

To: NYU Legal History Colloquium  
From: Ed Purcell

I am presenting four chapters from my coming book entitled "Antonin Scalia and American Constitutionalism: The Historical Significance of a Judicial Icon," and I am including the table of contents below so you can get a better idea of the organization of the book and where these four chapters fit in. The chapters I am asking the colloquium to consider are chapters 5, 7, 11, and 12. The colloquium considered two of these chapters (5 and 12) last year (along with four others, 3, 4, 6, and 10), but not the other two (chapters 7 and 11). The two chapters the colloquium considered last year have been substantially altered and expanded, so they need a new reading. Naturally, I will appreciate any and all comments and suggestions. Thanks in advance for your help.

## Acknowledgments

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## CHAPTER 5

### AN INCONSISTENT JURISPRUDENCE: THE DOCTRINAL SPECTRUM

Both on and off the bench Scalia proclaimed his commitment to originalism and textualism, but he applied those approaches differently in different areas and frequently failed to apply them at all.<sup>1</sup> He readily cited Blackstone as a classic originalist authority when the Englishman's views were in accord with his own, for example, but he dismissed them when not.<sup>2</sup>

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<sup>1</sup>Commentators left and right have repeatedly demonstrated Scalia's inconsistencies. See, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism*, 75 U. Cincinnati L. Rev. 7, (2006); Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18, 23; James B. Staab, *The Tenth Amendment and Justice Scalia's "Split Personality,"* 16 J. L. & POL'Y. 231; Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000) (hereafter, "Chemerinsky, *Jurisprudence of Justice Scalia*"); BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* 396, 405-06, 412-14, 561 n.1 (hereafter, "MURPHY, *SCALIA*"); Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-the-Argument Originalism*, 42 HARV. J. L. & PUB. POL'Y 91 (2009)); Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 969-71 (1999); Jeffrey Rosen, *Originalist Sin*, THE NEW REPUBLIC, May 5, 1997, available at <https://newrepublic.com/article/74152/originalist-sin>. For an effort to defend the contrary view, see, e.g., *SCALIA'S COURT: A LEGACY OF LANDMARK OPINIONS AND DISSENTS* (Kevin A. Ring, ed., 2016), at 6-19.

<sup>2</sup>Compare ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* (Christopher J. Scalia & Edward Whelan, eds., 2017), 209 (citing Blackstone in support of private right to bear arms) (hereafter, "SCALIA SPEAKS") with Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, The Tanner Lectures on Human Values, Princeton University, March 8-9, 1995, at 91 (rejecting Blackstone on the "intent of the legislature" as an interpretative standard) (hereafter, "Scalia, *Common-Law Courts*").

While the reasoning in his opinions varied greatly, it varied in ways that commonly served his political and ideological goals.

On First Amendment speech issues, to begin, Scalia essentially abandoned originalism<sup>3</sup> and adopted a strong version of the muscular free-speech law that developed only in the twentieth-century.<sup>4</sup> In a highly controversial 5-4 decision, for example, he voted with the majority to defend the right to burn the American flag as an act of “symbolic speech.”<sup>5</sup> By protecting an action that he personally found offensive,<sup>6</sup> he demonstrated his genuinely strong

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<sup>3</sup>The Supreme Court justices in the 1790s generally approved prosecutions under the Alien and Sedition Acts on circuit, and they favored a strong state over the right of dissenters. WENDELL BIRD, *PRESS AND SPEECH UNDER ASSAULT: THE EARLY SUPREME COURT JUSTICES, THE SEDITION ACT OF 1798, AND THE CAMPAIGN AGAINST DISSENT* (2016).

<sup>4</sup>Scalia, for example, accepted the expansive idea that “expressive conduct” may be protected. “Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572, 577 (1991) (Scalia, J., concurring in the judgment) (emphasis in original). For Scalia’s defense of a strong, if non-originalist, First Amendment, *see, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (Scalia, J.). He relied heavily on political “tradition” in *Burson v. Freeman*, 504 U.S. 191, 214 (1992) (Scalia, J., concurring in the judgment). Sometimes, in rhetorical flourishes, he would make a weak stab at invoking the “Founders” in support of his modern First Amendment views. *See, e.g.*, *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 679, 693-94 (1990) (Scalia, J., dissenting) (relying on the ideas of Holmes and Brandeis and declaring that “for the first time since Justice Holmes left the bench” the Court was holding that “the mere *potential* for producing social harm” allowed a restriction on speech, at 689, and then adding later in his opinion that “I doubt that those who framed and adopted the First Amendment would agree” with the majority opinion, at 693).

<sup>5</sup>*Texas v. Johnson*, 491 U.S. 397 (1989) (Brennan, J., joined by Scalia, J.). *See generally* ROBERT JUSTIN GOLDSTEIN, *FLAG BURNING & FREE SPEECH: THE CASE OF TEXAS V. JOHNSON* (2000). When Scalia came to breakfast the morning after the decision was announced, he found his wife marching around the kitchen table singing “It’s a Grand Old Flag.” *Id.* at 112.

<sup>6</sup>“Don’t get me wrong,” he assured audiences. “I don’t like scruffy, bearded, sandal-wearing people who go around burning the United States flag.” JOAN BISKUPIC, *AMERICAN*

commitment to free speech but demonstrated equally his willingness to disregard originalism when it suited his purposes. Acknowledging that “the freedom of speech” required adaptation to modern conditions, he justified his departure from originalism with a glaring dash of living constitutionalism, stating that “the Court must follow the trajectory of the First Amendment.”<sup>7</sup>

More striking, Scalia also went far beyond any strict textualism by declaring that the terms “speech” and “press” in the First Amendment “stand as a sort of synecdoche” for the “full range of communicative expression.”<sup>8</sup> That was certainly an understandable approach, but it also represented an exceptionally elastic form of textualism. Obviously it violated on its face his “most specific meaning” principle. More telling, it was not the textualism he applied when he dealt with concepts that he sought to limit sharply, such as “liberty,” “due process,” “equal protection,” and “cruel and unusual punishments.”<sup>9</sup> Surely those concepts could equally be seen as “synecdoches” standing for a “full range” of related rights. Indeed, if such relatively specific terms as “speech” and “press” were synecdoches for a broader range of expressive rights, those

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ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 232 (2009) (hereafter, “BISKUPIC, AMERICAN ORIGINAL”).

<sup>7</sup>Scalia, *Common Law Courts*, 118-19. The interpretative “enterprise is not entirely cut-and-dried, but requires the exercise of judgment.” *Id.* at 119.

<sup>8</sup>Scalia, *Common Law Courts*, 112.

<sup>9</sup>Scalia, for example, did not see “equal protection” as a synecdoche for a more comprehensive concept of equality when he dissented from the Court’s ruling that the Equal Protection Clause prohibited gender discrimination. Instead, he condemned a “self-righteous Supreme Court, acting on its Members’ personal view of what would make a ‘more perfect Union,’” and that sought to “impose its own favored social and economic dispositions nationwide” even in the face of “dispositions that are centuries old.” *United States v. Virginia*, 518 U.S. 515, 566, 601 (1996) (Scalia, J., dissenting).

other more general and capacious terms seemed even more clearly designed to serve as synecdoches for even broader ranges of equally protected rights.

*Brown v. Entertainment Merchants Association* exemplified the elasticity of his First Amendment textualism. There, writing for the Court, he voided a state statute that restricted the availability of violent video games to minors. His opinion gave the First Amendment a seemingly all-encompassing sweep that lacked any convincing originalist justification and seemed an exceptionally expansive, if not virtually boundless, use of his “synecdoche” method.”<sup>10</sup> Justice Thomas, a more consistent originalist than Scalia, indicted his colleague’s approach. “The Court’s decision today does not comport with the original public understanding of the First Amendment,” Thomas wrote in dissent, and the amendment did not have the expansive meaning that Scalia gave it. “The practices and beliefs of the founding generation establish that ‘the freedom of speech,’ as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians.”<sup>11</sup>

More obvious, Scalia played fast and loose with both history and tradition in his embarrassingly strained effort to square his originalism with the Court’s interpretation of the Equal Protection Clause in the path-breaking civil rights case *Brown v Board of Education*.<sup>12</sup> He

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<sup>10</sup>*Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011) (Scalia, J.).

<sup>11</sup>*Brown v. Entertainment Merchants Association*, 564 U.S. at 821 (Thomas, J., dissenting).

<sup>12</sup>*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (Warren, C.J.).

simply insisted that the original understanding of the clause prohibited racial discrimination.<sup>13</sup> In doing so he ignored the actual genesis and meaning of the clause in the Thirty-Ninth Congress that enacted it and—contrary to his theoretical claims--ignored as well the “original” racial assumptions of those who drafted, debated, and voted for it.<sup>14</sup> More pointedly, he ignored the fact that the same Thirty-Ninth Congress had also voted to segregate the public schools in the District of Columbia.<sup>15</sup> As Michael Klarman concluded, the “original understanding of the Fourteenth Amendment plainly permitted school segregation.”<sup>16</sup> Finally, Scalia dismissed the interpretive significance of the obvious and painful racist tradition of the subsequent three quarters of a century as well as the fact that over those same decades the Court had refused to invalidate laws that enforced racial segregation, discrimination, and disenfranchisement.

To avoid the glaring contradiction between his acceptance of *Brown* and his strong jurisprudential claims about “tradition,” Scalia substituted a different standard than he usually

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<sup>13</sup>Rutan v. Republican Party of Illinois, 497 U.S. 62, 92, 95-96 & n.1 (1990) (Scalia, J., dissenting). Abandoning originalism and tradition, he subsequently turned to a severely watered down textualism to furnish a justification for *Brown*. ANTONIN SCALIA & BRYAN A GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 88 (2014) (hereafter, “SCALIA, *READING*”).

<sup>14</sup>ANDREW KULL, *THE COLORBLIND CONSTITUTION* chs. 4-5 (1992). The “preference” that was “shared by the Thirty-Ninth Congress and by most of our government authorities” at the time “was to retain the discretion to discriminate by race as appropriate.” *Id.* at 82.

<sup>15</sup>Chemerinsky, *Jurisprudence of Justice Scalia*, 398. There was a broad consensus that the original understanding of the Fourteenth Amendment did not require an end to racial segregation. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (identifying numerous scholars who took that view, at 951-52, but contradicting that consensus).

<sup>16</sup>MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 26 (2004).

used when he invoked its normative authority. The tradition of racial segregation and disenfranchisement commanded no authority, he explained, because it was not “unchallenged.”<sup>17</sup> In fact, few traditional patterns of human behavior in America or elsewhere in the modern world have ever existed without some challenge or variation, but when Scalia invoked tradition as a controlling norm in other areas he treated the “traditions” he approved as authoritative, unproblematic, and seemingly universally honored.<sup>18</sup> For those traditions he did not inquire into the extent of agreement they commanded or consider who or what, if anything, challenged their authority. For example, he declared that the “religious tradition” of the United States “has consistently affirmed a national belief in God,” but in recognizing that tradition he gave no heed to the millions of Americans who questioned or rejected that belief or even to the many atheists who not only challenged it but did so formally in the courts.<sup>19</sup> Similarly, he defended his interpretation of the Second Amendment on grounds of a “tradition” of gun possession while

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<sup>17</sup>Rutan, 497 U.S. at 95 n.1 (Scalia, J., dissenting).

<sup>18</sup>See, e.g., *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 156, 163 (1994) (Scalia, J., dissenting); *United States v. Virginia*, 518 U.S. at 568 (Scalia, J. dissenting); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626, 2628 (2015) (Scalia, J., dissenting). See BISKUPIC, *AMERICAN ORIGINAL*, 269-70; RICHARD A. BRISBIN, *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 221-22, 327 (1997); LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 97-109 (1991). On “invented traditions” see Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* (Eric Hobsbawm and Terence Ranger, eds. 1983), 1-14.

<sup>19</sup>SCALIA SPEAKS, 320. In *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) (Stevens, J.), an atheist challenged the phrase “under God” in the Pledge of Allegiance, and Scalia had to recuse himself because of his prior public statements supporting religion. BISKUPIC, *AMERICAN ORIGINAL*, 267-68. For other similar challenges by atheists, see, e.g., *Torasco v. Watkins*, 367 U.S. 488 (1961) (ruling unanimously that states cannot bar an atheist from holding local office because he refuses to take oath asserting a belief in God); Laurie Goodstein, *In 7 States, Atheists Fight for Removal of Belief Rule*, *NEW YORK TIMES*, Dec. 7, 2014, p. A23.

dismissing the contrary “tradition” of widespread regulation and restriction on the possession of firearms.<sup>20</sup> Thus, to defend *Brown* Scalia made an exception to his standard concept of the normative authority of tradition and reshaped it to conform to the dominant contemporary—and entirely non-originalist--social judgment about race that he had come to accept in the late twentieth century.

Three years later, moreover, he had no qualm about denouncing the Warren Court for doing exactly what he had done in justifying *Brown*. In *Minnesota v. Dickerson*, a Fourth Amendment case, he indicted his judicial *bete noir* on the ground that in 1968 it had “made no serious attempt to determine compliance with traditional standards” but had merely relied on “current estimations” of reasonableness.<sup>21</sup> Given that he had done exactly the same thing in justifying his acceptance of *Brown*, his condemnation of the Warren Court in *Dickerson* illustrated the inconsistency, if not sheer expedience, of accusations he made and arguments he deployed.

When necessary, Scalia’s view of the role of tradition could also change in other ways as well. In *Michael H. v. Gerald D.*, writing for the Court, he declared that tradition gave meaning to the Due Process Clause and that “our traditions have protected the marital family.” Consequently, he upheld a state statute that created an irrebuttable presumption against a child’s

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<sup>20</sup>*E.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 791, 792 (2010) (Scalia, J., concurring). *See* ch.7, *infra*.

<sup>21</sup>*Minnesota v. Dickerson*, 508 U.S. 366, 379, 380 (1993) (Scalia, J., concurring).

biological father who was not married to the child's mother. He ruled that the child of a married woman living with her husband was a child of that marriage. "Our decisions establish that the Constitution protects the sanctity of the family," he explained, "precisely because the institution of the family is deeply rooted in this Nation's history and tradition."<sup>22</sup> A decade later, however, in *Troxel v. Granville* he ignored those same traditions and rejected a mother's appeal to the "traditional" protections that the Due Process Clause gave to the "marital family." There, as applied to a petition filed by a child's grandparents and opposed by the mother, the Court voided a state statute that gave "any person" the right to petition for visitation rights over the objection of the child's parents. Scalia dissented. The traditions protecting the "marital family" that had been so compelling a decade earlier in *Michael H.* suddenly had no force. "Judicial vindication of 'parental rights' under a Constitution that does not even mention them" was wholly improper, he declared, suddenly and inconsistently invoking his "rule of silence" to negate the relevance of "tradition." Thus, enforcing the mother's right "will be ushering in a new regime of judicially prescribed, and federally prescribed, family law."<sup>23</sup> His counterpoised principles of "tradition" and constitutional "silence" proved handy alternatives, and he could deploy one or the other depending on the particular result he sought.<sup>24</sup>

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<sup>22</sup>*Michael H. v. Gerald D.*, 491 U.S. 110, 123-24 (1989) (Scalia, J.). Scalia's opinion stressed the defining power of traditions to create "fundamental rights." *Id.* at 122-24.

<sup>23</sup>*Troxel v. Granville*, 530 U.S. 57, 91, 92-93 (2000) (Scalia, J., dissenting).

<sup>24</sup>Noticeably, in *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 667 (2013) (Scalia, J., dissenting), which did not involve a substantive due process claim, Scalia treated tradition differently than he did in *Troxel* and *Michael H.* There, unlike *Troxel*, he found tradition relevant, *Adoptive Couple* at 668, but, unlike *Michael H.*, he found it supporting rather than opposing the claim of an unmarried biological father.

Scalia played equally fast and loose with the Fourth Amendment. He defended the Court's 1928 decision in *Olmstead v. United States*, which held that wiretapping was not covered by the amendment.<sup>25</sup> "Easy case," he explained, for in *Olmstead* "the real Fourth Amendment governed," and a "conversation is not a person, house, paper, or effect"--the specific and limited categories of things that the amendment explicitly protected.<sup>26</sup> Fair enough, one might suppose as a matter of strict textualism, but once again Scalia was unwilling to stay with strict textualism. If "speech" and "press" were synecdoches for a broader range of communicative activities, then "person, house, paper, or effect" could be seen equally as synecdoches for a broader range of protected items, areas, or interests. Without explicitly explaining his departure from the text, he nonetheless applied his elastic synecdoche method in some Fourth Amendment cases. In *United States v. Jones*, for example, he held that the amendment voided the search of an automobile, surely not a "person, house, paper, or effect."<sup>27</sup> Thus, in spite of his heralded claims about textualism and originalism, he was prepared to extend the Fourth Amendment's protection to new types of cases that lacked historical or precedential foundations, and he rejected both when he wished to stretch the amendment's reach to meet modern conditions.<sup>28</sup> In those cases, he was ready to abandon the text of "the real Fourth Amendment" and embrace a more flexible,

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<sup>25</sup>*Olmstead v. United States*, 277 U.S. 438 (1928) (Taft, C.J.).

<sup>26</sup>SCALIA SPEAKS, 247.

<sup>27</sup>*United States v. Jones*, 565 U.S. 400 (2012) (Scalia, J.).

<sup>28</sup>DAVID M. DORSEN, *THE UNEXPECTED SCALIA: A CONSERVATIVE JUSTICE'S LIBERAL OPINIONS* 61-63, 65, 181-82 (2017) (citing, *inter alia*, *Arizona v. Hicks*, 480 U.S. 321 (1987) (Scalia, J.) (hereafter, "DORSEN, UNEXPECTED").

expanding, and thus “living” approach.<sup>29</sup>

Scalia tried to limit such “living” interpretations of the Fourth Amendment by rooting its protection in a property-based theory.<sup>30</sup> In *Jones* he emphasized that the government had “physically occupied private property” by attaching a GPS device to defendant’s automobile and that “such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”<sup>31</sup> The following year in *Florida v. Jardines* he fit his property-based approach to a case involving the police use of a drug-sniffing dog on defendant’s front porch. There, he held the police action an unconstitutional search because it intruded into another “constitutionally protected” property right—control over “the curtilage of the house”—that was not “explicitly or implicitly permitted by the homeowner.”<sup>32</sup>

He was not consistent, however, in applying that limiting theory. As six justices in *Jones* and *Jardines* agreed, such a property-based limitation was ill-adapted to meet the challenges

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<sup>29</sup>SCALIA SPEAKS, 247.

<sup>30</sup>Scalia’s goal was to limit or overrule the Warren Court’s decision in *Katz v. United States*, 389 U.S. 347 (1967) which came to stand for the proposition that government violated the Fourth Amendment when its conduct violated “reasonable expectation of privacy.” The quoted phrase appeared in the concurring opinion of Justice John Marshall Harlan, *id.* at 360 and 362. LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 233-35 (2014) (hereafter, “TRIBE & MATZ, UNCERTAIN JUSTICE”).

<sup>31</sup>*Jones*, 565 U.S. at 404-05 (Scalia, J.).

<sup>32</sup>*Florida v. Jardines*, 569 U.S. 1, 6, 7 (2013) (Scalia, J.).

posed by modern technological developments,<sup>33</sup> and Scalia had in effect already surrendered his property-based theory to that obvious new reality. In *Kyllo v. United States* he invalidated the search of a house based on police use of a thermal imaging device located on a public street.<sup>34</sup> There, the police action was arguably “unreasonable,” but it involved neither an intrusion into any traditional property right nor any kind of “search” that the Founders could possibly have recognized.<sup>35</sup> On the basis of the amendment’s term “unreasonable,” however, Scalia ruled the police action an unlawful search and in effect accepted the idea that the Fourth Amendment, like the First, had some kind of practically adaptive and readily expansive quality--precisely what he condemned in *Dickerson* and, of course more generally, as “living constitutionalism.”

In originalist terms, in fact, Scalia’s Fourth Amendment jurisprudence was remarkably inconsistent. In one case, for example, he argued that the original purpose of the Fourth Amendment was to bar general warrants issued without an individualized basis of suspicion and hence that it barred the random drug-testing of customs workers.<sup>36</sup> In a subsequent case, however, he contradicted that view by setting aside what he had described as the amendment’s

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<sup>33</sup>Jones, 565 U.S. at 413 (Sotomayor, J., concurring) and *id.* at 418 (Alito, J., concurring in the judgment, joined by Ginsburg, Breyer, and Kagan, JJ.); *Jardines*, 569 U.S. at 12 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.) and *id.* at 16, (Alito, J., dissenting, joined by Kennedy and Breyer, JJ.).

<sup>34</sup>*Kyllo v. United States*, 533 U.S. 27 (2001) (Scalia, J.).

<sup>35</sup>In contrast, Scalia upheld another search that the Founders would similarly have been unable to imagine, the police use of a helicopter hovering 400 feet over a person’s greenhouse looking for marijuana. *Florida v. Riley*, 488 U.S. 445 (1989) (White, J., joined by Scalia, J.).

<sup>36</sup>*National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting).

original purpose and approving the random drug-testing of high school athletes on practical grounds.<sup>37</sup> Similarly, in his historical argument in *Jones* was dubious, while his originalist analysis in *Dickerson* seemed “unsustainable on historical grounds.”<sup>38</sup>

Scalia’s opinion in *Dickerson*, moreover, illustrated the amorphous nature of his originalism in Fourth Amendment cases. “The purpose” of the amendment, he explained was “to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted.”<sup>39</sup> On that ground, he took another opportunity to castigate the Warren Court, this time for its non-originalist decision in *Terry v. Ohio* which purportedly controlled in *Dickerson*.<sup>40</sup> *Terry* held that the police could “stop” a person if they had a “reasonable” suspicion of wrong-doing and that, in the process, they could conduct a pat down “frisk” to ensure that the person was not armed. Speculating that “the ‘stop’ portion of the *Terry* ‘stop-and-frisk’ holding accords with the common law,” Scalia expressed skepticism about the originalist legitimacy of its “frisk” ruling. “I frankly doubt,” he speculated with nothing but filio-pietistic reverence to back him up, that “the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity.” Claiming to “adhere to original meaning,” however, he nonetheless accepted both parts of *Terry*. “And though I do not favor the mode of analysis in

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<sup>37</sup>*Vernonia School District v. Acton*, 515 U.S. 646 (1995) (Scalia, J.).

<sup>38</sup>DORSEN, UNEXPECTED, 181.

<sup>39</sup>*Dickerson*, 508 U.S. at 380 (Scalia, J., concurring).

<sup>40</sup>*Terry v. Ohio*, 392 U.S. 1 (1968) (Warren, C.J.).

Terry,” he admitted, “I cannot say that its result was wrong.”<sup>41</sup> His opinion in *Dickerson* exemplified both his casual, off-handed, and sometimes wholly speculative use of history as well as the subjective and *ad hoc* nature of the originalist methodology he claimed to apply.<sup>42</sup>

Indeed, judged by his own originalist standard, Scalia’s opinion in *Dickerson* was inconsistent with his ruling in *Kyllo*. If the purpose of the Fourth Amendment was “to preserve that degree of respect” for privacy “that existed when the provision was adopted,” as he declared in *Dickerson*, then it was clear in *Kyllo* that the amendment could not possibly protect against the use of a thermal imaging device placed on a public street. Such a “degree of respect” for privacy did not, and could not, have existed--or even been imagined--“when the provision was adopted.”

Scalia’s opinion in *Kyllo* highlighted the gulf that often existed between his actual legal reasoning and his proclaimed originalist theory. “Words in the Constitution,” he claimed, “were not to be interpreted in the abstract, but rather according to the understandings that existed when they were adopted.”<sup>43</sup> The Constitution’s “general terms” could be readily applied, he explained similarly on another occasion, because “[w]hat these generalities meant as applied to many

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<sup>41</sup>*Dickerson*, 508 U.S. at 380-82 (Scalia, J., concurring) (emphasis in original).

<sup>42</sup>Scalia, for example, tossed in an entirely speculative and unfounded historical contention when he dissented from the Court’s decision to uphold the taking of a DNA swab as a “minimal” intrusion. “But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.” *Maryland v. King*, 569 U.S. 435, 466, 482 (2013) (Scalia, J., dissenting). *Accord* *Austin*, 494 U.S. at 693 (Scalia, J., dissenting) (giving formal and hypothetical nod to the Founders by speculating on what they might have believed).

<sup>43</sup>SCALIA SPEAKS, 198.

phenomena that existed at the time of their adoption was well understood and accepted.”<sup>44</sup>

Thermal imaging devices, of course, were included in neither “understandings that existed” nor “phenomena that existed” when the Constitution was adopted.<sup>45</sup>

Beyond those inconsistent applications of originalism tower two more comprehensive inconsistencies in Fourth Amendment cases. First, in accepting the Court’s broad “reasonableness” standard in search cases, Scalia abandoned the amendment’s narrow original meaning that limited its prohibition only to the government’s use of “general warrants.”<sup>46</sup> Second, and even more arresting, for the most part he simply abandoned originalism altogether in Fourth Amendment cases. He invoked originalist reasoning in only 18.63 percent of the Fourth Amendment cases he heard.<sup>47</sup>

Scalia was similarly inconsistent in addressing the Fifth Amendment’s Takings Clause.

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<sup>44</sup>SCALIA, READING, 85. “I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification.” Dickerson, 508 U.S. at 379 (Scalia, J., concurring).

<sup>45</sup>Scalia similarly violated those statements of his originalist theory to achieve the result he sought in the Second Amendment. The word “Arms” there, he declared, “extends, prima facie, to all instruments that constitute bearable arms even those that were not in existence at the time of the founding.” District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (Scalia, J.).

<sup>46</sup>Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 553, 591 and *passim* (1999). For Scalia’s acceptance of the reasonableness standard in the absence of clear common law precedents, *see, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (Scalia, J.).

<sup>47</sup>Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L. J. 75 (2018). Justice Thomas did slightly worse, relying on originalism only 15.71 percent of the time, and the Court itself invoked originalism in less than 14 percent of the cases it decided.

There, he sought to expand protections for private property by bringing certain “regulatory” takings within the amendment’s coverage, and his controversial opinion in *Lucas v. South Carolina Coastal Council* was triply revealing.<sup>48</sup> First, it demonstrated how he was willing to squeeze inferences from the thinnest of historical materials when he had little else to support his political and ideological goal. In *Lucas* he tried to justify his broadened interpretation of the Takings Clause by citing the fact that the First Congress deleted the part of Madison’s original draft of the amendment that seemed to restrict the clause to only “physical deprivations.”<sup>49</sup> With no historical support, Scalia opined that the First Congress could have changed Madison’s language because it wished to broaden the clause so it would extend to “regulatory takings.” His reasoning was once again, as in *Dickerson*, entirely speculative.

Second, his opinion also revealed other inconsistencies. “It is always perilous,” he chided Justice Stevens in a later case, “to derive the meaning of an adopted provision from another provision deleted in the drafting process.”<sup>50</sup> That was, of course, exactly what he himself had done with Madison’s draft in *Lucas*. More notably, his use of Madison’s draft also

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<sup>48</sup>*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (Scalia, J.). On Scalia’s inconsistent originalism in Takings Clause cases, see Nicole Stelle Garnett, *Justice Scalia’s Rule of Law and Law of Takings*, 41 VERMONT L. REV. 717 (2017).

<sup>49</sup>Scalia argued that “the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison).” Madison’s original draft provided that “No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation”. *Lucas*, 505 U.S. at 1028 n.15 (Scalia, J.). For a historical analysis showing that regulatory takings were not part of the original understanding, see William Michael Treanor, *The Original Understanding of the Takings Clause*, 95 COLUM. L. REV. 782 (1995).

<sup>50</sup>*Heller*, 554 U.S. at 590 (Scalia, J.).

contradicted his rule that one should never use “legislative history.”<sup>51</sup> The original draft of the clause was precisely one tiny fragment of legislative history. Scalia’s transgression was particularly acute, moreover, because the draft was the barest possible kind of “legislative history,” a single brief fragment from the past, wholly lacking in the kind of depth and detail that sometimes made modern “legislative history” a highly informative and relatively reliable source. In spite of that, Scalia was still willing to use that tiny scrap of legislative history when it served his purpose.

Third, and most fundamental, Scalia’s opinion in *Lucas* showed that, when historical sources furnished him little or no support, he was more than ready to abandon originalism altogether and take recourse in other more immediately serviceable rationales. Conceding that the dissenters were “correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all,” he simply dismissed that “original” understanding as “entirely irrelevant.”<sup>52</sup> Instead, he invoked and relied on a principle that the Court first accepted only in 1922 in *Pennsylvania Coal. Co. v. Mahon*.<sup>53</sup> Indeed, he even admitted that prior to *Mahon* “it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of

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<sup>51</sup>SCALIA SPEAKS, 234; SCALIA, READING, 388.

<sup>52</sup>In a footnote rejecting the historical understanding, Scalia accepted the criticism that “our description of the ‘understanding’ of land ownership that informs the Takings Clause is not supported by early American experience. That is largely true, but entirely irrelevant.” It was irrelevant because Scalia declared that, on his own present-day reading, the text meant something different from what earlier judges had thought it meant. *Lucas*, 505 U.S. at 1028 n.15 (Scalia, J.).

<sup>53</sup>*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (Holmes, J.). Scalia referred to *Mahon* six times in his opinion. *Lucas*, 505 U.S. at 1014, 1015, 1018, 1026, 1027 1028 (Scalia, J.).

property.”<sup>54</sup> Underlying his decision was neither originalism nor textualism but, rather, his own anti-regulatory and anti-distributionist political views.<sup>55</sup>

The fact that Scalia’s own anti-regulatory political views shaped his interpretation of the Takings Clause and inspired his efforts to expand private property rights had been even more apparent five years earlier in *Nollan v. California Coastal Commission*. There, Scalia wrote for a five-justice majority that overturned a state court ruling requiring the owners of a beachfront residence to allow a narrow, ten-foot-wide public easement across their property along the beachfront. The easement would make a minimal intrusion on the property while allowing the public to walk between two public beaches that were located approximately a half-mile apart on either side of the owners’ property. Equally important, it would allow the owners their continued and full access to the beach and ocean, and its public use would not intrude in any way on the bulk of their property which was rigidly blocked off from the easement pathway by an eight-foot high concrete seawall.<sup>56</sup> Thus, the easement served a genuine public interest in providing access between two public areas while, at the same time, preserving both the owners’ access to the beach and the ocean as well as their exclusive use and control of most of their property,

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<sup>54</sup>Lucas, 505 U.S. at 1014 (Scalia, J.).

<sup>55</sup>*See Pennell v. San Jose*, 485 U.S. 1, 15, 21-24 (1988) (Scalia, J., concurring in part and dissenting in part); *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010) (Scalia, J., announcing the judgment of the Court and writing for a plurality in Parts II and III of an opinion, joined by Rehnquist, C.J. and Thomas and Alito, JJ).

<sup>56</sup>*Nollan v. California Coastal Commission*, 483 U.S. 825, 827 (1987) (Scalia, J.). I am indebted to my colleague Richard Chused for his insights on Scalia’s reasoning in *Nollan*.

including the largest part of it that was located inside the seawall where their residence stood.<sup>57</sup>

To invalidate the state ruling Scalia reshaped the law. First, he seemed to raise the showing required to overcome a Takings Clause claim by imposing a higher burden on government regulatory actions than the Due Process and Equal Protection Clauses imposed. To justify a land-use regulation, he maintained, more was required than a mere showing of “rationality.” Although the Court’s precedents had not determined the nature of the relevant standard under the Takings Clause, as he acknowledged,<sup>58</sup> he nonetheless declared that the clause required the government to show that a regulation would “substantially advance” a “legitimate state interest” and serve “a substantial government purpose.”<sup>59</sup> He did not explain those standards further because he found that there was no “essential nexus” between the state’s regulation and its claimed justifications.<sup>60</sup> His rejection of due process and equal protection standards together with his invocation of the “substantially advance” and “substantial” purpose

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<sup>57</sup>“As this Court made clear in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980), physical access to private property in itself creates no takings problem if it does not ‘unreasonably impair the value or use of [the] property.’ Appellants can make no tenable claim that either their enjoyment of their property or its value is diminished by the public’s ability merely to pass and repass a few feet closer to the seawall beyond which appellants’ house is located.” *Nollan*, 483 U.S. at 854-855 (Brennan, J., dissenting).

<sup>58</sup>“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest’ or what type of connection between the regulation and the state interest satisfies the requirement that the former ‘substantially advance’ the latter.” *Nollan*, 483 U.S. at 834 (Scalia, J.).

<sup>59</sup>*Nollan*, 483 U.S. at 834 & n.3 (Scalia, J.). Scalia drew the phrase “substantial government purpose” from *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Id.* at 834.

<sup>60</sup>*Nollan*, 483 U.S. at 837 (Scalia, J.).

standards, however, suggested a new and more restrictive approach to the Takings Clause.<sup>61</sup>

Second, and far more fundamental, Scalia asserted a constitutional premise that was sweeping, false, textually without support, and entirely non-originalist. “Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach,” he declared, it would have left “no doubt there would have been a taking.”<sup>62</sup> The right of owners to exclude others, he continued, was an essential element of private property.<sup>63</sup> The problem with that underlying premise was that neither traditional property law nor established constitutional law supported it. From the time of the Founders to the present the law had commonly required property owners to grant entirely analogous easements across private property for public streets and sidewalks.<sup>64</sup> Further, the law had also upheld a wide range of zoning limitations on both the uses of property and the kind of structures their owners could build, including restrictions on size, height, and

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<sup>61</sup>Scalia essentially acknowledged the reasonableness of the state’s action but held that such reasonableness was not enough to justify the easement. *Nollan*, 483 U.S. at 841-42 (Scalia, J.). In another 5-4 decision the Court subsequently expanded on *Nollan* and imposed a relatively restrictive limit on a city’s effort to take private property as part of its land-use plan. *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Rehnquist, C.J., joined by Scalia, J.).

<sup>62</sup>*Nollan*, 483 U.S. at 831 (Scalia, J.). The case turned on whether the Coastal Commission could require the Nollans to agree to the easement in exchange for permission to build a new house on the property. The Court’s negative answer to that question was ultimately controlled by Scalia’s preemptive assertion that the easement was an unconstitutional “taking.” *Id.* at 836-39, 842-42 (Scalia, J.).

<sup>63</sup>*Nollan*, 483 U.S. at 831 (Scalia, J.). Requiring “uncompensated conveyance of the easement outright would violate the Fourteenth Amendment.” *Id.* at 834.

<sup>64</sup>*Nollan*, 483 U.S. at 854 (Brennan, J., dissenting).

proximity to the property of others.<sup>65</sup> All of those regulations were “takings” of property, and the law had long approved them on grounds of their reasonableness for general public convenience. Thus, the easement at issue in *Nollan* was easily proper under established law. Scalia, however, asserted an essentially absolute principle that promised to expand constitutional protections for property and limit government regulatory efforts significantly. In supporting his goal, he made no mention of the Founders and cited no originalist sources.

Scalia ignored history once again and misleadingly cited originalist sources when he advanced one of his most characteristic claims, that “standing” doctrine had a constitutional basis in the principle of separation of powers. “My thesis,” he wrote in an early law review article, “is that the judicial doctrine of standing is a crucial and inseparable element” of separation of powers.<sup>66</sup> For originalist support he advanced only abstract and general quotations from *Federalist* No. 48 and *Marbury v. Madison*, none of which stated or even clearly implied his “thesis.”<sup>67</sup> In fact, it was not until the early twentieth century when the Court first suggested-

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<sup>65</sup>See, e.g., *Penn Central*, 438 U.S. 104; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (Brennan, J.); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>66</sup>Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1982) (hereafter, “Scalia, *Doctrine of Standing*”).

