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When Congress is Away the President Shall Not Play: Justice Scalia's Concurrence in *NLRB v. Noel Canning*

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WHEN CONGRESS IS AWAY THE PRESIDENT SHALL NOT PLAY: JUSTICE SCALIA'S CONCURRENCE IN *NLRB V. NOEL CANNING*

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On June 26, 2014, the Supreme Court unanimously decided *NLRB v. Noel Canning*, holding that the Recess Appointments Clause[1] authorizes the president "to fill any existing vacancy during any recess . . . of sufficient length."[2] Justice Scalia filed a concurring opinion, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito.[3] While Justice Scalia "concurred," his opinion read more like a dissent. Both the majority and the concurring opinions relied heavily on historical evidence in arriving at their respective opinions. This was expected from Justice Scalia given his method of "new originalism," which focuses on "the original *public meaning* of the constitutional text."[4] Nevertheless, in *Noel Canning*, Justice Scalia's argument also focused mildly on original *intent*—also referred to as the "old originalism" method.[5]

This Essay focuses on Justice Scalia's concurring opinion and evaluates the historical evidence he uses. Part I summarizes Justice Scalia's originalism arguments. Part II discusses the credibility and persuasiveness of these

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1. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

2. 134 S. Ct. 2550, 2577 (2014).

3. *Noel Canning*, 134 S. Ct. at 2592 (Scalia, J., concurring).

4. Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* 15 (Apr. 28, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1825543 [http://perma.cc/72VB-QU62].

5. *See* Amy Barrett, *The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law*, 27 CONST. COMMENT. 1, 1 n.2 (2010); Thiago Luiz Blundi Sturzenegger, *The Second Amendment's Fixed Meaning and Multiple Purposes*, 37 S. ILL. U. L.J. 337, 354–56 (2013); S.L. Whitesell, Comment, *The Church of Originalism*, 16 U. PA. J. CONST. L. 1531, 1532 (2014) ("[T]he 'Old Originalism' was concerned primarily with original intent, asking what the actual enactors actually thought.").

sources from a new-originalism perspective. Finally, Part III analyzes Justice Scalia's historical argument and presents additional historical evidence that adds further credibility to his concurring opinion.

I. JUSTICE SCALIA'S ORIGINALISM CONCURRENCE

Justice Scalia believed the majority interpreted the text of the Recess Appointments Clause too broadly and turned it into a "weapon" that future Presidents can use to the detriment of future Senates.[6] He characterized the majority's reasoning as an "adverse-possession theory" of executive authority: "Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor, so the Court should not 'upset the compromises and working arrangements that the elected branches of Government themselves have reached.'"[7] Although Justice Scalia asserted that, "historical practice of the political branches is, of course, irrelevant when the Constitution is clear,"[8] he wrote a lengthy discussion about historical practice to rebut the majority's analysis.[9] He also argued that this imbalance of authority allowed by the majority opinion raises separation-of-powers issues.[10]

Justice Scalia also examined the government-structuring provisions of the Constitution and the responsibilities of the judicial branch.[11] He emphasized the Court's duty to interpret the Constitution in light of its text, structure, and original understanding.[12] He first analyzed intrasession breaks and vacancies by examining the plain meaning of the text.[13] This Essay focuses specifically on the sources Justice Scalia used for his plain-meaning argument to define "[v]acancies that may happen," the credibility of these sources, and whether there are other sources that substantiate his argument.

II. CREDIBILITY AND PERSUASIVENESS OF SOURCES FROM A NEW-ORIGINALISM PERSPECTIVE

Judges have different opinions regarding credibility of sources depending on their judicial methodology. The "new originalism" method is

6. *Noel Canning*, 134 S. Ct. at 2592 (Scalia, J., concurring).
7. *Id.*
8. *Id.* at 2600.
9. *Id.* at 2600–06.
10. *Id.*
11. *Id.* at 2592–93.
12. *Id.* at 2594.
13. *Id.* at 2595–600.

primarily attributed to Justice Scalia.[14] New originalists aim to evaluate the public meaning of the text by focusing on the perspective of an objective reasonable person at the time of the founding.[15] Common sources for the "new originalism" method include dictionaries, letters, and historical writings.[16] This view is different from the "old originalism" approach, which looks primarily to the intent of the Framers.[17]

Justice Scalia used a wide range of sources in *Noel Canning*. Most notably, he used many letters written to the Framers. His use and analysis of these sources in *Noel Canning* wavers between old originalism (intent of Framers) and new originalism (objective original public meaning). While the Framers' writings may be evidence of objective word use, it is unclear whether Justice Scalia used these sources to establish original public meaning, or instead to analyze the intent of the Framers.

