALL JUSTICES SUBSCRIBE TO ORIGINALISM

It is understandable why Justice Scalia believed that Justices should not be subject to term limits. But he may have been laboring under the assumption that all Justices were like him. In other words,

¹⁷ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995).

¹⁸ *Id.* at 784.

¹⁹ *Id.* at 837-38.

²⁰ *Id.* at 845-926 (Thomas, J., dissenting).

²¹ *Id.* at 845-50.

Justice Scalia believed that his colleagues possessed his degree of “judicial restraint.” One cannot help but question the “judicial restraint” on both the conservative and liberal wings of the Supreme Court, when recent rulings from the Roberts’ Court have been split five to four.²² The Supreme Court is divided because recent Presidents have been more inclined to make political nominations.²³ However, despite the political divide on the Supreme Court, Justice Scalia believed that liberal and conservative justices in his Court possessed the requisite judicial restraint to serve as justices.

IV. CONCLUSION

Justice Scalia was one of the most distinguished jurists of our time. His personality was discernable in his writings. Conservatives loved him and liberals despised him. He shared a close friendship with Justice Ruth Bader Ginsburg, his legal adversary. In fact, at the luncheon I attended, Justice Scalia discussed his friendship with Justice Ginsburg whom he held in high esteem. He expressed confidence in Justice Ginsburg’s work and dedication to the Court because he knew that she was just as dedicated as he was to the Court.

Still rather terrified from asking the term limit question, I noticed that despite Justice Scalia’s criticisms of his colleagues, he had

²² Scott Chiusano, *Landmark decisions during Roberts’ decade as Chief Justice*, NY DAILY NEWS (Sept. 29, 2015, 2:35 PM), <http://www.nydailynews.com/news/national/landmark-cases-john-roberts-decade-chief-justice-article-1.2378637> (“His tenure has been a mixed bag of these sentiments, as the court has seesawed across party lines and overturned rulings with deep-set precedents on significant social issues.”).

²³ *See id.*; Richard W. Garnett, *The politicization of our Supreme Court*, FOX NEWS OPINION (Oct. 5, 2015), <http://www.foxnews.com/opinion/2015/10/05/politicization-our-supreme-court.html> (“In recent decades, Americans have increasingly turned to the Court—or, perhaps, the justices have taken it upon themselves—to resolve divisive and difficult moral and political questions.”); John Anthony Maltese, *The Long History of Presidents Nominating Supreme Court Justices in Presidential Election Years*, THE COOK POLITICAL REPORT (Feb. 15, 2016), <http://cookpolitical.com/story/9260>.

The Federalist similarly understands the power of nomination to be an exclusively presidential prerogative. In fact, Alexander Hamilton answered critics who would have preferred the whole power of appointment to be lodged in the President by asserting that the assignment of the power of nomination to the President alone assures sufficient accountability.

John McGinnis, *Advice and Consent: What the Constitution Says*, HERITAGE FOUNDATION (July 19, 2005), <http://www.heritage.org/research/reports/2005/07/advice-and-consent-what-the-constitution-says>.

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a great deal of respect for each Justice on the current Supreme Court. You can call it camaraderie among the Justices, but from hearing Justice Scalia speak, it was apparent that despite the politics associated with the Court, each Justice is highly devoted to his or her work on the Court. Justice Scalia truly believed that he and the other Justices of the Supreme Court should not be subject to term limits.