<sup>67</sup>The quote from the FEDERALIST PAPERS, No. 48, referred only generally to the comparative reach of the three branches, and the quote from *Marbury* noted only that the judiciary had no general jurisdiction to inquire into the discretionary acts of the executive. In addition, Scalia played loose with history by including a purportedly supporting footnote reference to *Hayburn’s Case*, 2 US. (2 Dall.) 409 (1792), and suggesting that its requirement of “adverse parties with personal interest in the matter” were required for Article III standing. Scalia, *Doctrine of Standing*, 882-83. *Hayburn’s Case* did not, in fact, place its requirement of standing on Article III.

-and then somewhat obliquely--that standing and separation of powers were directly connected.<sup>68</sup> Scalia's standing thesis, moreover, was entirely presentist and political in its target. He used it to attack Chief Justice Earl Warren's 1968 opinion in *Flast v. Cohen* that linked separation of powers with the Article III concepts of "cases" and "controversies" but partitioned standing doctrine off from that constitutional basis.<sup>69</sup> When Scalia was able to write his "thesis" into the nation's law a decade later in *Lujan v. Defenders of Wildlife*, he did no better in providing it with an originalist foundation. There, he simply asserted brashly and without support--and wrongly--that the Court had "always" linked the concrete injury requirement of standing to a constitutional foundation in the doctrine of separation of powers.<sup>70</sup>

Similarly, Scalia abandoned both originalism and textualism when he considered the law of treaty enforcement. Like a majority of the modern Court, he rejected the original doctrine that

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<sup>68</sup>EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED 39 (2011) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 488-89 (1923) (Sutherland, J.)) (hereafter, "LEE, JUDICIAL RESTRAINT"). See *id.* at 68, 132-35. Accord Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 163, 169, 71, 173-77 (1992).

<sup>69</sup>*Flast v. Cohen* 392 U.S. 83 (1968) (Warren, C.J.). Scalia finessed his lack of originalist sources by attacking *Flast* on the ground that "never before had the doctrine of standing been severed from the principles of separation of powers." Scalia, *Doctrine of Standing*, 891. His claim was true only because the two doctrines had not been explicitly linked until the twentieth century, and it was only after the linkage had been recognized that *Flast* attempted to separate them in distinguishing among the various "justiciability" doctrines. See LEE, JUDICIAL RESTRAINT, 132-35.

<sup>70</sup>"If the concrete injury requirement has the separation-of-powers significance we have always said, the answer [to the question at issue] must be obvious." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (Scalia, J.). For originalist authority, he quoted only from the same two inadequate sources he used in his 1982 article, *Federalist* No. 48, *id.* at 560, and *Marbury v. Madison*, *id.* at 576.

treaties were supreme federal law and consequently enforceable in the courts under the explicit terms of the Supremacy Clause.<sup>71</sup> In its place he accepted the later interpretation that treaties were supreme federal law only if they were “self-executing,” a requirement that the Court had developed on its own and held that most treaties failed to satisfy. That interpretation meant that, absent special congressional action, most treaties were not enforceable in the courts. The doctrinal change that he embraced was another instance of the “living” constitutionalism that he purportedly scorned but frequently accepted and used.

Equally telling, the change in the Court’s interpretation of treaties had been driven by the rise of the United States to a dominant international position over the course of the nineteenth and early twentieth centuries and then by the subsequent efforts of conservatives after World War II to prevent international human rights treaties from having domestic effect, especially as they could be used to challenge racial discrimination in the United States.<sup>72</sup> The result of the changed doctrine was two-fold: it limited judicial power and it deprived minority groups of the protection offered by international human rights agreements. Scalia readily accepted both the Court’s non-originalist and non-textualist interpretation of the treaty power as well as the appealingly “conservative” social and political results it brought.<sup>73</sup>

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<sup>71</sup>See DAVID L. SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* 65 and *passim* (2016) (treaties of their own force preempt state law and create enforceable federal law under original meaning of Supremacy Clause) (hereafter, SLOSS, *DEATH OF TREATY*).

<sup>72</sup>See SLOSS, *DEATH OF TREATY*, Part III.

<sup>73</sup>For Scalia’s rejection of the original treaty supremacy doctrine, see *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (Roberts, C.J., joined by Scalia, J.) (“non-self-executing” treaties do not preempt state law unless Congress legislates to the contrary); *Medillin v. Texas*,

Scalia also accepted the Fourteenth Amendment incorporation doctrine on modern and non-originalist grounds. The doctrine was highly dubious on originalist grounds, facially unsupported on textual grounds, and inconsistently and variously applied on logical grounds.<sup>74</sup> “The incorporation doctrine,” explained one scholar who studied Scalia’s jurisprudence, “is supported neither by the constitutional text nor by the traditional understanding of it.”<sup>75</sup> Scalia nonetheless accepted the doctrine on the ground that it was “long established and narrowly limited.”<sup>76</sup> Its “long established” status did not rest on any clear originalist or textualist

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552 U.S. 491, 504-05 (2008) (Roberts, C.J., joined by Scalia, J.) (same).

<sup>74</sup>McDonald, 561 U.S. at 765 n.13 (Alito, J., joined by Scalia, J.) noted that the Court has not incorporated the Third Amendment's protections against quartering of soldiers and imposing excessive fines, the Fifth Amendment's grand jury indictment requirement, the Sixth Amendment right to a unanimous jury verdict, the Seventh Amendment right to a jury trial in civil cases; and the Eighth Amendment's prohibition on excessive fines. The opinion acknowledged, moreover, the changing nature of incorporation law and noted in particular that “[o]ur governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment's civil jury requirement long predate the era of selective incorporation.” *Id.* at 765 n.13. In addition to creating such gaps in the incorporation doctrine, the Court added important elements to some of the rights in the amendments. To the First Amendment it added a right of “expressive association,” *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (Brennan, J.); to the Fourth Amendment it added the prophylactic “exclusionary rule,” *Mapp v. Ohio*, 367 U.S. 643 (1961) (Clark, J.); and to the Fifth Amendment’s privilege against self-incrimination it added certain specified protective warnings, *Miranda v. Arizona*, 384 U.S. 436 (1966) (Warren, C.J.), and declared that the warnings were of constitutional stature in *Dickerson v. United States*, 530 U.S. 428 (2000) (Rehnquist, C.J.).

<sup>75</sup>RALPH A. ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE: TEXT AND TRADITION 169 (2006) (citing Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949) (hereafter, “ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE”); RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989).

<sup>76</sup>“Except insofar as our decisions have included within the Fourteenth Amendment certain explicit substantive protections of the Bill of Rights--an extension I accept because it is both long established and narrowly limited--I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty.” *Albright v. Oliver*, 510 U.S. 266, 275-276 (1994) (Scalia,

determination but began only to 1897 when, for the first time, the Court repudiated its earlier “originalist” precedents and used the Fourteenth Amendment to make a provision of the Bill of Rights, the Fifth Amendment’s Takings Clause, applicable to the states.<sup>77</sup>

Although he surely did fight to keep incorporation “narrowly limited” when it was used to advance the kinds of rights that he opposed,<sup>78</sup> he nonetheless wielded it boldly and enthusiastically when he could use it to serve his own dominant personal values. Specifically, he used it readily and vigorously when it enabled him to protect guns and religion. To accomplish the former, he joined the other four conservatives in holding that incorporation made the Second Amendment applicable against the states.<sup>79</sup> He did so even though on originalist grounds it was clear that the Founders had adopted the Second Amendment to placate the states, protect their authority, and guarantee their right to maintain their militias free from federal interference.<sup>80</sup>

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J., concurring). *See* McDonald, 561 U.S. at 791 (Scalia concurring).

<sup>77</sup>In 1833 the Court rejected the idea that the Bill of Rights applied to the states in *Barron v. Baltimore*, 32 US. 243 (1833) and, after adoption of the Fourteenth Amendment, confirmed that proposition in *United States v. Cruikshank*, 92 U.S. 542 (1876). The first incorporation came only in 1897 in *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897) (Harlan, J.).

<sup>78</sup>“I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights.” *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470-71 (1993) (Scalia, J., concurring in the judgment).

<sup>79</sup>McDonald, 561 U.S. 742 (2010) (Alito, J., joined by Scalia) (incorporating the Second Amendment into the Fourteenth and thereby making it mandatory on the states). Scalia also wrote a concurring opinion responding to Stevens’s dissent and defending judicial reliance on “the traditions of our people.” *Id.* at 791, 792.

<sup>80</sup>*See* ch.7, *infra*.

Thus, as an originalist matter, incorporating the Second Amendment and thereby restricting the states and limiting their ability to regulate the ownership and possession of firearms simply made no sense.

To accomplish the latter, protecting religion, Scalia also cast originalism aside. The Founders had adopted the Establishment Clause, he maintained, to prevent the federal government from either establishing a national church or interfering with religious establishments in the states.<sup>81</sup> Given that original understanding, the incorporation of the Establishment Clause—like the incorporation of the Second Amendment—made no sense. It also transformed two state-protective guarantees into state-limiting restrictions, a result that was precisely the opposite of the clause’s original understanding and purpose.<sup>82</sup>

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<sup>81</sup>“The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference).” Lee v. Weisman, 505 U.S. 577, 631, 641 (1992) (Scalia, J., dissenting). The Court had affirmed that principle in *Permoli v. First Municipality of New Orleans*, 44 U.S. 589, 609 (1845) (Catron, J.). See, e.g., Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 843 (1986). For a study arguing that the clause was not intended as a positive effort to support state establishments, see STEVEN K. GREEN, *THE SECOND ESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* ch. 2, esp. 67-68 (2010) (hereafter, “GREEN, SECOND ESTABLISHMENT”), and for a study arguing that the prohibition of a national religion was the sole point that the Founders agreed on in adopting the Establishment Clause, see DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* viii-ix, 260-62 (2010) (hereafter, “DRAKEMAN, CHURCH”).

<sup>82</sup>The Court did not incorporate the First Amendment’s religion clauses until 1940. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Roberts, J.). Scalia took the essentially arbitrary and unfounded position that incorporation was fully consistent with the original meaning of the Establishment Clause. *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 885, 898 (2005) (Scalia, J., dissenting). He has, however, “never written an opinion that asks the unanswerable question of how it is that the Establishment Clause, intended by the words used by the Framers in the First Congress to prevent the federal government from tampering with state establishments of religion, can possibly be construed to

Equally striking and more revealing about his jurisprudence and career, Scalia not only accepted that non-originalist result, but he also proceeded to use it to interpret the Establishment Clause in ways that advanced his own personal beliefs. While still on the court of appeals, he had declared that the jurisprudence of the clause was “in a state of utter chaos,”<sup>83</sup> and he was determined to reorder it to serve his own purposes. Rejecting interpretations and doctrines that required strict separation of church and state, he maintained that the clause meant that government could not favor a particular religion over any other particular religion but that it could favor religion in general over nonreligion.<sup>84</sup> Further, he sought to restrict the meaning of the word “religion” to privilege what he accepted as “traditional” monotheistic faiths.

As a strictly textual matter, the Establishment Clause supported neither of those goals. It simply stated that Congress “shall make no law respecting an establishment of religion.”<sup>85</sup> That text, John Witte, Jr. and Joel A. Nichols concluded from their study of the Constitution’s religion clauses, “has no plain meaning.”<sup>86</sup> On its face, however, the text seemed inconsistent with Scalia’s claim that the clause allowed governments to provide positive support for religion. The

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mandate precisely such tampering.” ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE 129.

<sup>83</sup>DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS 157 (1991) (hereafter, “DAVIS, ORIGINAL INTENT”).

<sup>84</sup>Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 397, 401 (1993) (Scalia, J., concurring in the judgment); Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687, 732, 748 (1994) (Scalia, J., dissenting).

<sup>85</sup>U.S. CONSTITUTION, AMEND. 1.

<sup>86</sup>JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 81 (4<sup>th</sup> ed. 2016) (hereafter, “WITTE & NICHOLS, RELIGION”); DAVIS, ORIGINAL INTENT, chs.3-4.

text did not prohibit laws establishing some particular sect or denomination but rather laws establishing “religion” in general. More particularly, it did not prohibit establishing “a religion” but simply “religion,” using the term in the most comprehensive sense possible. Indeed, neither the constitutional text nor the history of the clause’s origin gave the slightest guidance as to “where to draw the line between religion and nonreligion.”<sup>87</sup> Thus, contrary to Scalia’s contention, the text itself strongly pointed to the conclusion that the clause prohibited government from officially recognizing and giving practical aid to “religion” in general.<sup>88</sup>

As an originalist matter, Scalia was on somewhat stronger though still dubious ground. While extensive historical scholarship produced conflicting findings, the one general conclusion it warranted most clearly was that the Founders thought religion was very important but disagreed on the truly critical issue of its proper relationship to government.<sup>89</sup> The Founders, Derek H. Davis concluded from his study of the historical origins of the Establishment Clause, “were on the whole themselves unclear and in some disagreement about the role that religion

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<sup>87</sup>WITTE & NICHOLS, RELIGION, 95. On the Court’s subsequent struggle to determine what is “religion,” *see, e.g.*, MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 712-41 (2006).

<sup>88</sup>“All of the evidence then, when examined in historical context, supports separationism as that paradigm of church-state thought that best captures the progressively evolving intentions of the founding fathers.” DAVIS, RELIGION. 227.

<sup>89</sup>*See, e.g.*, LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1994) (finding that the Establishment Clause requires strict separation between church and state); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004) (rejecting the idea that the Establishment Clause requires a “wall of separation” between church and state).

should play in national life.”<sup>90</sup> Beyond general agreement that the clause was designed to prohibit Congress from establishing a national religion, Donald L. Drakeman concluded from his similar study, “there is no body of evidence that supports any more detailed sense of what the language meant to the people who voted for [the Establishment Clause] or to the American public who received it.”<sup>91</sup>

Seeking to support his claim that the clause positively favored religion, Scalia turned to the Free Exercise Clause and his ever-serviceable back-up concept of tradition. He maintained that the former, which barred Congress from “prohibiting the free exercise” of religion, mandated “preferential treatment” for “religion in general”<sup>92</sup> and that the latter demonstrated that Americans and their government officials had from the nation’s beginning invoked God in a variety of ways.<sup>93</sup> The problem with both of those arguments was apparent. As a strictly textual

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<sup>90</sup>DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS, 1774-1789, at 212 (2000) (hereafter, “DAVIS, RELIGION”). Accord VINCENT PHILLIP MUNOZ, GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON 207 (2009) (the “Founders’ disagreement means that there is no single church-state position that can claim the exclusive authority of America’s founding history”) (hereafter, “MUNOZ, GOD AND THE FOUNDERS”).

<sup>91</sup>DRAKEMAN, CHURCH, 260. “The congressional record holds no Rosetta Stone for easy interpretation, and no ‘smoking gun’ that puts all evidentiary disputes to rest.” WITTE & NICHOLS, RELIGION 81-82; DAVIS, ORIGINAL INTENT, chs.3-4.

<sup>92</sup>Lamb’s Chapel, 508 U. S. at 400 (Scalia, J., concurring in the judgment).

<sup>93</sup>In *Lee v. Weisman*, for example, Scalia dissented from the Court’s ruling that the Establishment Clause prohibited religious invocations and benediction prayers at public school graduation ceremonies. There, the majority reasoned that public schools had no business incorporating religious elements into their ceremonies and that such religious rites exerted a degree of psychological coercion on the school’s students. That decision, Scalia charged, “lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.” *Lee v. Weisman*, 505 U.S. at 631, 632 (Scalia, J., dissenting).

matter, the Free Exercise Clause did not necessarily imply government favoritism or positive support for religion as opposed to merely protecting all religions by requiring government to take a neutral and hands-off attitude toward all of them.<sup>94</sup> Similarly, the fact that Americans and their government officials thought religion highly important and often invoked God, the Deity, or Divine Providence did not mean that such ceremonial practices authorized positive governmental actions of an entirely different nature, actions that conferred on religious groups and institutions official recognition, approval, or support.<sup>95</sup>

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Concurring with the Court's judgment, Justice David Souter rejected Scalia's reading of both the text and the "extratextual evidence of original meaning" that he presented. The latter stood "so unequivocally at odds with the textual premise inherent in existing precedent," Souter wrote, that it offered no significant basis for reconsidering the Court's precedents. *Id.* 505 U.S. at 609, 618 (Souter, J., concurring).

<sup>94</sup>The Court and some scholars have regarded the Free Exercise Clause and the Establishment Clause as in tension with one another, the former requiring the kind of special accommodations to religion that the latter prohibits. *See, e.g.,* *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981) (Burger, C.J.). Others have argued that the Establishment Clause was informed by the Free Exercise Clause and consequently meant that the government could support religion in general. *See, e.g.,* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. REV. 346 (2002); Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL OF RIGHTS J. 73 (2005). A neutral, hands-off interpretation of both clauses resolves those purported interpretative difficulties by eliminating the need to hold either that the two clauses are inconsistent or that one controls the other.

<sup>95</sup>Several justices referred to such public expressions about God and Divine Providence as "ceremonial deism." *Lynch v. Donnelly* 465 U.S. 668, 694, 716 (1984) (Brennan, J., dissenting); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 623, 630 (1989) (O'Connor, concurring in part and concurring in the judgment). Scalia criticized the justices who disagreed with him by claiming that "indifference to 'religion in general' is *not* what our cases, both old and recent, demand." *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in the judgment) (emphasis in original). Justices who rejected Scalia's position emphasized that neutrality did not mean "indifference" to religion but rather full and equal respect for all religions in a pluralistic society. *E.g.,* *County of Allegheny*, 492 U.S. at 610 (Blackmun, J.); *Lee v. Weisman*, 505 U.S. at 589-90, 597-98 (1992) (Kennedy, J.).

Even more clearly, neither textual nor originalist sources provided support for Scalia's further effort to distinguish among religions by favoring traditional monotheistic ones. "One cannot say the word 'God,' or 'the Almighty,' one cannot offer public supplication or thanksgiving," he complained sorely, "without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs." Such religions he arbitrarily excluded from the Establishment Clause's coverage. Historical practices, he asserted, showed "that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."<sup>96</sup>

In reaching that exclusionary conclusion Scalia again ignored both textual and originalist sources. As for textualism, he ignored the fact that the Constitution did not even mention the word "God," much less refer to any single or specific kind of "god." Not surprisingly, he refused to apply his "rule of silence" to declare the issue beyond judicial authority. Further, he ignored the fact that, contrary to the Constitution's treatment of so many key words that had specific substantive meanings, the clause did not capitalize the word "religion."<sup>97</sup> That fact

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<sup>96</sup>McCreary, 545 U.S. at 893 (Scalia, J., dissenting). For a critique of Scalia's generalized monotheism, see ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 40- 41(2013); Thomas Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. L. REV. 1097 (2006); Andrew M. Koppelman, *Phony Originalism and the Establishment Clause* (2011), Faculty Working Papers, Paper 3, at 7-14, available at <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/3> (hereafter, "Koppelman, *Phony Originalism*"), last consulted Aug. 26, 2019.

<sup>97</sup>Contrast, e.g., references to the "States" (*passim*), the "Power" of the federal branches (Articles I, II, and III), Electors (Art II), "Full Faith and Credit" and "Privileges and Immunities of Citizens" (Art. IV), "Debts and Engagements" (Art. VI), and "Ratification," "Conventions of nine States" and "Establishment of this Constitution" (Art. VII). The Bill of Rights similarly

suggested once again that the Constitution used the term, as it used the other rights-related terms in the First Amendment, in the broadest possible generic sense. In fact, the Court had previously accepted that principle before Scalia joined it. There was no need for a judicial judgment about any “particular belief or practice,” it explained in 1981, because “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”<sup>98</sup>

As for originalism, Scalia ignored the indisputable and decisive fact that many of the Founders were themselves either deists who saw God as aloof from human affairs or rationalistic theists who embraced ideas of “natural” religion rather than strict versions of Christianity.<sup>99</sup> “A majority of the delegates” to the Constitutional Convention,” Steven K. Green wrote in his examination of the Establishment Clause, “held deistic or heterodox beliefs and drew their understanding of rights and governance from Enlightenment and Whig writers” A “majority of the founding documents were all but bereft of religious language,” he continued, and they generally “took on secular or, at best, deistic overtones.”<sup>100</sup> Further, Scalia also ignored the variety of opinions that the Founders had expressed about what religions were properly included under the Establishment Clause. “Some set the legal line at Protestantism, others at Christianity

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capitalized many words with specific meanings, *e.g.* “Government,” “Militia,” “Arms,” “Soldier,” “Owner,” “Warrants,” “Oaths,” “Affirmation,” etc.

<sup>98</sup>Thomas, 450 U.S. at 714 (Burger, C.J.).

<sup>99</sup>GREGG L. FRAZER, *THE RELIGIOUS BELIEFS OF AMERICA’S FOUNDERS: REASON, RATIONALISM, AND REVOLUTION 173-74*, 185 (2012); DAVID L. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS 49-51*(2006).

<sup>100</sup>GREEN, *SECOND DISESTABLISHMENT* 56, 31.

in general (thereby including Catholics and Eastern Orthodox),” Witte and Nichols explained, “and still others at theism (thereby including Jews, Muslims, and Deists).” Indeed, Scalia ignored the fact that some quite prominent Founders—Madison and Jefferson, for example—argued “for the equality of religious and nonreligious individuals before the law,” urging inclusion of those who held any kind of religious belief, theist or not. “Most founders,” Witte and Nichols concluded, “extended the principle of equality before the law to all peaceable theistic religions, including not only Christianity, but also Judaism, Islam, and Hinduism.”<sup>101</sup> Thus, on originalist grounds, the amendment seemed designed to include all religions that somehow recognized a god or gods.<sup>102</sup>

In excluding deists and polytheists Scalia not only contradicted the originalist record but contradicted his own interpretive methodology as well. Without explanation, in construing the meaning of the word “religion” he failed to apply the synecdoche method that he used to justify his expansive interpretation of other key words in the First Amendment. If the Founders placed “speech,” “press,” and “religion” in the very same amendment, and if the first two were synecdoches standing for a wide range of communicative acts, why was the generic word “religion” not equally a synecdoche standing for a wide range of religious beliefs? Considered

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<sup>101</sup>WITTE & NICHOLS, RELIGION, 95, 51. “The founders principal concern was directed to equality among theistic religions before the law.” WITTE & NICHOLS, RELIGION, 51. The Establishment Clause was “designed to protect all theists, but only theists.” Natelson, *Original Meaning*, 112. See *id.* at 97, 107, 109-12, 138-39.

<sup>102</sup>None of the Founders “argued seriously about extending constitutional protection” to “non-Western religious traditions practiced by, for example, African slaves or Native American tribes—let alone nontheistic traditions like Buddhism.” WITTE & NICHOLS, RELIGION, 95.

as a synecdoche, it should surely have included both deists and polytheists. Scalia, however, was not pursuing interpretive consistency but his own narrower religious goals.

Scalia's exclusion of deists and polytheists also contradicted the broad pronouncement he made when he sought to protect a different religion that met his approval. "I have always believed," he announced in *Board of Education of Kiryas Joel v. Grumet* in 1994, a case involving a small Jewish community, that "the Establishment Clause prohibits the favoring of one religion over others."<sup>103</sup> In dismissing deists and polytheists from consideration under the Establishment Clause he did just that.

Specifically, Scalia insisted that the Establishment Clause was intended to refer only to religions that taught the existence of "a benevolent, omnipotent Creator and Ruler of the world."<sup>104</sup> He defended the "ceremonial" use of the Ten Commandments by two counties in Kentucky, for example, on the ground that the commandments were "not so closely associated with a single religious belief" but were "recognized by Judaism, Christianity, and Islam alike as

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<sup>103</sup>Kiryas Joel, 512 U.S. at 748 (Scalia, J., dissenting). Ironically, and seemingly consistent with Scalia's statement, the majority in *Kiryas Joel* found the state statute that created a school district for members of the Satmar Hasidic community an unconstitutional religious preference violating the Establishment Clause. Thus, contrary to the ostensible import of Scalia's statement quoted in the text, he did not oppose but rather supported that special arrangement. The statute at issue, he explained, was "facially neutral" because it "does not mention religion" and because, in any event, it provided merely a reasonable "accommodation" of religion. *Id.* at 752.

<sup>104</sup>*Lee v. Weisman*, 505 U.S. at 641 (Scalia, J., dissenting).

divinely given.”<sup>105</sup> Neither the constitutional text nor the original understanding singled out those three monotheistic religions as jointly circumscribing the meaning of the Establishment Clause, however, just as neither called for the exclusion of deists and polytheists. Thus, as a matter of original understanding, Scalia’s interpretation arbitrarily narrowed the category of theistic religions that many or most of the Founders understood as falling within its coverage.

Originalist sources underscored other flaws as well in his appeal to those monotheistic religions. One was that at the founding Americans tended to be quite hostile toward Islam and its theology, and they were not moved to attribute any authority to it merely because it was a monotheistic religion. Rather, they were deeply suspicious of Islam because they believed that “Muslims submitted to religious despotism and were taught to accept political despotism.”<sup>106</sup> Another flaw was that, insofar as the Founders did generally agree on more particular religious matters, they agreed not on generalized monotheism but on the virtues of specifically Protestant Christianity.<sup>107</sup> All but two states disqualified Jews, Unitarians, and agnostics from office, while some states refused even to allow them to vote. Rhode Island even barred Jews from citizenship

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<sup>105</sup>McCreary, 545 U.S. at 909 (Scalia, J., dissenting). *Accord, e.g., id.* at 894; Transcript of oral argument in *Salazar v. Buono*, No. 08-472 (Oct. 7, 2009), at 39, 51 (hereafter, “Oral Argument in *Salazar*”) (remarks of Scalia, J.).

<sup>106</sup>ROBERT J. ALLISON, *THE CRESCENT OBSCURED: THE UNITED STATES AND THE MUSLIM WORLD, 1776-1815*, at 59 (1995). See Thomas S. Kidd, “*Is It Worse to Follow Mahomet than the Devil?*”: *Early American Uses of Islam*, 72 *CHURCH HIST.* 766 (2003). During the ratification debates, critics occasionally attacked Article VI’s no-religious-test provision as an invitation to “Mahometans,” WITTE & NICHOLS, *RELIGION*, 72, but many of the Founders viewed Islam as a theistic religion and would, in theory at least, have believed that should receive equal protection. *Id.*, at 51.

<sup>107</sup>See, e.g., WITTE & NICHOLS, *RELIGION*, 95; MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* 8-20 (1984) (hereafter, “BORDEN, JEWS”).

and maintained that bar until 1842.<sup>108</sup> Moreover, in most states only Protestants could hold public office, thus extending the founding generation’s religious discrimination to Catholics who, as Madison noted, constituted “a small & even unpopular sect in the U.S.”<sup>109</sup>

Scalia’s Establishment Clause jurisprudence, then, was the result of neither originalist nor textualist requirements but the product of his own determination to find a way to ensure a vibrant role in American life and politics for religion, especially what he regarded as traditional monotheistic religion.<sup>110</sup> “If religion in the public forum had to be entirely nondenominational,” he declared, “there could be no religion in the public forum at all.”<sup>111</sup> Scalia would not tolerate that result, so he simply construed the bare text of the Establishment Clause to mean what he wanted it to mean. He attributed his interpretation to the Founders, but it was not the Founders but his own personal convictions that shaped his constitutional views. He was determined not

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<sup>108</sup>Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425 (1990) (hereafter, “McConnell, *Origins and Historical Understanding*); BORDEN, JEWES, 13. “The constitution of New York (1777), was the only [state constitution] without restrictions on holding office for Jews,” *id.* at 13.

<sup>109</sup>Koppelman, *Phony Originalism*, 9; James Madison to Edward Livingston, July 10, 1822 in 9 THE WRITINGS OF JAMES MADISON (Gaillard Hunt, ed., 1910), 101. During the ratification debates critics sometimes attacked Article VI’s no-religious-test provision as “an invitation to Papists.” WITTE & NICHOLS, RELIGION, 72. The Revolution and Constitution, wrote Federalist legal scholar James Kent in 1794, effected a break from “papal tyranny.” KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790-1900: LEGAL THOUGHT BEFORE MODERNISM 69 (2011).

<sup>110</sup>“[T]hose who adopted our Constitution,” he declared, certainly “believed that the public virtues inculcated by religion are a public good.” *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in the judgement). For Scalia’s efforts to protect religion under the Free Exercise Clause, *see, e.g., Locke v. Davey*, 540 U.S. at 726 (Scalia, J., dissenting).

<sup>111</sup>McCreary, 545 U.S. at 893 (Scalia, J., dissenting).

only to foster religion in the “public forum” but also to expand the ability of government to provide resources and funding for religious groups and organizations. Consistently he upheld programs and policies that provided such support<sup>112</sup> and repeatedly denied standing to those who sought to use the Establishment Clause to challenge them.<sup>113</sup> Indeed, he was even willing to defend a state statute that required the teaching of the religiously inspired and motivated theory of “creation science” as if the issue was one truly involving academic freedom and the theory one truly involving scientific inquiry.<sup>114</sup>

While Scalia at least nodded toward originalism in construing the Establishment Clause, in construing the Free Exercise Clause he essentially abandoned it in his important decision in *Employment Division v. Smith*.<sup>114</sup> Relying on grounds of precedent and expedience, he ruled

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<sup>112</sup>See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Rehnquist, C.J., joined by Scalia, J.); *Mitchell v. Helms*, 530 U.S. 793 (2000) (Thomas, J., joined by Scalia, J., announcing judgment of Court); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (Rehnquist, C.J., joined by Scalia, J.); *Agostini v. Felton*, 521 U.S. 203 (1997) (O’Connor, J., joined by Scalia, J.).

<sup>113</sup>See, e.g., *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 618 (2007) (Scalia, J., concurring in the judgment); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 146 (2011) (Scalia, J., concurring).

<sup>114</sup>*Edwards v. Aguillard*, 482 US 578, 610, 626 (1987) (Scalia, J., dissenting). Scalia’s opinion exemplified his determination to use the law to advance religious ideas over “secular” ones. His opinion “confuses science with religion,” and in “confusing science teaching with religious catechism, and referring to the teaching of evolution as “indoctrination,” Scalia apes (so to speak) the advocacy that his favored parties, the anti-evolutionists, have employed to undermine science and mislabel evolution as some sort of improperly imposed religious belief.” Stephan A. Newman, *Evolution and the Holy Ghost of Scopes: Can Science Lose the Next Round?*, 8 RUTGERS J. L. & RELIGION 11, 37 (2007).

<sup>114</sup>*Smith*, 494 U.S. 872 (1992) (Scalia, J.). “In rewriting free-exercise jurisprudence in *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), for example, Scalia eschewed textual and historical approaches in favor of seizing upon a weak precedential base as the foundation for persuasively mischaracterizing existing doctrines.” DAVID A. SCHULTZ &

that the Free Exercise Clause did not protect Native Americans from the application of “general” anti-drug laws when they used peyote as part of their religious practices.<sup>115</sup> He based his decision on the fact that the United States had changed drastically since the founding and that constitutional law had to adapt to the vastly expanded religious diversity that marked modern America. Otherwise, he warned, such diversity would threaten “anarchy.” That “danger increases in direct proportion to the society's diversity of religious beliefs,” he explained, and the United States had become “a cosmopolitan nation made up of people of almost every conceivable religious preference.”<sup>116</sup> That extreme religious diversity was constitutionally determinative. “[P]recisely because we value and protect that religious divergence,” he declared, “we cannot afford the luxury” of giving the Free Exercise Clause a more protective meaning.<sup>117</sup> For that facially practical and adaptive reason—another example of his now-and-then “living” constitutionalism—he concluded that the Court had to restrict the protection that the clause provided. Thus, as he excluded deists and polytheists from the protection of the Establishment Clause, he excluded Native Americans whose religious practices incorporated peyote from the

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CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA 209 (1996). Scalia tried to defend his originalism in *Smith in City of Boerne v. Flores*, 521 U.S. 507, 537 (Scalia, J., concurring in part).

<sup>115</sup>Smith, 494 U.S. at 885 (Scalia, J.).

<sup>116</sup>Scalia quoted the latter phrase from *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Smith, 494 U.S. at 888 (Scalia, J.). If Americans “strictly observed original intent, much of what constitutes religion in the twenty-first century would be excluded from First Amendment protection.” WITTE & NICHOLS, RELIGION, 95.

<sup>117</sup>Smith, 494 U.S. at 888 (Scalia, J.). A broader interpretation “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.” *Id.* at 888. For a critique of Scalia’s position in *Smith*, see, e.g., McConnell, *Origins and Historical Understanding*.

protection of the Free Exercise Clause.

Scalia's "living" constitutionalism in *Smith* served his more particular purposes well, for subjecting all religions to "neutral" laws of "general" applicability substantially advantaged the traditional monotheistic religions he favored. Those religions commanded widespread public acceptance and consequently would be able to protect their own particular interests and practices in the political process. "It may fairly be said," he acknowledged candidly, "that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."<sup>118</sup> Thus, for religions he adopted a reverse *Carolene Products* approach,<sup>119</sup> subjecting "discrete and insular minorities" to the political power of large and well-connected ones. In particular, his "living" constitutionalism placed his beloved Catholicism in a strong position. In the eighteenth century it had been but a "small and even unpopular sect" whose members were generally barred from holding public office, but by Scalia's day it had become a religion that was "widely engaged in," politically powerful, and highly effective in defending its interests in the political arena.<sup>120</sup>

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<sup>118</sup>Smith, 494 U.S. at 890 (Scalia, J.).

<sup>119</sup>United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (Stone, J.) (suggesting the need for special judicial protection of "discrete and insular minorities" unable to protect themselves in the ordinary political process).

<sup>120</sup>The political power of the Catholic Church, as well as that of other main line religions, had been apparent when Congress enacted national prohibition in the Volstead Act in 1919 but excepted sacramental wine from its ban. Michael D. Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's exemption for the Religious Use of Wine*, 70 BROOKLYN L. REV. 739, 744 (2005).

On occasion, too, as in *Smith*, Scalia's parochial views on religion could be rawly apparent.<sup>121</sup> In an Establishment Clause case involving a single large Latin cross that marked a national war memorial cemetery he insisted in open court that the cross had a universal significance as a symbol of respect for the war dead. "The cross," he declared in oral argument in *Salazar v. Buono* in 2009, "is the most common symbol" in war memorial cemeteries to signal "the resting place of the dead." The lawyer arguing the case objected immediately. "The cross is the most common symbol of the resting place of Christians," he replied. "I have been in Jewish cemeteries," and there was "never a cross on a tombstone of a Jew." Recognizing the incongruity of Scalia's presumption, the audience broke into laughter. The cross, the lawyer then repeated, "is the most common symbol to honor Christians." While the audience had immediately caught on, Scalia did not. Instead, he scornfully repeated his earlier assertion. "I don't think you can leap from that to the conclusion that the only war dead that that cross honors are the Christian war dead." Then, fiercely obstinate or invincibly clueless, he doubled-down. "I think that's an outrageous conclusion."<sup>122</sup>

While Scalia's interpretation of the Constitution's religion clauses showed his willingness to distort or abandon both originalism and textualism, his interpretation of two other key constitutional provisions revealed similar inconsistencies and contradictions. In construing

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<sup>121</sup>In *Smith* Scalia showed little understanding or sympathy for the peyote-using religious practices of Native Americans. See GARRETT EPPS, *TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL* (2001).