Justice Scalia arrived at a different conclusion than the majority regarding the original meaning of the phrase "[v]acancies that may happen."[18] The majority held that the phrase applies both to vacancies that first come into existence during a recess and to vacancies that initially occur

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14. Solum, *supra* note 4, at 15.

15. *Id.*

16. *See id.* at 25. For an in-depth discussion regarding the use of source materials in originalist methodology, consider the following passage by Professors Calabresi and Prakash:

> [T]here exists a standard methodology of originalism that sets out a hierarchy of originalist source materials. This standard methodology has been endorsed or utilized to some degree or another by . . . Justice Antonin Scalia. This hierarchy directs constitutional interpreters to look for the original meaning of the text in predictable places: (1) Consider the plain meaning of the words of the Constitution, remembering to construe them holistically in light of the entire document. (2) If the original meaning of the words remains ambiguous after one consults a dictionary and a grammar book, consider next any widely read explanatory statements made about them in public contemporaneously with their ratification. These might shed light on the original meaning that the text had to those who had the recognized political authority to ratify it into law. (3) If ambiguity persists, consider any privately made statements about the meaning of the text that were uttered or written prior to or contemporaneously with ratification into law. These statements might be relevant *if, and only if,* they reveal something about the original public meaning that the text had to those who had the recognized political authority to ratify it into law. (4) If ambiguity still persists, consider lastly any postenactment history or practice that might shed light on the original meaning the constitutional text had to those who wrote it into law. Such history is the least reliable source for recovering the original meaning of the law, but may in some instances help us recover the original understanding of an otherwise unfathomable and obscure text.

Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552–53 (1994) (footnotes omitted).

17. *See* Solum, *supra* note 4, at 1.

18. U.S. CONST. art. II, § 2, cl. 3.

before a recess but continue to exist during the recess.[19] The majority insisted that the text is ambiguous and open to both constructions, and it cited letters by Thomas Jefferson to Wilson Cary Nicholas and Attorney General William Wirt's opinion as support for adopting this broader interpretation.[20]

Justice Scalia argued that the majority's reliance on the opinion of Attorney General Wirt was misplaced.[21] He noted that Wirt thought the most natural reading of the phrase should be rejected because it could interfere with the "'substantial purpose' [of the Constitution] to 'keep . . . offices filled.'"[22] Wirt was concerned that "giving the Clause its plain meaning would produce 'embarrassing inconveniences.'"[23] Justice Scalia noted that this interpretation is incorrect for two reasons: (1) the Constitution already provides a solution to Wirt's dilemma because Congress can authorize acting officers to perform the duties associated with a temporarily vacant office, and (2) on extraordinary occasions, the President can call the Senate back into session to consider a nomination.[24] Justice Scalia pointed out that the Framers could have authorized the President to make recess appointments to fill vacancies arising late in the session if they thought the already-existing options were insufficient.[25] Additionally, Justice Scalia disagreed with Wirt and the majority's stance that the Constitution's "'substantial purpose' is to 'keep . . . offices filled.'"[26] He instead focused on the Constitution's purpose of providing carefully crafted restraints to protect the people from the improper exercise of power.[27]

III. ANALYZING SOURCES JUSTICE SCALIA USED AND ADDRESSING ADDITIONAL SOURCES THAT SUPPORT HIS ARGUMENT

Justice Scalia believes that the recess-appointment power is "limited to vacancies that arise during the recess in which they are filled" and that the appointments at issue in *Noel Canning* that filled pre-recess vacancies were

19. NLRB v. Noel Canning, 134 S. Ct. 2550, 2556 (2014).

20. *Id.* at 2567.

21. *Id.* at 2610 (Scalia, J., concurring).

22. *Id.* (omission in original) (quoting Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631, 632 (1823)).

