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SPECIAL ISSUE: IN MEMORY OF JUSTICE ANTONIN SCALIA (1936-2016)

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## INTRODUCTION

### Jess Bravin\*

Justice Antonin Scalia's seat on the Supreme Court of the United States will be filled by the time you read this, but his shoes can never be. Short and stout, the late jurist nonetheless towered over the institution he served, his sharp and sarcastic voice dominating oral argument in the ornate marble courtroom, his pen—or, in later years, his iPad—producing piercing opinions that provoked a disproportionate share of acclaim and outrage.

That the Court had never seen a wit like Scalia's, or such a highbrow intellect suffused with the common touch, is beyond dispute. Other aspects of Scalia's legacy, however, will be the stuff of debate for years. The range of essays in this volume offers some opening salvos in what may be a long war over how—and how much—Scalia shaped jurisprudence in America and beyond.

Scalia intended his opinions, in particular his dissents, to be memorable, and they are widely quoted in legal casebooks. But Scalia was more than a jurist or scholar, he was a symbol—on the broadest level, to the general public, of judicial conservatism; within the conservative legal movement, of a strictly-constructed counterrevolution to undermine the broad constitutional visions of equality and liberty laid out during the Warren era of the 1950s and '60s. Brian Christopher Jones, of Liverpool Hope University, and Austin Sarat, of Amherst College, set the stage by highlighting Scalia's symbolic, not to say superficial, significance, something powerful enough to inspire at least a marginal number of right-leaning voters to pull the lever for Donald Trump in November 2016 after his pledge to fill Scalia's seat with a nominee in Scalia's "mold."<sup>1</sup>

As a legal intellectual, Scalia is best known not for a particular doctrine but rather for a method, originalism, which, broadly stated, aims to interpret laws according to the original meaning their text conveyed at the time it was adopted. Not for nothing did Joan Biskupic title her Scalia biography *American Original*, a play on words immediately recognizable to any law professor.<sup>2</sup>

Scalia was originalism's evangelist, traveling the nation to deliver a stump speech touting it not simply as the best interpretive method, but as the *only* one of any consistency. While originalism might have flaws, he would say, "you can't beat something with nothing."

Others saw originalism differently, perhaps most nefariously as a stratagem to undo the jurisprudence of the New Deal and postwar eras under the guise of fealty to the framers. "It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact," the late Justice William Brennan said in a 1985 critique. "But in truth it is little more than arrogance cloaked as humility."<sup>3</sup>

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\* Supreme Court correspondent for the Wall Street Journal.

<sup>1</sup> Brian Christopher Jones & Austin Sarat, *Justices as "Sacred Symbols": Antonin Scalia and the Cultural Life of the Law*, 6 BR. J. AM. LEG. STUDIES 1-17 (2017).

<sup>2</sup> JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* (2009).

<sup>3</sup> Justice William J. Brennan, Jr., Speech given at the Text and Teaching Symposium, Georgetown University Oct. 12, 1985, Washington, D.C., available at [http://www.pbs.org/wnet/supremecourt/democracy/sources\\_document7.html](http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html) (last visited Apr. 12, 2017).

There are debates about originalism, including the meta-originalist question of whether the framers originally intended that Americans centuries later apply their work according to its original meaning in the 18<sup>th</sup> century—or that the bewigged would not feel betrayed if the legal significance of broad terms such as *liberty*, *equality* and *the people* grew alongside the American polity's own understanding of the full significance of the founding document's commitments.

Nevertheless, while the substance of originalism may remain in dispute, the method certainly has prevailed in the optics of constitutional interpretation. Sometimes, the framers “laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they tried to do,” Justice Elena Kagan, nominated by President Barack Obama, said at her confirmation hearings in 2010. “In that way, we are all originalists.”<sup>4</sup>

The conservative federal appeals judge President Donald Trump selected to succeed Scalia, Neil Gorsuch, calls himself an originalist. At his confirmation hearings in March 2017, Judge Gorsuch sought to dispel Democratic senators concerns that originalism was a stalking horse for right-wing jurisprudence by observing that liberals use it, too.

Gorsuch invoked *District of Columbia v. Heller*,<sup>5</sup> Scalia's triumph, which for the first time found that the Second Amendment afforded individuals a right to possess firearms, at least as far as keeping handguns in the home for self-defense. The question split the court 5-4, with Justice John Paul Stevens writing for the liberal minority. “Justice Scalia and Justice Stevens both, majority and dissent, wrote opinions that are profoundly thoughtful in examining the original history of the Constitution,” Gorsuch said. “I guess I'm with so many other people who've come before me, Justice Story, Justice Black and yes, Justice Kagan, who sitting at this table said, ‘We're all originalists,’ in this sense. And I believe we are.”<sup>6</sup>

Perhaps we're all originalists, but we're not all original originalists. When the method was defined in the 1980s, it often was stated as “original intent.” Later that was refined to “original meaning,” and later still, further clarified as “original public meaning” of the text.

Professor James Allan, a Canadian who teaches at the University of Queensland in Australia, is not subtle about his admiration for Scalia, not when he titles his essay, *One of My Favorite Judges*. But he takes issue, if gently, with the brand of originalism Scalia espoused, the original public meaning variety, which he explains as applying the text according to what a reasonable member of the public in 1789 might have given it.

“Within the broad church that is originalism, then, I think Scalia was in the wrong denomination,” Allan contends. “He should have sought the meaning of the U.S. Constitution in the actual intended meanings of the real life people who framed and ratified it, not in ‘how it was originally understood’ by some non-actual person at the time.”<sup>7</sup>

To James Pfander of Northwestern University, however, Scalia's originalism in some instances might be considered akin to the suspension of disbelief necessary for a night at the theater. He examines Scalia's efforts to narrow access to the courts by a strict application of limits on legal standing, which Pfander says is not compelled by the Constitution's text but rather accretions of common law he chose to elevate over legislative efforts to create judicial remedies.

“He was, in short, something of a living constitutionalist in the realm of standing law and was only too ready to invalidate generous federal legislative grants of standing on the

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<sup>4</sup> Transcript available at <http://edition.cnn.com/TRANSCRIPTS/1006/29/cnr.01.html> (last visited Apr. 12, 2017).

<sup>5</sup> 554 U.S. 570 (2008).

<sup>6</sup> Transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1703/21/cg.01.html> (last visited Apr. 12, 2017).

<sup>7</sup> James Allan, *One of My Favorite Judges: Constitutional Interpretation, Democracy and Antonin Scalia*, 6 BR. J. AM. LEG. STUDIES 10 (2017).

ground that they violated judge-made limits on the right of individuals to sue,” Pfander writes.<sup>8</sup> “By preserving the myth of originalist constitutionalism and avoiding inconvenient historical truths, Justice Scalia performed the inevitable judge’s task of fashioning new law out of old.”<sup>9</sup>

Professor Richard Epstein, of the University of Chicago, calls himself a “classical liberal”—by which he means not a liberal at all, at least in the modern sense. In his focused review of property-rights, Epstein comes at Scalia from the right, reaching the contrarian conclusion that his opinions simply were not conservative *enough*.

Epstein accepts the narrow results Scalia wrought in some of his opinions, cases such as *Nollan v. California Coastal Commission*<sup>10</sup> and *Lucas v. South Carolina Coastal Council*<sup>11</sup> that were regarded as near-revolutionary in limiting regulatory authority over land use, effectively removing it from the police powers reserved to the states by the 10<sup>th</sup> Amendment by subjecting certain environmental and housing decisions to Takings Clause analysis.

Like Justice Brennan, who dissented in *Nollan*, Epstein regards Scalia’s analysis as cramped. Brennan lamented that Scalia’s narrow focus on the burden a beach access easement placed on a single property owner obscured the comprehensive approach California sought to apply to management of its coastline. Epstein, on the other hand, complains that Scalia squandered an opportunity to junk decades of deferential precedent to democratic institutions in favor of a bold approach that simultaneously elevates private property rights and cripples state environmental, housing and other policies by requiring government payouts when enacting regulations landowners find inconvenient.<sup>12</sup>

Jane Marriott, of Royal Holloway, University of London, professes to find a blind spot in Scalia’s critical view of campaign-finance regulation. He was unabashedly suspicious of such laws, asserting that the politicians who enact them were compromised by a natural inclination to protect their own incumbency from challengers.

Examining certain kinds of enactments—say, restrictions on gay rights or criminalization of abortion—Scalia regularly celebrated the superiority of the democratic process to the wisdom of the courts. But, Marriott asks, “do courts, insulated from politics as they supposedly are (but clearly are not) possess the requisite institutional and democratic competence to allow themselves to overrule the conclusions of legislators on political realities?”<sup>13</sup>

To ask the question that way is of course to answer it, but Scalia had to wait a long time for a real-world test. For his first 20 years on the court, he was in dissent, fulminating as the majority upheld an increasingly complicated regulatory architecture intended to mitigate the corrupting potential of political spending. The bellwether decision, *Buckley v. Valeo*, came in 1976, well before Scalia joined the court, and it professed a distinction that he—as well as some of his liberal counterparts—found problematic: limits on political contributions were a permissible prophylactic against corruption, but restrictions on election spending infringed First Amendment free-speech rights.<sup>14</sup>

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<sup>8</sup> James E. Pfander, *Scalia’s Legacy: Originalism and Change in the Law of Standing*, 6 BR. J. AM. LEG. STUDIES 3 (2017).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> 483 U.S. 825 (1987).

<sup>11</sup> 505 U.S. 1003 (1992).

<sup>12</sup> Richard A. Epstein, *Missed Opportunities, Good Intentions: The Takings Decisions of Justice Antonin Scalia*, 6 BR. J. AM. LEG. STUDIES 19-11 (2017).

<sup>13</sup> Jane Marriott, *Justice Scalia: Tenured Fox in the Democratic Hen-House?* 6 BR. J. AM. LEG. STUDIES 11 (2017).

<sup>14</sup> 424 U.S. 1 (1976).

It wasn't until 2006, when the appointment of Justice Samuel Alito created a five-member bloc convinced that restrictions on political spending should be scrutinized like regulation of political speech, that Scalia's views commanded a majority. Year by year, the court struck down various campaign finance regulations, reaching a high-water mark in 2010 with the *Citizens United* decision, overruling a 1990 opinion by Justice Thurgood Marshall—from which Scalia had dissented—to remove limits on political spending by independent organizations such as corporations and unions.<sup>15</sup>

Marriott tells us that the theoretical line Scalia embraced on campaign-finance amounted to “denial” of the damage unchecked spending by special interests does to the democratic process. Scalia might say, though, that that *is* the democratic process.

Scalia joined the court in September 1986, barely missing the chance to participate in its most notorious gay-rights decision, *Bowers v. Hardwick*, which the previous June had capped the term by upholding Georgia's criminal sodomy law.<sup>16</sup> There's little doubt where Scalia would have stood, however, because he stood by its result, dissenting from each of the major succeeding cases that over the next 30 years not only would see *Hardwick* overruled by the Constitution applied to extend marriage rights to same sex couples.<sup>17</sup>

Scalia could claim he simply remained consistent with originalist principles, in that the framers of the Fourteenth Amendment were unlikely to have expected it to apply to homosexuals. Ian Loveland, of the City Law School, University of London, doesn't buy it.

“Scalia's opinions repeatedly mischaracterized the positions adopted by members of the court with whom he disagreed and invoked quite absurd analogies to sustain his own,” he writes. Rather than antiseptically apply the text, Scalia revealed his personal bias through a “repeatedly derogatory, almost demonising portrayal, of the litigants and organisations seeking to promote the cause of sexual orientation equality,” Loveland says.<sup>18</sup>

To be sure, Scalia never suggested the Constitution prohibits government from protecting gay rights. In his dissent from *Obergefell v. Hodges*, he asserted that he cared little over the outcome of the marriage battle, but exclusively was concerned with where the battlefield was located. “An unelected committee of nine” was the wrong arena, he said, as the rights of same-sex couples should instead be decided through the political process.

“Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best,” is how he saw it, noting that despite the prevalence of marriage bans 11 states had legalized same-sex marriage through legislative or voter initiatives.<sup>19</sup>

Loveland, perhaps inspired himself to hyperbole, writes that Scalia's frothing dissents from gay-rights decisions might find an “ideological bedfellow” in Donald Trump. “Both men persistently displayed in their respective legal and political spheres a disdain for the truth of their empirical observations and a contempt for the arguments advanced by their opponents,” he writes.<sup>20</sup>

Of course, a politician's utterances, while subject to review and criticism, ultimately are aimed at a mass audience, an electorate whose members may pay only glancing attention to their substance or treat them with skepticism. A judicial opinion has a narrower, specialized audience that is able to seriously evaluate the arguments. A dissent is about as important as the losing candidate's reflections the day after the election. Scalia liked to say he wrote his

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<sup>15</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>16</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>17</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015).

<sup>18</sup> Ian Loveland, *The Sexual Orientation Cases*, 6 BR. J. AM. LEG. STUDIES 3 (2017).

<sup>19</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584, 2627 (2015).

<sup>20</sup> Loveland, *supra* note 15, at 25.

dissents sharply, hoping they would be picked up for legal casebooks, offering him a venue to influence future generations of law students.<sup>21</sup>

Trump may have understood little about Scalia's work beyond the symbolic resonance that Jones and Sarat describe. As it happens, the justice he appointed, Neil Gorsuch knew Scalia and called him a "very, very great man,"<sup>22</sup> but had direct experience working for two other justices most influential in the gay rights debate. Gorsuch was hired by the just-retired Byron White, author of *Hardwick*. As is typical, he also did work for an active justice—Anthony Kennedy, author of four major gay-rights rulings, including ones that overruled *Hardwick* in 2003<sup>23</sup> and codified marriage rights in 2015.<sup>24</sup>

Gorsuch refers to both White and Kennedy as his mentors, although neither justice could be considered an originalist. When Justice Gorsuch hears his first case on gay rights—as on so many other topics—we will be watching to see if he breaks the mold.

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<sup>21</sup> See <http://volokh.com/2013/10/07/new-york-magazine-interview-justice-scalia-write-forceful-dissents/>.

<sup>22</sup> See <https://www.whitehouse.gov/the-press-office/2017/04/10/remarks-president-trump-and-justice-gorsuch-swearing-justice-gorsuch>.

<sup>23</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>24</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S. Ct. 2584 (2015).



# JUSTICES AS “SACRED SYMBOLS”: ANTONIN SCALIA AND THE CULTURAL LIFE OF THE LAW

Brian Christopher Jones\* & Austin Sarat\*\*  
*Liverpool Hope University; Amherst College, Amherst, MA*

## ABSTRACT

*Perhaps no single judge in recent years has embodied the intricacies and difficulties of the cultural life of the law as much as American Supreme Court Justice Antonin Scalia. While common law judges have traditionally acquired status—and cultural relevance—from the significance, eloquence and forcefulness of their judicial opinions, Justice Scalia took an altogether different route. Both on and off the bench, he pushed the limits of legal and political legitimacy. He did this through a strict adherence to what we call a “judicial mandate,” flamboyant but engaging writing, biting humor and widespread marketing of his originalist and textualist interpretative theories. This article chronicles these features of Scalia’s jurisprudence and public life more generally, ultimately characterising the late justice as a “sacred symbol” in American legal and political circles, and beyond.*

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\* Lecturer in Public Law, Department of Law, Liverpool Hope University.

\*\* Associate Dean of the Faculty and William Nelson Cromwell Professor of Jurisprudence and Political Science, Amherst College.

The authors wish to thank the members of Institutum Iurisprudentiae, Academia Sinica (Taipei, Taiwan) for their comments during a symposium on this topic.