<sup>122</sup>Oral Argument in *Salazar* at 38-39. Subsequently Scalia wrote a separate opinion in the case maintaining that the plaintiff who challenged the use of the cross lacked standing. *Salazar v. Buono*, 559 U.S. 700, 729 (2010) (Scalia, J., concurring in the judgment).

the Commerce Clause, he relied strictly on the constitutional text to challenge the “negative” or “dormant” commerce power, the doctrine that the Court could use the clause to invalidate state laws that impinged improperly on interstate commerce even in the absence of congressional legislation.<sup>123</sup> That doctrine, he insisted, had “no foundation in the text of the Constitution.”<sup>124</sup> In construing the Eleventh Amendment, however, he abandoned the constitutional text entirely and expanded the amendment’s reach far beyond its explicit terms<sup>125</sup> and contrary to the Court’s early decisions interpreting it.<sup>126</sup> To justify that anti-textual result, he was even willing to join an opinion by Chief Justice Rehnquist for a 5-4 majority that explicitly rejected textualism. That opinion scorned “blind reliance upon the text of the Eleventh Amendment” and declared that an argument based on a “lengthy analysis of the text of the Eleventh Amendment is directed at a

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<sup>123</sup>*E.g.*, *Tyler Pipe Industries Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part). “From his first term on the Court, Scalia has consistently opposed what he calls the Court’s ‘negative’ Commerce Clause jurisprudence.” ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE, 91. For Scalia’s treatment of the dormant Commerce Clause, *see id.* at 91-98.

<sup>124</sup>*Pharmaceutical Research & Manufacturers Association of America v. Walsh*, 538 U.S. 644, 674 (2003) (Scalia, J., concurring in the judgment). *Accord* *West Lynn Creamery*, 512 U.S. 186, 207, 209-10 (1994) (Scalia, J., concurring in the judgment).

<sup>125</sup>*E.g.*, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (Scalia, J.) (applying Eleventh Amendment to bar suit by Native American tribe, a category clearly not covered by the amendment’s text). *See also* *Alden v. Maine*, 527 U.S. 706, 728-29 (1999) (Kennedy, J., joined by Scalia) (because the “Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle, it follows that the scope of the States’ immunity from suit is demarcated not by the text of the Eleventh Amendment alone, but by fundamental postulates implicit in the constitutional design”). *Accord* *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) (Thomas, J., joined by Scalia).

<sup>126</sup>*E.g.*, *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405-12 (1821) (Marshall, C.J.).

straw man.”<sup>127</sup> While precedents supported Scalia’s non-textualist interpretation of the Eleventh Amendment, a longer line of precedents supported the Court’s non-textualist interpretation of the dormant Commerce Clause. Thus, a commitment to stare decisis could not explain the divergent positions he took in the two areas.<sup>128</sup> Inconsistent on both textual and precedential grounds, his opinions in these two areas were consistent in only one respect. They both served one of his primary ideological goals, limiting federal judicial power.

Addressing the Commerce Clause, moreover, Scalia was capable of a stunning aberration. While he had joined the conservatives “federalism revolution” in confining congressional power under the clause,<sup>129</sup> at a critical moment he switched sides. Choosing to write a separate--and therefore wholly unnecessary--concurrence in *Gonzales v. Raich*, he advanced an exceptionally broad view of the commerce power that stretched it well beyond the limits that he and the other conservatives had previously upheld.<sup>130</sup> There, he voted with the

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<sup>127</sup>*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 69 (1996) (Rehnquist, C.J., joined by Scalia). Scalia would use the text of the amendment, however, when it served his purpose. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 689 (1999) (Scalia, J.).

<sup>128</sup>“Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more.” *College Savings Bank*, 527 U.S. at 669 (Scalia, J.) (citing precedents beginning in 1890, including *Seminole Tribe*).

<sup>129</sup>*United States v. Lopez*, 514 U.S. 549 (1995) (Rehnquist, C.J., joined by Scalia, J.) (limiting the commerce power to channels and instrumentalities of interstate commerce as well as to activities that “substantially affected” interstate commerce).

<sup>130</sup>*Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (Scalia, J., concurring in the judgment). When asked about the contradiction between *Lopez* and *Raich* at a Federalist Society meeting, Scalia refused to answer. “Oh no,” he responded. “Get another question.” BISKUPIC, AMERICAN ORIGINAL, 9.

Court's liberals to set aside a state statute and uphold federal authority to prohibit the use of marijuana for medical purposes, even when the marijuana was home-grown and for personal use only.<sup>131</sup> His concurrence urged so sweeping a view of the commerce power that Justice Ginsburg happily and prominently cited it in three separate places in her subsequent opinion supporting the constitutionality of the Affordable Care Act.<sup>132</sup> In that later case, however, decided several years after *Raich*, Scalia returned to the conservative fold and adopted a narrower position that held the hotly contested measure--the paramount achievement of Democratic president Barack Obama--unconstitutional.<sup>133</sup> Scalia's aberrant behavior in *Raich* suggested to some that he was using the case to show himself less conservative and to thereby increase his chances of being selected to replace the recently deceased Rehnquist as Chief Justice.<sup>134</sup> Whatever his motive in *Raich*, there seemed no plausible originalist, textualist, or traditionalist explanation for his embarrassing flip-flops.<sup>135</sup> His subsequent return to the conservative fold in the Affordable Care

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<sup>131</sup>*Raich*, 545 U.S. at 7 (Stevens, J.).

<sup>132</sup>*National Federation of Independent Business v. Sibelius*, 567 U.S. at 618 (two references), 619 (Ginsburg, J., concurring in the judgment in part and dissenting in part). Ginsburg also cited Scalia's article on "The Rule of Law" against him. *Id.* at 644.

<sup>133</sup>*Sibelius*, 567 U.S. at 646 (Scalia, J., dissenting).

<sup>134</sup>MURPHY, SCALIA, 321-33, esp. 324-25. Considering Rehnquist's possible successor, Scalia's personal friend, Vice-President Dick Cheney and other conservatives initially pushed him forward for promotion to the center chair. PETER BAKER, *DAYS OF FIRE: BUSH AND CHENEY IN THE WHITE HOUSE* 417 (2013); JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 280 (2007). Scalia feared that he was too old for the appointment, but he nonetheless admitted that he wanted it. JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 139, 160, 173 (2019).

<sup>135</sup>Conservative law professor Randy Barnett, litigating the conservative challenge to the Affordable Care Act, offered an analysis that attempted to explain why, in spite of *Raich*, Scalia could still vote to invalidate the statute, as he subsequently did. Randy Barnett, *Undertanding Justice Scalia's Concurrence in Raich*, THE VOLOKH CONSPIRACY, March 9, 2012. In a critical

Act case, however, was wholly consistent with his political and ideological views.

Scalia's assertion of a sweeping commerce power in *Raich*, moreover, was doubly embarrassing for him. Not only was it inconsistent with the other restrictive opinions on the Commerce Clause that he joined before and after it, but it was also inconsistent with his scornful view of the Necessary and Proper Clause. In *Raich* he relied on that clause to support his defense of an extremely broad commerce power, arguing that "the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce."<sup>136</sup> Only eight years earlier, writing for the Court, he had mocked a dissent for being so baseless that it "of course resorts to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause."<sup>137</sup>

Further, in construing the Eleventh Amendment Scalia not only abandoned textualism but also embarrassed himself on originalist grounds. To provide an originalist cover for his views, he relied on a line of precedents that began, not in the eighteenth or early nineteenth century, but only in 1890. Then, when the Court was scuttling Reconstruction and sanctioning both Southern

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comment a lawyer at the Cato Institute could only suggest that "Scalia's preference for rules carried the day in *Raich*." Mark Moller, *What was Scalia Thinking?*, available at <https://www.cato.org/publications/commentary/what-was-scalia-thinking>, last consulted Aug. 27, 2019.

<sup>136</sup>*Raich*, 545 U.S. at 34-35 (Scalia, J., concurring in the judgment). "Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce." *Id.* at 35.

<sup>137</sup>*Printz v. United States*, 521 U.S. 898, 923 (1997) (Scalia, J.).

bond repudiation and racial segregation and disenfranchisement, the justices had enhanced state independence by elevating the Eleventh Amendment to a newly prominent position in *Hans v. Louisiana*.<sup>138</sup> There, the Court protected the white “redeemer” governments of the South by confecting a dubious originalist justification for ignoring the amendment’s text. *Hans* proclaimed that the states enjoyed a pre-constitutional sovereign immunity that barred the federal courts from hearing suits brought against them.<sup>139</sup> In embracing an interpretation that contradicted the text of the Eleventh Amendment Scalia claimed that he was content to rest on the “venerability of an answer consistently adhered to for almost a century,” that is, the post-Reconstruction answer that *Hans* created in 1890.<sup>140</sup> He accepted *Hans* as authoritative even though it was consistent with neither the text the Founders had adopted nor the Court’s own early nineteenth-century precedents. Instead, he declared that such “a venerable precedent” should control because it had been “embedded within our legal system for over a century.”<sup>141</sup> He rejected, of course, the many precedents that established the dormant Commerce Clause even

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<sup>138</sup>*Hans v. Louisiana*, 134 U.S. 1 (1890) (Bradley, J.).

<sup>139</sup>On the highly questionable and unconvincing nature of *Hans*, see Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts,”* 81 N. C. L. REV. 1927 (2003).

<sup>140</sup>*Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29, 31-33 (1989) (quote at 34) (Scalia, J., concurring in part and dissenting in part) Although early on he was somewhat uncertain about *Hans*, *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468, 495-96 (1987) (Scalia, J., concurring in part and concurring in the judgment), he subsequently embraced it fully. On Scalia’s abandonment of textualism in the area, see ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE, 106-14.

<sup>141</sup>*College Savings Bank.*, 527 U.S. at 689 (Scalia, J.). In *Union Gas*, 491 U.S. at 34-35 (Scalia, J., dissenting) he offered practical reasons to support his decision to defend *Hans* on *stare decisis* grounds.

though they were even more “venerable” and “embedded” in the legal system.<sup>142</sup> Indeed, Scalia himself traced the origin of the latter doctrine back to the Marshall Court and its formal adoption by the Court to 1873, nearly two decades prior to *Hans*.<sup>143</sup> Nonetheless, on the dormant Commerce Clause--where he sought to limit federal judicial power--“venerability” simply disappeared as a relevant consideration.

In spite of the bold assurance that marked his opinions, Scallia’s text-based reasoning was also on occasion simply arbitrary.<sup>144</sup> In *Tennessee v. Lane*, for example, the Court upheld an exercise of congressional power under Section 5 of the Fourteenth Amendment, setting aside the sovereign immunity of the states and enforcing a provision of the Americans With Disabilities

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<sup>142</sup>The dormant Commerce Clause had been established long before *Hans* in 1890. The doctrine was suggested in *Cooley v. Board of Wardens*, 53 U.S. 299, 319-20 (1851) (Curtis, J.) and stated clearly in the *Case of State Freight Tax*, 82 U.S.232, 279-80 (1873) (Strong, J.), and in *Bowman v. Chicago and Northwestern Railway Co.*, 125 U.S. 465, 485-87 (1888) (Matthews, J.). Fourteen years before *Hans* the Court had used it to void a state law prohibiting racial segregation in interstate carriers. *Hall v. DeCuir*, 95 U.S. 485, 487-90 (1876) (Waite, C.J.). “The Court’s dormant Commerce Clause docket expanded considerably in the period following the Civil War.” Barry Cushman, *Federalism*, in *THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION* (Karen Orren & John W. Compton, eds., 2018), 203.

<sup>143</sup>*Tyler Pipe*, 483 U.S. at 260 (Scalia, J., concurring in part and dissenting in part).

<sup>144</sup>*E.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (Scalia, J.) (finding preemption by construing phrase “relating to” broadly rather than narrowly when latter interpretation was entirely plausible); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457, 460 (2008) (Thomas, J., dissenting, joined by Scalia, J) (“When an individual is subjected to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his race; rather, it is the result of his conduct”). In the former case, three justices (Stevens, Rehnquist, and Blackmun) dissented and Souter did not participate; in the latter case, the other seven justices joined the majority opinion. *See also Feltner v. Columbia Pictures Tv*, 523 U.S. 340, 355 (1998) (Scalia, J., concurring); *Dastar Corp v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (Scalia, J.).

Act. Scalia strove repeatedly to limit congressional power under Section 5,<sup>145</sup> and in *Lane* he dissented and relied on the section's text which, he stressed, granted Congress the power "to *enforce*, by appropriate legislation" the amendment's other provisions. Acknowledging that he had italicized the word "enforce," he argued that

one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end.. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile per-hour speed limit-- even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit.<sup>146</sup>

Contrary to that assertion, however, and as he himself could not avoid admitting implicitly, governments could quite reasonably choose to "enforce" a 55 miles-per-hour speed limit by posting a 45 mile-per-hour limit. The simple and virtually universally known fact was that people commonly drove their cars at speeds somewhat above posted limits, regularly exceeding them by five or even ten miles per hour. The word "enforce," in other words, simply did not carry the necessarily rigid and exact meaning that Scalia insisted upon, and it surely did not carry such a restricted meaning from logical or linguistic necessity.<sup>147</sup>

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<sup>145</sup>*E.g.*, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 741 (2003) (Scalia, J., dissenting).

<sup>146</sup>*Tennessee v. Lane*, 541 U.S. 509, 554, 558 (2004) (Scalia, J., dissenting).

<sup>147</sup>Over the protest of four dissenting Justices, Scalia used a similar narrowing and restrictive technique to deny enforcement of Title VI of the Civil Rights Act of 1964. *Alexander v. Sandoval*, 532 U.S. 275, 285-86 (2001) (Scalia, J.) (denying the Department of Justice power

Equally striking, the Court had long recognized the obvious and unexceptionable contrary principle of valid law enforcement. “The inclusion of a reasonable margin to insure effective enforcement,” declared conservative Justice George Sutherland, “will not put upon a law, otherwise valid, the stamp of invalidity.”<sup>148</sup> Indeed, in a different doctrinal context where he was seeking to protect gun rights—one of his most fervent passions—Scalia himself invoked the same contrary principle. There he maintained that it was common for statutory and constitutional provisions “to go further than is necessary for the principal purpose involved.”<sup>149</sup> His acknowledgment of that principal in a gun-rights case demonstrated once again that the results he sought determined which legal arguments he would use and which he would ignore or dismiss.

Worse, Scalia’s crabbed interpretation of the word “enforce” in *Tennessee v. Lane* was particularly egregious for another reason. It flatly contradicted his own principle of proper constitutional interpretation that he had announced in his book, *A Matter of Interpretation*. “In textual interpretation, context is everything,” he had written, “and the context for the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation.”<sup>150</sup> His argument by italics in *Lane* violated that principle and

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to adopt, pursuant to statutory authority, a regulation that created a private cause of action to challenge laws having a disparate racial impact).

<sup>148</sup>*Euclid.*, 272 U.S. 365, 388-389 (1926) (Sutherland, J.).

<sup>149</sup>Transcript of Oral Argument, *District of Columbia v. Heller*, No. 07-290 (March 18, 2008), at 56.

<sup>150</sup>ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37 (1997) (hereafter, “SCALIA, MATTER”). Scalia stated the same principle two years earlier.

illustrated as well his characteristic use of italics as a handy tool for manipulating the meaning of texts.<sup>151</sup> To limit the power of Congress in enforcing the Fourteenth Amendment with effective civil rights statutes he was willing to use whatever arguments came to mind.

Scalia's acceptance of a comparative textualist argument showed similar inconsistencies. As a general matter, he sought to limit the Equal Protection Clause as much as possible to racial issues.<sup>152</sup> When he did so in order to reject affirmative action, he argued from the interrelated nature of the three Civil War amendments. The purpose of "the Civil War Amendments," he declared, was to prohibit all legal oppression on the basis of race or color.<sup>153</sup> While the thirteenth abolished "slavery" and "involuntary servitude," Scalia insisted more broadly that the fourteenth demonstrated "the Constitution's focus upon the individual" and the fifteenth "its rejection of

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Scalia, *Common Law Courts*, 111.

<sup>151</sup>Scalia employed a similarly arbitrary argument-by-italics in an effort to bar a plaintiff from compelling action by a federal agency pursuant to a statutory right to sue. *Federal Election Commission v. Akins*, 524 U.S. 11, 29, 30-31 (1998) (Scalia, J., dissenting). He adopted a similar argument by italics in *Bush v. Gore*, 531 U.S. 98, 111, 112 (2000) (Rehnquist, C.J., joined by Scalia, J.). Scalia used italics with great frequency. *See, e.g.,* *Printz*, 521 U.S. at 932 (Scalia, J.).

<sup>152</sup>*E.g.,* *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting) (Equal Protection Clause not relevant to alleged gender discrimination claim); *Coleman v. Court of Appeals of Maryland*, 566 U.S. at 44 (Scalia, concurring in the judgment) ("outside of the context of racial discrimination (which is different for *stare decisis* reasons), I would limit Congress's §5 power to the regulation of conduct that *itself* violates the Fourteenth Amendment," at 45) (emphasis in original). *Accord* *Tennessee v. Lane*, 541 U.S. at 561-65 (Scalia, J., dissenting).

<sup>153</sup>*Richmond v. J. A. Croson Co.*, 488 U.S. 469, 520, 522 (Scalia, J., concurring in the judgment, citing *Ex parte Virginia*, 100 U.S. 339, 345 (1880) (Strong, J.).

dispositions based on race.”<sup>154</sup> Together, he maintained, they meant that the Constitution barred government from using racial classifications regardless of benevolent motives and required it to focus solely on individual behavior and merit. In contrast, when he sought to limit the Fourteenth Amendment to racial issues for an entirely different purpose--to restrict as much as possible congressional efforts to enforce other types of civil rights claims--he ignored the textual argument based on the interrelated nature of the three amendments. If the thirteenth abolished “slavery” and “involuntary servitude” and the fifteenth rejected “dispositions based on race,” it was apparent on its textual face that the Fourteenth Amendment was neither limited to racial matters nor reasonably implied any such limitation. Quite the contrary. Its express terms extended the rights it established to “[a]ll persons born or naturalized in the United States.”<sup>155</sup> Further, Scalia acknowledged that “the Fourteenth Amendment, unlike the Fifteenth, is not limited to denial of the franchise and not limited to the denial of other rights on the basis of race.”<sup>156</sup> He used the Civil War amendments in tandem to condemn affirmative action, in other words, but he ignored their in-tandem implication when he sought to restrict congressional power to enforce the Fourteenth Amendment’s Equal Protection Clause more broadly in areas beyond racial discrimination.

In condemning affirmative action plans, moreover, Scalia gave a pointedly and unnecessarily narrow construction to both the original meaning of the Civil War amendments

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<sup>154</sup>Adarand Constructors v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

<sup>155</sup>U.S. CONSTITUTION, AMEND. 14, Sec. 1.

<sup>156</sup>Tennessee v. Lane, 541 U.S. at 555 (Scalia, J., dissenting).

and his proclaimed interpretative principle that “context is everything.”<sup>157</sup> On this issue he simply ignored the relevant historical context and the compelling evidence that showed how the combined social policies of federal, state, and local governments had fostered racial segregation and inequality over much of the twentieth century.<sup>158</sup> That, in turn, enabled him to deny that African-Americans in the late twentieth century had been harmed by “unlawful racial discrimination.”<sup>159</sup> On that historically faulty factual premise he could view the original understanding of the Civil War Amendments--understandings that clearly authorized affirmative action to remedy the consequences of racial discrimination and abuse--as irrelevant to contemporary issues of racial discrimination.<sup>160</sup>

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<sup>157</sup>SCALIA, MATTER, 37. *Accord* Scalia, *Common Law Courts*, 111. *See* Gil Seinfeld, *The Good, The Bad, and the Ugly: Reflections of a Counter-Clerk*, 114 MICH. L.REV.: FIRST IMPRESSIONS 111, 117-20 (2016).

<sup>158</sup>*See, e.g.*, RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (“Racial segregation in housing was not merely a project of southerners in the former slaveholding Confederacy. It was a nationwide project of the federal government in the twentieth century, designed and implemented by its most liberal leaders,” at xii); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985) (“The result, if not the intent, of the public housing program of the United States was to segregate the races, to concentrate the disadvantaged in inner cities, and to reinforce the image of suburbia as a place of refuge from the problems of race, crime, and poverty,” at 219). *See generally* IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD STORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005).

<sup>159</sup>“Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual.” *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment). *Accord* *Croson*, 488 U.S. at 526 (Scalia, J., concurring in the judgment).

<sup>160</sup>The Freedman’s Bureau furnished special protections for the ex-slaves and provided them with any number of goods and services, including food, clothing, schools, courts, and grants of confiscated Southern land. *See, e.g.*, *THE FREEDMEN'S BUREAU: RECONSTRUCTING THE AMERICAN SOUTH AFTER THE CIVIL WAR* (Paul A. Cimbala & Hans L. Trefousse, eds., 2005); *THE FREEDMEN'S BUREAU AND RECONSTRUCTING: RECONSIDERATIONS* (Paul A. Cimbala and

Further, his position on affirmative action demonstrated once again both his jurisprudential inconsistency and the influence of his personal values on his constitutional rulings. In a 1979 law review article he attacked affirmative action vigorously and across the board, charging that racial “entitlement” of any kind evoked “Nazi Germany.” “I am, in short,” he proclaimed, “opposed to racial affirmative action for reasons of both principle and practicality.”<sup>161</sup> Seven years later in his Senate confirmation hearing he acknowledged that the article expressed “policy views of mine at the time,” but he distinguished those views sharply from the position he would take when interpreting the Constitution. The article, he assured the Senate Judiciary Committee, expressed only his personal opinion about affirmative action, “not its constitutionality.” “I didn’t think [affirmative action] was a good idea,” he explained, but “those policy views will not inform my decisions from the Supreme Court.” Quite explicitly, moreover, he seemed to assure the committee that he would accept affirmative action plans if they had congressional approval. “Those views have nothing to do with the way I will apply whatever affirmative action laws are enacted by the Congress.” His personal position, he reiterated, “has nothing to do with whether I would enforce [affirmative action] vigorously if it’s passed by Congress.”<sup>162</sup>

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Randall M. Miller, eds., 1999); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1979); W. E. BURGHARDT DU BOIS, THE FREEDMEN'S BUREAU (1901); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); Stephen A. Siegel, *The Federal Government's Power to Enact Color Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998).

<sup>161</sup>Antonin Scalia, *Commentary: The Disease as Cure*, 1979 WASH. U. L. Q. 147, 153, 154, 156 (1979).

<sup>162</sup>*Hearings before the Committee on the Judiciary, United States Senate, Ninety-Ninth Congress, Second Session, on the Nomination of Judge Antonin Scalia, to be Associate Justice of*

Once on the Court, however, much as he had done in abandoning his claimed commitment to deference on federalism issues, he charted a steady course away from the assurances he had given the judiciary committee and moved to enforce his own contrary “policy views.” In his very first year on the high bench he rejected the Court’s interpretation of Title VII that approved a local government agency’s affirmative action plan. His opinion, however, seemed to accept the legitimacy of the congressional statute itself and fault the Court for misconstruing it. “A statute designed to establish a color-blind and gender-blind workplace,” he protested, “has thus been converted into a powerful engine of racism and sexism, not merely *permitting* intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.”<sup>163</sup>

Then, two years later in *City of Richmond v. Croson* he concurred in the Court’s decision to strike down the affirmative action plan of a Southern city. There, in a separate Janus-like solo opinion he maintained consistency with his statements to the judiciary committee while at the same time seeming to reject them absolutely. On one hand, consistent with the assurances he had given, he agreed that the city’s plan was unconstitutional because state and local governments were properly subject to a stricter constitutional standard than was the federal government. It “is one thing to permit racially based conduct by the Federal Government,” he explained, but it was “quite another to permit it by the precise entities against whose conduct in

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*the Supreme Court of the United States* (Aug. 5-6, 1986), 76, 94, 96, 95 (hereafter “*Scalia Hearings*”). *See id.* at 45.

<sup>163</sup>*Johnson v. Transportation Agency*, 480 U.S. 616, 657, 677 (1987) (Scalia, J., dissenting) (emphasis in original).

matters of race that [Fourteenth] Amendment was specifically directed.”<sup>164</sup> On the other hand, seeming to repudiate those same assurances, he announced in his opinion’s first paragraph that he agreed with the statement of Alexander Bickel, an uncompromising opponent of affirmative action, that all “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.”<sup>165</sup> For emphasis, in the same introductory paragraph he also quoted Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson* declaring that the Constitution should be “color-blind”<sup>166</sup> Both quotes supported his “policy view” that affirmative action plans should be unconstitutional in all cases.

Following *Croson*, Scalia moved to enforce that absolute anti-affirmative action principle. The very next year he voted to invalidate a federal affirmative action plan, contradicting the seemingly deferential view toward federal action that he had expressed in both *Croson* and his Senate confirmation testimony.<sup>167</sup> Then, in 1995 he joined a majority in *Adarand*

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<sup>164</sup>*Croson*, 488 U.S. at 521-22 (Scalia, J, concurring in the judgment). In a part of her opinion that only Rehnquist and White joined, O’Connor made the same point. “What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment.” *Id.* at 490.

<sup>165</sup>*Croson*, 488 U.S. at 521 (Scalia, J, concurring in the judgment), quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975). “If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on similar grounds; for it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded.” *Id.* at 132-33.

<sup>166</sup>*Croson*, 488 U.S. at 521 (Scalia, J, concurring in the judgment), quoting *Plessy v. Ferguson*, 163 U.S. 537, 552, 559 (1896) (Harlan, J., dissenting).

<sup>167</sup>*Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990) (Scalia, J., joining the separate dissents of both O’Connor, J. and Kennedy, J.) (both dissents requiring strict scrutiny of federal affirmative action plans and holding the federal action unconstitutional).

*Constructors v. Pena* to strike down another federal affirmative action plan. This time, again writing separately, he fully embraced the absolute anti-affirmative-action position he had floated in *Croson*. The government, he declared, “can never have a ‘compelling interest’ in discriminating on the basis of race” for affirmative action purposes.<sup>168</sup> Thus, eight years after ascending the high bench, he proclaimed that affirmative action was unconstitutional across the board, and unconstitutional regardless of the governmental branch or agency that sponsored it.

As a Supreme Court justice, Scalia’s shifting position on affirmative action supported three conclusions. First, his affirmative action opinions between 1987 and 1995 were, like much of his constitutional jurisprudence, inconsistent. Second, those opinions ended with the absolute conclusion that affirmative action was always unconstitutional. Third, those opinions traced a course that made his interpretation of the Constitution after 1995 identical to the personal “policy views” he had announced in 1979, the precise policy views that he had assured the Senate Judiciary Committee would not affect his constitutional decisionmaking.<sup>169</sup>

On a more general level, Scalia regularly proclaimed his respect for popular lawmaking

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<sup>168</sup>Adarand, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment). *See, e.g.*, Scalia’s later opinion in *Grutter v. Bollinger*, 539 U.S. at 346 (Scalia, J., concurring in part and dissenting in part).

<sup>169</sup>One might think that Scalia’s testimony before the judiciary committee showed a lack of candor. “From his first days on the Court, Scalia waged a fierce campaign to end affirmative action.” EVAN THOMAS, *FIRST: SANDRA DAY O’CONNOR* 259 (2019). At least one law review article has raised the question whether Scalia committed perjury when discussing the issue. James L McAlister, *A Pigment of the Imagination: Looking at Affirmative Action Through Justice Scalia’s Color-Blind Rule*, 77 MARQ. L. REV. 327, 345 n.152 (1994).

authority,<sup>170</sup> but he had no qualms about rejecting that authority when he decided to invalidate a statute.<sup>171</sup> In *City of Boerne v. Flores*, for example, he ended a concurrence by insisting on the principle that it was not the Court but “the people, through their elected representatives” who should rule.<sup>172</sup> In the same case, however, he voted with the majority to invalidate a congressional statute enacted under Section 5 of the Fourteenth Amendment.<sup>173</sup>

In spite of his customary rhetoric heralding the right of the people to rule through their democratically-elected legislatures, Scalia joined the other four conservative justices in voiding many legislative measures. In the years immediately following *Boerne*, they invalidated seven separate federal statutes on state sovereignty grounds alone<sup>174</sup> and, in the process, severely limited and essentially overruled a line of precedents extending from 1880 into the 1980s that upheld expansive congressional powers under all three of the Civil War amendments.<sup>175</sup> Those

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<sup>170</sup>*Booth v. Maryland*, 482 U.S. 496, 519, 520 (1987) (Scalia, J., dissenting);

<sup>171</sup>Scalia sometimes expressed his scorn for legislative behavior. “It is no indication whatever of the invalidity of the constitutional rule which we announce, that it produces unhappy consequences when a legislature lacks foresight, and acts belatedly to remedy a deficiency in the law.” *Plaut v. Spendthrift Farm*, 514 U.S. 211, 237 (1995) (Scalia, J.)

<sup>172</sup>*City of Boerne v. Flores*, 521 U.S. 507, 537, 544 (1997) (Scalia, J., concurring in part).

<sup>173</sup>*City of Boerne*, 521 U.S. at 536 (Kennedy, J., joined by Scalia, J.).

<sup>174</sup>ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE, 113.

<sup>175</sup>*See, e.g.*, *Ex parte Virginia*, 100 U.S. 339 (1880) (Strong, J.) (Fourteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Brennan, J.) (Fourteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (Warren, C.J.) (Fifteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (Stewart, J.) (Thirteenth Amendment); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Rehnquist, C.J.) (Fourteenth Amendment); *Runyon v. McCrary*, 427 U.S. 160 (1976) (Stewart, J.) (Thirteenth Amendment); *City of Rome v. United States*, 446 U.S. 156 (1980) (Marshall, J.) (Fifteenth Amendment).

precedents surely came well within the “venerability” principle he found compelling when he wished to justify staying with *Hans* and using the Eleventh Amendment to limit federal judicial power. Once again, however, he refused to apply that same “venerability” principle when it cut against his effort to limit congressional power under the Fourteenth Amendment.<sup>176</sup>

On top of that, the decisions Scalia joined limiting congressional power mocked another principle of statutory construction that he cited on other occasions. “The cardinal principle of statutory construction,” he declared in *Edwards v. Aguillard*, “is to save and not to destroy.”<sup>177</sup> In *Edwards*, however, he was not considering the constitutionality of congressional power to enforce broad civil rights legislation but rather defending a religiously inspired state statute that required the teaching of “creation science.” He was willing to “save and not to destroy” a statute that compelled the teaching of a Fundamentalist religious doctrine in public schools, but unwilling to do the same for statutes that sought to protect many other kinds of civil rights.<sup>178</sup>

When one or more of the conservative justices joined the Court’s liberals in upholding

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<sup>176</sup>Scalia did not seek to formally overrule the earlier cases but to limit them severely outside of the context of race. *See, e.g., Tennessee v. Lane*, 541 U.S. at 561-65 (Scalia, J., dissenting).

<sup>177</sup>*Edwards v. Aguillard*, 482 US 578, 610, 626 (1987) (Scalia, J., dissenting, quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 US 1, 30 (1937) (Hughes, C.J.)).

<sup>178</sup>*E.g., Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (O’Connor, J., joined by Scalia, J.) (denying congressional power to impose damages remedies on states under the Age Discrimination in Employment Act); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Rehnquist, C.J., joined by Scalia, J.) (same under the Americans with Disabilities Act); *Coleman*, 566 U.S. at 44 (Scalia, J., concurring) (same under a provision of the Family and Medical Leave Act).

the power of Congress under the Fourteenth Amendment, moreover, Scalia dissented, offering unusually weak grounds for his position<sup>179</sup> and urging severe restrictions on that power.<sup>180</sup> By 2011 he maintained that in some areas the Court should no longer even give deference to Congress, and he charged the legislative branch with “extravagant assertions of congressional power.” Most of those assertions involved “efforts to eliminate or control powers belonging to one of the other two branches,” while some involved “the assertion of a general police power that has never been given to the federal government and belongs only to the states.”<sup>181</sup>

His contrasting and excessively sweeping rhetoric in two cases decided a day apart in 2013 illustrated the pervasive fact that his jurisprudence sacrificed methodological and rhetorical consistency to the demands of political ideology. In *Shelby County v. Holder*<sup>182</sup> he joined a 5-4 majority that invalidated a provision of the Voting Rights Act of 1965. Although Congress had repeatedly reenacted the statute--most recently by overwhelming majorities--Scalia baselessly

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<sup>179</sup>As one scholar who studied his jurisprudence in the area concluded, Scalia relied on arbitrary dictionary definitions, mischaracterized precedents, ignored the significance of the Necessary and Proper Clause, betrayed the federalism principles he proclaimed in his confirmation hearing, and rejected the clear purpose of the Fourteenth Amendment to give Congress the primary role in determining how to enforce the Fourteenth Amendment. ROSSUM, ANTONIN SCALIA’S JURISPRUDENCE, 122-24.

<sup>180</sup>Coleman, 566 U.S. at 45 (2012) (Scalia, J., concurring in the judgment) (statutes must be tightly tailored to Fourteenth Amendment rights or focused exclusively on racial discrimination); *Tennessee v. Lane*, 541 U.S. at 560 (Scalia, J., dissenting) (no merely “prophylactic” legislation allowed under Fourteenth Amendment). In addition, he sought to deny the power of Congress unless its measures satisfied extreme and unprecedented evidentiary requirements for nationwide application. *Hibbs*, 538 U.S. at 741-44 (Scalia, J., dissenting).

<sup>181</sup>SCALIA SPEAKS, 216.

<sup>182</sup>*Shelby County v. Holder*, 570 U.S. 529 (2013) (Roberts, C.J., joined by Scalia, J.).

charged in the oral argument that “this is not the kind of a question you can leave to Congress.” His reasoning was rawly anti-democratic and contrary to his repeated claims about the rights of popular government. Senators and representatives, he declared, voted for the statute only because they were otherwise “going to lose votes” in seeking reelection.<sup>183</sup> Consequently, he voted to invalidate the statute.

In contrast, the very next day in *United States v. Windsor* he castigated the Court’s 5-4 decision to invalidate a provision of the Defense of Marriage Act. The case, he proclaimed, was about the power of our people to govern themselves, and the power of this Court to pronounce the law. Today’s opinion aggrandizes the latter, with the predictable consequence of diminishing the former. We have no power to decide this case. And even if we did, we have no power under the Constitution to invalidate this democratically adopted legislation.<sup>184</sup>

The dramatically contrasting rhetoric in *Shelby County* and *Windsor* was due to the fact that the two statutes at issue served radically different social and political purposes. Scalia voted to invalidate the Voting Rights Act of 1965, a monumental civil rights measure that had enabled

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<sup>183</sup>Transcript of oral argument, *Shelby County v. Holder*, No. 12-96 (Feb. 27, 2013), 47.

<sup>184</sup>*United States v. Windsor*, 570 U.S. at 778 (Scalia, J., dissenting). When Scalia felt differently about a state action, his rhetoric was quite different. Rejecting a constitutional limitation that the Court placed on death penalty prosecutions, he dissented in *South Carolina v. Gathers*, 490 U.S. 805, 823, 825 (1989), declaring that “I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process.” *Accord Edwards*, 482 U.S. at 626 (Scalia, J., dissenting).

millions of minority citizens to vote and that served as a barrier to Republican efforts to suppress minority and other Democratic leaning voting blocks. In contrast, he decried the invalidation of the Defense of Marriage Act, a statute that Congress had passed to block legal recognition of gay marriages by the federal government. Constitutionally inconsistent rhetoric; ideologically consistent results.