23. *Id.* at 2609 (quoting Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. at 634).

24. *Id.* at 2610.

25. *Id.* at 2609.

26. *Id.* at 2610 (omission in original) (quoting Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. at 632).

27. *Id.*

"invalid for that reason as well as for the reason that they were made during the session."[28] The main sources Justice Scalia uses to justify this conclusion include Samuel Johnson's *A Dictionary of the English Language*, Federalist Paper No. 67, letters written to the Framers, and *Blackstone's Commentaries*.[29]

A. Johnson, A Dictionary of the English Language

Justice Scalia cites Samuel Johnson's *A Dictionary of the English Language*[30] to define "[v]acancies that may happen."[31] *Johnson's Dictionary* is a credible source for interpreting the original meaning of the U.S. Constitution.[32] In fact, *Johnson's Dictionary* was considered the "standard authority at the time when the Constitution was drawn up in 1787."[33] Justice Scalia invoked *Johnson's Dictionary* by writing: " 'Happen' meant then, as it does now, '[t]o fall out; to chance; to come to pass.' Thus, a vacancy that *happened* during the Recess was most reasonably understood as one that *arose* during the recess."[34] In new-originalism analysis, dictionaries provide great weight in determining the original public meaning. Although *Johnson's Dictionary* was considered an exceptionally authoritative source at the time the Constitution was enacted, critics might nevertheless be skeptical of Justice Scalia's interpretation because the majority cited more dictionary sources than Justice Scalia did. Justice Scalia's analysis would carry even more weight if additional dictionary sources supported his interpretation of "happen."

Other dictionary sources that support Justice Scalia's definition of "happen" include: William Perry's *Royal Standard English Dictionary*, which similarly defines "happen" as "to come to pass, to light on";[35] Thomas Sheridan's *A Complete Dictionary of the English Language*, which defines

28. *Id.* at 2606.

29. *See id.* at 2606–10.

30. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) [hereinafter JOHNSON'S DICTIONARY].

31. *Noel Canning*, 134 S. Ct. at 2606 (Scalia, J., concurring) (citing 1 JOHNSON'S DICTIONARY, *supra* note 30, at 913).

32. Henry Hitchings, DR. JOHNSON'S DICTIONARY: THE EXTRAORDINARY STORY OF THE BOOK THAT DEFINED THE WORLD 230 (2006).

33. *Id.*

34. *Noel Canning*, 134 S. Ct. at 2606 (Scalia, J., concurring) (alteration in original) (citations omitted) (quoting 1 JOHNSON'S DICTIONARY, *supra* note 30, at 913).

35. WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (Isaiah Thomas ed., 1788).

"happen" as "to fall out by chance, to come to pass; to light on by accident";[36] John Walker's *A Critical Pronouncing Dictionary and Expositor of the English Language*, which also defines "happen" as "to fall out by chance, to come to pass; to light on by accident";[37] and the *Oxford English Dictionary*, which defines "happen" as "to take place; to occur, betide, befall."[38] While citing all of these dictionaries may have been unnecessary, given that many of them include *Johnson's Dictionary*'s definition of happen ("to fall out; to chance; to come to pass"[39]) and are likely reprints of *Johnson's Dictionary*, examining these additional sources further supports the credibility of Justice Scalia's analysis.

Additionally, some of the earlier dictionary definitions of "happen" focus on "accident" or "chance."[40] This emphasis on "accident" or "chance" could support the theory that "[v]acancies that may happen" are unexpected occurrences and would therefore arise *during* the recess. These sources further support Justice Scalia's assertion that "a vacancy that happened during the Recess was most reasonably understood as one that arose during the recess."[41]

To understand how "that may happen" relates to "[v]acancies," it is also helpful to examine definitions of "vacancies." For instance, N. Bailey's *Dictionarium Britannicum* defines the term "vacant" as "abandoned for want of an Heir, after the Death or Flight of their former Owner" and "not filled by an incumbent."[42] Similarly, John Bouvier's *A Law Dictionary* defines "vacancy" as "[a] place which is empty. The term is principally applied to cases where an office is not filled. By the [C]onstitution of the United States, the [P]resident has the power to fill up vacancies that may happen during the recess of the [S]enate."[43] Bouvier's emphasis on vacancies that may happen "*during the recess of the senate*" supports Justice Scalia's assertion that a

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36. THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2nd ed. 1789).

37. JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY AND EXPOSITOR OF THE ENGLISH LANGUAGE (1803).

38. THE OXFORD ENGLISH DICTIONARY 1096 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

39. 1 JOHNSON'S DICTIONARY, *supra* note 30, at 913.

40. *See, e.g.*, SHERIDAN, *supra* note 36 ("to fall out by *chance* . . . to light on by *accident*" (emphasis added)); WALKER, *supra* note 37 ("to fall out by *chance* . . . to light on by *accident*" (emphasis added)).

41. NLRB v. Noel Canning, 134 S. Ct. 2550, 2606 (2014) (Scalia, J., concurring).

42. N. BAILEY, DICTIONARIUM BRITANNICUM (1730).

43. John Bouvier, 2 A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 597 (2d ed. 1843).

vacancy must arise *during the recess* because Bouvier did not discuss any other time during which the President has power to fill vacancies.

B. Federalist Paper No. 67 and Letters Written to the Framers

Justice Scalia cited Federalist Paper No. 67: "[a]s Hamilton explained, appointment with the advice and consent of the Senate was to be 'the general mode of appointing officers of the United States.' "[44] Here, Justice Scalia did not make a claim about the intent of the Framers. Instead, he discussed their general understanding of constitutional structure. But this source of analysis may be perceived as what the Framers *intended*, and not what the objective meaning of the text was. While the Federalist Papers may be a persuasive source for the old-originalism method, it is less convincing for those who subscribe to the new-originalism approach. Claims that the Federalist Papers influenced the public meaning or original understanding of the text of the Constitution are weak.[45] Some scholars argue that partisan bias may have influenced the Federalist Papers authors' word choices.[46] Instead, judges should attempt to counteract potential bias by also consulting anti-Federalist writings as well to ensure consistent word usage.[47] Another argument against using the Federalist Papers is that the Framers wrote them to address the question of whether the Constitution should be adopted—not to interpret the meaning of the language in the Constitution.[48] Nevertheless, Justice Scalia's use of the Federalist Papers parallels the majority's use of them.[49]

Justice Scalia also cited George Washington's Attorney General Randolph and John Adams's Attorney General Lee for support that the original understanding of the text was that a vacancy that happened during the recess was one that *arose during the recess*.[50] While this is relevant evidence of public meaning, it is not dispositive, given that it was only one or two individuals' interpretation. At face value, these two Attorneys General do not seem to be any more or less persuasive than the other Attorneys

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44. *Noel Canning*, 134 S. Ct. 2607 (Scalia, J., concurring) (quoting THE FEDERALIST NO. 67 (Alexander Hamilton)).

45. Gregory E. Maggs, *A Concise Guide to the Federalist Papers As a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 825–40 (2007).

46. *Id.* at 838.

47. *Id.* at 839.

48. *Id.*

49. *See Noel Canning*, 134 S. Ct. at 2559–78.

50. *Id.* at 2607–08 (Scalia, J., concurring) (quoting Opinion on Recess Appointments (July 7, 1792) *in* 24 PAPERS OF THOMAS JEFFERSON 165–66 (J. Catanzariti ed., 1990); then citing Letter to George Washington (July 7, 1796); and then citing Letter from James McHenry to John Adams (May 7, 1799)).

General cited by the majority.[51] Justice Scalia did not explain why the interpretation of Randolph and Lee should control, other than stating that Randolph "had been a leading member of the Constitutional Convention."[52] Additionally, "old originalists" typically employ this method of interpretation to evaluate original *intent*, not original *public meaning*. Nevertheless, this evidence parallels and rebuts the majority's use of Attorneys General.

Many other historical documents use the words in the phrase "[v]acancies that may happen" that confirm Justice Scalia's argument. For instance, George Washington wrote to Alexander Hamilton: "I shall not be surprized [sic] at any event that may happen, however extraordinary it may be."[53] Although Washington does not speak directly to "[v]acancies" here, this does imply that the phrase "that may happen" often refers to unexpected or extraordinary occurrences, which would again support Justice Scalia's conclusion that "[v]acancies that may happen" must arise during the recess. Additionally, some of Washington's writings discuss separation-of-powers concerns that Justice Scalia mentions. For example, Washington wrote in a general order: "The General will, upon any Vacancies that may happen, receive recommendations, and give them proper Consideration, but the Congress alone are competent to the appointment."[54] This suggests that Washington shared the separation of power concerns that Justice Scalia voiced in his opinion.