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The idea of the brilliant and elegant philosopher judge has a long and romanticized history. From Sir Edward Coke, William Blackstone and Joseph Story to Oliver Wendell Holmes, Louis Brandeis and Lord Bingham, the common law is replete with this vision of judging. In this vision, judges sometimes seem to be law makers as much as faithful interpreters. In many ways Antonin Scalia fought against this traditional vision of the philosopher judge. He disliked activist judges who imposed their idea of wisdom on elected legislatures; in fact, he trumpeted his jurisprudence for its fidelity to law and deference to the popular will. But even though Scalia fought against the romantic vision of philosopher judge, he himself became a living symbol of a judicial philosophy, a symbol so powerful that sometimes it was difficult to disentangle the judge from his jurisprudence. His status as a symbol and how he achieved his status was much different from the route of the judges mentioned above. This paper attempts to explain how Scalia became what we call a judicial “sacred symbol.”

## I. SCALIA’S DEATH

Antonin Scalia died in the early morning hours of February 13, 2016. Reactions to his death were resoundingly, even if begrudgingly, laudatory; either way you cut it, Scalia was a giant in terms of his impact on American law. Justice Ruth Bader Ginsburg, one of Scalia’s closest friends on the Court—but also an ideological sparring partner—said, “‘We are different, we are one’, different in our interpretation of written texts, one in our reverence for the Constitution and the institution we serve.”<sup>1</sup> Even those outside traditional legal and political circles took note of Scalia’s passing and commented on his larger than life status. Stephen Colbert, a late-night comedian who on many occasions had lambasted Scalia’s views on the law, recounted an unexpectedly warm moment with the Justice, and praised him for his sense of humor,<sup>2</sup> a characteristic that we also explore below. Colleagues, friends, journalists, acquaintances, and others, acknowledged him as a quintessential, if controversial, American judge.

A range of memorials and acknowledgements followed Scalia’s death. The George Mason University School of Law announced it would rename itself: The Antonin Scalia Law School at George Mason University.<sup>3</sup> Law reviews published tributes. For example, the *Minnesota Law Review* published an online symposium providing a number of insightful articles about Scalia,<sup>4</sup> and the *Harvard Law Review* dedicated an issue to the late Justice, complete with commentary from Chief Justice John Roberts, Justice Elena Kagan, Justice Ruth Bader Ginsburg, Cass Sunstein,

<sup>1</sup> NPR Staff, *All Things Considered: Ginsburg and Scalia: “Best Buddies,”* NPR (Feb. 15, 2016), <http://www.npr.org/2016/02/15/466848775/scalia-ginsburg-opera-commemorates-sparring-supreme-court-friendship>.

<sup>2</sup> The Late Show with Stephen Colbert (Feb. 16, 2016), <https://www.youtube.com/watch?v=jeJHrIqWsNw>.

<sup>3</sup> Susan Svrluga, *It’s Official: George Mason’s Law School is Named in Honor of Antonin Scalia*, WASH. POST, (May 17, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/05/17/its-official-george-masons-law-school-is-named-in-honor-of-antonin-scalia/>.

<sup>4</sup> *Scalia Symposium*, 101 MINN. L. REV. HEADNOTES (2016), <http://www.minnesotalawreview.org/headnote-issue/volume-101-scalia-symposium/>.

John Manning, Martha Minow and Rachel Barcow.<sup>5</sup> One prominent legal scholar who has written extensively about judges' legacies noted that Scalia "has a definite shot at greatness."<sup>6</sup>

In fact, a marked difference highlighted reactions to Scalia's death and the death of former Chief Justice William Rehnquist one decade earlier, on December 5, 2005. Beyond the shock of an untimely death—it was known for some time that Rehnquist was battling cancer—Scalia's death left not only a vacancy on the Supreme Court, but was also blow to conservative legal thought. While Rehnquist had served on the Court longer than Scalia, it was Scalia who had pushed for the Court to move its jurisprudence in a different direction.<sup>7</sup> Rehnquist may have moved the Court—and therefore America—to the right simply by his presence, but Scalia, arguably, moved an entire body of legal thought to the right, and made it so that even those who did not agree with his interpretative methods had to come to terms with them.<sup>8</sup> But as Justice Kagan has recently said, it was not just his interpretive methodologies that were significant. As she put it, the late justice "did nothing less than transform our legal culture."<sup>9</sup> Indeed, as we will discuss below, Scalia significantly pushed the boundaries judicial behavior—both on and off the bench—within the United States and potentially abroad. Indeed, he was not merely a judge, but a marketer and perhaps even a showman ... and a formidable one at that.

#### A. A CRISIS OF SCALIAN PROPORTIONS

Although the passing of any justice during a presidential election year would generate controversy and concern, the passing of such a provocative and widely celebrated justice certainly enhanced the chaos, creating a quasi-constitutional crisis. In one incident, the Chair of the Senate judiciary committee (Sen. Chuck Grassley (R., IA)), made an unprecedented speech on the Senate floor about the politicization of the Supreme Court, accentuating its politicization—or, at least, the appearance of it. Grassley claimed that this was not the result of the Senate's confirmation processes,<sup>10</sup> but because of the Court's own decisions. Senator Grassley even boldly

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<sup>5</sup> John G. Roberts, Jr., *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 1 (2016).

<sup>6</sup> Jack Balkin, *Justice Scalia's Legacy*, BALKINIZATION (Sept. 7, 2016), <https://balkin.blogspot.co.uk/2016/09/justice-scalias-legacy.html>.

<sup>7</sup> Although, it should be acknowledged that Rehnquist contributed to the originalist movement as well, if only by denouncing "living constitutionalism". See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

<sup>8</sup> As Justice Kagan famously noted in her confirmation hearings, "we are all originalists" (see Jonathan H. Adler, *The Judiciary Committee Grills Elena Kagan*, WASH. POST (June 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/29/AR2010062902652.html>).

<sup>9</sup> *Six Justices Help Dedicate Mason's Scalia Law School*, Antonin Scalia Law School, George Mason University, <https://www2.gmu.edu/redefining-excellence/six-justices-help-dedicate-mason%E2%80%99s-scalia-law-school>.

<sup>10</sup> *Senator Chuck Grassley on Politicization of the Supreme Court*, C-SPAN (Apr. 5, 2016), <https://www.c-span.org/video/?c4587587/senator-chuck-grassley-politicization-supreme-court>. Just days earlier, Chief Justice John Roberts gave a speech denouncing the Senate confirmation process as politicising the American judiciary, and more importantly, the Supreme Court (Adam Liptak, *John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy*, N.Y. TIMES (March 21, 2016), available at <http://nyti.ms/1Rep9Ps>).

instructed Chief Justice John Roberts, “physician, heal thyself,” as regards the Court’s overly political decisions.<sup>11</sup> While Senator Grassley’s comments surprised and even angered some, recent polls have demonstrated that the American public has less confidence in the Supreme Court than at any point in history; a July 2016 Gallup poll found that 52% of Americans disapproved of the way the Supreme Court was handling its job.<sup>12</sup>

Scalia’s death has also left a four-four ideological split among the Court’s remaining justices. In some nations this would not be a major issue, but for one in which the Supreme Court decides the “nation’s most pressing issues,”<sup>13</sup> it is indeed a problem. On March 16, 2016, President Obama nominated Judge Merrick Garland of the United States Court of Appeals for the District of Columbia circuit, to replace Scalia. The Senate refused to move forward on his nomination, and Judge Garland endured the longest-delay of any Supreme Court nominee in history, passing the likes of Robert Bork and Clarence Thomas, as he awaited a hearing (that would never come) on his nomination.<sup>14</sup>

There are signs that, even after the recent Presidential election in the United States, Senate approval of Supreme Court nominations could still be a major constitutional issue. Before the election, some Republicans discussed the possibility that, should Hilary Clinton become President, the Senate would refuse to confirm any of her Supreme Court nominees.<sup>15</sup> And now that Donald Trump has won the presidency, Democrats may employ various delaying strategies against his nominee Neil Gorsuch, or any of his other potential nominees. As Graham notes, the proposed Republican plan would have been the opposite of FDR’s infamous court-packing plan, slowly diminishing the number of justices on the Court. To justify this effort, some commentators claimed that the Constitution allows for non-confirmation of any Presidential nominees to the Court.<sup>16</sup> While it is possible that any death on the “conservative” side of the Court could have brought this situation about, the fact that it was Scalia’s seat which became vacant amplified the stakes in replacing him.

### B. THE PROGRESSION OF THIS ARTICLE

To try to make sense of the meaning of, and reactions to, Scalia’s death, we investigate how Scalia became a “sacred symbol.”<sup>17</sup> First we examine the changing role of the American

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<sup>11</sup> *Id.*

<sup>12</sup> *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> (although, the percentage disapproving dropped to 47 in Sept. 2016).

<sup>13</sup> Editorial Board, *A Crippled Supreme Court’s New Term*, N.Y. TIMES (Oct. 3, 2016), <http://nyti.ms/2d7WGhO>.

<sup>14</sup> John Shuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait*, REUTERS (July 20, 2016), <http://www.nbcnews.com/news/us-news/merrick-garland-now-holds-record-longest-supreme-court-wait-n612541>.

<sup>15</sup> David A. Graham, *What Happens If Republicans Refuse to Replace Justice Scalia?*, THE ATLANTIC (Nov. 1, 2016), <http://www.theatlantic.com/politics/archive/2016/11/whats-the-opposite-of-court-packing/506081/>.

<sup>16</sup> Ilya Shapiro, *The Senate Should Refuse to Confirm All of Hillary Clinton’s Judicial Nominees*, THE FEDERALIST (Oct. 26, 2016), <https://thefederalist.com/2016/10/26/senate-refuse-confirm-hillary-clintons-judicial-nominees/>.

<sup>17</sup> We are hesitant to provide a definition of “sacred symbol” here, but do so below, after we have taken these issues into consideration. In terms of how Scalia may have been a

judiciary, and how Scalia became perhaps the face of it. While American judges have a long history of engaging in Academic scholarship,<sup>18</sup> only relatively recently have they become more publicly engaged, giving lectures and appearing on television, in addition to appearing at promotional events for books they author. Are such changes here to stay; and if so, what does this mean for the cultural life of the law?

We follow this by addressing Scalia's rise as the leader of conservative jurisprudence. Tracking Scalia's trajectory, including his connections to the 1980s conservative movement and other prominent conservative legal thinkers, like Robert Bork, is essential to understanding his "sacred symbol" status. Here the issue of judicial "mandates" arises. Although it may be odd to think in such terms, many American judges are characterized throughout their careers by reference to who nominated them and when they were nominated. Indeed, nomination by a particular president often impacts how the media or general public perceives justices. We discuss the significance of the perception that Supreme Court judges have "mandates."

Next, we consider Justice Scalia's writing. Scalia was notorious for the strident tone and rhetorical ingenuity of his opinions and often mentioned that this was used to engage his readers. While questions arise concerning the audience for Supreme Court opinions, it is not surprising that Scalia had his own thoughts on the matter; he repeatedly stated throughout the years that one of the primary audiences for judgments was law students. Connected to Scalia's writing, we scrutinize the way he used humor. He often found moments for laughter, and this was especially so on the bench—either in oral argument or through his sarcastic opinions.

In the following section we examine how Justice Scalia used and marketed his jurisprudential theories. His prolific writing and active promotion of "originalist" and "textualist" theories raise further questions about judges and their connection to popular culture. Finally, we return to the idea of Scalia as a "sacred symbol" and consider how this idea may impact the cultural life of the law. Although there is a large literature on judicial reputation and the behavior of judges,<sup>19</sup> we take a different—perhaps complementary—approach, examining Justice Scalia's cultural significance and impact, and using him as a lens to help us better understand the cultural relevance, and consequence, of judging in the 21st century.

## II. THE CHANGING (PUBLIC) ROLE OF THE JUDICIARY

In some jurisdictions supreme or constitutional court justices seem to be contemporary deities, balancing the scales of justice through reasoned (and sometimes impassioned) judgments; in other jurisdictions, such judges are merely... well, judges. This distinction sometimes hinges on constitutional structures and

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"sacred symbol" not only in America but also in foreign jurisdictions, see James Allan's article in this collection: James Allan, *One of My Favorite Judges: Constitutional Interpretation, Democracy and Antonin Scalia*, 6 BRIT. J. AM. L. STUDIES (2017).

<sup>18</sup> See Jeffrey M. Shaman, *Judges and Non-Judicial Functions in the U.S.*, in H.P. LEE, JUDICIARIES IN COMPARATIVE PERSPECTIVE 519-523 (2011).

<sup>19</sup> See, e.g., NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY (2015); LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006).

types of judicial review available in particular jurisdictions, but as other researchers have acknowledged, separating strong-forms and weak-forms of review is not as easy as it seems.<sup>20</sup> Yet Justice Scalia’s judicial career highlighted a number of important issues concerning the contemporary role and status of the judiciary.

Without a doubt, the constitutionalization of rights throughout the world has brought about a judicial renaissance,<sup>21</sup> and led to a corresponding expansion of judicial review that contains significant consequences for the distribution of power within any given polity.<sup>22</sup> Nevertheless, states continue to put—or at least allow—contentious problems to fall into the hands of judges.<sup>23</sup> Constitutional courts, therefore, are prominent symbols of the operation of the law or legal process within a given state, and their judges are widely considered the most prominent actors within such processes. This is true whether or not a state’s judiciary has a good or bad reputation, or whether judges engage in strong-form or weak form review.

When Alexander Hamilton characterized the American judiciary as the “least dangerous branch”<sup>24</sup> he certainly did not mean that it would be unpopular or culturally irrelevant. In fact, it may be the case that “least dangerous” correlates with “highest approval” or most popular branch of government. Throughout modern history the U.S. Supreme Court has enjoyed relatively high popularity,<sup>25</sup> at least compared to Congress.<sup>26</sup> The strategic positioning of the Court has also changed throughout its history. Unlike its previous location in the Old Senate Chamber (in addition to other places), the Court now sits in a prominent position in the nation’s capital. Bordered by the Library of Congress to the south, the Capitol to the west, and Constitution Avenue to the north, the building resides in the city’s political epicenter. Above the tall roman pillars to the building’s entrance is inscribed the phrase: “Equal Justice Under Law.” Whether or not this is what the Court actually provides is irrelevant; the takeaway is that, in terms of American justice, the Supreme Court is the most prominent, as well as last, port of call for those seeking a judicial remedy.

Adding to this prominence is the fact that, in the United States, judges have become more significant as public figures who participate in a wide range of extra-judicial activity, such as delivering speeches, agreeing to interviews, appearing on talk shows, and of course writing scholarly books and articles. While Supreme Court justices—and the American judiciary as a whole—have long been involved in such

<sup>20</sup> Aileen Kavanagh, *What’s so Weak about “Weak-Form Review”? The Case of the UK Human Rights Act 1998*, 13 INT’L J. CONSTIT. L. 1008 (2015).

<sup>21</sup> Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC’Y REV. 117 (2001).

<sup>22</sup> See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

<sup>23</sup> Ginsburg and Virsteeg found that the ability of courts to “supervise implementation of the constitution and to set aside legislation for constitutional incompatibility” increased from 38% in 1951 to 83% in 2011 (Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?* 30 J.L. ECON. & ORG. 587 (2014)).

<sup>24</sup> FEDERALIST No. 78.

<sup>25</sup> *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx>.

<sup>26</sup> The Court’s approval rating remains high even with the numbers mentioned earlier. See, e.g., Brian Christopher Jones, *Disparaging the Supreme Court, Part II: Questioning Institutional Legitimacy*, 2016 WIS. L. REV. 239 (2016). The piece notes how the Court, compared to Congress, may get a free ride as regards similar issues, such as workload or institutional output.

extra-judicial activities, today they are much more common. But whether or not this increase in extra-judicial activity carries positive implications for the judiciary remains to be seen. As Jeffrey Shaman has stated, the “line between permissible and impermissible extra-judicial activity is not an easy one to walk, and is redrawn from time to time.”<sup>27</sup> Justice Scalia was certainly one to push those boundaries.