Countless other inconsistencies also plagued Scalia's judicial work. His decisions addressing problems of constitutional retroactivity were themselves contradictory and inconsistent with "the traditional common-law understanding of rights he embraces in other contexts."<sup>185</sup> He abandoned both originalist reasoning and principles of separation of powers when he justified judicial deference to federal agencies on the ground that they were required by the twentieth-century demands of "the modern administrative state."<sup>186</sup> He abjured reliance on foreign and international law in construing the Constitution, but to defend executive power he was willing to cite a leading Court precedent that relied centrally on principles of international law.<sup>187</sup> He condemned the use of legislative history absolutely,<sup>188</sup> but he not only declared it "a

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<sup>185</sup>ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE, 188 ("Scalia's willingness to give *Ring* [*v. Arizona*, 536 U.S. 584] only prospective effect not only contradicts the traditional common-law understanding of rights he embraces in other contexts but also encourages the very policymaking tendencies of the colleagues he elsewhere attacks"). On Scalia's retroactivity decisions, *see id.* at 184-89. ACCORD DORSEN, UNEXPECTED, 37; Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 57-62 (2015).

<sup>186</sup>Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 516 (1989).

<sup>187</sup>*Compare* *Roper v. Simmons*, 543 U.S. 551, 607, 622-28 (2005) (Scalia, J., dissenting and opposing reliance on foreign and international law sources in construing Constitution) *with* *Webster v. Doe*, 486 U.S. at 614-15 (Scalia, J., dissenting, quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-20 (1936), which relied on international law to support

significant factor in interpreting a statute” in his confirmation hearing<sup>189</sup> but occasionally cited it in his opinions on the Court when it seemed to support his views.<sup>190</sup>

In condemning legislative history, moreover, Scalia was ready to prejudge a basketful of constitutional issues. Drawing on legislative history “is not just wrong,” he insisted in the most sweeping terms; “it violates constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of judicial interpretation in deciding the case presented.”<sup>191</sup> So much for his proclaimed emphasis on the need for judicial restraint and the necessity of avoiding constitutional issues whenever possible.

Scalia’s inconsistencies hardly stopped there. He was willing to loosen standing requirements to allow defendants in state court actions under Section 1983 to carry appeals to the Court, but he was unwilling to do the same for plaintiffs in state court actions asserting federal-

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independent and extra-constitutional foreign-affairs power of president). *See* Edward A. Purcell, Jr., *Understanding Curtiss-Wright*, 31 L. & HIST. REV. 653, 659-60, 714 (2013). Scalia could also cite to foreign law when it supported his position. *Lafler v. Cooper*, 566 U.S. 156, 175, 185 (2012) (Scalia, J., dissenting). Justice Ginsburg noted that on rare occasions Scalia cited foreign legal sources. RUTH BADER GINSBURG, *MY OWN WORDS* 254 (2016).

<sup>188</sup>SCALIA, *READING*, 388. *See, e.g.*, *National Endowment for the Arts v. Finley* 524 U.S. 569, 590, 594 (Scalia, J., concurring in the judgment) (“More fundamentally, of course, all this legislative history has no valid claim upon our attention at all”); *Samantar v. Yousuf*, 560 U.S. 305, 326, 326-29 (Scalia, J., concurring in the judgment); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 616, 617-23 (1991) (Scalia, J., concurring in the judgment).

<sup>189</sup>*Scalia Hearings*, at 65. *Accord, id.*, at 105-06.

<sup>190</sup>*Edwards*, 482 U.S. at 624-27, 636-39 (Scalia, J., dissenting); *Lucas*, 505 U.S. at 1028 n.15 (Scalia, J.).

<sup>191</sup>SCALIA, *READING*, 388.

law challenges to state laws that deprived schools of funding and raised local taxes.<sup>192</sup> In *Smith* he construed the Free Exercise Clause to deny protection to a small Native American religious group,<sup>193</sup> but in a later case he construed the Establishment Clause to uphold a clergy-led prayer at a public school graduation on the ground that “maintaining respect for the religious observance of others is a fundamental civil virtue that governments (including the public schools) can and should cultivate.”<sup>194</sup> He was willing to infer a causal relationship in the absence of record evidence to support a decision enabling defendants to defeat tort claims,<sup>195</sup> but unwilling to infer far more likely causal relationships that would allow plaintiffs to assert claims challenging employment discrimination and government intrusions under the Foreign Intelligence Surveillance Act.<sup>196</sup>

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<sup>192</sup>*Compare* *Camreta v. Greene*, 563 U.S. 692, 714 (2011) (Scalia, J. concurring, allowing standing to prevailing defendant on ground that “our precedents, strange though they may be,” controlled) *with* *ASARKO v. Kadish*, 490 U.S. 605, 634 (1989) (Rehnquist, joined by Scalia, concurring in part and dissenting in part, denying standing for appeal to the Court on ground that plaintiffs below lacked standing to bring their state-court suit originally in federal court). Scalia seemed similarly inconsistent in applying his ideas on standing in voting rights cases. Christopher S. Elmendorf & Edward B. Foley, *Symposium: How We Vote: Electronic Voting and Other Voting Practices in the United States: Gatekeeping vs Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL OF RIGHTS J. 507, 533-34 (2008).

<sup>193</sup>*Smith*, 494 U.S. 872 (1990) (Scalia, J.).

<sup>194</sup>*Lee v. Weisman*, 505 U.S. at 638 (Scalia, J., dissenting).

<sup>195</sup>*Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (Scalia, J.).

<sup>196</sup>*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (Scalia, J.); *Clapper v. Amnesty International*, 568 U.S. 398 (2013) (Alito, J., joined by Scalia). *See also* *Franklin v. Massachusetts*, 505 U.S. 788, 823, 824-25 (1992) (Scalia, J. concurring in part and concurring in the judgment).

The inconsistencies in the arguments and assertions Scalia used were strikingly apparent in the area of election law. He criticized those who supported gay rights by explaining that their growing “political power” was based on certain social facts--their ardent concern, geographical concentration, and “high disposable income”--that gave them “political power much greater than their numbers.”<sup>197</sup> When he insisted that corporations had a First Amendment right to funnel as much money as they wished into political campaigns, however, he gave no weight to the far more obvious and compelling social facts that gave corporations “political power” that far exceeded their numbers.<sup>198</sup> Similarly, when he opposed all restrictions on campaign finances, he stressed the great danger that incumbent legislators would exploit such restrictions by enacting self-serving laws to advance their own interests.<sup>199</sup> When, however, he opposed claims that partisan redistricting, gerrymandering, and state and local election laws were being exploited by

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<sup>197</sup>Romer v. Evans, 517 U.S. 620, 636, 645-46 (1996) (Scalia, J., dissenting).

<sup>198</sup>Austin, 494 U.S. at 679 (Scalia, J., dissenting). The Court largely adopted the position Scalia set out in his *Austin* dissent in *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010) (Kennedy, J., joined by Scalia, J.). “[T]o exclude or impede corporate speech is to muzzle the principal agents of the modern free economy.” *Id.* at 393 (Scalia, J., concurring). For decades “Scalia had hammered” on the view “that corporations have the First Amendment right to spend whatever they want to influence the outcomes of elections.” HASEN, JUSTICE OF CONTRADICTIONS, 114. For one response to Scalia’s ideologically shaped vision of First Amendment speech rights, see BERT NEUBORNE, MADISON’S MUSIC: ON READING THE FIRST AMENDMENT (2015).

<sup>199</sup>“The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. Perhaps the Michigan Legislature was genuinely trying to assure a ‘balanced’ presentation of political views; on the other hand, perhaps it was trying to give unincorporated unions (a not insubstantial force in Michigan) political advantage over major employers. Or perhaps it was trying to assure a “‘balanced’ presentation because it knows that with evenly balanced speech incumbent officeholders generally win.” Austin, 494 U.S. at 692-93 (Scalia, J., dissenting).

self-serving--and Republican--legislators, he dismissed those very same dangers as irrelevant.<sup>200</sup>

Finally, addressing the scope of the Court's own appellate jurisdiction, he was inconsistent there as well. When opportunities arose to cut back on liberal state court rulings that protected the constitutional rights of criminal defendants, Scalia defended an expansive view of that jurisdiction. The Court's "principal responsibility under current practice" and "a primary basis" for its constitutional jurisdiction, he insisted, was "to ensure the integrity and uniformity of federal law."<sup>201</sup> Yet, where his policy goals were different and he consequently wished to block appeals, he readily ignored what he had previously called the "primary basis" for the Court's jurisdiction and the importance of ensuring "the integrity and uniformity of federal law." In those cases he announced a contrary principle. "[D]eclaring the compatibility of state or federal laws with the Constitution," he then maintained, "is not only not the 'primary role' of this

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<sup>200</sup>HASEN, JUSTICE OF CONTRADICTIONS, 120-21. *See id.* at 114-32 (comparing Scalia's opinions in those areas). Scalia similarly invoked the danger of self-serving legislators when he argued against the use of legislative history. It was "no wonder that one of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a pre-written 'floor debate'--or, even better, insert into a committee report." SCALIA SPEAKS, 239.

<sup>201</sup>*Kansas v. Marsh*, 548 U.S. 163, 182, 183 (2006) (Scalia, J., concurring). The Court applied the rule established in *Michigan v. Long*, 463 U.S. 1032 (1980) (O'Connor, J.) which was based on the "important need for uniformity in federal law." *Id.* at 1040. Generally, the rule served conservative goals by allowing the Court to cut back on the constitutional rights of criminal defendants in state courts, and Scalia applied it regularly. *E.g.*, *Ohio v. Robinette*, 519 U.S. 33 (1996) (Rehnquist, C.J., joined by Scalia, J.); *Arizona v. Evans*, 514 U.S. 1 (1995) (Rehnquist, C.J., joined by Scalia, J.). *See, e.g.*, Edward A. Purcell, Jr., *The Story of Michigan v. Long: Supreme Court Review and the Workings of American Federalism*, in FEDERAL COURTS STORIES (Vicki C. Jackson and Judith Resnik, eds., 2010), 115-39. *Compare, e.g.*, Scalia's views with those of Justice Stevens in *Michigan v. Long*, 463 U.S. 1032, 1065 (Stevens, J., dissenting), and *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting).

Court, it is not a separate, free-standing role *at all*.”<sup>202</sup> Indeed, Scalia was the only justice to join Rehnquist’s separate opinion in another case that declared it “a rather unremarkable proposition” that in some instances “state courts will remain free to decide important questions of federal statutory and constitutional law without the possibility of review in this Court.”<sup>203</sup> Even the very nature of the Court’s constitutional role and the importance of “the integrity and uniformity of federal law” varied by Scalia’s personal goals and values.

When considered separately, Scalia’s individual opinions may seem to apply a coherent jurisprudence, but when considered comparatively and across the board they suggest a far different conclusion. They show that his jurisprudence was elastic and malleable, that he applied it inconsistently and erratically, and that he commonly used it to reach results consistent with his own political, religious, cultural, and ideological convictions. Never did he adequately explain, for example, why originalist sources were supposedly determinative in some cases but irrelevant in others.<sup>204</sup> Nor why it was proper for him to bow to *stare decisis* in some cases and areas but not in others.<sup>205</sup> Nor why “venerability” demanded respect for some precedents but not

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<sup>202</sup>Windsor, 570 U.S. at 781 (Scalia, J., dissenting) (emphasis in original).

<sup>203</sup>ASARCO, 490 U.S. at 636 (Rehnquist, C.J., concurring in part and dissenting in part, joined only by Scalia, J.).

<sup>204</sup>He attempted to explain this inconsistency by claiming that in his earlier years on the bench parties did not make originalist arguments in their briefs and scholars had not yet produced relevant originalist research. SCALIA, READING, 401-02.

<sup>205</sup>Scalia acknowledged that the doctrine of precedent was a “pragmatic *exception*” to his originalism, SCALIA, MATTER, 140 (emphasis in original), but he commonly failed to explain adequately, or often at all, why the exception applied most of the times when he relied on it. For his statement of common ideas about following or rejecting *stare decisis*, see SCALIA, READING, 87, 411-14. In one opinion, for example, he wrote that “I adhere to my view” of the issue “our

for others. Nor why the significance of both history and tradition changed from one case to another. Nor why sometimes neither was even relevant. Nor why some inferences from the constitution's text and structure were proper and others not. Nor why some words in the text-- "speech," "press," "Arms,"<sup>206</sup> "search," "property," "executive Power," and "person, house, paper, or effect"--were to be construed loosely and expansively, while many others--"Cases," "Controversies," "religion," "liberty," "Treaty," "enforce," "confrontation," "due process," "judicial Power," "equal protection," and "cruel and unusual punishments"--were to be construed narrowly and restrictively.

In a debate in 2005 with Nadine Strossen, the president of the American Civil Liberties Union, Scalia responded to a question about the meaning of the word "religion" in the Establishment Clause and made the decisive point exactly. "Its depends," he explained, "on how

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contrary precedents notwithstanding." *Stern v. Marshall*, 564 U.S. 462, 503 (2011) (Scalia, J., concurring). In the oral argument of another case, he declared that "I think that [United States v. Katz, 389 U.S. 347 (1967)] was wrong," but stated that "its's been around for so long, we are not going to overrule that." *TRIBE & MATZ, UNCERTAIN JUSTICE* 234. In other opinions he followed precedents even though he thought them dubious or wrong. *E.g.*, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. at 412-14 (Scalia, J.) (refusing to depart from a precedent that was "hard to square" with a controlling statute but had been accepted for "nearly seven decades"); *Camreta*, 563 U.S. at 714 (Scalia, J. concurring) (following "our precedents, strange though they may be"). In an Eighth Amendment case he commented that two cases that "find no proper basis" in the Constitution nonetheless "have some claim to my adherence because of the doctrine of *stare decisis*." He rejected them there, not because they had no basis in the Constitution but because there were "irreconcilable" with another Supreme Court decision whose foundation he thought was "probably" unsound. *Walton v. Arizona*, 497 U.S. 639, 656, 672-73, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment).

<sup>206</sup>The word "Arms" in the Second Amendment, Scalia declared, "extends, prima facie, to all instruments that constitute bearable arms even those that were not in existence at the time of the founding." *District of Columbia v. Heller*, 554 U.S. at 582 (Scalia, J.).

generalized you want to get.”<sup>207</sup> True. And the Constitution contained no rules whatsoever for determining the level of generalization proper for its many broad, capacious, and undefined terms. In Scalia’s jurisprudence, applied through by a range of varying and serviceable rhetorical moves, it was his own personal values and goals that regularly made that determination.

The ultimately personal nature and ideological thrust of Scalia’s jurisprudence seems particularly evident in light his interpretation of the Equal Protection Clause. “Our salvation is the Equal Protection Clause,” he declared, because it “requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”<sup>208</sup> That statement sounded a noble principle of justice and equality, but in applying it Scalia carefully narrowed its meaning and the scope of the “salvation” it promised. He insisted that the Court could not interpret the Equal Protection Clause to undermine “those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts.” It had no basis for striking down any practice that “bears the endorsement of a long tradition of open, widespread, and unchallenged use.”<sup>209</sup> Thus, he held that the clause did not protect certain

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<sup>207</sup>C-Span video, *The State of Civil Liberties*, available at <https://www.c-span.org/video/?194843-1/state-civil-liberties&start=NaN&start=3018>, at approximately 43:15 of the tape, last consulted Aug. 28, 2019.

<sup>208</sup>*Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 292, 300 (1990) (Scalia, J., concurring).

<sup>209</sup>*United States v. Virginia*, 518 U.S. at 568 (Scalia, J. dissenting). The second quote in the text above was a quote that Scalia cited from his own prior dissent in *Rutan*, 497 U.S. at 95.

groups--women and gays, for example<sup>210</sup>--even though those groups had long suffered abuse and discrimination at the hands of other dominant groups. Curiously echoing the harsh religious doctrine of predestination, he preached that the clause could not bring “salvation” to those who most needed it, but only to those who were already saved.

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<sup>210</sup>On women’s rights, *see, e.g.*, *J. E. B.*, 511 U.S. at 127 (1994) (Blackmun, J.). There, Scalia dissented from the Court’s decision prohibiting gender discrimination in the use of peremptory challenges in jury selection. He protested that “to pay conspicuous obeisance to the equality of the sexes, the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people’s traditions.” *Id.* at 156, 163. On gay rights, *see, e.g.*, *Obergefell*, 135 S. Ct. at 2626 (Scalia, J., dissenting). There, he dissented from the Court’s decision to uphold same-sex marriage. “We have no basis for striking down a practice [limiting marriage “to one man and one woman”] that is not expressly prohibited by the Fourteenth Amendment’s text, and that bears the endorsement of a long tradition of open, widespread and unchallenged use dating back to the Amendment’s ratification.” *Id.* at 2628.

## CHAPTER 7

### AN ARBITRARY JURISPRUDENCE: *HELLER*

The most personal opinion that Scalia wrote for the Court likely came in *District of Columbia v. Heller*.<sup>1</sup> It “is my legacy opinion,” he proudly announced. “[I]t is the best example of the technique of constitutional interpretation, which I favor: that is to say it is a good example of originalism.”<sup>2</sup> *Heller* was “originalism’s high-water mark,” declared one commentator, while another thought it showed Scalia “at the peak of his legal influence.”<sup>3</sup>

Scalia’s opinion for a five-justice majority in *Heller* deployed a variety of textual and historical arguments to identify what he announced as “the original understanding of the Second Amendment.” On that basis, he held that the amendment protected an individual constitutional right to possess handguns in the home for self-defense and voided a conflicting prohibition in the

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<sup>1</sup>*District of Columbia v. Heller*, 554 U.S. 570 (2008) (Scalia, J.).

<sup>2</sup>BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* 390 (2014) (hereafter, “MURPHY, SCALIA”).

<sup>3</sup>Adam J. White, *The American Constitutionalist: Antonin Scalia, 1936-2016*, 21 THE WEEKLY STANDARD (Feb. 29, 2016), 24, 25; JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 344-45 (2009) (hereafter, “BISKUPIC, AMERICAN ORIGINAL”).

District of Columbia Code.<sup>4</sup> In typical Scalian style his opinion was well-written, forcefully argued, and replete with both irrelevant flourishes and flashy insults hurled at those who disagreed with him.<sup>5</sup>

The opinion provoked extensive and severe scholarly criticism aimed at his highly selective use of historical materials, inadequate understanding of political and cultural contexts, and inattention to the historical changes that marked the late eighteenth and nineteenth centuries.<sup>6</sup> The massive evidence that scholars unearthed and the sophisticated analyses they

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<sup>4</sup>Heller, 554 U.S. at 625, 635.

<sup>5</sup>*E.g.*, “[I]t is not the role of this Court to pronounce the Second Amendment extinct,” Scalia proclaimed grandly. Heller, 554 U.S. at 636. He termed Stevens’s position in dissent “grotesque,” *id.* at 587, “unknown this side of the looking glass,” *id.* at 589, and “worthy of the Mad Hatter,” *id.* at 589.

<sup>6</sup>For a sample of works providing general support for Scalia’s individual rights interpretation, *see, e.g.*, JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); LEONARD LEVY, *ORIGINS OF THE BILL OF RIGHTS* (1999); STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* (2008); DAVID E. YOUNG, *THE FOUNDERS’ VIEW OF THE RIGHT TO BEAR ARMS* (2007); ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* (2004); David T. Hardy, *The Rise and Demise of the “Collective Right” Interpretation of the Second Amendment*, 59 CLEV. ST. L. REV. 315 (2011); James A. Hanretta, *Collective Responsibilities, Private Arms, and State Regulations: Toward the Original Understanding*, 73 FORDHAM L. REV. 529 (2004); Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

For a sample of works challenging or contradicting Scalia’s individual right interpretation, *see, e.g.*, Brief of Amici Curiae Jack N. Rakove et al., in Support of Petitioners, *District of Columbia v. Heller* (brief signed by fifteen of historians who specialized in eighteenth and early nineteenth century history) (hereafter, “Rakove Brief”); Brief for Professors of Linguistics and English in Support of Petitioners, *District of Columbia v. Heller* (brief signed by three language specialists) (hereafter, “Linguistics Brief”); PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* (2009) (hereafter, “CHARLES, SECOND AMENDMENT”); JOHN MASSARO, *NO GUARANTEE OF A GUN: HOW AND WHY THE SECOND AMENDMENT MEANS EXACTLY WHAT IT SAYS* (2009); SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND*

produced justified four basic conclusions.<sup>7</sup> First, there are many varieties of historical evidence that could be used in attempts to support different interpretations of the amendment's meaning. That evidence shows that a person genuinely determined to construe the amendment according to its original meaning could not know with any real certainty what that meaning was or whether there was any specific and shared understanding of it at all.<sup>8</sup> Second, though Scalia's version drew support from some selected pieces of historical evidence, it was most likely wrong. The bulk of the available historical research undermines it, and most scholars who have studied the issue have rejected it.<sup>9</sup> Third, the evidence does not come close to providing the clarity and

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THE RIGHT TO BEAR ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT (2002); David Thomas Konig, *Why the Second Amendment has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 U.C.L.A. L. REV. 1295, 1326-37 (2009); Cass Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246 (2008); Paul Finkelman, "A Well-Regulated Militia": *The Second Amendment in Historical Perspective*, 76 CHI-KENT L. REV. 195 (2000); Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22 (1984); Lawrence Delbert Cress, *The Second Amendment and the Rights to Bear Arms: An Exchange*, 71 AM. HIST. REV. 587 (1984). It is worth noting, too, that Scalia's opinion presented an antiseptic view of the Second Amendment that ignored the extent to which gun laws and practices were used in the United States to enforce slavery, white supremacy, and racist policies. ROXANNE DUNBAR-ORTIZ, *LOADED: A DISARMING HISTORY OF THE SECOND AMENDMENT* (2018).

<sup>7</sup>Two years after the decision, Justice Stephen Breyer identified some of the more recent literature showing that *Heller's* "historical account was flawed." *McDonald v. City of Chicago*, 561 U.S. 742, 912, 914-16 (2010) (Breyer, J., dissenting).

<sup>8</sup>Jack N. Rakove, *The Second Amendment: The Highest State of Originalism*, 76 CHI-KENT L. REV. 103 (2000). For a qualified defense of the individual rights view followed by several critical responses written just prior to *Heller*, see *Forum: Rethinking the Second Amendment*, 25 L. & HIST. REV. 139 (2007).

<sup>9</sup>See, e.g., Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L. J. 626 (2008). For a historical critique of *Heller's* individual rights model, see Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing Standard Model Moving Forward*, 39 FORDHAM URB. L. J. 1727 (2012).

confidence necessary to justify the pronouncement of a novel, sweeping, extremely controversial, and arguably exceptionally dangerous constitutional right. Finally, as a general matter, positions on the meaning of the Second Amendment correlate strongly with their advocates' political affiliations and ideological passions.<sup>10</sup>

Thus, in *Heller*, one thing was crystal clear: neither preexisting “law” nor sound historical scholarship dictated its conclusions. Taken at their most convincing, Scalia’s arguments were no more plausible than those of the dissent, and they provided a particularly dubious basis for creating a new constitutional right. His “opinion was a selective incorporation of the evidence to ensure the Second Amendment protected an individual right,” one Second Amendment scholar concluded, and it “clearly shows that politics had seeped into the United States’ highest court.”<sup>11</sup>

As a technical matter, Scalia could have handled the issue in *Heller* quite differently than he did. His specific holding, after all, was itself quite narrow, voiding only “the District’s ban on

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<sup>10</sup>Early on, a few liberal scholars suggested that the Second Amendment could support an individual right interpretation. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) (arguing that the individual rights interpretation is at least a plausible interpretation of the amendment); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 18, 216-17, 221-23 (1998) (arguing that the amendment’s meaning in 1791 did not support an individual right interpretation but that the Fourteenth Amendment modified its meaning to confer such a right) (hereafter, “AMAR, BILL OF RIGHTS”).

<sup>11</sup>CHARLES, *SECOND AMENDMENT* 10. Scalia’s majority opinion “went through great lengths to incorporate legal sources that supported its predetermined conclusion. Unfortunately, the sources it used did not actually support their contentions for the majority consistently made wrongful inferences of the fact, left out important commentary, or placed citations and quotes out of context.” *Id.* at 69. “An original and textual construction of the Second Amendment does not support the Supreme Court majority determination in *Heller*.” *Id.* at 89.

handgun possession in the home” and “its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate defense.”<sup>12</sup> That minimalist ruling could have been based on the proposition that the District’s regulation was so completely disabling, intrusive into the home, and potentially endangering to personal safety as to be unreasonable and therefore void under due process, privileges or immunities, the Ninth Amendment, or even some slightly expanded right of personal privacy in the home. For obvious reasons, however, those grounds were unacceptable to Scalia on their own terms and likely equally unacceptable to the other conservative justices as well.

Alternatively, Scalia could have invalidated the District’s measure by placing his decision on a formally different but still relatively narrow basis. He could have based it on straightforward “reasonableness” grounds, acknowledging that governments had broad authority to regulate firearms but concluding that the regulation at issue was too intrusive and potentially endangering to pass a reasonableness test. Scalia’s opinion actually referred to many of those practical considerations. It emphasized the dire threat posed by intruders in the home,<sup>13</sup> acknowledged that the Second Amendment had limits,<sup>14</sup> declared two parts of the regulation

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<sup>12</sup>Heller, 554 U.S. at 635 (Scalia, J.).

<sup>13</sup>Heller, 554 U.S. at 599, 628, 630 n.28, 636. The regulation at issue was particularly dangerous because it extended “to the home, where the need for defense of self, family, and property is most acute.” *Id.* at 628. *Accord id.* at 629. At the oral argument he pointed to the same dangers. Transcript of Oral Argument, *District of Columbia v. Heller*, No. 07-290 (March 18, 2008), 42 (hereafter “Oral Argument in *Heller*”). *See also id.* at 83.

<sup>14</sup>Heller, 554 U.S. at 595, 626-27, 636.

invalid under “any standard of scrutiny,”<sup>15</sup> and allowed the rest of the District’s handgun licensing regulation to stand.<sup>16</sup> The opinion, in other words, could have upheld plaintiff’s right to possess operable firearms in his home while at the same time stressing the power of government to regulate such firearms broadly and reasonably. In the oral argument, in fact, Scalia seemed to suggest that exact point. Guiding the attorney attacking the District’s regulation, he corrected his response to a question from Justice Stevens. “You would just say [the Second Amendment] is not being infringed,” Scalia prompted, “if reasonable limitations are placed upon it.”<sup>17</sup> Indeed, if the history of gun laws in America proved anything conclusively, it was that--whatever the Second Amendment might be imagined to mean--the regulation of firearms had from the nation’s beginning been widespread and often severely restrictive.<sup>18</sup>

Neither of those possible narrow grounds attracted Scalia, however, for he had a far more sweeping and personally compelling goal in mind. He was determined to rule on the Second Amendment, create a new individual constitutional right to own and use firearms, and place that

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<sup>15</sup>Heller, 554 U.S. at 628.

<sup>16</sup>Heller, 554 U.S. at 635. The plaintiff below had sought to enjoin the District from enforcing its licensing requirement, *id.* at 630-31, but the Court merely ordered that the District must allow him to register his handgun and must grant him a license to carry it in his home. *Id.* at 635.

<sup>17</sup>Oral Argument in *Heller*, 77. *See also id.* at 53. Throughout the argument Scalia stepped in to guide the attorney. CHARLES, SECOND AMENDMENT, 8-9.

<sup>18</sup>*See, e.g.,* PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIA TO CONCEALED CARRY (2018) (hereafter, “CHARLES, ARMED”); MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY (2014) (hereafter, “WALDMAN, SECOND AMENDMENT”); ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA (2011) (hereafter, WINKLER, GUNFIGHT”)..

right on the firmest, broadest, and most unchallengeable ground possible. He was responding enthusiastically to the individuals and groups who had initially brought *Heller* to the courts and who were animated by the goal of gaining Second Amendment protection for gun rights as part of their concept of constitutional “liberty.”<sup>19</sup> In *Heller* Scalia and the other conservative justices were ready to follow those gun-rights advocates, and they voted specifically to grant certiorari on that Second Amendment issue.<sup>20</sup> Their decision, Marcia Coyle wrote, revealed “an aggressive conservative Court taking on a long-sought objective on the conservative political agenda.”<sup>21</sup>

Scalia was not only determined to establish a fundamental constitutional principle affirming his contention that the Second Amendment guaranteed a specifically individual right to own and use firearms, but he also wanted to push to the periphery ideas about any flexible “reasonableness” standard and the general power of the government to “regulate” firearms.<sup>22</sup> He

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<sup>19</sup>MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* ch. 7 (2103) (hereafter, “COYLE, ROBERTS COURT”).

<sup>20</sup>The Court granted the petition “limited to the following question: Whether the following provisions—D.C.Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02— violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?” *Heller*, 552 U.S. 1035 (2007) (*per curiam*).

<sup>21</sup>COYLE, ROBERTS COURT 151.

<sup>22</sup>The Court in *Heller* failed to decide a critical issue. If the Second Amendment did establish an individual right, what level of scrutiny should be used to protect it? Did the amendment establish a right that was constitutionally the same as the rights in the First Amendment? Did it require, in other words, strict scrutiny? Scalia suggested that some higher level of scrutiny applied, 554 U.S. at 628 & n.27, but the justices in the majority apparently could not agree on the level that was proper and left the issue unsettled.

was determined to use his opinion not just to construe the Second Amendment but to emphasize that the individual right it recognized severely limited the power of governments to regulate guns. “The very enumeration of the right,” he declared in *Heller*, “takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is really worth insisting upon.” Scalia used his opinion, in other words, to exalt the Second Amendment and establish a broad principle that would satisfy, nourish, and further energize the Republican right in general and the gun-rights movement in particular. The “enshrinement of constitutional rights,” he intoned, “necessarily takes certain policy choices off the table.”<sup>23</sup>

The give-away as to Scalia’s animating purpose in *Heller* came at the very outset of his opinion when he made his key move by essentially begging the question. The Second Amendment provided: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>24</sup> Scalia simply bifurcated the text, as if the amendment’s two clauses were hardly related. The militia clause was merely “prefatory,” he claimed, while the rights clause was “operative.”<sup>25</sup> Then, he drew the conclusion he had embedded in the two premise bearing labels he had assigned the clauses. A “prefatory

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<sup>23</sup>*Heller*, 554 U.S. at 634, 636.

<sup>24</sup>U.S. CONSTITUTION, AMEND. 2.

<sup>25</sup>*Heller*, 554 U.S. at 577. Scalia reduced the “prefatory” clause further by later terming it a mere “prologue,” at 554 U.S. 578 n.4, a move he also made in the oral argument. Oral Argument in *Heller*, 45.

clause does not limit or expand the scope of the operative clause.”<sup>26</sup> Bingo! By fiat, cutting the second clause free from the first, he neatly jettisoned the express textual and contextualizing limit that the Constitution placed on the right to “keep and bear Arms.”<sup>27</sup> Thus textually unbound, Scalia felt free to define the right in the “operative” clause as broadly as he wished. A personal, individual right to possess firearms for self defense, he announced immediately thereafter, was the “*central component*” of the Second Amendment.<sup>28</sup>

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<sup>26</sup>Heller, 554 U.S. at 578. For a critique of Scalia’s key move, *see, e.g.*, David Thomas Konig, *Why the Second Amendment has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 U.C.L.A. L. REV. 1295, 1326-37 (2009) (“Justice Scalia’s ahistorical reliance on present-day settled rules of construction disqualifies his dismissal of the controlling force of the preamble,” at 1331). As an original matter “we can sensibly read the phrase *the people* in the amendment’s main clause as synonymous with the *militia*, thereby eliminating the grammatical and analytic tension that would otherwise exist between the two clauses.” AMAR, BILL OF RIGHTS 216. Many historians and linguists agree that the two clauses are “logically and linguistically dependent.” William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 365 (2009), citing “Rakove Brief”); “Linguistics Brief”.

<sup>27</sup>*E.g.*, in *United States v. Miller*, 307 U.S. 174, 178 (1939) (McReynolds, J.), the Court held that the militia clause restricted the “keep and bear Arms” clause. Dissenting in *Heller*, Stevens relied heavily and elaborately on *Miller*, *Heller*, 554 U.S. at 636, 637-79 (Stevens, J., dissenting), while Scalia tried to distinguish the case. *Id.* at 621-26. The claim that “the public understanding of ‘bear arms’ included the carrying of private arms for self defense is not supported by the historical record.” Nathan Kozuskanich, *Originalism, History, and the Second Amendment: What did Bearing Arms Mean to the Founders*, 10 U. PA. J. CONST. L. 413, 446 (2008). Massive digital searches of archives of late eighteenth-century sources “prove that Americans consistently employed ‘bear arms’ in a military sense, both in times of peace and in times of war, showing that the overwhelming use of ‘bear arms’ had a military meaning.” *Id.* at 416. *Accord* Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. EARLY AM. REPUB. 585 (2009). Madison himself used the phrase “bear arms” in this sense. *See* THE FEDERALIST PAPERS, No. 46, at 296 (Madison) (Clinton Rossiter, ed., originally published in 1961, with Introduction and Notes by Charles R. Kessler, 2003) (hereafter, “FEDERALIST PAPERS”).

<sup>28</sup>Heller, 554 U.S. at 599 (emphasis in original). *Accord id.* at 628.

Indeed, to reach his desired result he also jettisoned the “most specific level” of meaning principle that he used to interpret the rights that he sought to narrow or deny.<sup>29</sup> Surely, the most specific level of meaning of the right protected by the Second Amendment was the right and duty to bear arms by serving in the militia. In *Heller*, however, Scalia had no use for such a specific level of meaning so he simply returned that interpretive principle to the jurisprudential closet for other occasions.

Still, Scalia faced a nagging problem. The text of the amendment did, after all, contain that awkward “prefatory” clause, so it presumably had to mean something. To negate the slightest limitation it might be thought to impose, he imagined a harmless role for it that by no stretch of the imagination could justify a limit on gun rights. All that was necessary, he explained, was that “our reading of the operative clause” must be “consistent with [the militia clause’s] announced purpose.”<sup>30</sup> To render the purpose of the militia clause totally harmless, he first--and wholly inaccurately--redefined the concept of a “well-regulated” militia to mean merely “well trained,” a redefinition that obscured the amendment’s express textual affirmation of government power to “regulate” the right to bear arms.<sup>31</sup> Then, he shrank the purpose of the militia clause to a negative extreme, declaring that it was designed only “to prevent elimination

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<sup>29</sup>Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (Scalia, J.)

<sup>30</sup>*Heller*, 554 U.S. at 578.

<sup>31</sup>*Heller*, 554 U.S. at 597; Oral Argument in *Heller*, 26. See William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 361 and sources cited at n.45. (2009); Patrick J. Charles, *The Constitutional Significance of a “Well-Regulated Militia” Asserted and Proven With Commentary on the Future of Second Amendment Jurisprudence*, 3 NORTHEASTERN L. J. 67 (2011); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 SYRACUSE L. REV. 267 (2008).

of the militia.”<sup>32</sup> So defined, the clause could not bar any law dealing with firearms unless the law would literally mean the abolition of state militias. That definition meant that no law encouraging the use of firearms or expanding their availability could possibly run afoul of the “prefatory” clause, for such laws could not possibly require the “elimination” of the militia. So much for the limits that textualism allegedly imposed on judicial wilfulness.

