Original Intent v Consistency, and the Constitutional Right to Privacy

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For many years, I've been a bit upset about the "original intent" faction of the bar, and, more specifically, the progeny of the Federalist Society, who, as a result of 5 out of 7 of the most recent Presidential terms worth of conservative Republican court nominations, have come to dominate the Federal judiciary. For one thing, I've always thought it fantastic that these scholars were so apt at reading the minds of those who lived in a different time and such a different place.

I've had meandering thoughts about this area for a long time, but today, I've been thinking about how the doctrine of "original intent" seems at odds with the present positions of these conservative judges, particularly those on the U.S. Supreme Court, in at least two areas.

First, consider abortion. To fully evaluate the view of the Founding Fathers about abortion, one need only check out the prevailing social standards as they existed in 1787-91, the time during which the Constitution and the Bill of Rights were drafted and enacted. At that time, laws prohibiting abortion were unheard of; there weren't any. Lest we assume that Justice Scalia is already retorting: "But nobody would have thought of outlawing a procedure that was so reprehensible that it was unheard of by the good Christian men and women who founded our nation." Putting Scalia's other biases aside, that statement, if made, is factually incorrect. Abortion was routine in the late 18th century, done with the assistance of midwives, and not being something that was the topic of conversation among the literati. While families, as a rule, were larger than they are today, a review of the family size of our Presidents, Vice-Presidents, cabinet members and more distinguished members of Congress makes one thing palpably clear: their wives were not in a state of perpetual pregnancy, as were the women in other, much more devout sects. Given the state of birth control during that era, this fact ought to give any thinking person reason to pause. Given the horrific rate of death during childbirth during that era, many of the more educated Americans

tried to limit childbirth to children that were desired. Since tubes could not be tied in that bygone era, and vasectomy wasn't a word, much less a procedure, one can only imagine how busy the midwives were. And, of course, midwifery was a perfectly respectable, actually essential, profession, given that birth routinely occurred at home. ***Had the Founding Fathers wanted to protect "unborn lives," they had every opportunity to do so in the Constitution, and again, perhaps more appropriately, in the Bill of Rights***. The absence of even a mention of this issue, given how commonplace abortion was, reflects, if anything, an acceptance of the procedure, and, most probably, a view that the government had no place making such personal decisions for any of its citizens.

That neatly segues into the second area, search and seizure. In the aftermath of the Revolution, Americans were quite sensitive to their personal privacy, which had been effectively ignored during the British occupation. Various remnants of this concern remain in the Bill of Rights, such as the entire 3rd Amendment. To my knowledge, nobody has ever suggested applying a balancing test or a "good faith exception" to the quartering of soldiers. However, the 4th Amendment guarantee against unreasonable searches and seizures has a direct antecedent in the British constitutional tradition that a man's home is his castle. There were no exceptions that I know of at the time of the Founding Fathers. The fact that the 4th Amendment is written in absolute proof stands in corroboration of this. In practice, the 4th Amendment was routinely violated by police actions, especially against the poor and people of color, until the middle of the 20th century. At that time, the Warren court actually consider the breadth of the 4th Amendment and reaffirmed that the scope of government search and seizure was to be stricly limited and subject to the strictest scrutiny. It seems ironic that the very police departments that so opposed these rulings when they were first promulgated are among the strongest supporter of many of these procedures today, after 40 and 50 years in practice. So what's happened since? Well, since Earl Warren retired, the Court has grown increasingly conservative, and as early as the 1970s began to chip away at the landmark decisions of the Warren court, creating a series of exceptions to the bright line rules. If nothing else, the law was becoming steadily murkier. This was a public works project for criminal defense attorneys! And today, we have a Supreme Court that is in love with allowing the police the widest possible leeway in searches and seizures, creating any exception for which legal justification can be created; exceptions are created rather than holdings outright overturned.

So, I ask these questions. Where did "original intent jurisprudence" go in the abortion argument? And why isn't anyone standing up for the Founding Fathers' absolute language in the 4th Amendment? One would expect some consistency from these Justices who so decry "activism" when they disagree with the result. I'm waiting . . .