C. Blackstone's Commentaries

In addition to citing the Attorneys' General interpretations of the Clause, Justice Scalia also cited *Blackstone's Commentaries*. Justice Scalia described Blackstone as "[o]ne of the most prominent early academic commenters on the Constitution."[55] Blackstone's interpretation assumed that the President could make a recess appointment only if "the office became vacant during the recess."[56] Justice Scalia is correct that Blackstone is

51. *Id.* at 2568–73 (majority opinion).

52. *Id.* at 2607 (Scalia, J., concurring).

53. Letter from George Washington to Alexander Hamilton (May 8, 1796), *in* 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799 39 (John C. Fitzpatrick ed., 1939) [hereinafter WRITINGS OF GEORGE WASHINGTON].

54. General Orders (Jan. 1, 1776), *in* 4 WRITINGS OF GEORGE WASHINGTON, *supra* note 53, at 204.

55. *Noel Canning*, 134 S. Ct. at 2608 (Scalia, J., concurring).

56. *Id.*

a credible legal source,[57] but *Blackstone's Commentaries* is not dispositive of the *original meaning* of the *language* in the Constitution. While *Blackstone's Commentaries* may have influenced the Framers,[58] this source may be more useful to advance an original intent argument instead of an original public meaning argument. Nevertheless, Justice Scalia discussed how Blackstone "read the Clause,"[59] which could be evidence of public meaning of the words. Analyzing how Blackstone used the language "[v]acancies that may happen" would be more useful for a new-originalism argument.

While the Supreme Court often uses *Blackstone's Commentaries* as a reliable source, Blackstone wrote during a time when common law was "on the wane" and parliamentary supremacy was "definitively established."[60] This was not reflective of the seventeenth century, when the original colonies were established.[61] Therefore, Blackstone's interpretation of the Constitution, while useful, may not definitively reflect the original public meaning of the text.

Other commentaries other than Blackstone's support Justice Scalia's argument. For instance, Justice Story's *Commentaries* regarding the definition of "happen" is informative:

> The word "happen" had relation to some casualty, not provided for by law. If the senate are in session, when offices are created by law, which have not as yet been filled, and nominations are not then made to them by the president, he cannot appoint to such offices during the recess of the senate, because the vacancy does not happen during the recess of the senate.[62]

Justice Story's *Commentaries* focuses on the conventional meaning of the text, context, and the uses of the language in the Constitution.[63] Justice Story's *Commentaries* analyzes the specific textual language in "[v]acancies that may happen" and thus closely aligns with the new originalism method

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57. *See* Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111, 1112–13 (2006).

58. *See* Joshua R. Mandell, Note and Comment, *Trees That Fall in the Forest: The Precedential Effect of Unpublished Opinions*, 34 LOY. L.A. L. REV. 1255, 1278 (2001).

59. *Noel Canning*, 134 S. Ct. at 2608 (Scalia, J., concurring).

60. *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 562 (2006).

61. *Id.*

62. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1553 (1833).

63. *See* Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 445 (2006).

for which Justice Scalia advocates. These additional sources add credibility to Justice Scalia's already thorough concurring opinion.

CONCLUSION

Some have criticized Justice Scalia for his "inconsistent originalism" after his opinion in *Noel Canning*.[64] This Essay evaluated Justice Scalia's use of sources in determining the original public meaning of the phrase "[v]acancies that may happen" and discovered new sources that may bring clarity to the text. The new sources discussed in this Essay add further support to Justice Scalia's argument, helping to mitigate the concerns of critics.

64. Daniel Colbert, Noel Canning, Heller, *and Scalia's Inconsistent Originalism*, AMERICAN CRIMINAL LAW REVIEW, http://www.americancriminallawreview.com/aclr-online/noel-canning-heller-and-scalias-inconsistent-originalism/ [http://perma.cc/G76A-TKWY].