The manifestly arbitrary nature of Scalia’s textualism was similarly apparent at another point. Given the amendment’s “prefatory clause,” he noted, the “structure of the Second Amendment is unique in our Constitution.” But when he turned to construe the phrase “right of the people,” which appeared in the First and Fourth Amendments as well as the Second Amendment, he ignored the Second Amendment’s special textual characteristics--its “prefatory” clause and “unique” structure--and concluded that the three uses of the phrase “right of the people” carried the same meaning. “All three of these instances,” he announced, “unambiguously refer to individual rights, not collective rights.”<sup>33</sup> Simply not true. The militia clause made it clear that the phrase “right of the people” did not carry the same meaning as that in the other two amendments because only military-age males could serve in the militia and “bear Arms.”<sup>34</sup> Indeed, one year after the Second Amendment was ratified, Congress added yet another restriction in the Militia Act of 1792, further limiting militia service to military-age male

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<sup>32</sup>Heller, 554 U.S. at 599.

<sup>33</sup>Heller, 554 U.S. at 577, 579.

<sup>34</sup>See, e.g., FEDERALIST PAPERS, NO. 46, at 296 (Madison). Madison did not capitalize the word “arms.”

citizens who were “white.”<sup>35</sup> Thus, Scalia disregarded the significance of the Second Amendment’s “unique” structure—and the significance of its militia-based restriction “bear Arms” that appeared in the “operative” clause itself--when he wished the amendment to be “like” other amendments. It was “unique” when he wished it to be unique, but otherwise it was not unique at all.

Scalia’s opinion went even farther in its creativity by adding a surprisingly adaptive twist to Second Amendment law. His immediate goal, after all, was to provide constitutional protection for private handguns in the home, and he could hardly fail to acknowledge that such protection was far removed from anything connected to modern militias. “It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large,” he acknowledged with considerable understatement. “Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks.” Such modern conditions, however, were not relevant to the meaning of the Second Amendment. “[T]he fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.”<sup>36</sup>

If that last assertion was stock originalism, what followed was not. “There are many reasons that a citizen may prefer a handgun for home defense,” Scalia continued, and “handguns

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<sup>35</sup>1 Stat. 271 (May 8, 1792).

<sup>36</sup>Heller, 554 U.S. at 627-28.

are the most popular weapon chosen by Americans for self-defense in the home.”<sup>37</sup> In the oral argument he emphasized the same point when he declared that the dispositive issue was not “the dictionary definition of arms” but what weapons were “nowadays commonly held.”<sup>38</sup> Thus, he argued, modern preferences for handguns in the home--a consideration entirely unrelated to militia matters and hardly in the mind of the Founders--determined the nature and scope of the right that the Second Amendment protected. Although “modern developments” could not alter “our interpretation of the right,” they could do something just as good. They could transform the content of the right itself by infusing into it “popular” preferences for guns that were “nowadays commonly held.” That was a highly elastic bit of originalism, one that was adaptive, evolutionary, politically expedient, and hardly shaped by anything the Founders had prescribed.<sup>39</sup> Indeed, it contradicted his claim about the methodology of originalism itself. “Words in the Constitution were not to be interpreted in the abstract,” he insisted, “but rather according to the understandings that existed when they were adopted.”<sup>40</sup> His reasoning in *Heller* contradicted that principle.<sup>41</sup>

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<sup>37</sup>*Heller*, 554 U.S. at 629.

<sup>38</sup>Oral Argument in *Heller*, 47.

<sup>39</sup>Examining *Heller*'s sources and logic, “we discover a ruling exquisitely attuned to the living constitutionalism that Scalia so vehemently disdains.” LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 172 (2014). See Reva Siegel, *Comment: Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *HARV. L. REV.* 191 (2008) (hereafter, “Siegel, *Comment*”).

<sup>40</sup>ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* (Christopher J. Scalia & Edward Whelan, eds., 2017), 198 (hereafter, “SCALIA SPEAKS”).

<sup>41</sup>Scalia stated that the amendment “extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,” *Heller*, 554 U.S. at 582.

Scalia's position in *Heller* was rife with such inconsistent and problematic claims.<sup>42</sup> If preferences "nowadays commonly held" could determine anew the content of the right to bear arms, for example, why could they not equally determine the content of rights involving "liberty," "equality," "due process," and "cruel and unusual punishments"? Indeed, why could they not control the meaning of constitutional provisions that supported rights involving abortion, homosexuality, gender equality, and assisted suicide? Scalia's opinion gave no answer to such questions.

Equally obvious, Scalia's opinion was inconsistent with most of his proclaimed jurisprudential principles. It rejected judicial restraint, negated local legislative authority, asserted federal judicial power aggressively and creatively, disregarded the police powers of the states in a critical area marked by diverse and substantial local concerns, and ignored any structural analysis of the Second Amendment's place in the overall constitutional design.<sup>43</sup> More broadly, it was inconsistent with his efforts to bar the creation of new individual rights in so many other areas absent the clearest constitutional or statutory warrant, a test that the Second Amendment--absent Scalia's ploy of severing half of its text and ignoring most relevant historical scholarship--simply did not meet. Indeed, Scalia's opinion conflicted with the very

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<sup>42</sup>As Reval Siegel noted, Scalia's opinion and the sources he invoked produced many "temporal oddities." Siegel, *Comment*, 196. Further, he seemed to say that he was deciding *Heller* under a "rationality" standard, but at the same time he suggested that he was using some unspecified but stricter standard. *Compare*. *Heller*, 554 U.S. at 628 with 628 n.27. For Breyer's critique of Scalia's treatment of the applicable standard, *see id.* at 687-91. *See* CHARLES, SECOND AMENDMENT, 9-10.

<sup>43</sup>*See generally* DAVID C. WILLIAMS, *THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC* (2003).

goal and purpose he had proclaimed for his originalism, the contention that it would severely limit the ability of the courts to make their own law.<sup>44</sup>

Less obviously, Scalia's position was also in tension with many of his other positions and pronouncements. When he construed congressional power under the Fourteenth Amendment, a power he sought to restrict, he insisted that the power was limited to enforcing the precise rights the amendment created and should not be construed to reach any additional rights.<sup>45</sup> In contrast, when he construed the "operative" clause of the Second Amendment, a right he sought to defend, he adopted a far more liberal and expansive assumption. It was "not at all uncommon," he insisted in the oral argument in *Heller*, "for a legislative provision or a constitutional provision to go further than is necessary for the principal purpose involved."<sup>46</sup> The terms of the Fourteenth Amendment's first section limited congressional power under its fifth section, in other words, but the specific terms of the Second Amendment's first section did not similarly limit the individual rights created under its second section.

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<sup>44</sup>Scalia claimed that his method dealing with the Second Amendment was "an objective approach that reaches conclusions by applying neutral rules to verifiable evidence." McDonald, 561 U.S. at 800 (Scalia, J., concurring). In contrast, he charged, "the historical analysis of the principle dissent in *Heller* is as valid as the Court's only in a two-dimensional world that conflates length and depth." *Id.* at 804 n.9.

<sup>45</sup>*Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327, 1338 (2012) (Scalia, J., concurring in the judgment) ("outside of the context of racial discrimination (which is different for stare decisis reasons), I would limit Congress's [section] 5 power to the regulation of conduct that *itself* violates the Fourteenth Amendment"). *Accord* *Tennessee v. Lane*, 541 U.S. 509, 554, 558, 560 (2004) (Scalia, J., dissenting) (same).

<sup>46</sup>Oral Argument in *Heller*, 56.

Along the same lines, Scalia justified the breadth and generality of his opinion in *Heller* by noting that “this case represents this Court’s first in-depth examination of the Second Amendment.”<sup>47</sup> That meant that *Heller* was essentially a case of first impression and that the Court could therefore construe the amendment largely free from the limits of precedent. In contrast, when he addressed the issue of congressional power to abrogate the Eleventh Amendment immunity of states, another congressional power he disfavored, he chastised the justices who disagreed with him on the ground that they could not cite “a single Supreme Court case, over the past 200 years” to support their position. “How strange,” he commented sarcastically, that “such a useful power” supposedly existed even though it “should never have been approved and rarely (if ever) have been asserted” in any prior case.<sup>48</sup> If a constitutional principle had not been confirmed by the Court in over two centuries, in other words, it must be unsound and even fanciful. Because he admitted that *Heller* was the Court’s “first in-depth examination of the Second Amendment” after more than 200 years, the exact same argument applied to the principle at issue there. On that basis the claim of an individual right to possess firearms would be equally unsound and frivolous. But in *Heller* Scalia ignored his earlier argument for an obvious reason. Unlike his use of it in the prior case, in *Heller* it cut against the result he sought.<sup>49</sup>

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<sup>47</sup>*Heller*, 554 U.S. at 635.

<sup>48</sup>*Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29, 40 (1989) (Scalia, J., concurring in part and dissenting in part).

<sup>49</sup>“[N]o actual case came before the Court involving firearms during the antebellum period.” Karen O’Connor & Graham Barron, *Madison’s Mistake? Judicial Construction of the Second Amendment* in *THE CHANGING POLITICS OF GUN CONTROL* (John M. Bruce & Clyde Wilcox, eds., 1998), 76.

*Heller* is particularly significant for understanding Scalia's jurisprudence for a number of reasons. First, and most obvious, it demonstrated how indeterminate both his textualism and his originalism were and how easily both could be manipulated to reach the results he desired.<sup>50</sup> Contrary originalist arguments advanced by the four dissenting justices were based on extensive historical sources that were at least as soundly based and convincing as Scalia's.<sup>51</sup> As a result, Judge J. Harvey Wilkinson, a political conservative and a friend of Scalia's, drew the obvious and fatal conclusion. "While *Heller* can be hailed as a triumph of originalism," Wilkinson wrote, "it can just as easily be seen as the opposite--an expose of original intent as a theory no

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<sup>50</sup>Scalia's use of the constitutional text assumed that the Framers had systematically thought through all the issues they addressed, agreed on a consistent and comprehensive theory of government, and meant the exact same thing each time they adopted a particular word or phrase, an entirely implausible if not unbelievable assumption. See, e.g., *Heller*, 554 U.S. at 579 (Scalia, J.). Examining the Second Amendment in the context of federalism, Richard Epstein remarked that one relevant consideration, "like everything else in this debate, is suggestive but not conclusive." Richard Epstein, *A Structural Interpretation of the Second Amendment: Why Heller is (Probably) Wrong on Originalist Grounds*, 59 SYRACUSE L. REV. 171, 180 (2008). Richard Posner went farther. Done properly, "the 'originalist' method would have yielded the opposite result." The Second Amendment "creates no right to the private possession of guns for hunting or other sport, or for the defense of person or property." Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC, Aug. 27, 2008, available at <https://newrepublic.com/article/62124/defense-looseness>, last consulted June 7, 2019 (hereafter, "Posner, *In Defense*"). For an excellent and largely sympathetic analysis of *Heller*, see Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. L. REV. 923 (2009).

<sup>51</sup>See, e.g. *Heller*, 554 U.S. at 636 (Stevens, J., dissenting) and 681 (Breyer, J., dissenting). Similarly, in *Lee v. Weisman*, 505 U.S. 577 (1992), Souter developed a historical analysis of the Establishment Clause, *id.* at 609 (Souter, J., concurring) that countered Scalia's historical analysis of the clause, *id.* at 631; and in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), Souter did the same with the historical analysis of the Eleventh Amendment, *id.* at 100 (Souter, J., dissenting), effectively challenging the position in the opinion of Chief Justice Rehnquist that Scalia silently joined.

less subject to judicial subjectivity and endless argumentation as any other.”<sup>52</sup> That, indeed, was exactly the nature of Scalia’s originalism. It was just another interpretative theory that allowed or welcomed “judicial subjectivity,” a conclusion that his opinion in *Heller* so convincingly demonstrated.

Second, Scalia’s opinion in *Heller* rested on a highly questionable constitutional judgment. The historical evidence he cited was carefully selected, sharply disputed, and often of dubious relevance, while the historical evidence against him was at least as substantial and extensive.<sup>53</sup> Consequently, it was profoundly unwise—and a violation of principles of judicial restraint—to create a fundamental constitutional right on the basis of such an uncertain and contested historical record. Further, no bright line or clear constitutional test—guides that Scalia commonly proclaimed as necessary for proper judicial analysis when it served his purpose— informed his evaluation of the mass of conflicting evidence. His concept of “tradition,” moreover, could not possibly tip the balance in his favor, for as common as guns were in the American past their strict regulation was at least equally common and quite likely more so. Indeed, the Court’s own “tradition”—its precedents dealing with gun control measures—weighed heavily against him.<sup>54</sup>

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<sup>52</sup>J. Harvey Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 U. VA. L. REV. 253, 256 (2009).

<sup>53</sup>The four dissenting justices emphasized that point. *See Heller*, 554 U.S. at 636 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.) and 681 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.).

<sup>54</sup>*E.g.*, *Miller*, 307 U.S. at 178 (McReynolds, J.); *Presser v. Illinois*, 116 U.S. 252, 266-68 (1886) (Woods, J.); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (Waite, C.J.). Scalia did, nonetheless, claim that “tradition” supported the Court’s position on the Second

Scalia's judgment in *Heller* was even more questionable for other reasons as well. As the historical materials were at best debatable, two obvious conclusions followed. One was that before ruling, the Court should have given substantial consideration to the practical consequences of any decision it might make.<sup>55</sup> The other was that those practical consequences would surely vary greatly from state to state and locality to locality. On neither of those issues did *Heller* present an adequate record for decision.<sup>56</sup> Further, Scalia's individual right theory did nothing to settle the law but promised only to bring to the courts a potentially endless stream of cases challenging gun laws of all kinds and at all levels of government. In addition, Scalia's individual right theory immediately suggested an even broader potential sweep for the Second Amendment, the possibility that it might be made to apply to the states through the Fourteenth Amendment. That possibility was inconsistent with the overwhelming mass of historical evidence about the amendment's original meaning and inconsistent equally with Supreme Court precedents going back to 1876. *Heller*'s logic, however, suddenly made incorporation of the Second Amendment against the states seem possible,<sup>57</sup> a result that the five conservatives

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Amendment. *McDonald*, 561 U.S. at 792 (Scalia, J., concurring).

<sup>55</sup>For an enlightening debate over judicial methodology, compare Stevens's thoughtful and sophisticated approach to the Second Amendment in *McDonald*, 561 U.S. at 858 (Stevens, J., dissenting) with Scalia's defense of originalism and charge of subjectivity against Stevens's approach, *id.* at 791 (Scalia, J., concurring).

<sup>56</sup>"*Heller* gives short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation." Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC, Aug. 27, 2008, available at <https://newrepublic.com/article/62124/defense-looseness>, last consulted June 7, 2019.

<sup>57</sup>In *Heller*, 554 U.S. at 620-21, Scalia noted that the Court had held in *Cruikshank*, 92 U.S. at 553, that the Second Amendment did not apply to the states.

brought about only two years later.<sup>58</sup> Given all those considerations, there seemed little reason to adopt the individual rights theory beyond the intensely felt promptings of personal desire and ideological commitment.

Third, *Heller* demonstrated that a judge's firm belief that he or she was strictly objective and rigorously principled could easily mask the subjective values and goals that could inspire legal judgments.<sup>59</sup> The decisive personal fact was that Scalia was in love with guns. From his early boyhood he delighted in having and using them, happily recalling rabbit hunting with his grandfather and proudly telling a reporter that there was "a photo of me holding a rabbit and his twelve-gauge shotgun."<sup>60</sup> More than half a century later he fondly announced that "I still have his gun." Indeed, he boasted that he kept his grandfather's gun even though it was "entirely corroded about six inches down from the end of the barrel." Along the same line, he regularly enjoyed recounting memories of his years at a military high school when he was on the school's rifle team and rode the New York subways carrying his .22 caliber target rifle with him. The school's "varsity team was really pretty good," he recalled warmly; "it used to beat the West Point plebes."<sup>61</sup>

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<sup>58</sup>McDonald, 561 U.S. 742 (Alito, J., joined by Scalia, J.).

<sup>59</sup>Scalia continued to defend his *Heller* opinion long after it came down. COYLE, ROBERTS COURT, 209.

<sup>60</sup>Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK MAGAZINE, Oct. 6, 2013, available at <http://nymag.com/nymag/features/antonin-scalia-2013-10/index4.html>, last consulted June 6, 2019. "Since his days as a boy hunting rabbits with his grandfather on Long Island, Scalia has enjoyed guns for recreation." BISKUPIC, AMERICAN ORIGINAL, 345.

<sup>61</sup>SCALIA SPEAKS, 56. He was proud about the military training he received in high school and cherished his sense of still belonging to "the Regiment," *see id.* at 307-17.

More to the point was the way that Scalia’s love of guns and hunting influenced his broader thinking. Only two years before *Heller* he addressed the National Wild Turkey Foundation where he announced happily that “I’m a turkey hunter.” Not only that, he told the group proudly, he was also a deer hunter, a duck hunter, and a boar hunter as well.<sup>62</sup> Hunting “is a sport that I very much enjoy.”<sup>63</sup> In fact, over his years on the Court Scalia took literally dozens if not hundreds of hunting trips, largely with Republican political figures and donors, and the year before he decided *Heller* he traveled to Nuremberg, Germany, to accept an award at the World Forum for the Future of Sports Shooting Activities.<sup>64</sup> At the Court he “turned his chambers into a veritable museum of taxidermy, with his kills mounted and displayed on the walls,” Jeffrey Toobin reported. A huge elk’s head dominated the room, while a wooden decoy duck sat on a table in front of the sofa where he entertained visitors.<sup>65</sup>

Most immediately telling, Scalia praised what he termed the “hunting culture” and rooted its vitality and survival in “a broader culture that is not hostile toward firearms.” To protect that

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<sup>62</sup>SCALIA SPEAKS, 62.

<sup>63</sup>BISKUPIC, AMERICAN ORIGINAL, 345. For the extremes Scalia went to in arranging hunting trips, see MURPHY, SCALIA 298-304 (Scalia arranges for hunting trip with Vice-President Dick Cheney and gets ride on Cheney’s Air Force Two at time when Cheney was named litigant in a case before the Court), and for the ethical dispute that Scalia’s trip with Cheney caused, see *id.*, 252-66.

<sup>64</sup>Bruce, Stephen R., “Any Good Hunting?” *When a Justice’s Impartiality Might Reasonably be Questioned* (Oct. 5, 2016), available at SSRN: <https://ssrn.com/abstract=2782170> or <http://dx.doi.org/10.2139/ssrn.2782170> (reference to the award appears at p.2) (hereafter, “Bruce, Any Good Hunting?”), last consulted, June 15, 2019.

<sup>65</sup>JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 200-01 (2007).

hunting culture, he exhorted his audience, it was necessary to protect that “broader culture” by introducing young people to the value of guns and the pleasure of their use. “If you can’t get them into hunting, get them into skeet shooting, or anything that shows that guns are not things that are used only by bad people.”<sup>66</sup> For Scalia the general availability of firearms was a great social good, and the wrong-headed idea that guns were associated “with nothing but crime” was “what had to be changed.”<sup>67</sup>

Indeed, in the years immediately preceding *Heller* Scalia invoked the Second Amendment and proclaimed a national belief in “the right to own a gun,” a belief that he was convinced distinguished America from Europe. “Should we,” he asked rhetorically, “revise the Second Amendment because of what these other countries think?”<sup>68</sup> Only the year before he wrote *Heller* he answered that question with a resounding negative. “I hope this country never falls into such a state.”<sup>69</sup> Those deeply held personal convictions about the value of guns and the virtues of the “hunting culture” were surely compelling considerations that determined his position in *Heller*.<sup>70</sup> Indeed, they suggested that Scalia had in effect already decided *Heller* before the case ever reached the Court. He made all of the statements quoted in this paragraph in 2006 and 2007,

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<sup>66</sup>SCALIA SPEAKS, 63.

<sup>67</sup>BISKUPIC, AMERICAN ORIGINAL, 346.

<sup>68</sup>SCALIA SPEAKS 32, 258. Scalia opposed using foreign and international law sources in construing American law and condemned what he called “this follow-the-foreign-crowd requirement.” McDonald, 561 U.S. at 800 (Scalia, J., concurring).

<sup>69</sup>SCALIA SPEAKS, 63.

<sup>70</sup>*Heller* “is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology.” Posner, *In Defense*.

shortly before *Heller* was argued in March 2008 or decided in June of that year.

Another statement he made shows even more conclusively that his mind was firmly made up before the Court agreed to hear the case or he had read the extensive briefs that parties and amici submitted. On the day that the District of Columbia Circuit struck down the gun regulation that would be at issue in *Heller* Scalia said as much to a fellow hunting enthusiast . “[I]t takes four votes on the Supreme Court to hear a case, and it takes five to win it,” he declared. “If I don’t think we have the five to win it, there won’t be four to hear it.”<sup>71</sup> His determination was steeled and his course charted long before the Court had received the first filing in the case. Only sometimes was Scalia an originalist, but at all times he was a passionate lover of guns.

Finally, and more broadly, *Heller* demonstrated that originalism was essentially a method of constitutional change and, consequently, a tool of political movements that sought to bring about that change. Repeatedly in American history, from Jeffersonian attacks on the Marshall Court to the rhetoric of the Warren Court itself and on to contemporary Republican attacks on “liberal judicial activism,” political movements pressing for constitutional change commonly did so by appealing to the supposed “original” ideas of the Founders.<sup>72</sup> Scalia exemplified that practice, and his success in *Heller* would have been inconceivable absent the modern gun rights movement, the fierce pro-gun political campaigns that the National Rifle Association had been

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<sup>71</sup>Bruce, “*Any Good Hunting?*,” 2.

<sup>72</sup>*See, e.g.*, FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 98 (2013); JACK M. BALKIN, *LIVING ORIGINALISM* 11 (2011); EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY* 183-86 (2007).

mounting for four decades, and the ideological transformation of the post-Reagan Republican Party that seated *Heller*'s five-justice conservative majority on the Court.

Although the importance of guns in American culture grew during the nineteenth century, well into the twentieth century there was virtually no dispute about the constitutional power of federal, state, and local governments to regulate gun ownership and prohibit possession of certain kinds of firearms. Supreme Court rulings and popular culture both reflected that basic assumption. In 1939, for example, in *United States v. Miller* the arch-conservative James C. McReynolds wrote for a unanimous Supreme Court in ruling that the Second Amendment was intended to ensure "a well-regulated militia," not an individual right to possess firearms.<sup>73</sup> The same year Warner Brothers released *Dodge City*, a popular Western starring Errol Flynn as a sheriff charged with bringing law and order to a violent Kansas town. One of the first and most effective actions the movie hero took was to bar cowboys from bringing guns into the central city and, equally unsurprising, he succeeded in his task of bringing law and order to the community. In fact, that aspect of the movie reflected historical events. "Dodge City, Kansas, for example," Justice Breyer noted in his *Heller* dissent, "joined many western cattle towns in banning the carrying of pistols and other dangerous weapons in response to violence accompanying western

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<sup>73</sup>"In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen 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. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Miller*, 307 U.S. at 178 (McReynolds, J.). Justice Douglas did not participate.

cattle drives.”<sup>74</sup> Perhaps even more revealing, twenty years after *Dodge City* Warner Brothers released another Western, *Rio Bravo*, this one starring John Wayne--another classic movie hero who had become the popular symbol of rugged and armed American individualism. Playing another sheriff equally charged with establishing law and order in a violent town, Wayne decided similarly to bar cowboys from entering town with their guns, and he also succeeded in his task. Both movies were box-office successes, and both reflected--in line with the Court’s decision in *Miller*--the common sense view that prevailed up through the middle decades of the twentieth century about the wisdom and necessity of regulating gun possession to secure the public safety.<sup>75</sup>

Things began to change, however, in the 1970s when the N.R.A. moved from cautious and largely behind the scenes efforts limiting or moderating gun regulations to a far more public, militant, and extreme campaign to delegitimize gun regulation, advance a virtually untrammelled individual right to possess firearms, and anchor its public relations and lobbying efforts on the Second Amendment.<sup>76</sup> A new leadership generation adopted a near absolute opposition to

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<sup>74</sup> McDonald, 561 U.S. at 937 (Breyer, J., dissenting). For a study of the “myth” of Dodge City and its place in American history, see ROBERT R. DYKSTRA & JO ANN MANFRA, *DODGE CITY AND THE BIRTH OF THE WILD WEST* (2017).

<sup>75</sup>Notwithstanding his adherence to Scalia’s opinion in *Heller*, Chief Justice John Roberts seemed to accept that common sense view. “A basic step in organizing a civilized society is to take that sword out of private hands and turn it over to an organized government, acting on behalf of all the people.” *Robertson v. Watson*, 560 U.S. 272, 282-283 (2010) (Roberts, C.J., dissenting).

<sup>76</sup>The material in the following paragraph is drawn from CHARLES, ARMED; WALDMAN, SECOND AMENDMENT; WINKLER, GUNFIGHT; EMILIE RAYMOND, DEAD HANDS: CHARLTON HESTON AND AMERICAN POLITICS (2006); Jill Lepore, *Battleground America: One Nation, under the Gun*, THE NEW YORKER, April 23, 2012, available at

restrictions of any kind, worked to forge a large and devoted single-issue political base, methodically raised and spent tens of millions of dollars to advance its goals, and orchestrated vigorous lobbying efforts at the local, state, and national levels. The “fervor of its activist members,” an ex-NRA official lamented, “is just as inflexible as that of Muslim, Christian, or Jewish zealots.”<sup>77</sup> Their efforts increasingly bore fruit, blocking most legislative proposals to restrict gun sales or ban certain kinds of weapons from the market. In large letters on the facade of its headquarters in Fairfax, Virginia, the N.R.A. inscribed the words “the right of the people to keep and bear arms, shall not be infringed.”<sup>78</sup> Nothing else. Going one better than Scalia in *Heller*, the N.R.A. literally excised the militia clause from the Second Amendment.

The N.R.A.’s efforts proved especially successful within the Republican Party. As one element in its contemporaneous turn toward a hard right-wing ideology that cut across many issues,<sup>79</sup> Republicans began to defend gun rights with increasing fervor, criticizing gun

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<https://www.newyorker.com/magazine/2012/04/23/battleground-america>, last consulted April 16, 2018 (hereafter, “Lepore, *Battleground*”); and Ronald G. Shaiko & Marc A. Wallace, *Going Hunting Where the Ducks Are: The National Rifle Association and the Grass Roots*, in *THE CHANGING POLITICS OF GUN CONTROL* (John M. Bruce & Clyde Wilcox, eds., 1998), 155-71.

<sup>77</sup>RICHARD FELDMAN, *RICOCHET: CONFESSIONS OF A GUN LOBBYIST 2* (2008) (hereafter, “FELDMAN, RICOCHET”). “I’d been forced to recognize that, despite its sacrosanct facade, the NRA is actually a cynical, mercenary political cult. It is obsessed with wielding power while relentlessly squeezing contributions from its members, objectives that overshadow protecting Constitutional liberties.” *Id.*

<sup>78</sup>Michael Waldman, *How the NRA Rewrote the Second Amendment*, available at <https://www.brennancenter.org/analysis/how-nra-rewrote-second-amendment>, last consulted July 17, 2019.

<sup>79</sup>For the evolution of the Republican party and its ideology since the 1960s, *see, e.g.*, JOSEPH CRESPIANO, *STROM THURMOND’S AMERICA* (2012); ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S* (2012); GEOFFREY

registration proposals and defending gun manufacturers against “frivolous” lawsuits, that is, any lawsuit seeking to impose liability on anyone who produced or sold firearms. While the party’s 1972 platform supported gun control and focused in particular on the desirability of restricting “cheap handguns,” those positions disappeared completely in the following years. In both 1976 and 1980 the party’s platforms defended “the right of citizens to keep and bear arms.”<sup>80</sup>

In 1980, as part of its new aggressiveness, the N.R.A. for the first time endorsed a presidential candidate, Republican Ronald Reagan.<sup>81</sup> The move paid off handsomely, and the Reagan administration and the Republican Party quickly became loyal supporters of the N.R.A.’s positions. In 1982, for example, the Republican-controlled Senate, led by Orrin Hatch of Utah as Chair of the Senate Judiciary Committee’s Subcommittee on the Constitution, stepped to the plate. He produced a report on the history of the Second Amendment that claimed to discover “clear--and long-lost--proof that the Second Amendment of our Constitution was intended as an individual right of the American citizen” for the “protection of himself, his family, and his freedoms.”<sup>82</sup> Beginning in 1984 Republican platforms defended an explicitly “constitutional right

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KABASERVICE, *RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY: FROM EISENHOWER TO THE TEA PARTY* (2012); JOSEPH CRESPIANO, *IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION* (2007); ROBERT O. SELF, *AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND* (2003).

<sup>80</sup>Republican Party Platforms are the American Presidency Project, available at <https://www.presidency.ucsb.edu/documents/app-attributes/party-platforms> at (hereafter, “*American Presidency Project*”), last consulted, July 12, 2019.

<sup>81</sup>Lepore, *Battleground*, 18.

<sup>82</sup>Siegel, Comment, 216. *See also* Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 *IND. L. J.* 1587 (2014); David C. Williams, *Civil Republicanism and the Citizen Militia:*

to keep and bear arms,”<sup>83</sup> and the gun-rights ideology became critically important in considering judicial nominees.<sup>84</sup> Republican presidents would not nominate nor Republican Senates confirm candidates who failed to demonstrate strong support for the Second Amendment or receive the endorsement of the N.R.A.<sup>85</sup>

By the 1990s the contrasting political identifications of the two major political parties on the gun issue were marked in sharp relief. In 1992 the Democratic platform supported gun control for the first time, while the Republicans hit a new low in their rhetoric. They charged that “those who seek to disarm citizens in their homes are the same liberals who tried to disarm our Nation during the Cold War.”<sup>86</sup> In control of both the presidency and Congress, Democrats in 1994 passed laws requiring background checks for gun purchases in the so-called “Brady bill” and then enacted a ban on assault weapons.

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*The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

<sup>83</sup>*American Presidency Project*.

<sup>84</sup>Lee Epstein, Jeffrey A. Segal & Chad Westerland, *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609 (2008) (“The rule now is that Presidents name Justices who share their political ideology. If Presidents could put themselves on the bench, they would; however, they cannot, so they find the closest possible surrogates,” at 615).

<sup>85</sup>The administration, for example, withdrew the nomination of Andrew Frey, who served as Reagan’s deputy solicitor general, when two conservative senators discovered that he had made donations to the National Coalition to Ban Handguns. David M. O’Brien, *The Reagan Judges: His Most Enduring Legacy?* in THE REAGAN LEGACY: PROMISE AND PERFORMANCE (Charles O. Jones ed. 1988), 69.

<sup>86</sup>*American Presidency Project*.

In contrast, Republicans continued to push their pro-gun campaign. In 2000 they announced that the constitutional right to bear arms was necessary because “self-defense is a basic human right,” and they attacked proposals for national gun registration as “a violation of the Second Amendment and an invasion of privacy.”<sup>87</sup> Four years later, when they were in control of both the presidency and Congress, they allowed the assault weapon ban that the Democrats had passed in 1994 to expire. In the presidential campaign the same year they added claims to their platform that directly foreshadowed *Heller*. Their 2004 platform asserted that there was “an individual right to own guns” and that the right “is explicitly protected by the Constitution’s Second Amendment.” The amendment enabled “law-abiding citizens throughout the country to own firearms in their homes for self-defense.” Indeed, as if wooing Scalia himself personally and longingly, the platform declared in a gratuitous but highly evocative non sequitur that “Our Party honors the great American tradition of hunting.”

Changes in federal and state court decisions evidenced the growing impact of the gun rights movement.<sup>88</sup> Prior to 2001 no federal court had adopted the individual rights interpretation, while ten had adopted the militia-based collective rights interpretation. Only in 2001 did a federal court adopt the individual right theory, while two others followed before *Heller*. Similarly, between 1968 and 1980 ten state courts had adopted the collective right interpretation. Prior to 1988 only one had adopted the individual right interpretation, and only one other did so

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<sup>87</sup>“In 2000 the NRA exploited the white hot anger and frustration that gun owners and conservatives felt after eight years of Clinton/Gore firearms restrictions and bans.” FELDMAN, *RICOCHET*, 274.

<sup>88</sup>The material in the following paragraph is drawn from CHARLES, *SECOND AMENDMENT*, 6, 179 n.10, 180 n.13.

before 2000. Between 2000 and *Heller* in 2008, however, another five followed. The law was changing, and those changes flowed from the powerful and concentrated drive of the modern gun-rights movement and the ideological transformation of the Republican Party.

*Heller* then followed along in due course, and in its wake the Republican platform in 2008 was openly celebratory and rawly partisan.<sup>89</sup> “We applaud the Supreme Court’s decision in *Heller*,” it announced. Then, turning to the politically negative, it declared that Republicans “are astounded that four justices of the Supreme Court believe that individual Americans have no individual right to bear arms to protect themselves and their families.”<sup>90</sup> With *Heller* in the bank, the N.R.A. and its supporters consistently proclaimed their reliance on the individual constitutional right that Scalia found in the Second Amendment. In 2012 the party’s pro-gun rhetoric raged on unabated, and in 2016 Republican presidential candidate Donald Trump repeatedly affirmed that individual right and avidly sought the support of “Second Amendment

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<sup>89</sup>While *Heller* was before the Court, it caused some disagreement in the Bush administration. The Justice Department supported the individual right interpretation but thought that the Court should compromise on its decision and remand the case so that the lower court could develop a “more flexible” standard of review. Some in the administration opposed the remand idea but the president, informed of the dispute at the last minute, decided not to intervene. Among those opposing any compromise was Scalia’s hunting companion, Vice-President Dick Cheney, who agreed--without consulting the White House--to sign an amicus brief drafted by those who opposed the compromise. PETER BAKER, *DAYS OF FIRE: BUSH AND CHENEY IN THE WHITE HOUSE* 578-79 (2013). The brief was signed overwhelmingly by Republicans, 46 senators and 182 members of the House. On the Democratic side, 9 senators and 67 representatives signed, largely though not exclusively members from midwestern, southern, and western states.

<sup>90</sup>*American Presidency Project.*

people.”<sup>91</sup>

Scalia’s opinion in *Heller* and the ready agreement of the other four Republican justices--all appointed by Reagan and his Republican successors--were the products of that political movement and the consequent ideological transformation that had remade the Republican Party and its ideology over the preceding forty years. Ultimately, then, *Heller* is a monument to irony. If it was Scalia’s “legacy opinion,” that legacy was the opposite of what he assumed. *Heller* did not demonstrate the objectivity of originalism and textualism but their inadequacy and manipulability. It did not return the Constitution to any original understanding but adopted the late twentieth-century formulation promoted by the militant gun-rights movement. It did not flow from jurisprudential principles but from concentrated Court-packing driven by political change, party power, and ideological fervor.

Finally, *Heller* did not do honor to Scalia himself. Rather, it showed that the scourge of “subjective” and “activist” liberal judges exemplified in nearly perfect form the very judicial failings that he regularly attributed to them.<sup>92</sup>

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<sup>91</sup>Benjamin Pomerance, *Justices Denied: The Peculiar History of Rejected United States Supreme Court Nominees*, 80 ALB. L. REV. 627 (2017).

<sup>92</sup>*E.g.*: “Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.” *Atkins v. Virginia*, 536 U.S. 304, 337, 338 (2002) (Scalia, J., dissenting). A standard proposed by Stevens was essentially “subjective” and “incapable of restraining judicial whimsy” and an approach that “does nothing to stop a judge from arriving at any conclusion he sets out to reach.” *McDonald*, 561 U.S. at 793, 795, 799 (Scalia, J., concurring).