### III. SCALIA’S RISE TO “SACRED SYMBOL”

Some may look at Scalia’s tenure on the Court and find it relatively easy to classify him as a “sacred symbol;” others may scoff at the idea of thinking of him in that way. Sceptics would point to the fact that, although Scalia served on the Court for close to thirty years, he was not even in the top ten of the Supreme Court’s longest-serving justices.<sup>28</sup> In fact William Rehnquist served for 33 years, and had more time to impact the Court’s jurisprudence. Additionally, outside of *Heller*,<sup>29</sup> Scalia did not author many well-known opinions on major constitutional issues. He was mostly known for, and appeared to thrive on, his predilection for fiery dissents. Finally, although Scalia was certainly respected in the legal community, he did not have a squeaky clean personal reputation. Long known for being smug,<sup>30</sup> brash,<sup>31</sup> aggressive,<sup>32</sup> dogmatic,<sup>33</sup> and overly sarcastic,<sup>34</sup> Scalia used these qualities to advance his agenda and fend off his rivals.

Nonetheless, many other things turned Scalia into a “sacred symbol,” and these are explored below.

#### A. JUDGING FOR THE RIGHT: FULFILLING (OR NOT FULFILLING) JUDICIAL “MANDATES”

Like Justices John Roberts, Elena Kagan, Sonia Sotomayor, Clarence Thomas, Steven Breyer and Samuel Alito, and a host of other SCOTUS justices before them,

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<sup>27</sup> Jeffrey M. Shaman, *Judges and Non-Judicial Functions in the U.S.*, in H.P. LEE, JUDICIARIES IN COMPARATIVE PERSPECTIVE 528 (2011).

<sup>28</sup> *List of United States Supreme Court Justices by Time in Office*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_Supreme\\_Court\\_Justices\\_by\\_time\\_in\\_office](https://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_Justices_by_time_in_office).

<sup>29</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>30</sup> Joe Patrice, *Justice Scalia Forced to Eat Crow for His Own Smugness*, ABOVE THE LAW (Sept. 3, 2014), <http://abovethelaw.com/2014/09/justice-scalia-forced-to-eat-crow-for-his-own-smugness/>.

<sup>31</sup> Joe Johns, *Antonin Scalia Known for Sharp Mind and Brash Demeanor*, CNN (Feb. 13, 2016), <http://edition.cnn.com/videos/us/2016/02/13/justice-antonin-scalia-legacy-supreme-court-johns.cnn/video/playlists/supreme-court-justice-antonin-scalia-dead/>.

<sup>32</sup> Margaret Talbot, *Supreme Confidence*, NEW YORKER (Mar. 28, 2005), <http://www.newyorker.com/magazine/2005/03/28/supreme-confidence> (“Scalia’s interactions with lawyers are notoriously aggressive.”).

<sup>33</sup> Dahlia Lithwick, *Scalia v. Scalia*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/scalia-v-scalia/361621/> (“But once he was ensconced among the chosen few, a dogmatic... need to be right became [Scalia’s] guide.”).

<sup>34</sup> Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 2d 215 (2015).

Scalia had extensive experience in federal government before ascending to the bench, and thus was familiar with the politics of law and the law of politics. Scalia served in government at a time when ideas about originalism were on the move both intellectually and practically, and like any great opportunist—and without a doubt, Scalia was one—Scalia took advantage of it. When Bork,<sup>35</sup> Rehnquist<sup>36</sup> and Berger<sup>37</sup> were publishing their influential work on originalism, Edwin Meese had control of the Reagan Justice Department.<sup>38</sup> After a stint in the powerful Office of Legal Counsel (1974-1977), Scalia spent a few years working in academia at the University of Virginia and then at the University of Chicago, honing his views on law and especially on his interpretative theories. During this time, he served as the founding faculty adviser of the Federalist Society, a group which advocates judicial restraint, but that also champions conservative causes.<sup>39</sup> Scalia forged a conservative ideology that would come to define his jurisprudence, and which ultimately led to two judicial appointments under Reagan: one to the U.S. Court of Appeals (D.C. Circuit) in 1982, and the other to the Supreme Court in 1986. Scalia’s ascension to the Court, like so many other SCOTUS justices, was a reward for political service. But would Scalia fulfill his judicial “mandate” as a Reagan nominee, or would he feel unshackled by his lifetime appointment to the nation’s highest court?

The idea of judicial mandates arises from the fact that in the U.S. federal judicial appointment stems from a political process: nominations operate on a fairly open process that involves selection by the President and confirmation from the Senate, two inherently political branches. Until recently that process worked relatively smoothly,<sup>40</sup> with the longest hearing or confirmation of a Supreme Court nominee taking 125 days.<sup>41</sup> Because of this overtly political process, citizens may associate justices with the President who nominated them. In fact, the media consistently link justices with the President nominated them.<sup>42</sup> If citizens are constantly encountering information about which president appointed which justices, then of course there will be an implicit—if not entirely explicit—connection from politics to law.

The expectations arising from judicial mandates fueled controversy about Chief Justice John Roberts’ role in protecting the Affordable Care Act (“Obamacare”)

<sup>35</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

<sup>36</sup> William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

<sup>37</sup> RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977).

<sup>38</sup> Edwin Meese III, *Speech Before the American Bar Association* (July 9, 1985); *See also*, Edwin Meese III, *The Case for ‘Originalism’*, THE HERITAGE FOUNDATION, <http://www.heritage.org/research/commentary/2005/06/the-case-for-originalism> (June 6, 2005).

<sup>39</sup> *See*, <http://www.fed-soc.org/> for more information.

<sup>40</sup> Of course, not all those that were nominated to the Court acceded to it. There have been many withdrawals and some votes against candidates.

<sup>41</sup> US Federal Judge Merrick Garland, Barak Obama’s Supreme Court nominee to replace Justice Scalia, waited over 125 days, passing the previous record set by Louis Brandeis, for even a hearing on the possibility of assuming office. Ultimately, that hearing never came.

<sup>42</sup> KEITH J. BYBEE, *ALL JUDGES ARE POLITICAL EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW* 12 (2010). (“The media regularly identifies federal judges by the president who nominated them & consistently tags judges as either “liberal” or “conservative”, implicitly suggesting that judicial actions are best understood as a form of partisan policymaking”).

against potentially fatal legal challenges in 2012<sup>43</sup> and 2015.<sup>44</sup> Many prominent Republicans spoke out against the Chief Justice, and, as noted above, Senator Chuck Grassley (R., IA) recently directed some pointed words towards Justice Roberts and the politicization of the Supreme Court.<sup>45</sup> But Roberts is certainly not the only example of a U.S. Supreme Court justice accused of betraying his “mandate.” Justice Harry Blackmun (1970-1994), once beloved by conservatives, was, by the end of his tenure, loathed by the right. Nominated by Richard Nixon, Justice Blackmun earned the enduring ire of conservatives for his decision in *Roe v. Wade*.<sup>46</sup> He went on to defy his closest friend on the Court, Chief Justice Warren Burger (1969-1986), and in his later years often voted with the court’s liberal block. Such “unfulfilled” judicial mandates have not been uncommon among SCOTUS justices (see Earl Warren, William Brennan, John Paul Stevens and David Souter, among others).

The idea of judicial mandates certainly has political and legal implications that may impact judicial independence, a notion that is considered an essential and long-standing element of the rule of law. If judges feel under any obligation to the president who nominated them, it may compromise their ability to impartially adjudicate.

As regards Scalia, there is no doubt that he fulfilled and even surpassed his mandate. Scalia used his conservative background, perhaps even his religion,<sup>47</sup> to put himself forward as the “godfather”<sup>48</sup> of judicial conservatism. Whether or not he stuck firmly to his principles is up for debate,<sup>49</sup> but the widespread perception of Scalia as the vanguard of conservative jurisprudence remains one of his lasting legacies, and certainly underlined his status as a “sacred symbol.”

## B. SCALIA’S INTANGIBLES: A PERSONALITY ON THE COURT

### I. HIS WRITING

Long known as a leading “formalist,”<sup>50</sup> Scalia certainly did not act like a formalist when it came to his writing style or behavior during oral argument. His writing on the Court often drew a combination of praise, ire and disbelief. How could a Supreme Court justice get away with using “jiggery-pokery,” referencing “broccoli” mandates, or referring to colleagues reasoning as “pure applesauce”? On numerous occasions Scalia noted that he wrote his judgments, and especially his dissents,

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<sup>43</sup> National Federation of Independent Business v. Sebelius, 567 U.S. \_\_\_, 132 S. Ct. 2566 (2012).

<sup>44</sup> King v. Burwell, 576 U.S. \_\_\_, 135 S. Ct. 2480 (2015).

<sup>45</sup> Caitlin Hillyard, *Senator Chuck Grassley on Politicization of the Supreme Court*, C-SPAN (Apr. 5, 2016), <https://www.c-span.org/video/?c4587587/senator-chuck-grassley-politicization-supreme-court>.

<sup>46</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>47</sup> Associated Press, *Scalia Dismisses Religious Neutrality: ‘Nothing Wrong’ with State Invoking God*, GUARDIAN (Jan. 2, 2016), <https://www.theguardian.com/law/2016/jan/02/supreme-justice-antonin-scalia-dismisses-religious-neutrality>.

<sup>48</sup> Noah Feldman, *Justice Scalia: The Last Originalist*, BLOOMBERG VIEW (Feb. 16, 2016), <https://www.bloomberg.com/view/articles/2016-02-16/justice-scalia-the-last-originalist>.

<sup>49</sup> See Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 12 (2006).

<sup>50</sup> Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 YALE L.J. 529 (1997).

for law students.<sup>51</sup> Given the status and prominence of the U.S. Supreme Court—not only from a national perspective but also internationally—this is a curious statement. Was the notion of “writing for law students” merely an excuse to pen his decisions in a more biting or engaging tone?

Law students cannot yet practice law, but they do have to read and discuss Supreme Court opinions. Scalia believed that if students must read these opinions, then the decisions should be entertaining and engaging. But if Justice Scalia aimed at legal amateurs, why would he not aim his opinions at the wider citizenry? There is certainly nothing wrong with justices aiming their opinions at a wide audience. After all, using non-technical or “plain language” is something that other judges have championed; Sonia Sotomayor has incorporated plain language tactics, and has noted that the technical language of the law may obscure the relevance of a decision.<sup>52</sup> But, is not the primary audience for any jurisdiction’s supreme or constitutional court the wider citizenry? From a legal perspective the only sub-group Supreme Court judgments matter to are the parties involved in the litigation. But the higher the court, the more frequently the decisions will be used by lower courts when adjudicating similar disputes. Thus, even from a purely legal perspective there are multiple audiences for such judgments.

A political scientist may think that Supreme Court judgments are relevant for a number of reasons. For example, such decisions may demonstrate a political check on executive or legislative actions, thus justifying the separation of powers; or a decision may have direct relevance to a prominent political issue, thus presenting an opportunity for political mobilization. This expands the potential audiences for judges and their decision but does not necessarily go far enough.

A cultural viewpoint, however, would provide a more complete perspective. Such a perspective recognizes that judicial opinions are used not just by legal and political actors, but by a plethora of individuals, from journalists, academics, businesses, and police forces to citizens and even by others in foreign jurisdictions. Some opinions may even become cultural touchstones, assuming iconic status for citizens (i.e., *Brown* or *Roe*). Thus, to distinguish Supreme Court judgments as meant for a specific group discounts their large cultural relevance. Perhaps Scalia’s biting sarcasm or linguistic provocations were a veiled recognition of this cultural perspective. Perhaps he was not intending to “trash” his colleagues or de-legitimize the court, so much as he was attempting to say (in his own unique style, of course): “hey, look at what we’re doing here...this is important to everyone.”

## 2. HIS HUMOR

Justice Scalia famously repeated the line, “I am an originalist. I am a textualist. I am not a nut,”<sup>53</sup> and it was Scalia who first called himself a “faint-hearted originalist,”<sup>54</sup>

<sup>51</sup> See, e.g., Hasen, *supra* note 34, at 223; Molly Cooke, *Justice Scalia Addresses First-year Law Students*, THE HOYA (Nov. 17, 2015), <http://www.thehoya.com/justice-scalia-addresses-first-year-law-students/>.

<sup>52</sup> See, e.g., Steven Schwinn, *Opinion Analysis: Plain Language Rules the Day (and Keeps a Claim Alive) in Prisoner-Rights Suit*, SCOTUSBLOG (June 6, 2016), <http://www.scotusblog.com/2016/06/opinion-analysis-plain-language-rules-the-day-and-keeps-a-claim-alive-in-prisoner-rights-suit/>.

<sup>53</sup> Jeffrey Rosen, *If Scalia Had His Way*, N.Y. TIMES (Jan. 8, 2011), <http://nyti.ms/1H77IMw>.

<sup>54</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

He was recognized by many—even by those outside of legal circles—for his caustic wit and his predilection for humor.<sup>55</sup> Oftentimes during oral argument he would (at least attempt to) liven things up with a sarcastic comment or a joke. Scalia was by far the funniest justice on the Court for the past decade (followed by Stephen Breyer).<sup>56</sup> The number of laughs he received in oral argument far outpaced any other justice (although there is not a rate for “attempts at humor” versus actual laughs). Nonetheless, Scalia used his humor to establish himself as an interesting and memorable judge.

It is difficult to ascertain just how or why Scalia felt the need to frequently make light of the work of the Court or himself or of a particular situation. Perhaps it was humor for humor’s sake, and that is fair enough, especially in a world that often takes things far too seriously.<sup>57</sup> But there are other outcomes stemming from Justice Scalia’s humor and engaging writing style. The humor Scalia used on and off the bench and in opinions called attention to him. It made him more than just another dry or overly-technical Supreme Court justice. Thus, Scalia opened himself up on the bench, displaying personality traits in ways that other justices remain hesitant to do. This is helpful to understanding Scalia’s status as “sacred symbol.” The idea that a judge is not just a judge, but a living, breathing and as it sometimes turns out, entertaining person, is something that the law—rightly or wrongly—attempts to hide through overarching principles and codes of behavior. It was not as if Scalia disrespected those principles—although some certainly claim that he did—but that he challenged the traditional notions of judging.

### C. LEADING INTERPRETATIVE THEORIST AND MARKETER

Scalia’s influence on American law—and perhaps more importantly, on how constitutional cases are interpreted throughout the state and federal judiciary—was immense. He championed<sup>58</sup> originalist and textualist interpretative theories,<sup>59</sup> and was not bashful when confronting others who operated on different interpretations.<sup>60</sup>

Many U.S. judges have been recognized as leading interpretative theorists, but not all of them sat on the Supreme Court. Jerome Frank, a leader in the legal realist movement, sat on the U.S. Court of Appeals for the Second Circuit between 1941 and 1957. His first book, *Law and the Modern Mind*,<sup>61</sup> written after he had undergone six months of psychotherapy, was extremely influential among judges and scholars. Transaction Publishing has even recently re-published the book, with

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<sup>55</sup> See, e.g., in this volume, James Allan, *supra* note 17.

<sup>56</sup> Ryan A. Malphurs, Jaime Bochantin, L. Hailey Drescher & Melissa Wallace Framer, *Too Much Frivolity, Not Enough Femininity: A Study of Gender and Humor at the U.S. Supreme Court* (2013), <https://ssrn.com/abstract=2335613>.

<sup>57</sup> *Justice Scalia’s Under-the-Chin Gesture*, NPR (Mar. 30, 2006), <http://www.npr.org/templates/story/story.php?storyId=5312065>.

<sup>58</sup> Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 22-23* (Grant Huscroft & Bradley W. Miller eds. 2011).

<sup>59</sup> ANTONIN SCALIA & BRIAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

<sup>60</sup> See Allan, *supra* note 17.

