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## Justice Scalia's Legacy and What's Next for the Supreme Court



"Will [Scalia's] writings on originalism, textualism and the rule of law have a lasting effect on our legal culture, or will they, as some have already predicted, fade as the composition of the court changes over time?" Professor Micah Schwartzman, right, asked the panel. Dahlia Lithwick, Frederick Schauer and John Harrison [not pictured] also spoke at the event.

When U.S. Supreme Court Justice Antonin Scalia died Feb. 13, he set off a "galactic drama" and left a court term with consequential questions that may remain unanswered, Slate legal correspondent and senior editor Dahlia Lithwick said during a panel discussion at the University of Virginia School of Law on Thursday.

Lithwick joined UVA Law professors [John Harrison](#), [Frederick Schauer](#) and moderator [Micah Schwartzman](#) for a discussion on Scalia's legacy, and looked ahead to the political battle over his successor. The event was sponsored by the Virginia Law Democrats and the UVA Law chapter of the American Constitution Society.

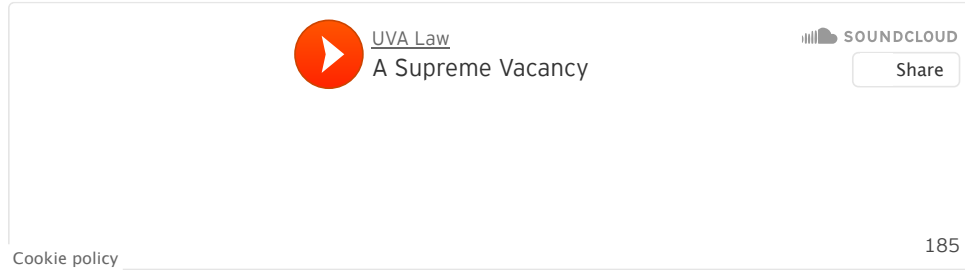
"This was going to be the term of our lifetimes," Lithwick said, listing cases on affirmative action, abortion, voting rights, religious liberty and immigration reform.

Now that the Senate's Republican leaders have said they will not confirm a nomination during the current presidential term to replace Scalia, a [former UVA Law faculty member](#), uncertainty hangs over the court.

"Anybody who tells you they know what's going to happen next is lying," Lithwick said.

Schauer, an expert in free speech and constitutional law and theory, kicked off the panel with four observations on Scalia's legacy.

In the 1950s and 1960s, when cases involving free speech involved Communists, Vietnam protesters and civil rights demonstrations, "free speech was the province of the political left," he said. "That has changed dramatically."



A SoundCloud player interface for a track titled "A Supreme Vacancy" by "UVA Law". The player includes a play button icon, the track name, the artist name, a "Share" button, and a "Cookie policy" link. The track has 185 plays.

Whether we think about issues of commercial speech, campaign finance (such as *Citizens United*) or abortion clinic protestors, "No longer do we think of the strongest free speech arguments as coming from the left. Justice Scalia — assisted by others, but he was clearly the leader — [was] the first and the loudest in shifting how we think about free speech issues," Schauer said.

Scalia was perhaps the most prominent critic of stare decisis, he said, the tradition of the bench abiding by prior decisions of that court. Paraphrasing Scalia's stance, Schauer said, "I took an oath to support and uphold the Constitution, but I didn't take an oath to support and uphold my predecessors' misreadings of the Constitution."

"A Supreme Vacancy" with Slate's Dahlia Lithwick and UVA Law Professors



"He put on the agenda a genuine question about whether the Supreme Court is under any obligation at all to follow the decisions of previous courts," Schauer said.

Third, Scalia changed the debate about how to interpret the Constitution. "The entire nature of the position against so-called living constitutionalism has been shifted from original intent to original public meaning — that will last for some time," he said. "That's almost entirely Justice Scalia's doing."

Perhaps less discussed, Scalia had a substantial impact in criminal trials, Schauer said. In *Crawford v. Washington* (2004), Scalia offered a vigorous and robust defense of the confrontation clause of the Sixth Amendment, which says accused persons must be allowed to confront, through cross-examination, their accusers. After that case, prosecutors changed how they handled domestic violence and child abuse cases, often tried through evidence-based prosecution and statements made out of court in the past; now in most instances accusers must testify in court.



John Harrison and Dahlia Lithwick

Harrison turned to the mechanics of how the court would proceed with cases it has already heard. Justices could either decide cases they have already heard — possibly leading to 4-4 decisions affirming the lower-court decision — or hold them for the next term. (He said he recently debated with colleagues, "What happens if they are divided 4 to 4 on the question of what to do between those two options?")

Regarding the nomination of Scalia's successor, Harrison said, "It is entirely up to the president whom to nominate and it is entirely up to the Senate what to do about that."

Harrison recalled the "Armageddon" of working on Supreme Court confirmations when he was employed by the Justice Department during a Democratic Senate and Republican presidency.

"The next time will be whatever is a step up from Armageddon, because the stakes are, if anything, higher, and the parties are, if anything, more polarized, especially on issues related to the Supreme Court. So Armageddon-plus is what we will see if the presidency and the Senate are in opposite hands [after the election]."

Harrison said Scalia is best known for his critique of legislative history and his advocacy of original linguistic meaning over lawmakers' intent as a basis for interpreting laws and the Constitution.

"Judge and Justice Scalia raised fundamental questions that have occupied scholars and will continue to occupy scholars for some time because they are so basic," Harrison said.

Though some are worried about whether the court could become more fractious with a potential series of 4-4 votes this term, Lithwick said she has come to doubt this will happen.

"I think by some combination of having re-argument in some cases and by having tiny jurisdictional decisions, we may not see an explosively angry term at the end of this term," Lithwick said. "I think all of the justices want absolutely nothing to do with being an election-year issue."

Lithwick said Obama would nominate someone who has recently been confirmed by the Senate by a 97-0 margin.

"By temperament, he is not a person who's going to put up the liberal version of Antonin Scalia," Lithwick said.

Lithwick said she was fascinated by the dichotomy of his influence as an advocate for originalism and the lack of originalists on the Supreme Court — now, only Justice Clarence Thomas remains.

Yet, "None of us — none of us — who've gone to law school when Scalia [was] on the bench can say that we're not completely shaped by his interpretive approach and his style," she said.

"The other place that Scalia's massive legacy lies is just in the way he chose to write for the public and not for the court, and that if you look at how, in his wake, both the chief justice and Elena Kagan are at pains to write the way he wrote — to write in tweetable units and to write in ways that move the needle in Congress and move the needle in public discourse — that is a Scalia legacy and I think it's important."

The flip side of that writing power, Lithwick suggested, is how it became more inflammatory over time, influenced others and led to "a willingness to speak much more sharply at the court." She wondered whether the tone would shift in his absence.

The next nominee, panelists agreed, would be a symbol for the Democrats, someone voters would rally behind if Republicans continue to block confirmation hearings. Lithwick said it was in the Democrats' interest to keep the issue on the front pages in an election year.

In some ways Scalia himself has already influenced the choice for his successor, as well as the selection of recent justices. He helped wipe out a kind of Supreme Court jurisprudence that didn't stick to the text.

"The days when that kind of loosey-goosey interpretive style was permitted are over," Lithwick said. "Originalism is baked in, whatever your political orientation, and I think it's going to be baked in for a long, long time."

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