## CHAPTER 11

### THE FUSION OF JURISPRUDENCE AND POLITICS

While Scalia's interpretive methods failed in practice to accomplish what he promised, they nonetheless succeeded triumphantly in another realm. They helped forge a powerful union that linked him and his jurisprudence to the political goals and aspirations of certain segments of American society. His paeans to originalism, textualism and traditionalism--and the substantive conclusions he attributed to them--appealed to large numbers of those who gathered together in the post-Reagan Republican Party: libertarians, business leaders, religious believers, gun advocates, market ideologues, disaffected whites, and traditional economic conservatives.<sup>1</sup>

Scalia became their constitutional voice, not merely defending their interests but affirming their most fundamental political views and moral values. Equally important, he proved for them that their views and values were also those of the Founders themselves and that those views and values were written, one way or another, in the United States Constitution. His stance was fierce and his appeal thrilling. Standing alone in *Morrison v. Olson*, defending the Reagan

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<sup>1</sup>For the growing link between the Republican Party and originalism, see, e.g., Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives Constitutional Development*, 94 BOSTON U. L. REV. 1083, 1095-1104 (2014).

administration against the whole Court,<sup>2</sup> he may have evoked for some the heroic image of Howard Roark in Ayn Rand's novel *The Fountainhead*.<sup>3</sup> Scorning an oppressive and wrong-headed majority, he declared his unalterable personal commitment to his own principles and his own independence. Unlike all of the other justices in the majority, he proclaimed, "I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound."<sup>4</sup>

For the groups that rallied to the post-Reagan Republican Party, Scalia confirmed their status as the Founders' true successors and blessed them with a sense of transcendent political and constitutional righteousness. Further, for some in those groups, he also confirmed their ethnic and religious authenticity as the Founders's true heirs. For those who wanted to believe in a romanticized past where everyone agreed on "traditional" values, loyally followed the Founders' clear commands, and believed that being a true American meant being white and Christian, Scalia's originalism proved compelling. After all, the *Federalist* itself announced in its very second essay that underlying belief. Americans were not only "attached to the same principles of government," it proclaimed, but they were also "descended from the same ancestors" and

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<sup>2</sup>Seven justices were in the majority, and Justice Kennedy did not participate. *Morrison v. Olson*, 487 U.S. 654 (1988) (Rehnquist, C.J.).

<sup>3</sup>Rand's book attracted an audience on the hard-core right, and Justice Thomas even had his law clerks watch the movie version made in 1949. EVAN THOMAS, *FIRST: SANDRA DAY O'CONNOR* 274 (2019).

<sup>4</sup>*Morrison*, 487 U.S. at 734 (Scalia, J., dissenting).

professed “the same religion.”<sup>5</sup>

Scalia’s jurisprudence appealed to those groups for other reasons as well. It implicitly suggested that their adversaries were not only wrong but illegitimate. Those who rejected originalism and the Republican agenda, his admirers could readily believe, were neither committed nor loyal to the Constitution. They wanted only to twist it for their own selfish, elitist, and partisan ends. The apparently simple and straightforward principles of Scalia’s jurisprudence, moreover, were easily packaged in punchy sound-byte terms suitable for ready political use. “It is necessary to judge according to the written law--period,” he announced to one audience.<sup>6</sup> In terms of national politics, his ideas could readily be reduced to a message that perfectly tracked and seemed to provide a sophisticated jurisprudential foundation for the long-established anti-Warren Court Republican rhetoric that the courts should “interpret and not legislate.”

Further, Scalia’s jurisprudence—like the other variations of originalism that the Reagan administration inspired--served the goals of the Republican coalition in two other and broader ways. First, by transforming eighteenth-century ideas and attitudes into constitutional norms originalism seemed well suited for undermining the legitimacy of modern legal developments that

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<sup>5</sup>THE FEDERALIST PAPERS, No. 2 , at 32 (Jay) (Clinton Rossiter, ed., originally published in 1961, with Introduction and Notes by Charles R. Kessler, 2003) (hereafter, “FEDERALIST PAPERS”).

<sup>6</sup>ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED (Christopher J. Scalia & Edward Whelan, eds., 2017), 245 (hereafter, “SCALIA SPEAKS”).

the coalition opposed, those supporting abortion rights, gay marriage, affirmative action, labor unionization, elimination of the death penalty, expanded tort liability for corporations, rigid separation of church and state, institutional reform litigation, and federal anti-discrimination laws of all kinds.<sup>7</sup> Second, by focusing on eighteenth-century ideas and attitudes originalism also served to deflect attention from the pressing realities that marked modern America. In particular, it helped to deflect attention from the acute dangers of growing social and economic inequality in modern America and to obscure the fact that the law was increasingly being used to favor powerful private economic interests rather than ensuring equitable economic conditions for all Americans.<sup>8</sup>

Personally, Scalia was closely tied to major elements of the Republican coalition.<sup>9</sup> He served in both the Nixon and Ford administrations, worked with the right-wing and libertarian American Enterprise Institute, and helped found, strongly supported, and maintained close personal and professional connections with the staunchly conservative Federalist Society. Reagan

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<sup>7</sup>Edward A. Purcell, Jr., *The Courts, Federalism, and the Federal Constitution, 1920-2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920- )* (Michael Grosberg & Christopher Tomlins, eds. 2008),161-62.

<sup>8</sup>Edward A. Purcell, Jr., *Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, 66 *FLA. L. REV.* 1457, 1503-08 (2014).

<sup>9</sup>The material in the following paragraph is drawn from RICHARD L. HASEN, *THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION* 13, 82, 86-113, 146-51 (2018) (hereafter, “HASEN, JUSTICE OF CONTRADICTIONS”); JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 3-10, 40-41, 75-80, 158-60, 185-99, 248-49, 315-17 (2009) (hereafter, “BISKUPIC, AMERICAN ORIGINAL”); and BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* 42-44, 91-92, 190-97 229-32, 281-83, 294-95, 298-307, 451-57, 313-17, 482-85, 488-90 (2014) (hereafter, “MURPHY, SCALIA”).

appointed him to the federal bench and then raised him to the Supreme Court, and throughout his judicial career Scalia continued to maintain close personal friendships with Republican and conservative leaders, including Dick Cheney, Ted Olson, and many of the members and leading figures in the Federalist Society. Throughout his years on the bench, he actively courted the Federalist Society and encouraged its work, frequently participating in its events and building support for its nationwide expansion. In 2012 alone he traveled to speak at five separate Federalist Society events, and over the years the organization repaid his efforts handsomely by honoring him on a variety of occasions.<sup>10</sup> In addition, his two oldest sons worked at law firms that represented George W. Bush in *Bush v. Gore*, and one subsequently took a position with the Bush administration.

Scalia's personal beliefs, moreover, tied him closely to the views and values that pervaded the post-Reagan Republican Party. As a particularly devout Roman Catholic who drove his family long distances to attend traditional Latin masses, he had the keenest sympathies for Christian religious beliefs. As a gun-owner and avid hunter, he nourished a passionate love of guns. He believed abortion and homosexual acts were immoral, embraced the principles of "free market" economics and linked them to Christianity, and regarded the death penalty as not only constitutional but desirable and effective. He dismissed "foreign" ideas and "foreign" law and showed little sympathy for immigrants and minority groups. Toward plaintiffs who sued private corporations he was callous if not overtly hostile, and he echoed Republican rhetoric by warning

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<sup>10</sup>NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 134 (2019).

that “over most of the past century change has been moving from a *status quo* capitalism toward socialism.”<sup>11</sup> His public statements and speeches rang out virtually every relevant political and social theme that the Republican Party sought to exploit. Late in his life, he even seemed to cut himself off from individuals and sources he considered “liberal,” leading one commentator in 2013 to note his “remarkable isolation from anyone who doesn’t agree with him.”<sup>12</sup>

More important, in spite of his inconsistencies in applying his originalist jurisprudence, he was generally reliable and consistent in reaching practical results that pleased his political supporters. On the conclusions built-in to his premises, his jurisprudence led directly to the results his supporters approved. Addressing abortion, the death penalty, affirmative action, and both gun rights and gay rights, he delighted his followers. In limiting Congress, restricting the federal judiciary, and protecting executive power he pleased most if not all of them. Further, his decisions under the Constitution’s religion clauses exerted an enormous appeal to much of the party’s political base. He upheld government benefits to religious groups<sup>13</sup> and religious

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<sup>11</sup>SCALIA SPEAKS, 334 (emphasis in original).

<sup>12</sup>MURPHY, SCALIA, 492. “Its been a long time” since he attended a party with both liberals and conservatives, Scalia admitted. Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK MAGAZINE, Oct. 6, 2013, available at <http://nymag.com/nymag/features/antonin-scalia-2013-10/index5.html> (hereafter, “Senior, *In conversation*”), last consulted, Nov. 16, 2018. Scalia read *The Wall Street Journal* and the *Washington Times* regularly, cancelled his subscription to the *Washington Post* (“so shrilly, shrilly liberal”), and did not read the *New York Times*. *Id.*, index1 (emphasis in original).

<sup>13</sup>*E.g.*, *Mitchell v. Helms*, 530 U.S. 793 (2000) (Scalia, J., joining plurality opinion by Thomas, J, upholding government aid to parochial schools for general religious instruction).

invocations at public ceremonies,<sup>14</sup> insisted that the Constitution favored religion over irreligion,<sup>15</sup> and even defended a religiously inspired state statute that required the teaching of “creation science.”<sup>16</sup> He managed to appeal to almost all of the Republican base--its religious wing as well as its libertarian, free-market, and traditional conservative wings--by linking Christianity closely to capitalism which, he argued, was “more *dependent* upon Christianity than socialism is.”<sup>17</sup>

In practical terms Scalia was especially reliable in advancing the Republican agenda. Beyond working to expand rights involving guns and religion, he sought to sharply limit other rights raised by consumers, employees, tort claimants, environmental advocates, civil rights plaintiffs, criminal defendants, and those claiming to be victims of statutory and constitutional violations. In those efforts he was relatively successful because the other conservative justices

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<sup>14</sup>*E.g.*, *Lee v. Weisman*, 505 U.S. 577, 631 (Scalia, J., dissenting, arguing that a prayer delivered at public school graduation was valid on “traditional” grounds and was not “coercive”).

<sup>15</sup>The Founders “believed that the public virtues inculcated by religion are a public good.” *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 397, 400 (1993) (Scalia, J., concurring in the judgment). *Accord* *Good News Club v. Milford Central School*, 533 U.S. 98, 120 (2001) (Scalia, J., concurring); *Locke v. Davey*, 540 U.S. 712, 726 (Scalia, J., dissenting); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 732 (1994) (Scalia, J., dissenting); *SCALIA SPEAKS*, 322-24.

<sup>16</sup>*Edwards v. Aguillar*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting). Scalia’s especially narrow interpretation of the Free Exercise Clause and his carefully designed interpretation of the Establishment Clause both favored majoritarian rule and, as a practical matter, implicitly favored Christian religions and values. HASEN, *JUSTICE OF CONTRADICTIONS*, 111-13; Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 386-89 (2000).

<sup>17</sup>*SCALIA SPEAKS*, 341 (emphasis in original). On the relation between the Republican Party, Christian religious groups, and support for the “free enterprise” system, *see, e.g.*, KEVIN M. KRUSE, *ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA* (2015).

were for the most part in agreement with his views. Their unity was hardly surprising because the Republican Party had been fully committed to those efforts since the Reagan administration and had worked assiduously to swamp the federal bench with judges who shared its anti-plaintiff and pro-corporate ideology.<sup>18</sup>

By one empirical yardstick the five conservatives (Scalia, Rehnquist, Thomas, Alito, and Kennedy) were the least supportive of private enforcement actions among the 29 justices who most recently served on the Court, and by a second measure they were five of the seven most anti-private enforcement justices to sit on the Court in the past half century.<sup>19</sup> Their highly

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<sup>18</sup>The Republican Party became committed to anti-litigation rhetoric and policies, condemning litigation against business as largely “frivolous” and advancing various proposals for self-serving “tort reform.” It regularly supported proposals designed to eliminate incentives and create disincentives for potential plaintiffs, and the conservative justices on the Rehnquist and Roberts Courts issued a long string of decisions implementing those ideas. *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* esp. chs. 2-4 (2017) (hereafter, “BURBANK & FARHANG, *RIGHTS AND RETRENCHMENT*”); WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004); LEE EPSTEIN AND JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005); NANCY SCHERER, *SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS* (2005); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1889-1904 (2008); Theodore Eisenberg, *U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business*, 6 J. EMPIRICAL LEGAL STUD. 969 (2009).

<sup>19</sup>BURBANK & FARHANG, *RIGHTS AND RETRENCHMENT*, 183, 173.

restrictive decisions on standing<sup>20</sup> and the Eleventh Amendment<sup>21</sup> served those goals, as did their decisions denying implied constitutional and statutory rights of action<sup>22</sup> and barring plaintiffs from the courts by forcing them to go to arbitration.<sup>23</sup> So, too, did their decision to void the right of action Congress established in the Violence Against Women Act,<sup>24</sup> their use of preemption to bar state law claims against pharmaceutical companies,<sup>25</sup> and their many rulings that raised obstacles in the path of claimants who brought suit under a variety of federal statutes, including

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<sup>20</sup>*E.g.*, *Allen v. Wright*, 468 U.S. 737 (1984) (O’Connor, J.); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (Scalia, J.); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011) (Kennedy, J.); *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587 (2007) (Alito, J.).

<sup>21</sup>*E.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Rehnquist, C.J.); *Alden v. Maine*, 527 U.S. 706 (1999) (Kennedy, J.); *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) (Thomas, J.); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (O’Connor, J.); *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30 (2012) (Kennedy, J.).

<sup>22</sup>*E.g.*, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (Berger, C.J.); *United States v. Stanley*, 483 U.S. 669 (1987) (Scalia, J.); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (O’Connor, J.); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (Scalia, J.); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) (Rehnquist, C.J.); *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (Kennedy, J.).

<sup>23</sup>*E.g.*, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (Scalia, J.); *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) (Scalia, J.); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012) (Scalia, J.); *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991) (White, J.); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (O’Connor, J.).

<sup>24</sup>*United States v. Morrison*, 529 U.S. 598, 627 (2000) (Rehnquist, C.J.)

<sup>25</sup>*Mutual Pharmaceutical Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013) (Alito, J.); *Pliva, Inc. v. Mensing*, 564 U.S. 604 (2011) (Thomas, J.).

the Privacy Act,<sup>26</sup> the Fair Labor Standards Act,<sup>27</sup> the Securities and Exchange Act of 1934,<sup>28</sup> Civil Rights Act of 1964,<sup>29</sup> the Age Discrimination in Employment Act,<sup>30</sup> and Title IX of the Educational Amendments of 1972.<sup>31</sup> Across a range of cases their decisions grew increasingly favorable to business organizations and hostile to those who challenged their interests.<sup>32</sup> The Court had been “captured by the Chamber of Commerce,” one scholar concluded in 2012, while another noted that in the 2012-13 Term the Court sided with the Chamber in 14 of 18 cases in which the organization filed an amicus brief.<sup>33</sup>

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<sup>26</sup>Federal Aviation Administration v. Cooper, 566 U.S. 284 (2012) (Alito, J.).

<sup>27</sup>Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012) (Alito, J.).

<sup>28</sup>Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011) (Thomas, J.); Morrison v. National Australian Bank, Ltd., 561 U.S. 247 (2010) (Scalia, J.); Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) (Kennedy, J.); Stoneridge Investment Partners, LLC v. Scientific-Atlantic, Inc., 552 U.S. 148 (2008) (Kennedy, J.).

<sup>29</sup>University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338 (2013) (Kennedy, J.); Vance v. Ball State University, 570 U.S. 421 (2013) (Alito, J.); Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007) (Alito, J.).

<sup>30</sup>Gross v. FBL Financial Services, Inc., 557 U.S. 167, 179-80 (2001) (Thomas, J.).

<sup>31</sup>Gebser v. Lago Vista Independent School District, 524 U.S. 274, 290-93 (1998) (O’Connor, J.).

<sup>32</sup>The Court’s pro-business orientation was especially noticeable after Chief Justice Roberts and Justice Alito joined the Court. Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013); ALAN B. MORRISON, *SAVED BY THE SUPREME COURT: RESCUING CORPORATE AMERICA* (2011); Jeffrey Rosen, *Supreme Court Inc.*, THE NEW YORK TIMES MAGAZINE, March 16, 2008.

<sup>33</sup>Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S. C. L. REV. 637, (2012); A.E. Dick Howard, *Ten Things the 2012-13 Term Tells Us About the Roberts Court*, 99 VA. L. REV. 48, 52-54 (2013).

To a large extent, Scalia was the point person driving those efforts. While teaching at the University of Chicago and editing the American Enterprise Institute’s journal *Regulation* in the early 1980s he urged the abolition of “new tort theories” that affected interstate businesses,<sup>34</sup> and on the United States Court of Appeals for the District of Columbia his policy views had been quite clear. There, “he ruled against sixteen out of seventeen civil plaintiffs who claimed their constitutional rights had been violated” and proved “particularly adept at invoking procedural defenses to constitutional claims.”<sup>35</sup> One of the early causes he joined, for example, was the corporate “tort reform” campaign to restrict federal statutes that offered attorneys’ fees to prevailing parties. In the early 1980s he advocated legislation to curb the award of such fees. The courts had interpreted federal attorneys’ fees statutes to favor plaintiffs but not defendants, he charged, and the law had become “an expanding wasteland of confusion.”<sup>36</sup> Once on the Supreme Court he joined the four other conservatives in limiting recoveries under the federal Civil Rights Attorneys’ Fees Statute and added a separate concurrence to warn of the potential “inequity” and “evil” inherent in any broader rule.<sup>37</sup> One empirical study concluded that Scalia was among “the most anti-private enforcement justices to serve on the Supreme Court in a period spanning more

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<sup>34</sup>Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J. L. & PUB. POL’Y 19, 22 (1982).

<sup>35</sup>James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook, and Winter*, 40 U. MIAMI L. REV. 1171, 1181 (1986).

<sup>36</sup>Unsigned [Antonin Scalia], *The Private Attorney General Industry: Doing Well by Doing Good*, REGULATION, May/June, 1982, at 5-7 (quote at 6). “Such chaos often accompanies the initial attempt to abandon important and long-standing legal traditions.” *Id.* at 6.

<sup>37</sup>*Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 610, 618, 622 (2001) (Scalia, J., concurring). *C.f.* *Farrar v. Hobby*, 506 U.S. 103 (1992) (Thomas, J., joined by Scalia, J.).

than 50 years”<sup>38</sup>; another found that he was the most conservative justice on the Court since 1953;<sup>39</sup> and a third found that he ranked as one of the most conservative justices to sit on the Court in the past three-quarters of a century.<sup>40</sup>

Scalia’s efforts to deny injured and aggrieved parties access to the federal courts were strikingly apparent and relentless in two critically important areas. One was in civil rights cases where the Court persistently limited the reach and effectiveness of protective federal laws, and the other was in the broad field of federal litigation in general where the Court imposed new procedural burdens on plaintiffs that heavily advantaged defendants. For the most part the Court’s other conservative justices joined him in both areas, and together they brought sweeping changes to the law that broadly handicapped individuals who sought to sue governments or private corporations.

In the first area, civil rights, Scalia made his political views clear as soon as he joined the Court,<sup>41</sup> but it was only after Anthony Kennedy took his seat and provided a fifth conservative vote in 1988 that the concerted ideological campaign took off. Then, beginning in the 1988-89

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<sup>38</sup>BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, 34. *See id.* at 150-51

<sup>39</sup>LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 110 (2005).

<sup>40</sup>Lee Epstein, William M. Landes, & Richard A. Posner, *Revisiting the Ideological Rankings of Supreme Court Justices*, 44 J. LEGAL STUD. S295 (2015).

<sup>41</sup>*E.g.*, *Newton v. Rumery*, 480 U.S. 386 (1987) (Powell, J., joined by Scalia); *Anderson v. Creighton*, 483 U.S. 635 (1987) (Scalia, J.); *United States v. Stanley*, 483 U.S. 669 (1987) (Scalia, J.).

Term, a new five-justice conservative majority issued a string of restrictive decisions designed to limit federal civil rights and anti-discrimination laws.<sup>42</sup> Their decisions seemed so consistent in results and so driven by party ideology that the Democratic Congress rallied in opposition. In 1990 Democrats passed a relatively strong measure overturning some of the those recent decisions, but Republican President George H. W. Bush vetoed it, leading the next year to the passage and signing of a weaker compromise law.<sup>43</sup> With the new Civil Rights Act of 1991 in place, the conservative justices backed off a bit but nonetheless continued their efforts to narrow the protections afforded by various federal civil rights laws.<sup>44</sup>

Sometimes, too, Scalia pressed for restrictions that were more extreme than even the other conservative justices were ready to accept. Dissenting in *Crawford-El v. Britton*, joined only by Justice Thomas, he made the radical claim that the Court had been wrong in 1961 when it decided

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<sup>42</sup>*E.g.*, *Lorance v. A.T.&T. Technologies, Inc.*, 490 U.S. 900 (1989) (Scalia, J.); *Martin v. Wilks*, 490 U.S. 755 (1989) (Rehnquist, C.J., joined by Scalia, J.); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (White, J., joined by Scalia, J.); *Jett v. Dallas Independent School District*, 491 U.S. 701, 738 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (Kennedy, J., joined by Scalia, J.).

<sup>43</sup>Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, a Partial Return to Ward's Cove, or All of the Above*, 43 CASE W. RES. L. REV. 287 (1993); Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994); Peter M. Leibold, Stephen A. Sola & Reginald E. Jones, *Civil Rights Act of 1991: Race to the Finish--Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043 (1993).

<sup>44</sup>*E.g.*, *Wilson v. Seiter*, 501 U.S. 294 (1991) (Scalia, J.); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (Scalia, J.); *Heck v. Humphrey*, 512 U.S. 477 (1994) (Scalia, J.); *Lewis v. Casey*, 518 U.S. 343 (1996) (Scalia, J.); *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (Scalia, J.).

*Monroe v. Pape*, the cornerstone of modern civil rights litigation under Section 1983.<sup>45</sup>

Overturing *Monroe* would severely limit Section 1983 as a viable remedy for those abused by the unlawful actions of local governmental units and state and local officials. Equally radical, he concurred alone in *Ricci v. DeStefano* to suggest that Title VII of the Civil Rights Act of 1964 was unconstitutional insofar as it allowed for liability on the basis of disparate impact. The “war between disparate impact and equal protection,” he prophesied, “will be waged sooner or later.”<sup>46</sup> Were the Court to strike down all “disparate impact” liability, it would make the enforcement of anti-discrimination laws exceptionally difficult and, in many or most instances, virtually impossible. Such a result did not concern Scalia, for he believed that the law often and properly denied remedies for injuries of many kinds. Indeed, even when fundamental rights were at issue, he readily insisted on the principle “that not all constitutional claims require a judicial remedy.”<sup>47</sup>

To protect defendants from civil rights claims, Scalia often voted to strengthen the immunities that they could invoke to defeat actions under Section 1983. The text of that statute was silent as to immunities, an omission that readily suggested that Congress simply intended no immunities to apply. Writing on an analogous issue, Scalia acknowledged that congressional

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<sup>45</sup>*Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting, joined only by Thomas, J.). *Monroe v. Pape*, 365 U.S. 167 (1961) (Douglas, J.) ruled that “under color of law” was not limited to legally “authorized” actions by government officials but included any action, however unlawful, that was taken under a badge of authority.

<sup>46</sup>*Ricci v. DiStefano*, 557 U.S. 557, 594, 595-96 (2009) (Scalia, J., concurring).

<sup>47</sup>*Webster v. Doe*, 486 U.S. 592, 606, 614 (1988) (Scalia, J., dissenting). *See id.* at 612-13. *Accord* *United States v. Windsor*, 570 U.S. 744, 778, 781 (2013) (Scalia, J., dissenting); *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2694 (2015) (Scalia, J., dissenting).

silence readily supported that negative inference. “If one did not believe that state limitations periods applied of their own force,” he acknowledged, “the most natural intention to impute to a Congress that enacted no limitations period would be that it wished none.”<sup>48</sup> Whatever Congress may have intended in enacting Section 1983, however, the Court had applied common-law immunity doctrines to such actions long before Scalia took his seat, and on an issue that so well served his restrictive purposes he readily acceded to precedent.<sup>49</sup> In doing so he abandoned “the most natural intention to impute” to Congress as well as any pretense of adhering to the textualism that he so often claimed to honor.<sup>50</sup> For the most part he used those common law immunity doctrines to support rulings that made it increasingly difficult for civil rights plaintiffs to prevail.<sup>51</sup>

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<sup>48</sup>Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 157, 164 (1987) (Scalia, J, concurring in the judgment). See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment).

<sup>49</sup>“The doctrine of official immunity against damages actions under § 1983 is rooted in the assumption that that statute did not abolish those immunities traditionally available at common law.” Richardson v. McKnight, 521 U.S. 399, 414 (1997) (Scalia, J., dissenting).

<sup>50</sup>Aware that he was engaging in “essentially legislative activity” in immunity cases, Scalia blamed the Warren Court for his actions. He argued that in deciding *Monroe v. Pape*, 365 U.S. 167 (1961) it had wrongly expanded the law. Consequently, he maintained, he was justified in supporting new restrictive rules that would limit the reach of that decision. Crawford-El, 523 U.S. at 611 (Scalia, J., dissenting). His rationale struck a triple blow, one against those who would criticize him for inconsistency, another against those who would bring actions under Section 1983, and a third against his regular target, the Warren Court.

<sup>51</sup>Scalia wrote for the Court in *Anderson v. Creighton*, 483 U.S. 635 (1987) (Scalia, J.) and joined restrictive majorities in, e.g., *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (Breyer, J.); *Saucier v. Katz*, 533 U.S. 194 (2001) (Kennedy, J.); and *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). He urged further limiting qualifications in *Richardson v. McKnight*, 521 U.S. at 414 (Scalia, J., dissenting), and *Burns v. Reed*, 500 U.S. 478, 496 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).

To further discourage and defeat such plaintiffs, Scalia also tried to block them from asserting a number of specific claims. Although he abandoned originalism on some First Amendment issues, he nonetheless applied it strictly when it served to deny claims for which he had no sympathy. He readily rejected suits brought both by employees whom the government fired, demoted, or otherwise punished because of their political affiliations<sup>52</sup> and by those who were denied government contracts<sup>53</sup> or access to government funding programs<sup>54</sup> for political reasons.

Indeed, Scalia's use of First Amendment speech doctrine was shocking. Overwhelmingly, his decisions favored the rights of those who took conservative as opposed to liberal political positions. A statistical study of the Court's free speech decisions found that he was almost three times as likely to vote in favor of those who espoused conservative messages as he was to vote in favor of those espousing liberal ones.<sup>55</sup>

Scalia's ideological campaign was strikingly apparent in the area of voting rights. He not

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<sup>52</sup>Rutan v. Republican Party of Illinois, 497 U.S. 62, 92 (1990) (Scalia, J., dissenting).

<sup>53</sup>O'Hare Truck Service v. City of Northlake, 518 U.S. 712, 726 (1996) (Scalia, J., dissenting). His opinion in the case appeared in Board of County Commissioners, Wabaunsee County v Umbehr, 518 U.S. 668, 686 (1996).

<sup>54</sup>National Endowment for the Arts v. Finley, 524 U.S. 569, 590 (1998) (Scalia, J., concurring in the judgment).

<sup>55</sup>Lee Epstein, Christopher M. Parker, and Jeffrey A. Segal, *Do Justices Defend the Speech They Hate?* (May 2, 2014), 4, available at <http://epstein.wustl.edu/research/InGroupBias.pdf>, last consulted, July 24, 2019.

only joined the other conservative justices in restricting laws designed to safeguard voter rights but urged particularly narrow views of the protections the Constitution offered to those who sought to vote.<sup>56</sup> Concurring in the Court’s judgment upholding an Indiana law requiring voters to present a government-issued photo ID, he declared that there was no valid legal objection to restrictions on voting merely because they had burdensome impacts on some identifiable groups of voters. He claimed that the Court’s precedents meant that burdens on voting reached constitutional significance only if they impacted “voters generally.” To make his implicit political point crystal clear, he declared specifically that the “Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class.”<sup>57</sup>

His argument seemed partisan on its face and designed to encourage more Republican-backed voter-suppression measures in other states. In addressing other constitutional rights, for example, he never suggested that a claimant could not prevail unless he or she showed that all other similar rights holders were equally burdened by the same restrictive law. Indeed, in the oral argument he had seemed to acknowledge that his position in the photo ID case was wrong when he noted—contrary to the assertions he later put in his opinion—that if “one half of one percent” of

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<sup>56</sup>*E.g.*, *Shelby County v. Holder*, 570 U.S. 1 (2013) (Roberts, C.J., joined by Scalia, J.); *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 ((2009) (Roberts, C.J., joined by Scalia, J.).

<sup>57</sup>*Crawford v. Marion County Election Board*, 553 U.S. 181, 204, 206 (2008) (Scalia, J., concurring in the judgment). “Scalia’s opinion did not even address partisanship concerns, a sharp contrast to his focus on the issue of incumbency protection in the campaign finance cases.” HASEN, JUSTICE OF CONTRADICTIONS, 131.

the voters found the photo ID requirement substantially burdensome, they would "have a cause of action to say you can't apply it to me."<sup>58</sup>

Even more broadly, in *Veith v. Jubilirer* he sought to prevent the Court from interfering in any way with partisan gerrymanders, a manipulative device that Republicans were using effectively to strengthen their ability to control state legislatures and the House of Representatives. He acknowledged "the incompatibility of severe partisan gerrymanders with democratic principles" but pronounced that fact judicially irrelevant. He assumed that such gerrymanders could violate the Constitution but declared that, even if they did, the courts could still not interfere with them.<sup>59</sup> There was, he declared, no possible judicial remedy for such abuses.<sup>60</sup>

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<sup>58</sup>Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping v. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL OF RTS. J. 507, 534 n.165 (2008) (hereafter, "Elmendorf & Foley, *Gatekeeping*"). Scalia's argument was "analogous to requiring a plaintiff-parishioner challenging a zoning ordinance expressly directed at churches to prove that the ordinance not only substantially burdens the plaintiff's exercise of religion (for example, by preventing his congregation from building a church on land that they own in the jurisdiction), but rather that the ordinance substantially interferes with the practice of religion generally throughout the jurisdiction (which it might not do if most major denominations already have houses of worship in the jurisdiction)." *Id.*

<sup>59</sup>*Vieth v. Jubilirer*, 541 U.S. 267, 292-93, 305-06 (quote at 292) (2004) (Scalia, J., announcing judgment of Court and delivering opinion for four-justice plurality). *See* HASEN, JUSTICE OF CONTRADICTIONS, 122-23.

<sup>60</sup>In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (Roberts, C.J.), over the dissent of the four Democratic justices, five Republican justices followed Scalia's lead and held that challenges to partisan gerrymanders presented "political questions" that were beyond the power of the courts to adjudicate.

Underlying Scalia’s attitude was a surprisingly open racial insensitivity. He ignored originalist historical evidence in condemning affirmative action,<sup>61</sup> seemed to suggest that blacks were better suited for “slower-track” schools,<sup>62</sup> and scorned the Voting Rights Act of 1965 as a “perpetuation of racial entitlement.”<sup>63</sup> Refusing even to acknowledge the substantive point involved, he mocked the idea that racial diversity in a law school’s student body could provide an “educational benefit.”<sup>64</sup> Most overtly, he readily acknowledged and accepted what he regarded as an inevitable racial bias in the law.<sup>65</sup> Although he repeatedly declared that race should be irrelevant and that only individual merit should count,<sup>66</sup> his views aligned closely with the views

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<sup>61</sup>HASEN, JUSTICE OF CONTRADICTIONS, 58, 102, 105-07.

<sup>62</sup>Transcript of oral argument, *Fisher v. University of Texas*, No. 14-981 (Dec. 9, 2015), 67-68.

<sup>63</sup>Transcript of oral argument, *Shelby County, Alabama v. Holder*, No. 12-96 (Feb. 27, 2013), 47. Scalia’s comments echoed the post-Reconstruction views of Justice Joseph Bradley, when he ruled the Civil Rights Act of 1875 unconstitutional and declared that “there must be some stage” when those who have “emerged from slavery” should “cease[] to be the special favorite of the laws” and be content with “the ordinary modes by which other men’s right are protected.” *The Civil Rights Cases*, 109 U.S. 3, 25 (1883) (Bradley, J.).

<sup>64</sup>*Grutter v. Bollinger*, 539 U.S. 306, 346, 347-48 (2003) (Scalia, J., concurring in part and dissenting in part).

<sup>65</sup>See Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights and Remedies from the Perspective of Justice Antonin Scalia’s McCleskey Memorandum*, 45 Mercer L. Rev. 1035, 1038 (1994). In rejecting the claim that Georgia applied the death penalty in a racially discriminatory manner, Scalia not only dismissed substantial empirical evidence that supported the claim but also informed the other justices that such racial disparities in the imposition of the death penalty, even if proven, would not trouble him.

<sup>66</sup>*E.g.*, *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 520, 527-28 (1989) (Scalia, J., concurring in the judgment); Antonin Scalia, *The Disease As Cure: ‘In order to get beyond racism, we must first take account of race’*, 1979 WASH. U. L. Q. 147 (1979).

of some elements of the Republican coalition<sup>67</sup> and had the practical effect of privileging whites and disadvantaging blacks and other minorities.

In the second area where Scalia pressed to limit access to the courts, cases interpreting the procedural rules that controlled federal litigation generally, he joined the other conservatives in changing the Court's interpretations of several key provisions of the Federal Rules of Civil Procedure. The changes constricted the ability of plaintiffs to obtain relief in federal cases across the board, especially those in which government agencies or business organizations held the evidence necessary to plead and prove the claims at issue.<sup>68</sup> Together, the conservative justices tightened pleading requirements under Rule 8,<sup>69</sup> limited the availability of class actions under

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<sup>67</sup>“The black freedom insurgency of the 1950s and 1960s dismantled the white supremacist southern Democratic Party, leading to a partisan realignment that saw the white South and much of the growing suburban fringe on the nation's cities vault toward the Republican party between the 1950s and 1990s.” ROBERT O. SELF, *ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S* 6 (2012).

<sup>68</sup>*E.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (Scalia, J.). *See, e.g.*, Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1732-41 (2014) (hereafter, “Purcell, *From the Particular*”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformatino of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L. J. 223 (2003); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

<sup>69</sup>*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (Souter, J., joined by Scalia, J.); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (Kennedy, J., joined by Scalia, J.).

Rule 23,<sup>70</sup> made summary judgment easier under Rule 56,<sup>71</sup> and gave defendants added leverage to force low settlements on plaintiffs under Rule 68.<sup>72</sup>

Scalia's opinion in *Wal-Mart Stores, Inc. v. Dukes* was a particularly obvious example of his efforts to block court access.<sup>73</sup> There, he reversed two lower courts and denied class certification to a class of one and a half million women employees who brought gender-discrimination claims against Wal-Mart. To do so, he raised the requirements for class actions in the federal courts to demanding new heights and imposed "a decisive change in the meaning of Rule 23."<sup>74</sup>

His class action opinions made his social and economic sympathies clear. He privileged defendants by giving legal weight to the costs and burdens that class actions forced on them while dismissing the significance of the costs and burdens that foreclosing class actions forced on plaintiffs.<sup>75</sup> Absent the class action remedy, those costs and burdens would, as a practical matter,

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<sup>70</sup>*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (Scalia, J.); *Comcast*, 569 U.S. 27 (Scalia, J.).