<sup>61</sup> JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

an introduction from celebrated constitutional scholar Brian H. Bix.<sup>62</sup> Another more recent example is Richard Posner, who has served on the U.S. Court of Appeals for the Seventh Circuit since 1981. He is a leading proponent of law and economics, and his 1973 book, *The Economic Analysis of Law*,<sup>63</sup> has been widely acclaimed. Other jurisdictions have had their share of heavyweight legal intellectuals. Given its status as the birth of the common law, Britain is one of those places. Judges such as William Blackstone<sup>64</sup> and Sir Edward Coke<sup>65</sup> were giants of their day, not to mention more contemporary figures, such as Lord Denning<sup>66</sup> and Tom Bingham.<sup>67</sup> And yet, judges in the U.K. remain relatively insulated from public scrutiny.<sup>68</sup> While already a towering figure in UK legal circles, Bingham became famous for his articulation of the rule of law.<sup>69</sup> But as prominent as Bingham was, not many citizens outside legal circles knew him. In fact, there is probably a significant percentage of Brits that cannot name a sitting judge, let alone a U.K. Supreme Court justice.

Throughout history American judges have produced serious, academic scholarship,<sup>70</sup> some of which pushed the bounds of legal or interpretative theory. Thus books, law review articles and speeches have been commonly accepted media for judges. But what happens when the bounds of academic scholarship stretch into quasi-promotional events?

Engaging in academic scholarship is fundamentally different from actively marketing ideas to the citizenry. And yet Scalia engaged in such marketing activities. At one point the *Wall St. Journal* characterized his many public appearances as “The Justice Scalia Roadshow.”<sup>71</sup> While promoting books late in his career, such as *Making Your Case*<sup>72</sup> and *Reading Law*,<sup>73</sup> he made many appearances on television shows that Supreme Court justices do not usually find themselves on, such as *60 Minutes* (CBS), *Charlie Rose* (PBS), *Piers Morgan Tonight* (CNN) and *Fox News Sunday* (Fox). According to the U.S. Code of Judicial Conduct, these appearances apparently fall under Canon 4(A)(1): speaking, writing, lecturing, and teaching.<sup>74</sup>

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<sup>62</sup> JEROME FRANK, *LAW AND THE MODERN MIND* (2009).

<sup>63</sup> RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* (1973).

<sup>64</sup> See, e.g., WILFRID PREST (ED.), *BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY* (2009).

<sup>65</sup> See, e.g., DAVID CHAN SMITH, *SIR EDWARD COKE AND THE REFORMATION OF THE LAWS: RELIGION, POLITICS AND JURISPRUDENCE, 1578-1616* (2014).

<sup>66</sup> See, e.g., EDMUND HEWARD, *LORD DENNING: A BIOGRAPHY* (2d ed.) (1997); LORD DENNING, *THE CLOSING CHAPTER* (1983).

<sup>67</sup> See, e.g., MADS ANDENAS & DUNCAN FAIRGRIEVE, *TOM BINGHAM AND THE TRANSFORMATION OF THE LAW* (2011).

<sup>68</sup> Although, the latest reaction to the High Court’s decision regarding Brexit (*Miller v. Secretary of State for Exiting the European Union* [2016] EWHC 2768), may demonstrate that things are changing in Britain.

<sup>69</sup> TOM BINGHAM, *THE RULE OF LAW* (2011).

<sup>70</sup> Shaman, *supra* note 27.

<sup>71</sup> Dan Slater, *Scalia Justifies His Jurisprudence: ‘I am Not a Nut’*, WSJ LAW BLOG (Apr. 8, 2008), <http://blogs.wsj.com/law/2008/04/08/scalia-justifies-his-jurisprudence-i-am-not-a-nut/>.

<sup>72</sup> ANTONIN SCALIA & BRYAN GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008).

<sup>73</sup> ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

<sup>74</sup> *Code of Conduct for United States Judges*, 175 F.R.D. 363 (1998): “A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.”

After all, Scalia was promoting his book that was about “the law, the legal system, and the administration of justice.”<sup>75</sup> Scalia certainly pushed the bounds regarding what is acceptable/unacceptable in this domain.

### I. SCALIA, JUDGING AND POP CULTURE

Although U.S. Supreme Court decisions have been shown to generally follow public opinion,<sup>76</sup> the court itself, historically, has been slow to catch on with certain aspects of popular culture (e.g., televised hearings). This is unsurprising in some respects. Many justices shy away from the limelight, leaving it to those in the political branches. After all, the role of judging traditionally does not involve “making news” in the promotional sense. But there was one area in which Scalia was genuinely in tune with popular culture: in his theory of originalism.

The theory of originalism has a deep association with American popular culture and the public’s understanding of state symbols such as the Founders and the Constitution. Indeed, we are not the first ones to make this case.<sup>77</sup> Further, originalist and textualist interpretative methods have deep roots. Justice Hugo Black (1937-1971) was a strong proponent of these methods and was unafraid to advocate them to others.<sup>78</sup> Part of the connection between originalism and popular culture arises from the long-held idolization of the 1789 American Constitution. Even though the current reach of the Constitution would probably be unrecognizable to the Founders,<sup>79</sup> and even though specific sections of the constitution seem antiquated, the American public continues to engage in a form of constitutional worship that is difficult to find anywhere else.<sup>80</sup>

Scalia’s use of originalism is certainly not the only example of his unique connection to popular culture. Scalia’s judicial and extra-judicial writings, in addition to his courtroom and non-courtroom antics, generally got a wide amount of media attention.<sup>81</sup> One such example came during oral argument in *Department*

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<sup>75</sup> *Id.*

<sup>76</sup> For a historical take on this, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); for a more modern take, see Gerald Rosenberg, *The Road Taken: Robert A. Dahl’s Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 613 (2001).

<sup>77</sup> See Jack M. Balkin, *Why are Americans Originalists?*, in LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERRELL (David Schiff & Richard Nobles eds. 2015); there is also a rebuttal to this piece here: Ilya Somin, *The Origins of Originalism*, WASH. POST (Jan. 21, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/21/the-origins-of-originalism/>; See also Eric A. Posner, *Trump and the Originalists*, (Aug. 8, 2016) available at <http://ericposner.com/trump-and-the-originalists/>.

<sup>78</sup> Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994).

<sup>79</sup> For example, the prospects of constitutional review of legislation and the striking down of Acts of Congress, although it occurs on a regular basis today, were not inherent features of the 1789 Constitution. These aspects were decided in *Marbury v. Madison*, 5 U.S. 137, 138 (1803).

<sup>80</sup> Brian Christopher Jones, *Preliminary Warnings on “Constitutional” Idolatry*, PUB. LAW 74 (2016).

<sup>81</sup> Steve Twomey, *Scalia Angrily Defends His Duck Hunt with Cheney*, N.Y. TIMES (Mar. 18, 2004), <http://nyti.ms/29x8clq>.

of *Health and Human Services v. Florida*,<sup>82</sup> when Scalia compared the government making everyone purchase health insurance to the government making everyone eat broccoli. Although this line is often thought of as a Scalia original, he actually borrowed it.<sup>83</sup> Nevertheless, Scalia was keen enough to pick up this analogy and use it during oral argument. Although his plea was ultimately unsuccessful, it certainly influenced the debate about the Affordable Care Act, and more pointedly, the Supreme Court’s 2012 judgment of the law in *Sebelius*.<sup>84</sup>

But Scalia was far from the only Supreme Court justice to permeate popular culture. In fact, other SCOTUS justices, such as Ruth Bader Ginsberg, are also prominent pop culture symbols. After all, the latter has her own nickname (The Notorious RGB),<sup>85</sup> her own fan blog,<sup>86</sup> and of late has been outspoken on some inherently political issues.<sup>87</sup> On the fan blog visitors can even purchase merchandise, including baby clothes, coffee mugs, and carrier bags.<sup>88</sup> But Ginsburg is not as divisive as Scalia,<sup>89</sup> not as formidable an interpretive theorist, and certainly not as humorous or biting (not on the bench, nor in her opinions).

This pop culture relevance can be contrasted with other countries that have Supreme or Constitutional Courts. In some jurisdictions judges are widely viewed as out of touch with popular culture; and indeed, they are certainly not known or “celebrated” in the same way as SCOTUS justices. This is certainly the case in Britain, as the judiciary on the whole is relatively unknown outside of legal circles, has been criticized as being out of touch, un-representative, and oblivious to popular culture. This widely held perception throughout the United Kingdom led to the 2012 announcement that judges must undergo cultural awareness training at the Judicial College.<sup>90</sup> Last December a second-year law student penned a prominent

<sup>82</sup> *Dep’t Health & Human Services v. Florida* (Oral Argument) (Mar. 27, 2012), p. 13, [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-398-Tuesday.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf) (“Could you define the market -- everybody has to buy food sooner or later. So, you define the market as food; therefore, everybody’s in the market; therefore, you can make people buy broccoli”).

<sup>83</sup> The trail that stretches back to the early 1990s when Bill Clinton proposed a universal health care system. David B. Rivkin Jr., a prominent libertarian lawyer, penned an op-ed in the *Wall St. Journal* asking a similar question: can the government regulate the diets of those it deems overweight? After consultation by Mr. Rivkin in 2009, Senator Orin Hatch (R., UT) made a similar point about buying “certain cars, dishwashers or refrigerators.” This led to Terence Jeffrey’s 2009 article in *CNS News* entitled: “Can Obama and Congress Order You to Buy Broccoli. (See Terence P. Jeffrey, *Can Obama and Congress Order You to Buy Broccoli?*, *CNS NEWS* (Oct. 21, 2009), <http://cnsnews.com/blog/terence-p-jeffrey/can-obama-and-congress-order-you-buy-broccoli>.)

<sup>84</sup> *National Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_, 132 S. Ct. 2566 (2012).

<sup>85</sup> This is modelled after famous 1990s rapper, the late Notorious BIG.

<sup>86</sup> See <http://notoriousrbg.tumblr.com/>.

<sup>87</sup> Michael D. Shear, *Ruth Bader Ginsburg Expresses Regret for Criticising Donald Trump*, *N.Y. TIMES* (July 14, 2016), <http://nyti.ms/29AWs0l>.

<sup>88</sup> One of the coffee mugs available even bears the inscription “The Ruth will set you free.”

<sup>89</sup> Although, she did speak out against a Donald Trump presidency in July 2016: Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, *N.Y. TIMES* (July 10, 2016), <http://nyti.ms/29rq7tH>.

<sup>90</sup> Jack Doyle, *Out-of-Touch Judges to Be Given Lessons in Popular Culture (After One Asked Who Are the Beatles?)*, *DAILY MAIL* (June 16, 2012), <http://www.dailymail.co.uk/news/article-2160110/Out-touch-judges-given-lessons-popular-culture-asked-Beatles.html>.

piece for the *Guardian* newspaper about how members of the U.K. Supreme Court did not look like they had “ever put down their copy of Intellectual Property Quarterly to pick up an iPod, tossed aside their *Neue Juristische Wochenschrift* to grab a *Now* magazine or looked up from the *Cambridge Law Journal* to watch some *Celebrity Juice*.”<sup>91</sup> Further, in 2013 a sitting Supreme Court justice, Baroness Hale, even proclaimed that many judges lead “sheltered lives.”<sup>92</sup>

At some rudimentary level, being in tune with popular culture means that judges must understand and use the technology that is shaping society, and which can open up the judiciary to increased transparency and accountability. Perhaps surprisingly, this is where Scalia—and on an institutional level, the U.S. Supreme Court more generally—have repeatedly chosen to be out of step with popular culture.<sup>93</sup> Compared with other constitutional courts, their ideas on the use of technology both inside the courtroom and out is out of step with evolving standards.<sup>94</sup> Cameras in the courtroom are one such example. For a variety of reasons, the U.S. Supreme Court refuses to allow cameras to televise their proceedings. And yet in some countries this is common practice. For instance, the U.K. Supreme Court now video records all hearings and judgment announcements, and these can be streamed live and are also archived on their website.<sup>95</sup> Additionally, the UKSC has Twitter, YouTube and Flickr channels.<sup>96</sup> Even with all these accoutrements, the status of UKSC justices in popular culture remains well below their transatlantic counterparts.

From the above, it should be obvious that Scalia had an ambivalent relationship with popular culture, engaging with it when it suited his interpretive style, method of justice, or promotional aspirations, and also shunning it when it could potentially take him out of his comfort zone or damage his credibility.

#### IV. JUSTICE SCALIA AS “SACRED SYMBOL”

Calling Scalia a “sacred symbol” captures something of his significance in law, politics, and popular culture. As we see it, for a judge to become a sacred symbol he or she must:

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<sup>91</sup> Kier Baker, *Pop Culture 101: A Guide for Out-of-Touch Judges*, *GUARDIAN* (10 Dec. 2015), <https://www.theguardian.com/law/2015/dec/10/pop-culture-101-a-guide-for-out-of-touch-judges>.

<sup>92</sup> David Barrett, *Judges Lead ‘Sheltered Lives’, Warns Britain’s Most Senior Female Judge*, *TELEGRAPH* (Apr. 6, 2013), <http://www.telegraph.co.uk/news/uknews/law-and-order/9976400/Judges-lead-sheltered-lives-warns-Britains-most-senior-female-judge.html>.

<sup>93</sup> See, e.g., Tal Kopan, *Scalia: Cameras in Supreme Court Would ‘Mis-educate’ Americans*, *POLITICO* (July 26, 2012), <http://www.politico.com/blogs/under-the-radar/2012/07/scalia-cameras-in-supreme-court-would-mis-educate-americans-130246>.

<sup>94</sup> See, e.g., Jones, *supra* note 26, at 255-60.

<sup>95</sup> *News Release: Catch-up on Court Action: Supreme Court Launches ‘Video on Demand’ Service*, *SUP. CT.* (May 5, 2015), <https://www.supremecourt.uk/news/catch-up-on-court-action-supreme-court-launches-video-on-demand-service.html>. The Court does have a specific “terms of use” policy, where footage is only allowed to be accessed through their site.

<sup>96</sup> UK Supreme Court (@UKSupremeCourt), *TWITTER*, <https://twitter.com/uksupremecourt>; UKSupremeCourt, *YOUTUBE*, <https://www.youtube.com/user/UKSupremeCourt>; UK Supreme Court, *FLICKR*, <https://www.flickr.com/photos/uksupremecourt>.

- (1) profoundly affect the course of American jurisprudence<sup>97</sup> through either
  - (a) the significance and impact of his/her judicial opinions,
  - (b) his/her influence on other members of the judiciary, or
  - (c) through his/her extra-judicial writing/speaking;and
- (2) have a large segment of the citizenry—including those outside legal and political circles—develop a profound attachment to him or her.

Some justices may fulfill one or the other of these criteria, but not both. Justice Ginsburg clearly satisfies the second, considering that a large segment of Americans know her, identify with her, and hold her in high esteem. However—while certainly no intellectual slouch—it would be difficult to say that she has “profoundly” affected the course of American jurisprudence. On the flip side judges have often profoundly affected American jurisprudence, but for whatever reason, have not achieved much societal attachment.

## V. CONCLUSION

When a judge becomes a “sacred symbol” he/she may foment internal division on a court, and attract wanted and unwanted attention. In Scalia’s case the intense controversy surrounding President Obama’s effort to replace him arose from Scalia’s status as a “sacred symbol.” Judges as “sacred symbols” may impose high costs on the courts on which they sit and in the legal systems in which they serve.

Recently Keith Bybee splendidly articulated the complex duality of the American legal system: that citizens tend to recognize judges as independent actors who make impartial decisions, but in so doing they recognize that politics or partisanship plays a vital role in judicial decision-making.<sup>98</sup> Bybee believes that these are “acceptable hypocrisies,” and that (American) courts depend on them to function.<sup>99</sup> Justice Scalia’s story also displays such potential hypocrisies: at times it is difficult to tell whether or not Scalia was pushing the bounds of legal and political legitimacy, or in fact, the bounds of legal and political hypocrisy.<sup>100</sup> Perhaps he was doing both.

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<sup>97</sup> Although, it does not necessarily have to be “American” jurisprudence; the “American” label can be dropped if need be. Yet, given that we’re primarily analyzing American law, that is what we have inserted here.

<sup>98</sup> Bybee, *supra*, note 42.

<sup>99</sup> *Id.*

<sup>100</sup> We thank Institutum Iurisprudentiae, Academia Sinica Assistant Research Professor Yen-Tu Su for this particular insight.