<sup>71</sup>*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (Rehnquist, J.); *Scott v. Harris*, 550 U.S. 372 (2007) (Scalia, J.).

<sup>72</sup>BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, 132-35.

<sup>73</sup>*Wal-Mart*, 564 U.S. 338 (2011) (Scalia, J.).

<sup>74</sup>BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, 142.

<sup>75</sup>*See Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 483, 485-86 (2013) (Scalia, J., dissenting); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234-38 (2013) (Scalia, J.); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (Scalia, J.).

prevent literally millions of injured or aggrieved individuals from seeking judicial relief for their injuries. Indeed, he showed concern for protecting the monetary claims of individual class members only when such solicitude provided a useful argument against certifying a Rule 23 (b) (2) “injunctive” class action and when the costs and burdens of actually pursuing those claims in separate individual suits would, as a practical matter, preclude virtually all of them.<sup>76</sup>

Most striking, like his actions in so many other areas, Scalia’s efforts to restrict court access under the Federal Rules contradicted his fundamental methodological and jurisprudential principles. First, on their own terms the changes the conservatives made were inconsistent with originalism and textualism, and they were equally inconsistent with traditional understandings of the rules.<sup>77</sup> In their pathbreaking decisions the conservative justices changed the original meaning of the rules, reinterpreted their text in novel ways, and altered the long-established meaning that the rule’s drafters, the Congress, and the Court had all originally given them. As one class-action specialist serving on the Advisory Committee on the Federal Rules declared, Scalia’s opinion in *Wal-Mart* “cannot be squared with the text, structure, or history” of Rule 23.<sup>78</sup>

Second, because the conservative justices made changes that were not based on any alterations in the text of the rules themselves, their decisions flouted both Scalia’s oft-proclaimed respect for the legislative branch and the principle of separation of powers. More specifically and

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<sup>76</sup>*Wal-Mart*, 569 U.S. at 364 (Scalia, J.).

<sup>77</sup>Purcell, *From the Particular*, 1758-62.

<sup>78</sup>Robert H. Klonoff, *The Future of Class Actions: The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 776 (2013).

egregiously, their decisions flouted the Court’s own prior and express commitment to abide by the rules as previously construed unless and until Congress changed them. Scalia had joined the Court in repeatedly declaring that the Rules Enabling Act bound the justices to follow the original meaning of the Federal Rules at the time when Congress adopted and approved them.<sup>79</sup> Any change in the meaning of Rule 8, the Court declared unanimously in 1993, “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”<sup>80</sup> Six years later Scalia and the Court again reaffirmed the same principle, this time addressing Rule 23. “The nub of our position is that we are bound to follow Rules 23 as we understood it upon its adoption,” they declared. In any event, “we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”<sup>81</sup> Scalia embraced that principle completely. He not only joined the Court’s opinion but also joined Rehnquist’s separate concurrence that stated explicitly that “[u]nless and until the Federal Rules of Civil Procedure are revised, the Court’s opinion correctly states the existing law, and I join it.”<sup>82</sup>

In the opening decade of the twenty-first century, however, Scalia turned his back on those commitments and joined the other conservative justices in contravening them. In doing so they bypassed Congress, ignored the principle of separation of powers, and abandoned the claims

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<sup>79</sup>48 Stat. 1064, June 19, 1934, currently codified at 28 U.S.C. Sec. 2072.

<sup>80</sup>*Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (Rehnquist, C.J., joined by Scalia, J.). See Stephen B Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1681-89 (2004),

<sup>81</sup>*Ortiz v. Fireboard Corp.*, 527 U.S. 815, 861 (1999) (Souter, J., joined by Scalia, J.).

<sup>82</sup>*Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring, joined by Scalia, J.).

of originalism, textualism, and traditionalism. To achieve their policy goals, they made new law reinterpreting Rules 8, 23, and 56 and barred untold numbers of injured individuals from seeking lawful redress in the federal courts.<sup>83</sup>

Beyond his formal actions on the bench that advanced the Republican agenda, Scalia also worked steadily in other ways to secure and maintain a position of national leadership on the political right and to expand his influence and standing there. The conservative/libertarian movement that had gathered strength since the 1970s enjoyed a vibrant intellectual foundation, and as a man of ideas Scalia fit in smoothly and quickly took a leadership role.<sup>84</sup> Developing his jurisprudence in speeches and articles before he went on the bench, he continued afterwards to refine them and, far more tellingly, to methodically promote them across the country. With his increased visibility as a member of the Supreme Court he became exceptionally active as a public speaker and published books and articles addressed to both professional and popular audiences.

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<sup>83</sup>See, e.g., BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, ch. 4; JOE S. CECIL *et al.*, FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 9-11 (2011); Joe S. Cecil *et al.*, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL & LEGAL STUD. 861, 882-83 (2007); Jonah B. Gelbach, *Note, Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L. J. 2270h, 2332 (2012); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 128 n.68 (2009); William H. J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEG. STUD. 474 (2017).

<sup>84</sup>See, e.g., JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT (2016); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTRREVOLUTION (2015) (hereafter, "HOLLIS-BRUSKY, IDEAS"); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

Seeking relentlessly to spread his ostensibly neutral and purportedly non-political ideas about originalism, textualism, and traditionalism, he frequently appeared on radio and television to discuss them and tirelessly went on the road to sell them before literally hundreds of live audiences.<sup>85</sup> “He was doing at least a dozen major speeches a year,” wrote Joan Biskupic. “Scalia is out there, figuratively and literally,” she explained, and he was providing “an inspiring template for right-wing politicians and conservative lawyers and law students.”<sup>86</sup> He assiduously sought to “develop followers,” concluded another biographer,<sup>87</sup> while a third declared him “a leading preacher in the conservative revival.”<sup>88</sup> In 2003 alone he was reimbursed by universities and bar groups for 21 separate speaking engagements.<sup>89</sup> He had, wrote Laurence Tribe and Joshua Matz, “evangelized originalism.”<sup>90</sup>

Scalia was willing, for example, to employ the “block liberty” fallacy that libertarians and economic conservatives loved, treating the pivotal concept of liberty as if it had an unchanging

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<sup>85</sup>“Because of his voluminous off-the-bench speeches and appearances, Scalia opened the door for all manner of extrajudicial behavior by members of the Court. His widely reported and frequently controversial public remarks had changed the conventional perception of the justices from lofty judicial figures to partisan political actors.” MURPHY, SCALIA, 306.

<sup>86</sup>BISKUPIC, AMERICAN ORIGINAL, 221.

<sup>87</sup>MURPHY, SCALIA, 163. *See id.* at 172, 222.

<sup>88</sup>RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 1 (1997).

<sup>89</sup>JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 243 (2007).

<sup>90</sup>LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 8 (2014) (hereafter, “TRIBE & MATZ, UNCERTAIN JUSTICE”).

and absolute meaning. Individual “liberty has been reduced” by Court decisions that eroded the rights of property, he declared, and “let us not pretend that that development has not been a *reduction* of individual liberty.”<sup>91</sup> Striking was the absence of any consideration of the extent to which a reduction of some liberties in some areas for some people could increase other liberties in other areas for other people—employees, consumers, women, gays, political dissidents, racial and ethnic minorities, injured or aggrieved individuals, and all those who wanted a healthier and safer environment. Contrary to Scalia’s contention, “liberty” was not a pre-existing absolute, and restricting it in some ways and for some purposes was not a zero-sum game. Indeed, as political philosophers from Harrington and Locke to the present all recognized, only by imposing restrictions on some liberties could republican society itself survive and prosper. Indeed, many years ago then-Solicitor General and future Supreme Court Justice Stanley Reed shrewdly pointed out the decisive social truth. “Claims of individual liberty may in reality be claims to domination over others.”<sup>92</sup>

Appealing to his Republican base by deploying such “block liberty” rhetoric, moreover, Scalia ignored yet another genuinely shared originalist conviction that united the Founders: the unquestioned principle that constitutional liberty required reasonable limits on everyone’s liberty so that all could enjoy the liberty that republican government sought to provide. “Individuals entering into society, must give up a share of liberty to preserve the rest,” George Washington

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<sup>91</sup>SCALIA SPEAKS, 167 (emphasis in original). *Accord* Scalia, *Originalism*, 856.

<sup>92</sup>DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940*, at 141(2014).

explained when he transmitted the newly drafted Constitution to the Confederation Congress.<sup>93</sup>

“Without such restraint,” Fisher Ames seconded in the Massachusetts ratifying convention, “there can be no liberty.”<sup>94</sup> To rally his supporters, however, Scalia was willing to tout an entirely arbitrary concept of “liberty” that contradicted the thinking of the Founders but fit snugly with the anti-regulatory rhetoric and policies underlying the Republican agenda.<sup>95</sup>

Even on the bench, Scalia spoke evocatively to the Republican base that listened far beyond the courtroom. Adopting the rhetoric of the religious right, he termed the campaign for gay rights a “culture war”<sup>96</sup> and denigrated “the so-called homosexual agenda.”<sup>97</sup> When immigration became a hot-button national issue, he vigorously supported restrictive state efforts that went beyond national law and spoke feelingly on behalf of his supporters and their hostility

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<sup>93</sup>George Washington letter transmitting the Constitution to Congress, Sept. 17, 1787, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (ed. Max Farrand 1911), 666.

<sup>94</sup>Fisher Ames, *Speech: Massachusetts Convention, 15 January 1788* in FRIENDS OF THE CONSTITUTION: WRITINGS OF THE “OTHER” FEDERALISTS 1787-1788 (Colleen A. Sheehan & Gary L. McDowell, eds., 1998), 198. See Edward A. Purcell, Jr., *What Changes in American Constitutional Law and What Does Not?* 102 IOWA L. REV. ONLINE 64, 106-13 (2017).

<sup>95</sup>Scalia knew better and sometimes spoke differently. “Any system of government involves a balancing of individual freedom of action against community needs, and it seems to me quite foolish to assume that every further tilt in the direction of greater freedom of action is necessarily good.” SCALIA SPEAKS, 193.

<sup>96</sup>“[I]t is no business of the courts (as opposed to the political branches) to take sides in this culture war.” *Romer v. Evans*, 517 U.S. 620, 636, 652 (1996) (Scalia, J., dissenting).

<sup>97</sup>“Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.” *Lawrence v. Texas*, 539 U.S. 558, 586, 602 (2003) (Scalia, J., dissenting).

to immigration. American citizens, he declared, “feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy.”<sup>98</sup> Dissenting from another Court decision, he identified with the most resentful parts of the Republican base when he agonized that “case by case, [the Court] is busy designing a Constitution for a country I do not recognize.”<sup>99</sup> Similarly, he played to the right-wing gallery in the oral arguments on the Affordable Care Act by raising what Justice Ginsburg bemoaned as the irrelevant “broccoli horrible.”<sup>100</sup> That reference was to what one commentator called “the familiar taunting query of the right” that used “the invocation of broccoli as the sickening consequence of unrestrained big government.”<sup>101</sup> In wielding the “broccoli horrible,” Scalia

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<sup>98</sup>Arizona v. United States, 567 U.S. 387, 416, 436 (2012) (Scalia, J., concurring in part and dissenting in part).

<sup>99</sup>Board of County Commissioners v. Umbehr, 518 U.S. 668, 686, 711 (1996) (Scalia, J., dissenting from the Court’s holding that the First Amendment protected government contractors from retaliation for their political views). Subsequently, the trope became popular on the right. Robert Bork used it for a book title, *A Country I Do Not Recognize: The Legal Assault on American Values* (2005), while Laura Ingraham sounded it on Fox News. “[I]n some parts of the country, it does seem like the America that we know and love doesn’t exist anymore,” she complained. “Massive demographic changes have been foisted on the American people, and they’re changes that none of us ever voted for and most of us don’t like.” Rachel Leah, *Laura Ingraham enforces racist stereotypes about people of color as she laments demographic changes*, SALON, Aug. 9, 2018, available at <https://www.salon.com/2018/08/09/laura-ingraham-enforces-racist-stereotypes-about-people-of-color-as-she-laments-demographic-changes/>, last consulted July 25, 2019.

<sup>100</sup>See Transcript of oral argument, *Department of Health and Human Services v. Florida*, No 11-398 (March 27, 2012), 13.

<sup>101</sup>Adam Gopnik, “*The Broccoli Horrible*”: *A Culinary-Legal Dissent*, THE NEW YORKER (June 28, 2012), available at <https://www.newyorker.com/news/news-desk/the-broccoli-horrible-a-culinary-legal-dissent>, last consulted Aug. 5, 2019. In *National Federation of Independent Business v. Sibelius*, 567 U.S. 519 (2012) Chief Justice Roberts used the broccoli example (at 558), and a joint dissent by the four other conservatives—Scalia, Kennedy, Thomas, and Alito—also defended its use (at 660). Dissenting on another point, Justice Ginsburg mocked the reference as “the broccoli horrible.” *Id.* at 615 and 617.

responded to a particularly powerful political mobilization on the right and one that his invocation succeeded in further encouraging. “In the wake of Scalia’s remarks at the oral argument,” noted two scholars, “broccoli and the problem of limiting principles were all over the news.”<sup>102</sup>

Scalia’s dissents, moreover, sometimes sounded like the histrionics of a rabble rouser. The issue was “quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome,” he declared in one case, proclaiming grandiloquently that there was only one proper answer: “It shall be the people.”<sup>103</sup> Outspoken on issues that aroused the Republican base, he warned during the oral argument in *Heller* that limiting gun ownership would endanger innocent families and prevent self defense “when you hear somebody crawling in you--your bedroom window.”<sup>104</sup> Similarly, in a civil rights suit he opposed a remedial prisoner release order by warning about “the inevitable murders, robberies, and rapes” that the order would cause. Many of those to be released, he warned ominously in racially-tinged language designed to frighten and infuriate that base, “will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.”<sup>105</sup> Both his public speeches and his judicial opinions demonstrated that he saw his originalism as far more than a

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<sup>102</sup>Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 U.C.L.A. L. REV. 66, 111 (2013). For the right’s mobilization effort, *see id.* at 100-19.

<sup>103</sup>*City of Boerne v. Flores*, 521 U.S. 507, 537, 544 (1997) (Scalia, J., concurring in part).

<sup>104</sup>Transcript of Oral Argument, *District of Columbia v. Heller*, No. 07-290 (March 18, 2008), 42.

<sup>105</sup>*Brown v. Plata*, 563 U.S. 493, 550, 561, 554 (2011) (Scalia, J., dissenting).

theory of jurisprudence. He saw it as an instrument of political polemics.<sup>106</sup>

In *United States v. Windsor*, a case involving gay marriage that outraged much of the Republican base, Scalia took the highly unusual step of dramatically urging a congressional confrontation with Democratic President Barack Obama. In *Windsor* the president had refused to defend the anti-gay Defense of Marriage Act, and a five-justice majority voided one of its central provisions. Dissenting angrily and passionately, Scalia charged that the president “did not faithfully implement Congress’s statute” and exhorted the legislative branch to rebel against his infidelity. Although the Court could not properly act in the case because there were no truly adverse parties before it, he argued, the lack of a judicial remedy should not and did not limit the ability of Congress itself “to confront the president directly.” The legislature, he exhorted, should force “a direct confrontation with the President” and deploy the “innumerable ways” the Constitution gave it “to compel executive action without a lawsuit.” Not surprisingly, he justified his plea on originalist grounds. “Our system is *designed* for confrontation,” he proclaimed. With hostile and demeaning turns of phrase he sneered at the president’s “Executive contrivance” and urged Congress to “bring him to heel.”<sup>107</sup> Seldom if ever has a justice launched from the Supreme Court bench such a partisan trumpet call to battle aimed at a sitting president of the United

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<sup>106</sup>Scalia claimed that he wrote his opinions for law students (Senior, *In Conversation*, index 7), which was surely true, but his performances were also intended for a much wider audience which he reached by public appearances, reports in the popular press, and his many professional acolytes and political admirers who spread his words in many forums.

<sup>107</sup>*United States v. Windsor*, 570 U.S. at 791, 790, 787 (Scalia, J., dissenting) (emphases in original).

States.<sup>108</sup>

Scalia’s judicial opinions commanded widespread attention, while his speeches, writings, interviews, and other public appearances and statements created a powerful and compelling popular image.<sup>109</sup> The barbed and often amusing nature of many of his public statements and the sheer nastiness that marked many of his judicial opinions made him a compelling public figure, while the political and social appeal of his personal views and judicial opinions made him the beloved judicial spokesman for the Republican coalition.

As a result, Scalia became a true media celebrity, a new kind of popularly known and nationally prominent justice.<sup>110</sup> In part, his celebrity status was a function of social change. By the middle of the twentieth century the Supreme Court had become central to American life and

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<sup>108</sup>Scalia issued another, if milder, charge against President Obama in *Arizona v. United States*, 567 U.S. 387, 416, 435-36 (2012) (Scalia, J., concurring in part and dissenting in part) (“Are the sovereign States at the mercy of the Federal Executive’s refusal to enforce the Nation’s immigration laws?” at 436). See *TRIBE & MATZ, UNCERTAIN JUSTICE*, 207-10.

<sup>109</sup>“Supreme Court clerks—liberal as well as conservative—were enthralled by him. ‘There was a lot of Scalia envy in the building,’ recalled the clerk of a liberal justice.” EVAN THOMAS, *FIRST: SANDRA DAY O’CONNOR* 237 (2019). At a meeting of the Federalist Society “young, conservative law students” recited the words from Scalia’s dissent in *Morrison v. Olson* “as if it were Holy Scripture.” Amanda Hollis-Brusky, *Here’s Why Originalism Won’t Be Buried with Scalia*, available at <https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/22/>, last consulted May 28, 2018.

<sup>110</sup>Scalia was not alone among the justices in reaching celebrity status. The Court’s increasing limitation on its docket and its expanding number of law clerks apparently freed the justices to devote more of their time to public appearances. Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958-60 and 2010-12*, 2015 UTAH L. REV. 1005, 1005-08 (2015). For a similar analysis of Scalia’s efforts, see *HASEN, JUSTICE OF CONTRADICTIONS*, 76-82.

politics in many areas, some of which directly and often profoundly touched millions of people in their daily lives. Further, modern media had created a celebrity culture that was constantly on the lookout for striking personalities who could command public attention. In that social context Scalia was a natural fit who offered the public stage an irresistible combination of personal qualities. He possessed legal brilliance and authority, a magnetic personality, theatrical instincts, a charming manner and quick wit, the poise of an experienced debater, self assurance seemingly impervious to criticism, and a conviction of both intellectual outrage and moral righteousness. Perhaps above all, he harbored an unrelenting psychological drive to demand and hold the center ring.

As he increasingly insisted that originalism was easy and certain in application, he also seemed to court publicity with ever greater determination. He reveled in both his burgeoning fame and his highly controversial, though hardly dominant, position on the Court. Indeed, his failure to forge an originalist majority, write a larger proportion of the Court's major opinions, or fulfill his apparent hope of succeeding Rehnquist as Chief Justice may have stoked an intensifying desire to magnify his reputation and secure the recognition and influence he fervently believed that he deserved.<sup>111</sup>

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<sup>111</sup>"I don't care," Scalia sometimes said about his "legacy," but at other times he acknowledged that he did care. "When I'm dead and gone, I'll either be sublimely happy or terribly unhappy." Revealingly, when asked about any "heroic" opinions he wrote, he responded not to that question but to a different and unasked question, whether he worried that his fate might be like that of Justice George Sutherland who Scalia characterized as being "on the losing side of everything, an old fogey, [expressing] the old view." When asked whether that would actually be his fate, he replied by again declaring defensively that "I don't care." Immediately asked if he actually thought he might wind up like Sutherland, however, he volunteered that "I can see that happening." Senior, *In Conversation*, index 8.

In celebrity terms Scalia far surpassed the other conservative theorists and judges who had assaulted the Warren Court and who might have won popular acclaim and risen to celebrity heights. None, however, did. Not Raoul Berger or Robert Bork,<sup>112</sup> important intellectual figures who began modern originalism with their influential work in the early 1970s but who lacked both Scalia's personal qualities and his judicial authority. The same was true, however, of the other conservative justices who did possess that authority but lacked Scalia's commanding personality, ideological fervor, and psychological drive. Not Lewis Powell who in many ways led the early conservative effort on the high bench to counter the rulings of the Warren Court. Not Warren Berger, who succeeded Earl Warren as Chief Justice and held the center chair for sixteen years. Not William Rehnquist, who pressed the assault on the Warren Court for thirty years and served as Chief Justice for almost two decades. And not Clarence Thomas, whose views were wholly compatible with the political values of the Republican coalition and who was a more consistent originalist than Scalia.<sup>113</sup>

But it was Scalia, not the others, who became the preeminent judicial spokesman for the Republican coalition and the vibrant judicial symbol of its values.<sup>114</sup> He fused the roles of

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<sup>112</sup>Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977). See JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* chs.4 & 5 (2005).

<sup>113</sup>Thomas was recognized among conservative lawyers as more consistently originalist than Scalia. See, e.g, HOLLIS-BRUSKY, *IDEAS*, 54-57.

<sup>114</sup>“To the true believers in the movement, he is the heroic upholder of the conservative faith. The other justices, having reached the pinnacle of the legal profession, are heroic to those in that profession; Scalia is heroic in the larger and more committed world of political activists.” Stephen A. Newman, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of*

theorist, apologist, polemicist, and public entertainer with the role of Supreme Court Justice, and in the process became a national celebrity who was an ideological hero for the coalition's adherents. When one of his sons and one of his admirers collected his writings and published them posthumously, it was not surprising that they chose the pontifical and Nietzsche-redolent title, *Scalia Speaks*.

One of Scalia's major achievements, then, was to make himself a political and cultural icon by merging a purportedly "objective" and "correct" originalist jurisprudence with the political and social values of a powerful and aggressive political coalition. In the last analysis, to most of his admirers--those in the public generally and even some in the academy and on the bench--it made no significant difference that his judicial opinions were jurisprudentially inconsistent and methodologically erratic. Similarly, it made no significant difference that his public performances and personal statements often seemed to baldly contradict his judicial stance of objectivity, neutrality, restraint, and deference to Congress and the states. Finally, it made no difference that he now and then decided cases that were likely against his personal inclinations and contrary to the views of some or most of his admirers. Those were only occasional and relatively minor departures, for the most part unknown to the great bulk of his admirers. Most of the time--and always on the crucial and hot-button issues that were highly visible to the public and that mattered most to the Republican coalition--he was publicly and powerfully with them. He stood at the forefront of their lines, proclaiming their values and defending their policies. His consistent rhetoric and reliable behavior in the cases of paramount social and political importance

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*Antonin Scalia*, 51 N.Y.L.S. L. REV. 907, 924 (2006).

were what truly counted with them. While Scalia failed to articulate and apply a convincing and soundly-based jurisprudence, he succeeded in shaping and promoting a powerful and galvanizing constitutional rhetoric to serve their political interests.

For American constitutionalism, then, the second paramount reason for Scalia's historical significance lies in the fact that he stands as an exemplar of the close and sometimes--as in his case--intimate and carefully cultivated relationship that exists between constitutional jurisprudence and American politics and between abstract theory and personal values. The way he promoted his originalist jurisprudence, filled in its substantive content, and applied or ignored its principles in practice, helped unite and energize the diverse elements that formed the base of the post-Reagan Republican Party, and it effectively advanced the varied political, social, and cultural interests of that base as well as the economic interests of its powerful corporate wing. Scalia gave that base a constitutional theory that validated its most fundamental beliefs and conferred on its adherents a profound sense of inherited authenticity, constitutional legitimacy, and political righteousness.

If the theoretical appeal of originalism arose from a wholly understandable if ultimately misconceived desire to find an objective method of constitutional interpretation, its practical appeal arose from an equally understandable and result-oriented recognition that it served the political goals of Scalia's base. As he declared forthrightly, the "questions that are the easiest for

the originalist” were those involving “abortion, assisted suicide, sodomy, the death penalty.”<sup>115</sup> In helping to forge that union between constitutional jurisprudence and practical politics Scalia’s career exemplified to an extreme and unusually obvious extent the merger of personal values and constitutional principles, the use of abstract theories to serve practical political ends, and the acclaim that those theories generated from those who approved the conclusions the theories supposedly required.

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<sup>115</sup>ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 402.

## CHAPTER 12

### THE NATURE OF AMERICAN CONSTITUTIONALISM

The ultimate irony of Scalia's career is that his judicial performance disproved his own jurisprudential claims. It demonstrated that his decisions and opinions on the Court were often the result of neither a "correct" constitutional jurisprudence nor the consistent application of his own self-proclaimed interpretive methods. Rather, they flowed commonly from personal values and goals that overlapped for the most part with those of the post-Reagan Republican Party. In the forefront for both Scalia and the party was an infuriating image of the Warren Court and a fierce rejection of many of the social, political, and cultural changes that stemmed from the 1960s.<sup>1</sup> Responding to what he and many other conservatives considered malign forces, Scalia focused his career on designing and promoting a jurisprudence that would delegitimize the moral, political, and constitutional foundations that supported those forces.

It was ironic that Scalia based his jurisprudence on an appeal to a supposedly

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<sup>1</sup>“Originalism was constitutional orthodoxy in the United States until, in historical terms, very recent times--the post-World War II era of the Warren Court.” ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* (Christopher J. Scalia & Edward Whelan, eds., 2017), 189. *Accord id.* at 197, 203, 228-29, 266, 269 (hereafter, “SCALIA SPEAKS”). On the history of originalism in America, *see* ERIC J. SEGALL, *ORIGINALISM AS FAITH* (2018); JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005).

authoritative American past because, for his purposes, that past proved unreliable and dysfunctional. As much as it provided carefully selected pieces of evidence to support some of his claims, it also provided far more evidence that contradicted those claims. Above all, the cumulative evidence of the nation's history demonstrated what Scalia sought above all to deny. The founding era—and the text of the Constitution itself—revealed large and critical areas of ambiguity, incompleteness, uncertainty, avoidance, and disagreement, while the decades that followed demonstrated that social changes, economic developments, political conflicts, intellectual reorientations, and institutional transformations drove complex processes of constitutional innovation and doctrinal evolution.<sup>2</sup>

Although Scalia rejected that view of the nation's past, American history nonetheless made those facts and processes all too apparent. At the beginning the Founders themselves were conflicted and uncertain about the meaning of many and perhaps most of the provisions they wrote into the Constitution. James Madison, the reputed "Father of the Constitution," changed his own thinking about many issues before, during, and again after the Constitutional

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<sup>2</sup>Ironically, Scalia castigated the idea of a "living Constitution" for, among other things, turning lawyers and law students from the study of history. *SCALIA SPEAKS*, 72. He pictured an either/or relationship between history and the living Constitution when, in fact, they are intimately related. Scalia was apparently unable to understand that relationship because he regarded the study of history as a method of establishing clear and static norms rather than as a method for truly understanding the nation's past and the contested and dynamic nature of its constitutional enterprise. As Robert Gordon wrote, "calls to return to the world of the Founders are mostly attempts to escape from history altogether--from controversy, contingency, development, the painful and shameful elements of the past, and the troubling disturbances of modernity." ROBERT W. GORDON, *TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW* (2017) 364.

Convention, as in one way or another did a good many of the others who drafted and ratified it.<sup>3</sup> Subsequently, as external conditions and contexts changed and increasingly exposed constitutional gaps and ambiguities, Americans began what became their unavoidable and often stressful process of remodeling the Constitution's operations and adapting its provisions to resolve new disputes and meet new challenges.<sup>4</sup> As Scalia himself recognized, changing Court personnel was a principal institutional mechanism that drove those processes at the highest and most formal jurisprudential level.<sup>5</sup> Studies have repeatedly shown how the federal judiciary has generally accommodated itself over time to dominant new political coalitions and adapted

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<sup>3</sup>See, e.g., LANCE BANNING THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 200-01, 374, 393 (1995); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, at 263-70 (1993) (hereafter, "ELKINS & MCKITRICK, AGE OF FEDERALISM"); JACK N. RAKOVE, A POLITICIAN THINKING: THE CREATIVE MIND OF JAMES MADISON (2017); Sveinn Johannesson, "Securing the State," : *James Madison, Federal Emergency Powers, and the Rise of the Liberal State in Postrevolutionary America*, 104 J. AM. HIST. 363 (2017). See generally, e.g., GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (2d ed. 1998); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 (2009); ELKINS & MCKITRICK, AGE OF FEDERALISM.

<sup>4</sup>Scalia himself began changing some of his views, and immediately after his death conservative justices began to note that fact and use it in beginning to rethink issues of doctrine. He seemed to be changing his mind, for example, on *Chevron* deference. See Daniel S. Brookins, *Confusion in the Circuit Courts: How the Circuit Courts are Solving the Mead Puzzle By Avoiding It Altogether*, 85 GEO. WASH. L. REV. 1484, 1508 n.167 (2017).

<sup>5</sup>"Overrulings of precedent rarely occur without a change in the Court's personnel." *South Carolina v. Gathers*, 490 U.S. 805, 823, 824 (1989) (Scalia, J., dissenting). Scalia was hardly the only justice to recognize that same mechanism. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting); *Michigan v. Long*, 463 U.S. 1032, 1065, 1070-71 (1983) (Stevens, J., dissenting). Scholars of varying political persuasions also agreed. See, e.g., BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 224-25 (1998) (hereafter, "CUSHMAN, RETHINKING"); John Harrison, *Utopia's Law, Politics' Constitution*, 19 HARV. J. L. & PUB. POL'Y 917, 930 (1995).

constitutional principles to serve their new goals and policies.<sup>6</sup>

Beyond those formal doctrinal changes, moreover, American government itself also changed over the decades in organization and operation, in the interactions between the three federal branches, and in the working relationships that existed between each of those three branches and the steadily growing number of states that entered the Union.<sup>7</sup> From the nation's earliest days executive power gradually expanded and executive practices grew more important, developments that became increasingly noticeable in the latter half of the nineteenth century and then accelerated rapidly during the twentieth and twenty-first centuries.<sup>8</sup> Similarly, in the early nineteenth century the Supreme Court charted pivotal and highly controversial new paths, and late in the century it began to extend federal judicial power more broadly and to affect ever larger areas of American life, a process that continued into the twenty-first century.<sup>9</sup> So too with

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<sup>6</sup>The classic study is Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). See, e.g., KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* (2019) (“Rather than providing a sober second thought, the Court is more likely to act as yet another partisan participant in the policy-making process,” *id.* at 312); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007); CUSHMAN, *RETHINKING*.

<sup>7</sup>The material in the following four paragraphs is drawn from EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY* ch.7 and numerous works cited therein (hereafter, “PURCELL, ORIGINALISM”).

<sup>8</sup>See, e.g., STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1997); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); MICHAEL A. GENOVESE, *THE POWER OF THE AMERICAN PRESIDENCY, 1789-2000* (2001).

<sup>9</sup>WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* ((1988); William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969); Edward A. Purcell, Jr., *Ex parte Young*

federal administrative agencies. Slowly growing since the nation's founding, those agencies expanded rapidly after 1887 when Congress began creating dozens of new administrative institutions and gave many of them the authority to exercise combined legislative, executive, and judicial powers in various subareas of law, a development that Scalia and many others viewed as establishing a new and "headless fourth branch" of government<sup>10</sup>

While those sweeping changes were altering the structure and operations of American government, Congress continued on paper as the most powerful branch. Its impact on the nation's course, however, began a slow and uneven decline, punctuated by periods of assertiveness and even of brief dominance.<sup>11</sup> Its division into two chambers, the doubling and then redoubling of the number of states in the Union, the resulting expansion in the membership of both its houses, and the multiplying range of external pressures that fragmented the interests of those who served in it combined to make Congress increasingly slow to take significant actions, while the expansion of executive and judicial power and the lure of divisive party

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*and the Transformation of the Federal Courts, 1890-1917*, 40 U. TOLEDO L. REV. 931 (2009).

<sup>10</sup>SCALIA SPEAKS, 374. *See id.* at 261-62. On the Growth of administrative agencies and the ways they complicated American government and constitutional law, *see, e.g.*, JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012); DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940* (2014); JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* (2012); BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009).

<sup>11</sup>For an exploration of Congress's non-legislative powers that could allow it a much greater role in American politics, *see* JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* (2017). *See generally, Symposium: The Most Disparaged Branch: The Role of Congress in the Twenty-First Century*, 89 BOSTON U. L. REV. 331 (2009).

loyalties often rendered it even less able or willing to assert itself. Sometimes those forces combined to prevent it from acting at all. The fact that Congress--the branch that the Founders regarded as the Constitution's central and dominant institution--increasingly lost or surrendered its intended leadership role reverberated through the levels and branches of government, gradually altering their distinctive operations and moving the governmental system ever farther from the one that the Founders had envisioned. Gradually, more and more *de facto* power shifted to the executive, the judiciary, and the administrative agencies, shifts that brought substantial if usually incremental practical realignments in the relationships and lawmaking roles of all of the various levels, branches, and agencies of government.<sup>12</sup>

The states remained important sources of power, but the influence of individual states rose and fell while their collective influence periodically waxed and waned. As new states entered the Union the power of the older "original" states declined, while newer states began exerting their own distinctive and often conflicting demands. Moreover, the addition of new states and the development of new interests in older states gradually shifted the lines of sectional conflict and the kinds of pressures that groups of states exerted on the national government.<sup>13</sup>

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<sup>12</sup>For a theoretical consideration of the way such institutional changes occur, *see, e.g.*, Arthur L. Stinchcombe, *The Sociology of Organization and the Theory of the Firm*, 3 *PACIFIC SOCIOLOGICAL REV.* 75 (1960). For twentieth-century examples, *see, e.g.*, DAVID SCHOENBROD & ROSS SANDLER, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

<sup>13</sup>*See, e.g.*, SVEN BECKERT, *THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850-1896* (2003); RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865-1896* (2017); Elliott West, *Reconstructing Race*, 34 *WEST. HIST. Q.* 6 (2003).

Sometimes intra-state and interstate divisions reduced or negated state influence, while at other times broadly shared views about desirable policy goals at the state and local levels increased it. Similarly, the role and influence of the states waxed when the federal branches and agencies were divided or in conflict but waned when those authorities pursued mutually reinforcing policies.

Beyond those shifting relationships and evolving patterns of *de facto* authority, moreover, American law was changing in yet another way. By the latter half of the twentieth century both Congress and the Court were increasingly allowing private parties and institutions to control the scope, interpretation, and application of federal law. In such critical areas as civil rights, employment discrimination, and privacy law, a range of corporate officials, managers, consultants, and outside service and equipment vendors were shaping the law in ways that limited and sometimes distorted its basic purposes and goals.<sup>14</sup> In an even wider range of areas, the Court's severe restrictions on class actions and its vigorous promotion of adhesion contracts that imposed practical disadvantages on potential claimants<sup>15</sup> or required mandatory arbitration

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<sup>14</sup>LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* (2016); THOMAS O. MCGARITY & WENDY WAGNER, *BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH* (2012); KENNETH A. BAMBERGER & DEIRDRE K. MULLIGAN, *PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES* (2015); THE SOCIAL CONSTRUCTION OF TECHNOLOGICAL SYSTEMS (Wiebe Bijker *et al.*, eds., 1987); Ari Ezra Waldman, *Designing Without Privacy*, 55 HOUSTON L. REV. 659 (2018); Ari Ezra Waldman, *Privacy's Law's False Promise*, 97 WASH. U. L. REV. ---- (2019).

<sup>15</sup>Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793 (2014); Judith Resnik, *Contracting Civil Procedure*, in *LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR* (Paul Carrington & Trina Jones, eds., 2006), 60; Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 U.C.L.A.

of federal claims further limited or even defeated the goals of the substantive law.<sup>16</sup> American constitutionalism was increasingly encouraging the outsourcing of both the content and application of national law to non-governmental interpreters and enforcers.