# ONE OF MY FAVORITE JUDGES: CONSTITUTIONAL INTERPRETATION, DEMOCRACY AND ANTONIN SCALIA

James Allan\*  
*University of Queensland*

## ABSTRACT

*In this article the author explains why Antonin Scalia was one of his favourite judges. It starts by excerpting some of Justice Scalia's most biting and funny comments, both from judicial and extra-judicial sources. Then it explains the attractions of an originalist approach to constitutional interpretation, though arguing that the intentionalist strain is preferable to Scalia's 'original public meaning' or 'new originalism' approach. Finally, it argues that within the confines of a constitutional structure with an entrenched bill of rights, Scalia was a strong proponent of democratic decision-making to resolve key social policy decisions, unlike many other top judges.*

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\* Garrick Professor of Law, T.C. Beirne School of Law, University of Queensland

It is best to start by making it clear that on some big issues I differed with the views of former U.S. Supreme Court Justice Antonin Scalia. For instance, I am a critic of bills of rights, be they of the entrenched, constitutionalized United States and Canadian varieties or of the statutory United Kingdom and New Zealand varieties.<sup>1</sup> By contrast, Justice Antonin Scalia supported the U.S.-style bill of rights that he was regularly called upon to interpret.<sup>2</sup> Furthermore, I am an ‘Original Intended Meaning’ (‘OIM’) originalist, the sort that thinks it is authors’ intentions that count, that provide the legitimate and authoritative external standards that point-of-application interpreters ought to seek and that can constrain those interpreters in a way that ‘living tree/living Constitution’ and ‘moral’ interpretations never can. Justice Scalia rejected that sort of OIM originalism, sometimes quite sharply,<sup>3</sup> in favor of searching for what a well-educated and knowledgeable person at the time would have taken the words to mean. Scalia’s version of originalism is known as ‘textualism’ or as ‘Original Public Meaning’ or ‘OPM’ or ‘new’ originalism.

I mention those differences, indeed will come back to them below, for the sake of providing the reader with a bit of perspective on what follows. Bear them in mind because in big picture terms in this article I come to praise Antonin Scalia, not to bury him. In fact Scalia was (and is) one of my favorite judges. As many readers will realize, that is not a sentiment that is or was widely held by law professors in the United States.<sup>4</sup> And it was probably even less widely held by legal academics in

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<sup>1</sup> I have criticized bills of rights at length and in a host of contexts. For a selected few instances see e.g., James Allan, *Bills of Rights and Judicial Power – A Liberal’s Quandary?* 16 OXFORD J. LEG. STUD. 337 (1996); James Allan, *Rights, Paternalism, Constitutions and Judges*, in LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 29 (Grand Huscroft & Paul Rishworth eds., 2002); James Allan, *Oh That I Were Made Judge in the Land*, 30 FED. L. REV. 561 (2002); James Allan, *A Modest Proposal*, 23 OXFORD J. LEG. STUD. 197 (2003); James Allan, *An Unashamed Majoritarian*, 27 DAL. L. J. 537 (2004); James Allan and Grant Huscroft, *Rights Internationalism Coming Home to Roost?* 43 SAN DIEGO L. REV. 1 (2006); James Allan, *Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century*, 17 KING’S L. J. 1 (2006); James Allan, *Jeremy Waldron and the Philosopher’s Stone*, 45 SAN DIEGO L. REV. 133 (2008); James Allan, *Meagher’s Mischaracterisations of Majoritarianism*, 20 KING’S L. J. 115 (2009); JAMES ALLAN, *DEMOCRACY IN DECLINE* (2014).

<sup>2</sup> But the support was qualified. Yes, Scalia supported the U.S. Bill of Rights but maintained that the rights enshrined in it were only guaranteed by the structure of government established in the Constitution: ‘Every tin horn dictator in the world today, every president for life, has a Bill of Rights. That’s not what makes us free; if it did, you would rather live in Zimbabwe. But you wouldn’t want to live in most countries in the world that have a Bill of Rights. What has made us free is our Constitution. Think of the word “constitution”; it means structure [...] The genius of the American constitutional system is the dispersal of power. Once power is centralized in one person, or one part [of government], a Bill of Rights is just words on paper.’ Justice Antonin Scalia, Address at the Federalist Society (May 8, 2015).

<sup>3</sup> See Justice Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION (Amy Gutmann ed., 1998).

<sup>4</sup> Jeremy Waldron, before twice quoting Justice Scalia at length, obliquely, mockingly and disapprovingly refers to this widespread dislike of Scalia’s views in the U.S. legal academy by saying ‘(It is time to roll your eyes now and pay no attention for a few minutes, because I am going to quote Justice Antonin Scalia and quote him at length.)’ See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1390 (2006).

my native Canada, or in the U.K., or in New Zealand, or in Australia. Justice Scalia was despised by many law professors in the Anglo-American world and his views were thoroughly rejected by more still. Not me though. As a law professor who has worked now for 11 years in Australia, and for a decade before that in New Zealand, with teaching sabbaticals in the U.S. and Canada, I am quite partial to the man, and to his jurisprudence. As I said, he is one of my favorite judges.

The goal of this article is to give you an idea of why that is, why this non-American law professor who disagreed with him on a couple of big issues might nevertheless have that view. I will consider it a bonus if, for a reader or two, the good that Scalia did is not interred with his bones.

## I. BLUNT AND BITING

You cannot get a sense of Scalia as a judge unless you have some idea of how blunt and biting and downright funny he could be. This is a quality I very much like. Start with a few examples from his judicial opinions on the top U.S. court:

“It is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its members’ personal view of what would make a “more perfect Union” (a criterion only slightly more restrictive than a “more perfect world”) can impose its own favored social and economic dispositions nationwide.”<sup>5</sup>

“Words no longer have meaning if an Exchange that is not established by a State is ‘established by a State’.”<sup>6</sup>

“We should start calling this law SCOTUScare ... [T]his Court’s two decisions on the Act will surely be remembered through the years ... And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites.”<sup>7</sup>

[Responding to Justice Anthony Kennedy, Scalia indicated that if he had written such nonsense he would]

“hide [his] head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.”<sup>8</sup>

“The [majority] opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting

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<sup>5</sup> United States v. Virginia, 518 U.S. 515, 601 (Scalia, J.) (1996).

<sup>6</sup> King v. Burwell, 576 U.S. \_\_\_, 2 (Scalia, J.) (2015).

<sup>7</sup> *Id.* at 21.

<sup>8</sup> Obergefell v. Hodges, 576 U.S. \_\_\_, 7, 22 (Scalia, J.) (2015).

opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.”<sup>9</sup>

“If it were impossible for individual human beings (or groups of human beings) to act autonomously in effective pursuit of a common goal, the game of soccer would not exist.”<sup>10</sup>

“If one assumes, however, that the PGA TOUR has some legal obligation to play classic, Platonic golf – and if one assumes the correctness of all the other wrong turns the Court has made to get to this point – then we Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government’s power “[t]o regulate Commerce with foreign Nations, and among the several States,” to decide *What Is Golf*. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really a golfer*? *The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a “fundamental” aspect of golf.*”<sup>11</sup>

“A law can be both economic folly and constitutional.”<sup>12</sup>

Next consider a few extra-judicial examples (which are often even better):

“If we’re picking people to draw out of their own conscience and experience a “new” Constitution, we should not look principally for good lawyers. We should look to people who agree with us. When we are in that mode, you realize we have rendered the Constitution useless.”<sup>13</sup>

“If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don’t need a constitution to keep things up-to-date. All you need is a legislature and a ballot box.”<sup>14</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Supra* note 5, at 584.

<sup>11</sup> *PGA Tour Inc., v. Martin*, 532 U.S. 661, 700 (Scalia, J.) (2001).

<sup>12</sup> *CTS Corp., v. Dynamics Corp. of America*, 481 US 69, 96-7 (Scalia, J.) (1987).

<sup>13</sup> Justice Antonin Scalia, *Constitutional Interpretation the Old Fashioned Way*, Address at Woodrow Wilson International Center (Mar. 14, 2005) *available at* [http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional\\_Interpretation\\_Scalia.pdf](http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf).

<sup>14</sup> Interview by Calvin Massey with Justice Antonin Scalia (Jan. 2011) *available at* <http://www.callawyer.com/2011/01/antonin-scalia>.

“If you think aficionados of a living Constitution want to bring you flexibility, think again. You think the death penalty is a good idea? Persuade your fellow citizens to adopt it. You want a right to abortion? Persuade your fellow citizens to enact it. That’s flexibility.”<sup>15</sup>

“Bear in mind that brains and learning, like muscle and physical skill, are articles of commerce. They are bought and sold. You can hire them by the year or by the hour. The only thing in the world not for sale is character.”<sup>16</sup>

“What is a moderate interpretation of the text? Halfway between what it really means and what you’d like it to mean?”<sup>17</sup>

Finally, I will relate a personal anecdote. It was 1999 and I was working at a very good law school in Dunedin, New Zealand. A colleague and friend from a different New Zealand law school had organized a conference in Auckland and had invited Justice Scalia, who would be attending. I went too. Now I could tell you how, of all the judges speaking at that conference, it was only Scalia who volunteered for a special question and answer session with the Auckland law school students, and who stayed until there were no more questions. Or I might relate how much fun it was to find myself in a bar alone with my conference organizing friend, and with Scalia, with the latter making fun of his own short size and telling some great jokes while the three of us had a drink or two. But instead let me recount the session I witnessed at that Auckland conference, where Justice Scalia was on the same panel as a then Supreme Court of Canada Justice. The Canadian judge went first, and gently criticized as ‘ancestor worship’ any form of constitutional interpretation that relies on some form of originalism, preferring what we might today label a ‘living tree’<sup>18</sup> or ‘living Constitution’ interpretive approach. With hundreds of lawyers and judges in the room Scalia went up the podium when his turn came, put down his prepared talk, and proceeded to rebut the Canadian judge’s claims, point by point. He was scathing and unrelenting. I still recall Scalia looking at the Canadian judge and saying something along the lines of: “Of course I have no doubt that in Canada the judges have superior moral sentiments and feelings to mere plumbers or secretaries. But let’s be clear that this is what my Canadian friend’s approach boils down to – feelings, nothing more than feelings. In the US, those of us who are originalists on our top court do not believe we have superior moral and political feelings to everyone else.”

It was a tour-de-force. I suspect the experience was also something of a shock for a top Canadian judge as in my native Canada, and I daresay in Australia, New Zealand and Britain, the top judges get used to being treated as lesser Gods, unctuously deferred to (not least by law students and lawyers who sometimes do so in ways that might qualify as ‘Uriah Heepesque’), and not often criticized in public by anyone –

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<sup>15</sup> Scalia, *supra* note 13.

<sup>16</sup> Justice Antonin Scalia, Commencement Address, Address at Commencement Exercises, College of William and Mary (May 12, 1996).

<sup>17</sup> Scalia, *supra* note 13.

<sup>18</sup> This phrase was made famous, in the Westminster common law world, by Lord Sankey in the Privy Council case from Canada of *Edwards v. Att’y-Gen. for Can.* [1930] AC 124 (PC). This ‘living tree’ term is the broad equivalent outside the United States for what Americans describe as a ‘living Constitution’ approach.

and especially not by barristers, top lawyers, lower level judges, and rarely even by politicians for that matter. It struck me at the time that it would be a lot better and healthier for a legal system (especially those with a bill of rights where judges have more scope to gainsay the elected legislature) if top judges did have to face such public criticism – and I include vigorous criticism – on a more regular basis, and hence have to defend their views. Certainly Scalia appeared perfectly at home taking as much as giving. In fact, he seemed to revel in the vigorous exchange of views. I doubt there existed a kitchen anywhere whose heat could have forced Scalia out.

Of course that sort of combative style and attitude makes it very unlikely that Scalia would excel at consensus building, in the way that, say, Justice Brennan did on the Supreme Court of the United States.<sup>19</sup> And indeed he did not. Scalia excelled instead at the biting dissent (including dissenting alone). Alan Morrison and Robert Stein put that same general point in these two ways:

Whenever one dissents, whether in a judicial decision or a faculty committee, a choice must be made between attempting to narrow the majority's decision or pointing out its potentially apocalyptic consequences. Justice Scalia has chosen the second option as his preferred choice in most cases.<sup>20</sup>

As an ideologue, Justice Scalia preferred his subjectively “correct” answer to the most mutually agreeable answer. Justice Scalia cites his adherence to originalism and textualism as the reason for his inability to form coalitions. Another, perhaps pettier, view suggests that Justice Scalia isolated himself by attacking his colleagues ... [though] Scalia responded, “You really think my colleagues are going to mess up American law because they are peeved at me?...”<sup>21</sup>

Now some will consider an unwillingness to move from what one sees to be the ‘glass full’ correct position in order to win supporters for a ‘glass half full’ position that is a less bad outcome than what would otherwise result to be foolhardy, in evolutionary terms perhaps even to be an ultimately ‘loser proclivity’. Others will disagree and consider the judge’s job description *not* to include hefty dollops of compromising and backroom negotiating with the other Justices – perhaps for core Rule of Law reasons tied to thinking the law’s meaning is not dependent on (or at least ought not to be dependent on) shifting coalitions of judges’ bargained-for votes, or perhaps for reasons tied to long-term rule-utilitarian calculations that put a big emphasis on democracy. Whichever position happens to attract you the reader, it is clear that Scalia fell into the latter camp. He was a great dissenter, not a backroom coalition builder.

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<sup>19</sup> See, e.g., Robert Stein, *Foreword: A Consequential Justice*, 101 MINN. L. REV. 1-11 (2016) arguing that Brennan was much, much more adept at building a majority coalition of justices than was Scalia.

<sup>20</sup> Alan Morrison, *Remembering Justice Antonin Scalia* 101 MINN. L. REV. 12, 21-2 (2016).

<sup>21</sup> Stein, *supra* note 19, at 9 (internal note to Scalia’s 2015 Stein Lecture at the University of Minnesota omitted).

And I am myself much more partial to that ‘great dissenter’ sort of judge. Put aside for the moment the more substantive issue of what sort of judicial philosophy one wants from his or her ideal top judge and focus on the periphery, on how one wishes a top court judge to respond to other top judges who appear not to be convinced by your ideal judge’s reasoning in some case. In that situation I prefer my judicial common law world to be broadly inhabited by dissenting Scalias rather than negotiating, coalition-building Brennans.<sup>22</sup> In Australia, where I live and work, there are two very good recent examples of big dissenters on the country’s top court, the High Court of Australia, both of whom are now retired. One is Dyson Heydon. In his last couple of years on the High Court he dissented at a very high rate indeed.<sup>23</sup> Another is Michael Kirby, also someone known for dissenting. In terms of their approaches to constitutional interpretation and public law decision-making more generally, the substantive issue, I am very much a fan of Heydon and a critic of Kirby.<sup>24</sup> But I nevertheless recognize that the odd Kirby or two every century on a top court might be a good thing<sup>25</sup> – for John Stuart Mill free speech type reasons related to the benefits of being criticized and sharpening your own arguments as well as on other grounds too. Likewise with Lord Denning, to take a British example of a great dissenter, and irrespective of whether you are an admirer of the Denning *modus operandi* or not.<sup>26</sup>

<sup>22</sup> For my considered view on the type of judge to appoint to a top court in the common law world see both James Allan, *The Travails of Justice Waldron* in *EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY* (Grant Huscroft, ed., 2008), 161-83 and James Allan, *Is Talk of the Quality of Judging Sometimes Strained, Feigned or Not Sustained?* in *JUDICIAL INDEPENDENCE IN AUSTRALIA* 64-75 (Rebecca Ananian-Welsh & Jonathan Crowe eds., 2016). I note in the latter of those that the qualities of one’s ideal top judge are one thing and what you want on an ideal top court another, such that we might not want that ideal top court staffed solely by nine clones of our ideal top judge. The analogy here is with imagining you had won a lottery where the monies had to be spent on one ideal house. Then imagine you had won a lottery where the monies had to be spent on two houses. In the latter instance, few if any people would buy a second home that was a clone of the first one. The criteria you brought to the task of buying two houses would differ, possibly wildly so, from those you brought to buying one. As regards the world’s Scalias, then, the general point is that those who like the Scalia approach to judging still might not wish to have nine Scalias on their ideal top court while those who are not overly enamored with the Scalia approach might nevertheless think that the odd Scalia through time is quite beneficial to a top court. Of course this argument applies more widely than just to Scalia-type judges. For a brief discussion that covers some of the same dissenter v. coalition-builder ground see *Jeremy Waldron, Temperamental Justice*, N.Y. REV. BOOKS, 15-7 (May 10, 2007).