In sum, while the formal skeletal structure of American government remained essentially the same on paper and in abstract contemplation, its varied components multiplied, changed internally, exercised different degrees of power, and restructured their relationships with one another and with the law itself. Indeed, not one of the three federal branches, the foundation stones of the constitutional system, remained the same in the early twenty-first century as it had been in 1789 or, for that matter, in 1865, 1920, or even 1980. They all changed profoundly in size, role, operation, internal complexity, scope of authority, and social and ideological orientation, and those multi-leveled changes profoundly altered the nature and operations of the constitutional system.<sup>17</sup>

Those internal structural changes combined with the establishment of an enduring two-

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L. REV. 423 (1992).

<sup>16</sup>See, e.g., *A.T.& T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (Scalia, J.); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (Scalia, J.); *American Express Co., Inc. v. Italian Colors*, 570 U.S. 228 (2013) (Scalia, J.). See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

<sup>17</sup>PURCELL, ORIGINALISM, ch.7. Within the past few decades, for example, the Supreme Court has changed significantly, becoming increasingly polarized as it has been reshaped by sharply divided outside elites and more methodically staffed with rival ideological adherents by presidents from different parties. NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP, HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019) (hereafter, “DEVINS & BAUM, COMPANY”).

party system and massive changes in American society to continually reconfigure the dynamics of the nation's law, politics, and government. The two-party system was a dramatic innovation that contradicted the Founders' hopes about the way the government would function. It added organized and often dysfunctional competitions for power, periodic institutional transformations, and diverse partisan repercussions that periodically rippled through all of the levels and branches of government.<sup>18</sup> The growth of cities, technological revolutions, transformations in the economy, expansions of interstate transportation and communications, growing religious and cultural diversity in the American people, the nation's changing role in international affairs, and the rise and disintegration of successive local, intrastate, and regional alliances and rivalries added ever more complex internal tensions, conflicting interests, and novel challenges. Together all of those developments made it clear that American constitutional government was an inherently complex, dynamic, and evolving institutional system that became increasingly so over the centuries, a system that the Constitution presided over only in part, and then only loosely, flexibly, and often quite indirectly.

Although, as Scalia believed, the nation's governmental structure was essential to achieve the Constitution's purposes, its dynamic and changing nature meant that its various institutional components not only underwent their own changes but that they also had to adapt to changes in the other levels and branches in order to effectively serve their checking and

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<sup>18</sup>See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); David Fontana, *Government in Opposition*, 119 YALE L. J. 548 (2009); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

balancing function. That process demonstrated, among other things, that there was a radical difference between the Constitution's fundamental and commonly linked principles, "separation of powers" and "checks and balances." As the various separated institutions ordained by the former changed in organization and operation, the responses required by the latter had to be reconsidered and recalibrated. If the direct election of senators and the "nationalization" of Congress reduced the likelihood that the legislative branch would protect the states, for example, then the judicial branch had new reasons to move more fully into that role. Even more obvious, as presidential power expanded drastically, both the legislative and judicial branches had reasons to supervise executive actions ever more closely and rigorously. Whether or not the branches did reconsider and recalibrate their roles, however, and whether or not they actually "checked" the other branches, was a matter of political practice not principle, and the varying relationships that resulted over time were nothing that the Constitution itself could determine, direct, or even clearly guide.<sup>19</sup>

Scalia was surely right when he declared that one of the "most important roles" of the courts was "to preserve the checks and balances within our constitutional system,"<sup>20</sup> but he was profoundly wrong in believing that some kind of static originalism could possibly cope with the changes that were necessary to maintain those checks and balances in a complexly evolving governmental structure operating through new and often trying times. As an ongoing enterprise

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<sup>19</sup>PURCELL, ORIGINALISM, 54-58.

<sup>20</sup>Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (hereafter, "Scalia, *Rule of Law*").

in popular and law-based government, American constitutionalism was not ultimately rooted in any purported and specific “original meaning”—nor could it be. It was a system that had to be maintained and operated flexibly and wisely. As Madison said in the Virginia ratifying convention, “no theoretical checks--no form of government can render us secure” unless “the people will have virtue and intelligence to select men of virtue and wisdom.”<sup>21</sup>

In formulating the Constitution’s “theoretical checks,” however, Madison did not get at least two fundamental points right.<sup>22</sup> Although he recognized the danger that diverse political forces could impede the operations of the Constitution’s system of checks and balances,<sup>23</sup> he was wrong in thinking that the principal danger to its operation would be an overreaching legislature and that “the weakness of the executive” would render it a less dangerous branch.<sup>24</sup> More important, he was equally wrong in thinking that by “giving to those who administered each department the necessary constitutional means” that would enable them “to resist encroachments of the others,” the system would also give those officials the “personal motives” that would lead them to resist those encroachments. “The interest of the man,” he argued, “must be connected

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<sup>21</sup>3 THE DEBATES ON THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (Jonathan Elliot, ed., 1910), at 536-37 (June 20, 1788).

<sup>22</sup>Similarly, Madison was also wrong in arguing that the states would share united views about the powers of the national government and stand together when they thought that federal power was being abused. PURCELL, ORIGINALISM, 50-52.

<sup>23</sup>THE FEDERALIST PAPERS, No. 49, at 312-13 (Madison) (Clinton Rossiter, ed., originally published in 1961, with Introduction and Notes by Charles R. Kessler, 2003) (hereafter, “FEDERALIST PAPERS”); *id.* No. 50, at 316-17 (Madison).

<sup>24</sup>FEDERALIST PAPERS, No. 49, at 312 (Madison); *id.*, No. 51, at 320 (Madison); *id.*, No. 48, at 307 (Madison).

with the constitutional rights of the place.”<sup>25</sup> A wonderful idea, but one with a grave and inherent flaw. The fact was that the Constitution could not fully accomplish that goal because the interests and motives of individuals stemmed not only from the constitutional “place” they occupied but also--in varying ways and degrees in the different institutional “places” the Constitution established<sup>26</sup>--from extraneous social, political, cultural, economic, and ideological goals and commitments. Thus, the practice of the system of checks and balances was necessarily shifting, pragmatic, and highly political in its operations.<sup>27</sup> It was not a practice that worked automatically or consistently, and it was surely not one that was specified in the Constitution itself nor one that operated as the Founders had envisioned.

American constitutional government, then, with its distinctive rule of law was a historically evolving, culturally rooted, value based, and institutionally channeled enterprise that remained in many ways open-ended and subject to periodic remodeling. The Constitution offered no guarantees, and neither the Constitution itself nor any interpretive “method” provided an escape from that human and political reality. The polarization on the Supreme Court in the twenty-first century, for example, was due in large part to the drive of ideologically-based social movements and the increasing polarization that divided the two national political parties and the

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<sup>25</sup>FEDERALIST PAPERS, No. 51, at 319 (Madison).

<sup>26</sup>Even in the polarized times of the early twenty-first century, being a Supreme Court justice, as opposed to a member of Congress or the executive branch, seems to put serious constraints on partisan and ideological behavior. *See, e.g.*, DEVINS & BAUM, COMPANY, 140-46, 151-52.

<sup>27</sup>PURCELL, ORIGINALISM, 57-58.

opposing legal and political elites that influenced judicial selection and policy.<sup>28</sup> Those social and cultural developments increasingly determined the individuals who went on the Court, the views and values they brought with them, and consequently the directions in which they moved the law and helped to realign the system's operations.

Fortunately, a great many powerful constraints--legal, social, cultural, political, professional, and institutional--undergirded the operations of American government and channeled constitutional interpretation. Over the decades those forces provided substantial degrees of stability, reliability, continuity, and predictability. Because the fundamental jurisprudential problem of American constitutionalism lay in the fact that the Constitution was in large areas indeterminate, the nation's constitutional history was the history of Americans defining themselves over time.<sup>29</sup> Thus, American constitutionalism was a complex amalgam of historical practices sustained by many shared cultural beliefs, and the Constitution provided the structure for those practices, anchored foundational beliefs about the virtue of popular government, inspired the social and political values that Americans accepted as authoritative, and helped direct political action into the channels that they recognized as acceptable. However, it did not--and certainly did not as an original matter--provide "correct" answers about how

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<sup>28</sup>*See, e.g.*, DOUG MCADAM & KARINA KLOOS, *DEEPLY DIVIDED: RACIAL POLITICS AND SOCIAL MOVEMENTS IN POSTWAR AMERICA* (2014); Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 *Sup. Ct. Rev.* 301.

<sup>29</sup>Most notable in formal terms were a series of constitutional amendments that moved American constitutionalism in the direction of requiring greater freedom, justice, and equality for all. U.S. CONSTITUTION, AMENDS. 13, 14, 15, 16, 17, 19, 23, 24, 26, and 27.

Americans should manage that structure and apply those values.

Scalia, then, promoted a profound misunderstanding of American constitutionalism. Most centrally, he advanced a flawed concept of constitutional “law” itself. “Today’s decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law,” he insisted from the high bench.<sup>30</sup> His misunderstanding was basic. “Law” existed in a variety of forms and operated on a variety of levels, but the law of the Constitution was a special area, in many ways necessarily and radically different from the law that existed in other areas. Clear, known, and sometimes rigid rules were both possible and desirable in many areas of human life, from specific rules setting automobile speed limits, defining criminal acts, and identifying property boundaries to more general rules establishing contractual rights, imposing tort liabilities, and providing government benefits. The Constitution, however, established a profoundly different kind of law, one that created a governmental structure and provided some specific rules but relied for the most part on generalized principles and provisions requiring wise interpretation and flexible adaptation. Scalia too often wrote and spoke as though virtually all of constitutional law—including the “law” of checks and balances--had, or at least should have, the same qualities as traffic law.

Further, Scalia confused “law” with the idea of the “rule of law” which, he declared,

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<sup>30</sup>Morrison v. Olson, 487 U.S. 654, 697, 733 (1988) (Scalia, J., dissenting). “Once we depart from the text of the Constitution, just where short of that do we stop?” he asked. *Id.* at 711. His conclusion was extreme. “This [decision] is not only not the government of laws that the Constitution established; it is not a government of laws at all.” *Id.* at 712 (Scalia, J., dissenting).

required “a Law of Rules.”<sup>31</sup> If “law” could often refer to relatively clear, known, and pre-existing “rules” designed to govern specific areas of human conduct, the “rule of law” referred to something much broader and more fundamental.<sup>32</sup> It meant more than the mere enforcement of society’s known and pre-existing laws and properly promulgated rules, including those limiting the exercise of government power. It also meant that basic decisions about government actions and policies should be made by whatever institution the society accepted as authoritative, as long as those decisions were made in accordance with prescribed procedures and remained consistent with the society’s fundamental norms. Thus, the “rule of law” included not only the good-faith enforcement of all of a society’s ordinary “rules” and all of its “rules” about the limits of government power, but also the properly made decisions of the society’s authoritative institutions.<sup>33</sup> Further, in American constitutionalism the “rule of law” also meant that certain fundamental political and moral values be honored and that an independent and authoritative judiciary be available to enforce them. Although many and perhaps most Supreme Court decisions were not--and could not be--applications of the kind of preexisting “rules” that Scalia thought necessary for the “rule of law,” they were nonetheless examples of the Constitution’s own fundamental and essential, if surely malleable and fallible, “rule of law.”

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<sup>31</sup>Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>32</sup>Even Albert Venn Dicey, the leading nineteenth-century English advocate of “the rule of law,” changed his thinking later in his career and recognized the persistence and importance of flexible judge-made law. ROBERT STEVENS, *LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976*, at 103-04.

<sup>33</sup>This general description of the “rule of Law” is somewhat similar to the “soft” positivism outlined in H.L.A. HART, *THE CONCEPT OF LAW* 250 (2d ed. 1997) (law as application of positive rules that can be construed in light of a society’s moral and cultural norms). The description in the text is not based on jurisprudential theory, however, but on the historical practice of American constitutionalism.

Further, Scalia's jurisprudence drained American constitutionalism of its implicit moral foundation, however imprecise and contested. That foundation assumed the relevance of appeals to the moral ideal of justice and, increasingly after constitutional amendments, to the noble ideal of human equality.<sup>34</sup> In contrast, Scalia's originalism was an overtly positivist jurisprudence, and he was an avowed positivist in his conception of law and the judicial role.<sup>35</sup> "It is necessary," he repeatedly insisted, "to judge according to the written law--period."<sup>36</sup> Seldom did Scalia speak of "justice," and when he did he insisted that trying to enforce any such moral ideal was foreign to his role as a judge.<sup>37</sup> Although Christian citizens had "a moral obligation toward the just state,"<sup>38</sup> judges themselves had no business consulting abstract moral ideas; they owed their obligation solely to the written positive law. Scalia insisted that he had learned nothing in law school or in legal practice that qualified him to rule on moral issues or to decide cases based

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<sup>34</sup>*See, e.g.*, EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955). *See, e.g.*, MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION (2019).

<sup>35</sup>*See, e.g.*, SCALIA SPEAKS, 152-54; ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3-47 (1997); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739, 745 (2004) (Scalia, J., concurring in part and concurring in the judgment).

<sup>36</sup>SCALIA SPEAKS, 245. Scalia was a self-proclaimed positivist, and in standard jurisprudential terms he accepted the "hard" variety. In that view law rested solely on authoritative and written sources of law and did not allow any role for moral and cultural values in applying it. It rejected "soft" positivism which allowed for the influence of such moral and cultural values. On the history of positivism in the United States, *see, e.g.*, ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998); Edward A. Purcell, Jr., *Democracy, The Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, 66 FLA. L. REV. 1457 (2014).

<sup>37</sup>SCALIA SPEAKS, 248-49, 262-63, 267. *E.g.*, *Burnham v. Superior Court of California*, 495 U.S. 604, 623 (1990) (Scalia, J.) (rejecting proposed test for personal jurisdiction as requiring "subjective assessment of what is fair and just").

<sup>38</sup>SCALIA SPEAKS, 141.

on concepts of justice or fairness. Judges, he declared, “have no greater capacity than the rest of us to determine what is moral.”<sup>39</sup> Indeed, he adopted an extreme procedural positivism, maintaining that persons sentenced to death after a proper trial who later came forward with proof of their actual innocence could nonetheless, consistent with the Constitution, be lawfully executed.<sup>40</sup>

Although Scalia’s constitutional thinking was flawed in those and other ways, his jurisprudence and career nevertheless remain particularly significant on another and quite different level, the way they illuminate the nature of American constitutionalism itself. First, his efforts to advance originalism and his agreement with the policy goals of the Republican Party demonstrated the classic jurisprudential pattern of American constitutionalism. Lawyers and legal advocates drew on the Constitution and the sources of American law to articulate interpretations that affirmed the supremacy of the Constitution while at the same time molding those interpretations to secure and advance their own views, values, ideas, and interests. Those who reached the Supreme Court were products of that same process and--though more tightly constrained by formal, professional, cultural, and institutional norms--tended, consciously or unconsciously, to do the same, considering themselves, as Justice George Sutherland did, as properly following their own “conscientious and informed convictions.”<sup>41</sup>

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<sup>39</sup>SCALIA SPEAKS, 267. *See id.* at 248-49, 262-63, 267. “But abstract moralizing is a dangerous practice when it is reflected in the operating documents of a a nation-state (or a federation of nation-states), which require the moralizing *to be judicially enforced.*” SCALIA SPEAKS, 263 (emphasis in original).

<sup>40</sup>*Herrera v. Collins*, 506 U.S. 390, 427, 427-28 (1993) (Scalia, J., concurring).

<sup>41</sup>*West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400, 402 (Sutherland, J., dissenting).

For Scalia, his own “conscientious and informed convictions” were particularly compelling, and he sought to enforce them with determination and vigor. While he believed that he was protecting democracy, enforcing the Constitution, constraining his personal preferences, denying his own moral views and values, and forcing the law into greater conformity with the thinking of the Founders, he was in fact--like some other major figures in American constitutional history--leading a campaign of constitutional politics. In his case it was a campaign that would not return the United States to the views and values of the founding generation but would move them toward the views and values of the post-Reagan Republican coalition.

Second, Scalia’s jurisprudence and career illustrated the historical processes by which shifting branch and level affinities repeatedly reshaped the contours of constitutional law and politics.<sup>42</sup> From the nation’s earliest days, political adversaries defended the particular governmental institution or institutions that seemed most favorable to their respective causes. In the 1790s the Jeffersonian Republicans praised legislatures and attacked the executive, while Hamiltonian Federalists did the reverse, criticizing the former and defending the latter. After Jefferson became president he suppressed his suspicions of executive power and used it vigorously, while the out-of-power Hamiltonians suddenly began to denounce the terrible dangers they now saw in executive power. With many analogous shifts and reversals, subsequent political generations followed the same pattern, with rivals striving to shape

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<sup>42</sup>*See, e.g.,* EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* ch. 1, 261-65, 285-95 (2000).

constitutional thinking to favor the respective branch or level they controlled or that seemed most likely to foster their interests. In the twentieth century “conservatives” defended the federal courts until the New Deal by advancing constitutional theories that magnified judicial power vis a vis Congress and the executive. Their progressive adversaries naturally did the opposite. Then, with the Warren Court, political liberals switched branch allegiance and praised the vision of an enlightened and egalitarian judicial power, while their political adversaries suddenly became vigorous proponents of the legislative power that their conservative forebears had feared.

Scalia’s jurisprudence simply tracked that well-established pattern. The Warren Court advanced bold new “liberal” rulings, so he countered by urging limits on the federal courts and proclaiming the lawmaking primacy of Congress. Congressional liberals sought to constrain the executive power under Nixon and Reagan, so he countered by advocating his theory of a powerful “unitary” executive. He was a particularly striking example of the traditional process of shifting level and branch affinities, moreover, because his efforts were so determined, shaped by his own political goals and values, and inventive in molding constitutional doctrine to serve his purposes.

Third, Scalia’s judicial “conservatism” itself illustrated the inherently changing and dynamic nature of American constitutional law and politics. There had, after all, been many “conservatisms” in American history. The founding generation had embraced a Hamiltonian conservatism that stressed the importance of finance, manufacturing, and a strong central

government, for example, while the middle decades of the nineteenth century gave rise to a “conservatism” that was pro-slavery, agriculturally-focused, and hostile to ideas of a strong central government.

In the late nineteenth century judicial conservatism underwent another marked change. Between approximately 1890 and the First World War a new generation of conservatives abandoned the commitment of their mid- nineteenth-century forebears to decentralized federalism, suspicion of corporations, anxieties about monopolistic consolidation, and ideas about the severely limited reach of federal judicial power. In their place they embraced the emerging corporate and industrial economy and used judicial power to expand the reach of national law and the authority of the federal courts.<sup>43</sup> To protect private property, they broke with earlier conservative generations by using the Fourteenth Amendment to incorporate the Fifth Amendment’s Takings Clause and by using the Due Process Clause to create the doctrine of “liberty of contract.” In addition, they enforced the principle of “dual federalism” and held to narrow interpretations of the Commerce Clause, the Equal Protection Clause, and the Bill of Rights.

In the decades after 1910 succeeding conservative generations continued to shift in their ideas and assumptions as they faced new conditions and challenges. Early on they upheld more

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<sup>43</sup>MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, esp. ch. 3 (1992); Edward A. Purcell, Jr., *Some Horwitzian Themes in the Law and History of the Federal Courts*, in *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS* (Daniel W. Hamilton & Alfred L. Brophy, eds., 2010), 271.

extensive federal regulatory efforts under the Commerce Clause and asserted a more activist judicial power by incorporating the First Amendment into the Fourteenth and extending the Due Process Clause to create certain new constitutional privacy rights. They remained suspicious of the executive power and attacked it fiercely when Woodrow Wilson and Franklin Roosevelt exercised it, and in the 1930s they committed themselves to the strict regulation of firearms and a restrictive, militia-based interpretation of the Second Amendment. Then, after World War II, they abandoned their predecessors's doctrines of "dual federalism" and "liberty of contract," and further broadened federal power under the Commerce Clause. In the 1960s they agreed to an expanded reach for the Equal Protection Clause and provided crucial support for the great legislative and judicial achievements that came with the Civil Rights Movement.

Most recently, Scalia and his generation of late-twentieth-century judicial conservatives began implementing their own constitutional changes. They sought to limit many of the rights previously recognized under the Due Process and Equal Protections Clauses, diminish federal power under the Commerce Clause, restrict the role of the federal judiciary, limit or even prohibit government regulation of firearms under the Second Amendment, roll back legal protections for the civil rights of minorities, and provide greater protections for both private property and state sovereignty. Further, many of them--Scalia in the lead--sought to strengthen the executive branch by jettisoning earlier conservative suspicions about presidential power and advocating the theory of a largely unchecked "unitary executive."

A comparison of Scalia's views with those of the Court's leading conservative from the

preceding, pre-Reagan generation illustrated the extent to which his distinctive judicial conservatism broke significantly from the conservatism of the immediate past. The second Justice John Marshall Harlan, appointed by a Republican president before the party's post-1970s reincarnation, shared with Scalia many familiar conservative positions, including advocacy of both judicial restraint and deference to the states.<sup>44</sup> Like Scalia, Harlan was a powerful critic of the Warren Court, and he rejected many of its distinctive and innovative decisions, especially its criminal procedure and legislative redistricting rulings.<sup>45</sup> He even dissented from the Court's decision to invalidate the poll tax and did so on the quintessentially Scalian ground that "tradition" established a valid constitutional pedigree for the tax.<sup>46</sup> Recognizing him as one of his conservative predecessors, Scalia was happy to cite Harlan's earlier warning against the dangers of judicial lawmaking<sup>47</sup> and to quote his charge that the Warren Court was pushing an unwelcome

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<sup>44</sup>Harlan died in 1971 while still on the bench. *See generally* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (1992).

<sup>45</sup>For criminal procedure, *see e.g.*, *Mapp v Ohio*, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (Harlan, J., dissenting); *Miranda v. Arizona*, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting). For legislative redistricting, *see, e.g.*, *Baker v. Carr*, 369 U.S. 186, 330 (1962) (Harlan, J., dissenting); *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting); *Wesberry v. Sanders*, 376 U.S. 1, 20 (1964) (Harlan, J., dissenting).

<sup>46</sup>*Harper v. Virginia Board of Elections*, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting) ("Property qualifications and poll taxes have been a traditional part of our political structure," at 684).

<sup>47</sup>ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 4 (2014). Similarly, in his Senate confirmation hearings conservative Chief Justice Roberts twice cited Harlan as an example of balanced and thoughtful constitutional judging. Committee on the Judiciary, United States Senate, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109 Cong., 1st Sess. (Sept. 12-15, 2005), 162, 259.

and too “swift pace of constitutional change.”<sup>48</sup>

Yet, Harlan’s views and values also contradicted Scalia’s in an eye-popping number of areas. In contrast to Scalia, Harlan urged an expansion of the grounds available to support standing,<sup>49</sup> voided school prayer as a violation of the Establishment Clause,<sup>50</sup> invoked substantive due process to justify new individual privacy rights,<sup>51</sup> agreed with efforts to broaden the reach of key federal civil rights laws,<sup>52</sup> joined in providing more expansive constitutional protections for blacks under the Fourteenth Amendment,<sup>53</sup> advocated broad new principles that expanded the jurisdiction of the federal courts,<sup>54</sup> accepted the principle that Fourth Amendment should be

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<sup>48</sup>*Montgomery v. Louisiana*, 136 S. Ct. 718, 737 (2016) (Scalia, J., dissenting) (citing Harlan’s dissent in *Pickelsimer v. Wainwright*, 375 U.S. 2, 4, (1963)). Similarly, in opposing the application of the Fourteenth Amendment to areas beyond racial discrimination, Scalia cited Harlan twice in his dissent in *Tennessee v. Lane*, 541 U.S. 509, 554, 563, 564 (2004) (Scalia, J., dissenting, citing *Katzenbach v. Morgan*, 384 U.S. 641, 659 (1966) (Harlan, J., dissenting) and *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part)).

<sup>49</sup>*Poe v. Ullmann*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting); *Powell v. McCormack*, 395 U.S. 486 (1969) (Harlan, J., joining Court opinion).

<sup>50</sup>*Engel v. Vitale*, 370 U.S. 421 (1962) (Harlan, J., joining Court opinion).

<sup>51</sup>*Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Harlan, J., concurring in the judgment).

<sup>52</sup>*Monroe v. Pape*, 365 U.S. 167, 192 (1961) (Harlan, J., concurring); *Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971) (Harlan, J., concurring).

<sup>53</sup>*E.g.*, *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1957) (Harlan, J.); *Gomillion v. Lighfoot*, 364 U.S. 339 (1960) (Harlan, J., joining Court opinion); *Loving v. Virginia*, 388 U.S. 1 (1967) (Harlan, J., joining Court opinion).

<sup>54</sup>*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 459 (1957) (Harlan, J., joining concurrence of Burton, J., urging an unprecedented and expansive federal “protective

construed to protect a “reasonable expectation of privacy,”<sup>55</sup> and on narrow grounds seemed even to accept the incorporation of the Eighth Amendment.<sup>56</sup> Two other positions Harlan affirmed captured the particularly wide gulf that divided him from Scalia. First, Harlan supported the Court’s foundational decision in *Monroe v. Pape* drastically expanding the reach of Section 1983 of the federal civil rights laws and providing muscular new protection for a wide range of constitutional rights.<sup>57</sup> Unlike Scalia, moreover, he was moved in particular by the need to provide truly meaningful federal protection for rights that were of constitutional stature, in particular the right to vote and the right to attend a desegregated public school.<sup>58</sup> Second, Harlan accepted the power of the federal judiciary to imply private causes of action from both federal statutes and federal constitutional provisions, and he agreed with both of the Court’s leading decisions exercising that power and creating such rights.<sup>59</sup> Scalia, in contrast, charged that

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jurisdiction”); *United Mine Workers v. Gibbs*, 383 U.S. 715, 742 (1966) (Harlan, J., concurring in part of opinion giving federal courts broad “pendent jurisdiction).

<sup>55</sup>*Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

<sup>56</sup>*Robinson v. California*, 370 U.S. 660, 678 (1962) (Harlan, J., concurring in the judgment).

<sup>57</sup>*Monroe v. Pape*, 365 U.S. at 192 (Harlan, J., concurring).

<sup>58</sup>“There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools?” *Monroe v. Pape*, 365 U.S. at 196 n.5 (Harlan, J., concurring).

<sup>59</sup>*J. I. Case v. Borak*, 377 U.S. 426 (1964) (Harlan, J., joining Court opinion); *Bivens v. Six Unknown Agents*, 403 U.S. 388, 398 (1971) (Harlan, J. concurring in the judgment).

*Monroe* was wrongly decided,<sup>60</sup> and he derided the two implied-right-of-action cases that Harlan supported as “relics” of the Warren Court that were wholly beyond the federal judicial power.<sup>61</sup>

The contrast between Scalia and Harlan spotlighted the changing nature of judicial “conservatism” and thereby provided a revealing example of the shifting nature of constitutional law and politics. It illustrated the fact that American constitutionalism was an evolving practice through which new generations of conservatives, like new generations of liberals, managed the nation’s governmental enterprise and attempted through changing times to maintain according to their best and contrasting lights an orderly, democratic, and relatively just system of self-government.<sup>62</sup> Thus, juxtaposed to Harlan’s jurisprudence, Scalia’s originalism exemplified that process of ideological and interpretive evolution. As Harlan and a long line of earlier conservative justices had done in their own times and contexts, Scalia developed his jurisprudence in an effort to shape the Constitution to meet the values and goals he shared with those in his own generation who called themselves conservatives.

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<sup>60</sup>*Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting)

<sup>61</sup>*Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring in the judgment).

<sup>62</sup>For a sample of the historical and institutional analyses of the Court’s complex and changing role in the nation’s constitutional enterprise, *see, e.g.*, *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* (Howard Gillman & Cornell Clayton, eds., 1999); *THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT* (Ronald Kahn & Ken I. Kersch, eds., 2006); *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONAL APPROACHES* (Cornell W. Clayton & Howard Gillman, eds, 1999); *THE CONSTITUTION AND AMERICAN POLITICAL DEVELOPMENT: AN INSTITUTIONAL PERSPECTIVE* (Peter F. Nardulli, ed., 1992).

Finally, Scalia's career also illustrated the uncertain, disputed, and plastic nature of the most basic principles, provisions, and concepts of the Constitution itself. In this regard, Scalia compares and contrasts in illuminating ways with another major figure in the Court's history, in this case the Progressive Justice Louis D. Brandeis. Aside from their self-assurance and intellectual brilliance, the progressive Brandeis and the conservative Scalia were alike in sharing many fundamental principles and convictions. Both praised the values of democracy, defended the right of the people to govern themselves through their legislatures, and urged respect for legislative power and deference to legislative judgments. Both urged judicial restraint, hailed the principle of separation of powers, and rejected the idea of substantive due process. Both praised the values of federalism, and sought to protect and enhance the independence of the states. Both criticized the federal courts for their activism in bending the law to support the policy views of their judges; both sought to limit the lawmaking power of those courts; and both sought to restrict their jurisdiction in a variety of ways. In particular, both emphasized the doctrine of standing as an effective doctrinal basis for limiting the federal courts, and both agreed that the doctrine was rooted in Article III, Brandeis being the first to clearly articulate that theory and Scalia enthusiastically adopting it. Equally, too, both were ready to assert judicial power when necessary to advance the values they thought right, and both vigorously supported a highly speech protective First Amendment. Brandeis could even invoke originalist rhetoric when it served his purpose.<sup>63</sup>

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<sup>63</sup>*See, e.g.,* *Myers v. United States*, 272 U.S. 52, 240, 293-94 (1926) (Brandeis, J., dissenting); *Whitney v. California*, 274 U.S. 357, 372, 375-77 (1927) (Brandeis, J., concurring).

Of course, they were also radically different in other ways. Brandeis's jurisprudence stressed facts and consequences, while Scalia's stressed text and formalities. Brandeis urged progressive adaptations, while Scalia stood on traditional practices. Brandeis was suspicious of executive power, while Scalia promoted it vigorously. Brandeis was an innovator in drawing on legislative history, while Scalia condemned its use across the board. Brandeis disliked corporations and believed in government regulation of the economy, while Scalia admired corporations and put his faith in the benevolence of the free market. Most fundamentally, Brandeis believed in a "living Constitution" that adapted to social changes, while Scalia condemned that concept as the root of all constitutional evil.

Thus, it was no surprise that the two construed their shared constitutional principles in quite different ways and that they invoked the exact same principles and relied on the exact same textual provisions to serve radically different purposes. Brandeis urged limitations on federal jurisdiction to assist injured and aggrieved individuals who did not want to be forced into the federal courts they sought to avoid, while Scalia urged such limitations to keep such parties out of the federal courts they very much wanted to enter. Brandeis preached legislative primacy because he saw legislatures as sources of progressive reform measures, while Scalia preached legislative primacy because he saw them as bastions of the conservative values he favored. Brandeis construed the law to support efforts at all levels of government to regulate business and protect workers and consumers, while Scalia construed it to limit such efforts and protect business, property interests, and private economic power. Brandeis argued for a highly speech-protective First Amendment to protect individuals and especially political dissidents, while Scalia did so to

protect the speech rights of the corporations and wealthy political donors that Brandeis scorned.

Especially significant, too, Brandeis and Scalia were alike in one other way. To a highly unusual degree, they both associated themselves closely and actively with political movements of their day, developed constitutional methods that supported the goals of those movements, and emerged as judicial heroes to the movements' followers. Indeed, both became famous and particularly admired because they cultivated coteries of law clerks and law professors who praised their work and promoted their views to the legal profession and the general public. One might even suggest that they were also alike in having their own distinctive wing-men, Holmes for Brandeis and Thomas for Scalia.

Those similarities and differences show that Brandeis and Scalia were both outstanding examples of major characteristics of American constitutionalism. One is that the Constitution's fundamental principles and the legal doctrines designed to implement those principles mean relatively little when abstracted from the context in which they are used and the purposes they are shaped to serve. That is especially true of doctrines of federalism and separation of powers whose meaning and significance depend for the most part on the politics and social conflicts of the day. Another is that general principles and doctrines, by themselves, seldom if ever actually determine the results that the justices reached in the difficult and controversial cases they decided. Rather, it was their personal goals and values that played key roles in shaping the particular meaning they gave to those principles and doctrines and that inspired the specific reasoning they used to justify the diverse results they reached. A third characteristic is that Americans tended to

admire and praise them not for the abstract principles they proclaimed but for the way they infused particular meanings into those abstract principles and justified the social and political results that their admirers favored.

The final overarching reason for Scalia's enduring historical significance, then, is the ironic fact that his career demonstrated the dynamic nature of American constitutionalism, the very "living" constitutionalism that Scalia condemned so vigorously. He was a full participant in that national enterprise, standing in the grand tradition of American constitutional thinking by infusing his jurisprudence with assumptions, premises, and values that would ensure the results he sought in the areas that were most intensely important to him. His judicial thinking and career demonstrate the fact that the idea of "living" constitutionalism is not in the first instance or ultimately a "theory" of constitutional interpretation but a metaphorical characterization of the central and inherent reality of American constitutionalism itself. Scalia's "originalism" was but one more variation in the innumerable and often overlapping ways in which Americans have attempted to guide and channel the course of their "living" constitutionalism. He ranks among the nation's most heralded and influential justices even though he failed to recognize--indeed, insisted on denying-- his true place in that tradition. Most fortunately for him, and unlike all but the barest handful of his judicial predecessors, he caught a powerful political and cultural wave that carried him to influential heights and transformed him into an iconic figure in American law and politics.

"Originalism," in truth, is not necessarily a "conservative" ideology, not at least after the

post-Civil War amendments that repudiated the nation's "original sin" of racism and race-based slavery and the other subsequent amendments that embedded egalitarian and democratizing principles in the Constitution.<sup>64</sup> If judges and theorists reject Scalia's crabbed and pre-designed version, they can readily see quite different vistas and reach quite different conclusions. If originalism is identified with the aspirations of the Constitution's preamble and with the fundamental values and principles it enshrines, especially after its many egalitarian amendments, then originalism could lead to and justify conclusions far different from Scalia's. Indeed, in the minds of many it already has. True, the Constitution's goals and values are vague and imprecise; they readily spur disagreements about their meaning; and they often come into conflict with one another. Nonetheless, they do remain the true guiding stars of American constitutionalism, and they possess enough theoretically clear and historically grounded meaning that Americans can test their application by asking and honestly answering--with knowledge, understanding, integrity, sensitivity, and as much wisdom as they can muster--specific questions about whether and to what extent all Americans are in actual fact being treated fairly, equally, and decently. Just as no interpretive method or theory can guarantee the nation's fate or the direction of the law's future development, the Constitution can not guarantee that Americans will always exhibit and act on those qualities nor, most unfortunately, that even if they did so act they would consequently agree on all or most things. Still, that approach would inspire a far different analytical approach to constitutional interpretation and lead to far different "originalist" results than would the views and values that Scalia sought to advance with his own partisan and tightly time-bound

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<sup>64</sup>See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011); David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J. L. & PUB. POL'Y 969 (2008).

jurisprudence.

Ultimately, then, Scalia serves as a classic example of the way that American constitutional thinking evolves and of the complex and varied ways the nation's constitutional system operates. The third and final reason for his enduring historical significance, then, lies in the fact that he stands as a towering figure of irony. He was a justice whose judicial career disproved the grand claims of his own jurisprudence and who demonstrated, while striving insistently to deny it, the truly "living" nature of American constitutionalism.