<sup>23</sup> Justice Dyson Heydon authored 45% of his judgments in dissent in 2011 and 40.43% in 2012. Andrew Lynch & George Williams, *The High Court on Constitutional Law: The 2012 Statistics*, 36(2) U. NEW S. WALES. L. J. 359, 522 (2012).

<sup>24</sup> See, e.g., my *The Three “R”s of Recent Australian Judicial Activism: Roach, Rowe and (no) ‘Riginalism*, 36 MELBOURNE U. L. REV. 743. (2012).

<sup>25</sup> See *A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Honourable Michael Kirby*, 33 MELBOURNE U. L. REV. 1032-57 (2009).

<sup>26</sup> I have a strong memory of a saying to the effect that ‘Having a Denning on a top court is fine, you just wouldn’t want more than one a century’. I was quite sure it had been said by a top British judge. But I cannot find the source of it, not even after asking a number of people I thought would know in the U.K., the U.S. and here in Australia. They too think they recognize this aphorism but cannot place its author. If I am wrong about it being someone else’s invention, I will happily claim it for myself.

## II. CONSTITUTIONAL INTERPRETATION: SCALIA THE ORIGINALIST

Turn now from Scalia the biting, funny judge not afraid to file (or perhaps unleash) a dissenting opinion and consider his approach to constitutional interpretation. This is a top judge who once said: ‘I am not so naïve (nor do I think our forbears were) as to be unaware that judges in a real sense “make” law. But they make it *as judges make it*, which is to say *as though* they were “finding” it – discerning what the law is, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.’<sup>27</sup> And extracurricularly he claimed that:

Every issue of law resolved by a federal judge involves interpretation of text – the text of a regulation, or of a statute, or of the Constitution. Let me put the Constitution to one side for the time being, since many believe that that document is in effect a charter for judges to develop an evolving common law of freedom of speech, of privacy rights, and the like. I think that is wrong – indeed, as I shall discuss below, I think it frustrates the whole purpose of a written constitution.<sup>28</sup>

That purpose, for Scalia, was to lock certain things in, say bicameralism or a federal division of powers or a set of rights that set a new floor level of treatment of citizens below which the legislature could not drop. So Scalia thought that statutes and the constitution ought both to be interpreted in the same way, using a method he called ‘textualism’<sup>29</sup> but which (in the context of constitutional interpretation) is more commonly dubbed ‘originalism’ or ‘new originalism’ or ‘original public meaning’ or ‘OPM’.<sup>30</sup> Here is how U.S. legal academic Larry Alexander describes this broadly Scalia-type school of constitutional interpretation:

The original public meaning view of originalism asks the interpreter of legal texts to seek the meaning that a reasonable member of the public at the time of the text’s promulgation would have given the text. The interpreter is not to seek the authorially-intended meaning. There are two basic rationales the proponents of this version of originalism give for preferring it to the authorially-intended meaning of originalism. One rationale is that the original public meaning view avoids the problem of discovering that a law means something other than what most people think it means. The other rationale is that the original public meaning view avoids the aggregation problem, the problem posed by legal texts whose authors, who are multiple, have different intended meanings.<sup>31</sup>

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<sup>27</sup> James B. Beam Distilling Co. v. Georgia 501 U.S. 529, 549 (Scalia, J.) (1991) (emphasis in the original).

<sup>28</sup> Scalia, *supra* note 3.

<sup>29</sup> See, e.g. *id.* at 23. Scalia is clear that this does not mean strict constructionism (*id.* at 23), that ‘context is everything’ (*id.* at 37) and that what we seek to find is ‘how the text of the Constitution was originally understood’ (*id.* at 38).

<sup>30</sup> For a full and excellent discussion of the topic see *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* (Huscroft & Miller ed., 2011).

<sup>31</sup> Larry Alexander, *Legal Positivism and Originalist Interpretation*, 16 *REVISTA ARGENTINA DE TEORIA JURIDICA* 1-10, 3 (2015).

As I signaled at the start of this article, I do not find Scalia's OPM version of originalism to be convincing (though it must be conceded that in the United States this Scalia-favored strand of 'new originalism' seems now to be the dominantly subscribed to or supported version of originalism). In their separate chapters in *The Challenge of Originalism* book<sup>32</sup> both Larry Alexander and Stanley Fish set out powerful (and for me wholly convincing) arguments for why 'old originalism' or 'Original Intended Meaning' or searching for the authors' intended meaning is the preferable strand, and indeed why it is the only coherent version of originalism.<sup>33</sup> In brief, there are two core problems with the OPM version of originalism. First off, in asking how the Constitution was originally understood OPM originalists end up having to construct some hypothetical member of the public or reasonable person back at the time the legal text came into force. You create an artificial, fictitious person – a rough contemporary of the actual authors – and ask yourself what this hypothetical member of the public, at that time, would have taken the text to mean (which is why there is a concern for the standard meaning of the words back at the time the Constitution was framed and ratified). But there is simply no non-arbitrary way to construct such a hypothetical person. Put differently, there is a spectrum of reasonable people (all differing in their general knowledge, IQs, linguistic fluency, where they lived, political attachments, and so on and so forth) and these different hypothetical people, each possessed of different information, may well interpret the same legal text differently. Choosing between them is just arbitrary. Worse, one suspects that for most people who construct a 'reasonable person' or a 'well-informed person at the time' touchstone that this hypothetical being will end up looking a lot like the person doing the constructing, be it in terms of range of knowledge, political leanings, value hierarchy, you name it. You are more than likely to construct someone an awful lot like you. After all, few people see themselves as anything other than reasonable.

The second problem is at least as telling. Real life OPM adherents may tell us that the meaning of some provision in the Constitution depends upon what some hypothetical, well-informed, reasonable person at the time (call him 'Jim', or probably back then 'James') would have taken the words to mean. But how would this James back then have gone about interpreting the legal text, remembering that he is not some literalist, strict constructionist and that the bare words – as Stanley Fish continually shows – will not often, if ever, be constraining? Would this James have sought the real-life actual authors' intended meanings of the text (since fictional James could not have been seeking his own preferred meaning)? But if fictional James is looking at the intended meanings of the real life authors then we, today, might as well cut out this made up Jamesian middle man and look at the real life ratifiers' and framers' intentions ourselves. Or would the fictional James, in all those penumbral or hard

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<sup>32</sup> Huscroft & Miller, *supra* note 30.

<sup>33</sup> Alexander's chapter begins at 87 and Fish's at 99 in this book. In addition to Alexander and Fish there are other powerful exponents of OIM or old originalism, most notably Richard Kay in the U.S. and (in the context of a jurisdiction with an unwritten constitution, so everything in a sense is statutory interpretation) Richard Ekins in the U.K.. In Canada any sort of originalist is an endangered if not extinct species, save in federalism disputes where even Supreme Court of Canada Justices (who otherwise are wholly dismissive) become originalists.

cases, have constructed his own fictional, hypothetical, reasonable person James II? And likewise James II would have constructed James III *ad infinitum*?

So given these two core problems with OPM originalism why is it that all originalists are not (or no longer are) authors' intentions or Original Intended Meaning or old originalists? Certainly Scalia unequivocally rejects the relevance of the real life 'drafter's intent as the criterion for interpretation of the Constitution'.<sup>34</sup> Larry Alexander, after dismissing as wrong-headed two other concerns about original intentions originalism, concedes that there is a very real problem with this OIM interpretive approach. It is the group intentions problem, or as Alexander put it in the passage above, the aggregation problem. How do you deal with legal texts that were collectively authored? It is this, argues Alexander, that pushed people away from OIM originalism into the arms of OPM originalism. By positing but one hypothetical person back at the time of the law's passage you niftily avoid the group intentions problem. But as noted above, this cure is a good deal worse than the disease. It is worse than the group intentions disease because while attributing a single intention to a group is a problem, overwhelmingly it is not an insuperable one (while the OPM problems are). Certainly groups can and do have shared intentions (as any symphony-goer can attest, or any team sports fan can too after watching his favorite team execute a complicated play). In addition, albeit more so in the Westminster parliamentary world than when it comes to the U.S. Congress, there are evolved practices such as a Minister's Second Reading speech before the passage of a government Bill that allows us most times to say that these – the Minister's intentions – are what all who voted in favor intended.<sup>35</sup>

Within the broad church that is originalism, then, I think Scalia was in the wrong denomination. He had it wrong. He should have sought the meaning of the US Constitution in the actual intended meanings of the real life people who framed and ratified it, not in 'how it was originally understood'<sup>36</sup> by some non-actual person at the time. He ought to have sought his external interpretive constraints where Alexander and Fish and Kay and Ekins seek theirs.

However, let me for a moment put to one side that intra-familial originalism debate and focus instead on the differences originalists (broadly speaking) have with non-originalists (broadly speaking). I want to do this because my goal in this article is to explain why I liked Scalia as a judge. Yes, as I set out in Part I, he was funny and biting and blunt and a great dissenter, and I liked that. But in this Part II it is Scalia's approach to constitutional interpretation that is our focus. And the question one needs to ask of non-originalist approaches to constitutional interpretation – which runs the gamut from 'living tree' or 'living Constitution' approaches through Dworkinian Herculean 'best fit' approaches<sup>37</sup> through moral reading approaches and even takes in Posnerian 'can't help it' or 'don't invalidate unless it fails the puke test' approaches<sup>38</sup> – is from where do the external constraints come? Given the

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<sup>34</sup> A MATTER OF INTERPRETATION, *supra* note 3, at 38.

<sup>35</sup> For a book length treatment of OIM as it applies to legislatures, see RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (2012), and especially 161-79 where he details the U.K.'s House of Commons' elaborate procedures for enacting statutes.

<sup>36</sup> See *supra* note 29.

<sup>37</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

<sup>38</sup> Richard Posner describes (approvingly) O.W. Holmes's approach in just these terms. See *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1638, 1709 (1998)

fact of reasonable disagreement, a disinterested outside observer would not find a top judge's claim to be constrained by what is most moral, or by what best fits with the settled materials, or by what is most in keeping with changing social values, or by asking what makes him want to puke to amount to mind-independent constraints on that interpreter.<sup>39</sup> With these non-originalist interpretive approaches, to say there is an external-to-you constraint on the answer you have to reach would not be convincing. Hence, if you worry about judicial usurpation or judicial activism, and very much desire the interpreting judges to be constrained by something outside of their own moral and political and pragmatic sensibilities, then non-originalist approaches will not obviously be all that appealing to you.

Originalism, by contrast, asks you to look to external historical facts to find your answer, and so that answer might (and sometimes will) be one you dislike morally or politically or on efficiency grounds. Put differently, if we are to put much stock in rule of law values then the answers dictated by the legal norms must sometimes differ from the answers the point-of-application interpreter (the judge) would like them to be if he or she were legislating or writing a constitution from scratch. Non-originalist interpretive approaches make this distinction – between A) what the most plausible interpretation of the legal text happens to be and B) what I, the interpreter, would like the answer or outcome to be – extremely precarious. Indeed, Ronald Dworkin found it notoriously difficult to point to U.S. Supreme Court decisions that were in his view rightly decided (according to his own interpretive theory, or theories) and yet which had reached decisions he thought were morally and politically wrong.<sup>40</sup> If, like me, you believe the distinction between A) and B) is a crucially important one in a democratic society,<sup>41</sup> then any non-originalist interpretive theory will be less attractive to the extent you think it undermines the distinction and gives judges significant leeway (from an outside observer's vantage, if not seen or admitted by the interpreting judges themselves) to impose their own preferred outcomes – to legislate from the bench.<sup>42</sup>

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(and at note 148) and *2004 Term Foreword: A Political Court*, 119 HARV. L. REV. 31, 84 (2005). And you could include a literalist, strict constructionist approach here too, as the mere words themselves without recourse to authors' intentions, are not constraining, for all the reasons Stanley Fish gives in note 33.

<sup>39</sup> And as Jeremy Waldron has noted, this is true even if it turns out that we live in a moral realist world rather than a non-cognitivist or moral sceptic world when it comes to the status of moral evaluations. In other words, even if there is a mind-independent truth to moral claims, we limited biological human beings cannot know for certain what those truths are, so reasonable disagreement kicks in all the same even if moral realists be right. See Jeremy Waldron, *The Irrelevance of Moral Objectivity* in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 158-87 (Robert P. George, ed., 1992).

<sup>40</sup> James Allan, Charles Fried, & Ronald Dworkin, "*The Supreme Court Phalanx*": *An Exchange*, N.Y. REV. BOOKS. (2007). Here I wrote a letter asking Dworkin to name a case as per the main text.

<sup>41</sup> I say this, and strongly desire it, while also conceding that in extreme examples of egregious moral wickedness – examples I believe arise only exceptionally rarely in a democracy – then the right moral thing for a judge to do can be to lie. For me the argument pans out in consequentialist terms; it is even easier to make the case if you are a deontologist.

<sup>42</sup> For OIM originalists the external constraint is provided by evidence of what the real life authors of the legal text look to have intended based on the historical evidence that can be found. Yes, there will be times when the evidence is far from conclusive. And yes, if the

But rather than read how I put the case against non-originalist interpretive approaches, here is small taste of how Scalia himself puts it:

It seems to me that a sensible way of approaching this question is to ask oneself whether the framers and ratifiers of the Constitution (or of the Fourteenth Amendment) would conceivably have approved a provision that read somewhat as follows:

In addition to the restrictions upon governmental power imposed by the Bill of Rights, the States and the federal government shall be subject to such additional restrictions as are deemed appropriate, from time to time, by a majority of the Judges of the Supreme Court.  
To pose that question is to answer it.<sup>43</sup>

And that takes me back to Scalia's preferred OPM branch of originalism and my preferred OIM branch. Notice two things. Firstly, Scalia's OPM interpretive approach could, and did, throw up cases where his preferred political and moral outcome differed from what he read the Constitution as dictating. In other words, the above distinction between A) and B) is alive and well for Scalia, and I very much like that fact.

At times, [Scalia's] personal beliefs clashed with his originalism. In *Texas v. Johnson* [491 U.S. 397 (1989)] in which the Supreme Court held that the First Amendment protected flag burning, Justice Scalia joined Justice Brennan's majority opinion. Left to his personal beliefs, Justice Scalia

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cost of finding this evidence is too high (including in time or due to policy-related reasons such as wanting to force legislators to make laws in clear English or not wanting to force litigants to troll through the legislative record at great expense every time they go to court) then you might opt to restrict the allowable search for it. See Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004). On this tangentially related issue, I have argued in the past that you can distinguish constitutional interpretation from statutory interpretation in situations where you are deciding whether to put those sort of policy-related restrictions on the search for authors' intended meaning. I am more open to such restrictions vis-à-vis statutory interpretation than constitutional interpretation because there is much, much more scope for the legislature to respond to them and say 'you judges got our meaning wrong by using these rule of law enhancing restrictions on the search for actual intentions, so we have passed a new, clearer statute'. You basically can never do that with constitutional interpretation situations as amendments almost never happen. So the ability to respond to the imposition of some 'let's advance rule of law concerns or try to keep costs contained' rule that in fact gets the intended meaning wrong will be much lower, if it exists at all, in the context of constitutional interpretation. In my view that means you might strike a different balance as regards constitutional interpretation than you would as regards statutory interpretation. See James Allan, *Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of "Original Intent"*, 6 LEG. THEORY 109-126 (2000).

<sup>43</sup> Antonin Scalia, *Romancing the Constitution: Interpretation as Invention*, in CONSTITUTIONALISM IN THE CHARTER ERA, 337-44, 341 (GRANT HUSCROFT & IAN BRODIE eds., 2004). All seven and a half pages, brimming with wit and vigor, are well worth reading.

has stated that he would throw all flag burners in jail.<sup>44</sup> But his originalist reading of the First Amendment broadly protects freedom of speech and, therefore, Justice Scalia's personal preferences succumbed to his ideological adherences [or as I would put it, to an interpretive approach that could impose answers that differed from those first-order preferences].<sup>45</sup>

Secondly, although I think Scalia's OPM branch of originalism is ultimately wrong-headed and unconvincing compared to the OIM branch (for all the reasons sketched out above), it is also the case that when it comes to *legal texts* (as opposed to, say, a James Joyce novel or a T.S. Eliot poem) the authors overwhelming use words in their standard sense. Write a constitution and you want to be understood in as transparent a way as possible, and so use language in its standard, conventional sense.<sup>46</sup> No one drafting a constitution, or a statute, sets out for a bit of word play. What the drafters and ratifiers intend is very, very likely to align – not just with what some single hypothetical well-informed person at the time *would have taken the words to mean* but indeed – with what virtually all well-informed people at the time *did take them to mean*. Yes, there will be a few peripheral cases where the OPM approach will surreptitiously have to appeal to actual authors' intentions to reinforce some standard dictionary definition or to buttress why one meaning is to be chosen over another, but mostly these two branches or denominations of originalism will give the same answers as to what the Constitution means. As Richard Kay notes more generally,<sup>47</sup> the alternative line of thinking – that conventional or public meaning has somehow diverged from, or more accurately put here, has taken on something near the exact opposite sense of, the intended meaning – requires you to posit a giant screw-up on behalf of the authors.

My larger point is that whenever we are talking about a relatively benevolent liberal democracy (so not, say, apartheid South Africa), I much prefer Scalia's approach to constitutional interpretation to the various non-originalist alternatives. Of course I think he's in the wrong denomination of originalism. But I like his approach miles better than all the 'living tree'/'living Constitution' and moral reading-type alternatives that clearly dominate, say, the European Court of Human Rights, the Supreme Court of Canada in all its *Charter of Rights* litigation, many of the recent SCOTUS majority opinions, and even some of the recent constitutional interpretation in Australia, where they lack any sort of national bill of rights and so you might have hoped for more.<sup>48</sup>

So in addition that is another reason I liked Scalia as a judge. He is, or rather was, considerably better than almost all of the alternatives today on offer. As a Scalian might say, it takes a theory to beat a theory, and the burden is not to prove originalism is flawless or perfect but simply to show it is better than the alternatives.

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<sup>44</sup> 2015 Stein Lecture, October 20<sup>th</sup>, 2015, University of Minnesota.

<sup>45</sup> Stein, *supra* note 19, at 8 (internal notes omitted).

<sup>46</sup> There will be legal terms of art, as well, but these will be used in their conventional, standard legal senses at the time.

<sup>47</sup> See Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 N.W. U. L. REV. 703 (2009).

<sup>48</sup> *Supra* note 24.

### III. SCALIA AND THE SCOPE FOR DEMOCRATIC DECISION-MAKING

To start this Part III it might be desirable to make a confession. I think the best way, or rather the least-bad way, to make large scale social policy decisions is by counting all citizens or residents equally and voting for representatives. These elected parliamentarians or members of Congress will then in turn have an equally weighted vote as to whether their jurisdiction might, say, change the status quo when it comes to abortion, euthanasia, same-sex marriage, and so on. I very much believe it to be a bad thing when unelected judges make these calls, as they regularly have and continue to do, including in the United States and my native Canada.<sup>49</sup> Scalia was against this trend towards ever more powerful judges or judicial usurpation. He liked democratic decision-making, and did not believe that the U.S. Bill of Rights had an ever-expanding scope or reach or ambit, one that allowed more and more issues to be resolved by unelected judges like him. No, Scalia believed that the inroads into parliamentary sovereignty (or into what the elected branches could and could not do) were locked in at the time the constitutional provision was adopted. That is what originalism delivers, a locked-in new floor below which the legislature may not descend but above which reform or change depends on voting and letting-the-numbers-count. The reach of some enumerated list of rights, for Scalia, did not after adoption grow or expand its reach or metaphorically become ‘alive’ based on what nine ex-lawyer top judges happened to believe were changing social values.

The people are not stupid. When the primary function of the Supreme Court was thought to be interpretation of text and identification of legal tradition, the people were content to have justices selected primarily on the basis of legal ability. But they know that Harvard Law School, Stanford Law School – yea, even Yale Law School – do not make a man or woman any more qualified to determine whether there ought to be a right to abortion, or to homosexual conduct, or to suicide, than Joe Six Pack.<sup>50</sup>

How many of today’s top common law judges think like that, have that respect for democratic decision-making, and are skeptical of too great judicial power? Well, we all know the answer is far, far too few. Jeremy Waldron speaks of this aspect of Scalia’s comparative unusualness in this way:

It is worth noting however that this hunger for power does not seem to afflict all judges. Even in a system of strong judicial review, like that of the United States, there are judges who are very diffident about – well, that’s too mild: some are ferociously opposed to – exercising the final power of decision over moral and political issues on which citizens and their representatives disagree. Some of them are influenced in this by their awareness of citizens’ resentment of judges’ arrogation of this power. Consider, for example, Justice Antonin Scalia’s dissent in the great 1992

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<sup>49</sup> I make this argument at length in *DEMOCRACY IN DECLINE: STEPS IN THE WRONG DIRECTION* (2014).

<sup>50</sup> Scalia, *supra* note 43, at 343.

abortion case, *Planned Parenthood v. Casey*.<sup>51</sup> Discussing “the ‘political pressure’ directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions,” Justice Scalia advised his fellow-justices to consider “the twin facts that the American people love democracy and the American people are not fools.” . . . . The comment has to be understood in terms of the context of American constitutionalism, and Scalia is not an opponent of judicial review as such. But he is alert to the threat that it poses to democracy, not only by empowerment of people (judges) who, in many cases, ought not to be so empowered, but also by the way in which juristocracy truncates affirmatively valuable processes of political decision-making. Again, a dissent from Scalia, this time from the gay marriage case of *Obergefell v. Hodges*,<sup>52</sup> makes the point quite well:

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.<sup>53</sup>

To my way of thinking Waldron is wholly correct. Yes, there are other top common law judges out there who are opposed to juristocracy or kritarchy or ‘judges as Philosopher King final decision-makers’ or call it what you will. Yes, there are others opposed to this ‘Hero Judge’ role,<sup>54</sup> true. But not all that many others. Far too many of today’s top judges – and yes, I specifically include top judges in the U.K. and the U.S. – either convince themselves that ‘proportionality’-type analyses are not empowering them to the extent an outside observer can clearly see that they are, or implausibly believe that there is some sort of robust ‘dialogue’ going on with the legislature that limits their last-word power, or actually quite welcome both their power to settle contentious social issues (by majority 5-4 top court judicial vote, as it happens) as well as, more generally, welcoming their restraining power over mere elected politicians. Scalia was not one of those sort of judges. The Supreme Court of the United States, and therefore the country as a whole, was the better for it.

This, then, is yet another reason for my praising Antonin Scalia the top judge. He had more trust in the voters and the democratic process than the vast preponderance of other common law top judges operating in a system with an entrenched bill of rights.<sup>55</sup>

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<sup>51</sup> 505 U.S. 833 (1992).

<sup>52</sup> 576 U.S. \_ (2015) at 2 of the slip opinion.

<sup>53</sup> Jeremy Waldron, “*Who Wants Juristocracy?*” *Who Indeed?* IN THE SEARCH FOR CERTAINTY: ESSAYS IN HONOUR OF JOHN SMILLIE 14-5 (Shelley Griffiths et. al. eds., 2016) (internal notes omitted).

<sup>54</sup> See John Gava, *The Rise of the Hero Judge*, 24 U. NEW S. WALES L. J. 747 (2001).

<sup>55</sup> And note that in my view the U.K.’s Human Rights Act, or statutory bill of rights, has empowered the top judges to an extent that rivals judicial power in the U.S. and

#### IV. CONCLUDING REMARKS

It should be plain to all readers by now that I was a fan of Scalia the judge. I would gladly have put his clone on to the High Court of Australia, or on to the Supreme Court of Canada, or indeed back on to the Supreme Court of the United States. By my way of thinking it is extremely unlikely that Scalia's replacement will measure up to the judge he or she is replacing – not in terms of wit, humor and quality of dissents; not in terms of the interpretive theory this replacement brings to the job; not in terms of a core respect for the voters' choices; and notwithstanding whether the replacement is nominated by a Democrat or a Republican.

By contrast, most law professors in the U.S. – and possibly more again in Canada, the U.K., Australia and New Zealand – will see just about any replacement for Scalia as an improvement. A major reason for that, in my view, is that many law professors quite like a solid measure of judicial activism or 'social progress through the unelected judges' and are not overly trustful of the choices that would be made by a majority of their fellow citizens.<sup>56</sup> Call this preference one for a modern day form of aristocracy if you wish. But if I am right, and this view pervades the legal academy, then it would be a brave punter who bet against its being passed on to the next generation of lawyers, probably in even more virulent form.

I find that prospect pretty depressing. I think Scalia did too.

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Canada. See my *Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky* in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 108-26 (Tom Campbell et.al. eds., 2011).

<sup>56</sup> That is the kind way of putting it. A less kind way would be to say that they are openly elitist, preferring the quality of decisions lawyers and judges fashion to those of the great unwashed. In short, they believe that strong judicial review delivers the goods, and teach their students accordingly.

# JUSTICE SCALIA: TENURED FOX IN THE DEMOCRATIC HEN-HOUSE?

Jane Marriott\*  
*University of London*

## ABSTRACT

*This paper examines Justice Scalia's approach to campaign finance adjudication, in particular his skepticism of legislative motive. Three distinct strands of skepticism are identified: power-grabbing, incumbent-bracing and speech-preventing. As regards democracy Justice Scalia is identified as being caught in definitional dilemma whereby his campaign finance jurisprudence appears to serve a particular vision of democracy, which is, itself, the identifiable creature of his approach to constitutional adjudication. Ultimately, it is argued that, whilst a liberal dose of mistrust of government might well be warranted in cases concerning the devices of democracy, in the task of scrutinising campaign finance regulation and reform, a strong argument emerges for suspicion of judicial motives too since there is as much danger to democracy posed by the tenured fox as by the incumbent one.*

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\* Lecturer in Law, School of Law, Royal Holloway, University of London.

## I. INTRODUCTION

In the context of the 40<sup>th</sup> anniversary of *Buckley v. Valeo*,<sup>1</sup> a recent line of authority spurning electoral reforms,<sup>2</sup> an election cycle in which expenditure on campaigning exceeded \$7 billion,<sup>3</sup> and the death of Justice Scalia, it was perhaps unsurprising that 2016 came to be widely regarded as offering an opportunity for deliverance from a Supreme Court majority seemingly bent on deregulation of the campaign finance system and in denial of the consequences of its actions. Justice Scalia belonged to the gang of five – a ‘conservative on campaign finance’ cohort also comprising Chief Justice Roberts and Justices Alito, Kennedy, and Thomas. Commentators have condemned the resulting disfigurement of American elections, with Justice Scalia in receipt of much academic, political and public opprobrium, despite having rarely authored a majority campaign finance opinion for the Court.<sup>4</sup> It must be acknowledged that, as in other areas of Supreme Court adjudication, Justice Scalia’s dissents and concurrences on controversies in campaign finance tended to draw fire rather more readily than those of others. Given his judgments’ often stark concision and potent bite, such was the nature of things.<sup>5</sup> It must also be acknowledged that, despite the undoubted transformative power of elections, the Trump victory is unlikely to liberate the Court from the grip of its conservative Justices, or from agenda led, market driven, laissez-faire campaign finance adjudication. The new President’s recognition of a “broken”<sup>6</sup> system and promise to “drain the swamp”<sup>7</sup> might be welcome but the rhetoric is wholly disconnected from the reality that, on regulation and reform, the Supreme Court’s role is determinative.

Given the prevalence of the 5-4 split in campaign finance cases, it is self-evident that having to fill an empty seat on the Supreme Court bench could “flip national rules for American elections by 180 degrees.”<sup>8</sup> Currently, however, the possibility of an about turn appears remote. Instead, with a probable, and probably increasingly acute, lurch to the right as a result of successive Trump appointments to the Supreme Court, 2016 may prove a false dawn for campaign finance reform. At the time of writing it is too early to say but, for the new administration, the issue may be set low on the agenda and, given what has been achieved under the existing regulatory regime, the political

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<sup>1</sup> 424 U.S. 1 (1976).

<sup>2</sup> See *Randall v. Sorrell*, 548 U.S. 230 (2006), *Federal Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449 (2007), *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010).

<sup>3</sup> Projected figures as at 10 November 2016. See <https://www.opensecrets.org/overview/cost.php> (accessed 3/7/17), showing total spending as \$6,917,636,161, comprised of \$4,266,514,050 for Congressional races and \$2,651,122,110 for the Presidential race.

<sup>4</sup> See, e.g., Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723 (2011).

<sup>5</sup> On Justice Scalia’s writing style, see Charles Fried, *Manners Makyth Man: The Prose Style of Justice Scalia*, 16 HARV. J. L. & PUB. POL’Y, 529 (1993); Kagan, *Of Golf and Ghouls: The Prose Style of Justice Scalia*, 9 J. LEG. WRITING INST. 71 (2003).

<sup>6</sup> *First Presidential Debate*, Sep. 26, 2016.

<sup>7</sup> <https://www.donaldjtrump.com/press-releases/trump-pledges-to-drain-the-swamp> (last visited March 7, 2017).

<sup>8</sup> Richard L. Hasen, *After Scalia: The Future of United States Election Law*, School of Law, U.C. Irvine Sch. of Law Research Paper Series No 2016-14, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2763713](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2763713).

will may well turn out to be lacking; even if it is broke, don't fix it. Considering the circumstances, part of Justice Scalia's jurisprudential bequest could turn out to be his contribution to a conservative blueprint for campaign finance adjudication that may endure for decades to come. His campaign finance jurisprudence might recently have been dammed with faint praise as merely "rhetorically effective"<sup>9</sup> but the question that should perhaps be posed is whether it needs also be appreciated for its clear ideological grounding and internal jurisprudential consistency? Those hallmarks are, after all, largely absent from the broad sweep of either the Court's campaign finance adjudication which, since *Buckley*, has "swung like a pendulum,"<sup>10</sup> or Justice Scalia's judicial responses to matters of election law generally, which lack the same settled characteristics.<sup>11</sup> Here, Justice Scalia's campaign finance jurisprudence is examined, in particular its skepticism of legislative motive. Three distinct strands of skepticism are identified: power-grabbing, incumbent-bracing and speech-preventing. Ultimately, it is argued that, while a liberal dose of mistrust of government might well be warranted in cases concerning the devices of democracy, in the task of scrutinising campaign finance regulation and reform, a strong argument emerges for suspicion of judicial motives too since there is as much danger to democracy posed by the tenured fox as by the incumbent one.

## II. BUCKLEY V. VALEO

In *Buckley v. Valeo*, in opposition to the strongly worded dissent of Justice White maintaining that unlimited election spending constituted "a mortal danger" against which "effective preventive and curative steps"<sup>12</sup> should be taken, the Supreme Court invalidated key provisions of the Federal Election Campaign Act 1974 (FECA), Congress's post-Watergate reforms of money in politics. The decision defined the parameters of constitutionally permissible regulation of election campaigns and has set the tone for campaign finance adjudication for the last forty years. For present purposes, *Buckley*'s key holdings were fourfold. Firstly, whilst limits on contributions were upheld, limits on election expenditures were struck down as unconstitutional because they imposed direct inhibitions on political speech and thus fell foul of the First Amendment. Secondly, a governmental interest in equalizing the relative ability of all voters to influence the outcome of elections was not sufficiently compelling to justify the burden placed on First Amendment freedoms as a result: "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>13</sup> Thirdly, the only governmental interest compelling enough to support campaign finance regulation was an interest in preventing corruption or the appearance of corruption. Fourth, and finally, FECA's

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<sup>9</sup> *Id.* at 2.

<sup>10</sup> Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 673 (2006).

<sup>11</sup> See Hasen, *supra* note 8.

<sup>12</sup> 424 U.S. 1 259 (1976).

<sup>13</sup> *Id.* at 49.

disclosure provisions were upheld, being deemed instrumental in providing the electorate with information regarding the provenance and deployment of campaign funds, deterring actual corruption and avoiding the appearance of corruption and detecting violations of campaign finance laws.

Prior to *Buckley*, the Supreme Court had experienced only “glancing encounters”<sup>14</sup> with the kinds of conflicts presented by campaign finance regulation. *Buckley* was unique because, in the context of adjudicating on devices of democracy, it forced the Court to confront the tensions between equality and liberty, individual and collective welfare, the integrity of the democratic system and legislative self-interest, and state and judicial power. Polsby states of the much vilified decision that there had “never been a more treacherous case for balancing interests and harmonizing values”<sup>15</sup> and notes that the Court’s opinion “has more than its share of dark places and contradictions.”<sup>16</sup> Shortly after his appointment to the Supreme Court in 1986, however, Justice Scalia declared, in *Austin v. Michigan*, that “*Buckley* should not be overruled, because it was entirely correct.”<sup>17</sup> Heavily dependent on the tenets of *Buckley*,<sup>18</sup> Justice Scalia’s dissent in *Austin* provided the principal, first-person articulation of positions that would become characteristic of his campaign finance jurisprudence, namely: faith in disclosure as the least worst infringement of individuals’ liberties in regulating money in politics,<sup>19</sup> a narrow construction of corruption, a correspondingly expansive construction of free speech, a healthy regard for the abilities of citizens to make informed choices without government interference in fundamental political rights in order for them to do so,<sup>20</sup> and a skepticism of legislators’ motives.<sup>21</sup>

### III. SELF-INTEREST

According to Ortiz, campaign finance regulation is motivated by four explicit concerns: improving the day to day operation of legislative politics, improving the quality of political discussion and debate, protecting democratic processes from corruption, and maintaining political equality.<sup>22</sup> The regulatory exercise meets

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<sup>14</sup> Daniel D. Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, SUP. CT. REV. 5 (1976).

<sup>15</sup> *Id.* at 42.

<sup>16</sup> *Id.* at 14.

<sup>17</sup> *Austin v. Michigan Chamber of Comm.*, 494 U.S. 652, 683 (1990) (Scalia, J., dissenting). Later, Justice Scalia would join Justice Thomas in maintaining that *Buckley* should be overruled because it “provided *insufficient* protection to political speech”: *Randall v. Sorrell*, 548 U.S. 230, 230 (2006) (emphasis added).

<sup>18</sup> Explicitly acknowledging the importance of the “seminal” case of *Buckley v. Valeo* in *Federal Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449, 485 (2007).

<sup>19</sup> Joining Justice Kennedy in dissent, stating “[t]he more narrow alternative of recordkeeping and funding disclosure is available.” *Austin v. Michigan*, 494 U.S. 652, 707 (1990).

<sup>20</sup> *Id.* at 695 (“the people are not foolish but intelligent and will separate the wheat from the chaff”).

<sup>21</sup> *Id.* at 660 and 669.

<sup>22</sup> Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 897-899 (1998).

little ideological resistance, being deemed “amply justified in principle”<sup>23</sup> yet, in practice, campaign finance regulation “raises the spectre of governmental efforts to promote the interests of existing legislators.”<sup>24</sup> Thus, whilst each component of a given regulatory framework might be explicitly directed at ridding politics of the malign influence of money it may also implicitly benefit incumbent legislators in possession of “linedrawing power”<sup>25</sup> and an overwhelming desire to remain in office. Re-election appears to be the one policy on which they all agree.<sup>26</sup> The regulation of campaign finances may thus present a distinctive situation which appears to run counter to the adversarial nature of partisan politics due to an apparent, albeit variable, political consensus both on the need to purify the system and the means by which purification is to be achieved.<sup>27</sup> The assumption may not, therefore, be made that regulations governing the raising and spending of money for political purposes are neutral or necessarily constructed with the health and integrity of democratic processes in mind, irrespective of the fact that they may be so labelled.<sup>28</sup> The wider impact of self-interested campaign finance regulation can be severe, resulting in uncompetitive elections, a stacked and ossified democratic system with representatives “planted in office for perpetuity.”<sup>29</sup> It is apparent, therefore, that the regulation of campaign finance can all too easily result in the promotion of political expediency over democratic principle where the state becomes an “institutionalized structure of support, sustaining insiders while excluding outsiders”<sup>30</sup> which, itself, “counts as a problem of corruption.”<sup>31</sup> In campaign finance adjudication, there has been explicit and longstanding judicial recognition that both existing regulations and proposals for reform may be designed as mechanisms of power-holding or maintenance, intended to “serve the interests of the ‘ins’ ... in resisting the incursions of the ‘outs’.”<sup>32</sup> The Court of Appeals in *Buckley*, for example, noted that “[t]he wiles of ambitious office seekers and their supporters are not easily cabined.”<sup>33</sup> In similar fashion, rather than simply expressing deference in the face of what were ostensibly “policy decisions” on regulating campaign finances, Justice Scalia

<sup>23</sup> Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1390 (1994).

<sup>24</sup> *Id.* at 1400.

<sup>25</sup> Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent Protecting Gerrymanders*, 116 HARV. L. REV. 649, 658 (2002).

<sup>26</sup> Michael Johnston, *The Incumbent Protection Act of 2002? Politics Under the New Campaign Finance Law*, Institute of Advanced Study, June 2003 – available at <https://www.sss.ias.edu/files/papers/paper15.pdf>.

<sup>27</sup> Generally speaking, western liberal democratic campaign finance controls comprise a combination of all or some of expenditure limits, contribution ceilings, disclosure provisions and an enforcement body.

<sup>28</sup> For a discussion of this phenomenon, see Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996). See also JOHN SAMPLES, *THE FALLACY OF CAMPAIGN FINANCE REFORM* (2006) and Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994).

<sup>29</sup> Persily, *supra* note 25, at 654

<sup>30</sup> Richard S. Katz & Peter Mair, *Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party*, 1 PARTY POLITICS 5, 16 (1995).

<sup>31</sup> Johnston, *supra* note 26, at 1.

<sup>32</sup> *Buckley v. Valeo*, 519 F.2d 821, 843 (D.C. Cir. 1975).

<sup>33</sup> *Id.*

consistently proved extremely sensitive to the possibility of legislation “whose temporary political importance may threaten to eclipse respect for inconvenient individual liberties”,<sup>34</sup> despite evidence that, over the last thirty years, incumbency advantage has dwindled due to rising levels of party loyalty, the nationalization of electoral politics and closer articulation between presidential and congressional elections.<sup>35</sup> Highlighting the weaknesses of the “self-interest” argument for restricting campaign finance regulation and reform, Hasen maintains that it is both axiomatic<sup>36</sup> that politicians might favor campaign finance legislation and inevitable that the Court’s campaign finance hawks would latch on to the un-nuanced idea of campaign finance laws as a “protection racket”<sup>37</sup> since this would best serve the deregulatory agenda. Notwithstanding his recognition that legislative motivation is often inexplicit and difficult to discern,<sup>38</sup> his philosophy that the meaning of the text was determinative<sup>39</sup> and belief that, in any event, Justices should be “governed by laws, not by the intentions of legislatures”<sup>40</sup> throughout his tenure, and with an enthusiasm that perhaps exceeded the political reality, Justice Scalia consistently floated the idea of legislators’ self-interest as a danger to democracy where it informed campaign finance rules. In the courtroom, where scrutiny might reveal the threat of self-interest having crystallized into legislative output and political practice, Justice Scalia’s “hard-charging skeptic”<sup>41</sup> jurisprudence reveals three distinct manifestations of legislators’ self-interest in campaign finance regulation: power grabbing, incumbent bracing and speech preventing.

#### A. POWER GRABBING

In the power grabbing sense Justice Scalia’s judgments depict legislators as disingenuous, moralizing imperialists requiring careful judicial supervision, and from whom the electorate and electoral processes need the protection provided by the Court. The path to campaign finance reform may be littered with “the very best of announced objectives (dictators promise to bring order, not tyranny), and often with the very best of genuinely intended objectives (zealous policemen conduct unlawful searches in order to put dangerous felons behind bars)”<sup>42</sup> but leads to “governmental abridgement of liberty”<sup>43</sup> nonetheless. Dissenting in *Austin v.*

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<sup>34</sup> T.R.S. Allan, *The Limits of Parliamentary Sovereignty*, PUB. L. 614, 620-621 (1985).

<sup>35</sup> Gary C. Jacobsen, *It’s Nothing Personal: The Decline of Incumbency Advantage in US House Elections* 77 J. POLIT. 861 (2015).

<sup>36</sup> RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT AND THE DISTORTION OF AMERICAN ELECTIONS* 147 (2016).

<sup>37</sup> *Id.*

<sup>38</sup> “I cannot say for certain that many, or some, or even any, of the Members of Congress who voted for this legislation did so not to produce fairer campaigns but to mute criticism of their records and facilitate re-election.” *McCConnell v. Fed. Election Comm’n*, 540 U.S. 93, 262 (2003).

<sup>39</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

<sup>40</sup> *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993).

<sup>41</sup> Bob Bauer, *Justice Scalia and Campaign Finance: A Puzzle*, <http://www.moresoftmoneyhardlaw.com/2016/02/justice-scalia-campaign-finance-one-puzzle/> (Last visited March 7, 2017).

<sup>42</sup> *Austin v. Michigan Chamber of Comm.*, 494 U.S. 652, 692 (1990).

<sup>43</sup> *Id.*

Michigan Justice Scalia argued that the Court’s support for the Michigan Campaign Finance Act’s prohibition on corporations using treasury money in independent expenditures supporting or opposing candidates running for state office eliminated organisations from public debate and, thus, permitted the “always dominant” power of government firstly to be augmented and, secondly, deployed “to impoverish the public debate.”<sup>44</sup> In similar fashion, in *Citizens United v. Fed. Elections Comm’n*,<sup>45</sup> where the Court held that the federal government, under cover of the Bipartisan Campaign Reform Act (BCRA), could not prevent corporations from spending money to support or denounce individual candidates in elections, Justice Scalia challenged the idea that such speech could be prohibited because, in the view of government, it fostered “moral decay” or failed to serve “public ends,” the natural consequence then being “no limit to the Government’s censorship power.”<sup>46</sup>

### B. INCUMBENT BRACING

The second way in which legislators’ self-interest was employed by Justice Scalia to undercut state and federal governments’ attempts at campaign finance regulation and reform was through its depiction as a means of bracing incumbents against the efforts of challengers to gain office. In a number of cases spanning twenty-five of his thirty year tenure, the perceived character flaws and shortcomings of incumbents were scathingly identified, and the statistically and anecdotally well-documented advantages of incumbency<sup>47</sup> made clear. In *Austin* Justice Scalia declared that “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,”<sup>48</sup> and in *McConnell* he posed the question whether, through the provisions of the BCRA, it was “accidental ... that incumbents raise about three times as much ‘hard money’ – the sort of funding generally *not* restricted by this legislation – as do their challengers?”<sup>49</sup> The self-interest issue does not just feature disparities in the accumulation of cold hard cash, however. Often regulation is commended by legislators on the basis of its even-handedness in treating both challengers and incumbents equally but, even then, and perhaps in particular then,

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<sup>44</sup> *Id.* at 694.

<sup>45</sup> 558 U.S. 310 (2010).

<sup>46</sup> *Id.* at 391. In this instance provisions of the BCRA prevented the showing of a documentary seeking to discredit Hillary Clinton’s 2008 bid for presidential candidacy on the basis that it was an election communication.

<sup>47</sup> See, e.g., Gary W. Cox and Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?* 40 AM. J. POL. SCI. 478 (1996); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition* SUP. CT. REV. 331 (1997); Stephen Ansolabehere & James M. Snyder, *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942–2000*, 1 ELECTION L. J. 315 (2002); David R. Mayhew, *Incumbency Advantage in U.S. Presidential Elections: The Historical Record*, 123 POLIT. SCI. Q. 201 (2008); Alexander Fourniaies & Andrew Hall, *The Financial Incumbency Advantage: Causes and Consequences*, 76 J. POLIT. 711 (2014).

<sup>48</sup> *Austin v. Michigan Chamber of Comm.*, 494 U.S. 652, 692 (1990).

<sup>49</sup> *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 249 (2003).

it would be prudent to question “incumbents’ notions of healthy campaigns”<sup>50</sup> since those notions might be conditioned by a desire to perpetuate the advantages of incumbency and, in practice, may lead to the suppression of challengers’ actual speech or opportunities for it.<sup>51</sup> In *Austin* Justice Scalia addressed the deficiencies of one such statute, saying of the Campaign Finance Act that “perhaps it was trying to ensure ‘balanced’ presentation because it knows that with evenly balanced speech incumbent officeholders generally win”<sup>52</sup> – because of other advantages that accompany possession of public office, such as profile – whilst acknowledging that, ultimately, “any restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.”<sup>53</sup> This brings us to the issue of speech prevention as a consequence of self-interest. It is here, in First Amendment territory, where Justice Scalia’s deployment of self-interest as a counter to regulation and reform is most compelling, expressing doubt that America’s “healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not.”<sup>54</sup> It must, however, be said that Justice Scalia’s commitment to skepticism, whilst enduring, was neither total nor complete.

It has been indicated that, in campaign finance cases, Justice Scalia exhibited a high degree of vigilance where legislators’ self-interest was likely to manifest. As has also been indicated, he supported disclosure of the sources of campaign contributions as an unquestioned good. *McIntyre v. Ohio Elections Commission*<sup>55</sup> concerned a prohibition on the distribution of anonymous campaign literature contained in Ohio’s Elections Commission Code, which the Court found unconstitutional as it violated the First Amendment’s freedom to publish anonymously. Justice Scalia disagreed. Bauer notes that where, at the hands of Justice Scalia, legislators would usually “come in for rough treatment as self-interested actors who are not to be trusted, as political wolves in policy-makers’ clothing”<sup>56</sup> by contrast, in *McIntyre* the views of elected legislators were much better received with the Justice urging the Court to have a “decent regard for the practical judgment of those more familiar with elections than we are” and for “universal and long-established American legislative practice.”<sup>57</sup> It may be argued, therefore, that self-interest – at least in the sense of desiring a particular outcome – operates on more than merely the legislative level, appearing to be present in Justices’ judgments too since here it was deployed by Justice Scalia to support the principle and practice of disclosure, something of which he approved. Certainly, his mode of constitutional adjudication has been labelled “essentially opportunistic,”<sup>58</sup> through adopting precedents and approaches when they produced a result he wanted. This

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<sup>50</sup> Fed. Election Comm’n v. Wisconsin Right to Life, 551 U.S. 449, 503 (2007).

<sup>51</sup> *Randall v. Sorrell* 548 U.S. 230, 268 (2006), Justice Scalia joining Justice Thomas dissent, stating “[i]n practice, this restriction will generally suppress more speech by challengers than by incumbents”.

<sup>52</sup> *Austin*, 494 U.S. 652, 692 (1990).

<sup>53</sup> *McConnell*, 540 U.S. 93, 249 (2003).

<sup>54</sup> *Austin*, 494 U.S. 652, 695 (1990).

<sup>55</sup> 514 U.S. 344 (1995).

<sup>56</sup> *Supra* note 41.

<sup>57</sup> 514 U.S. 344, 381 & 377 (1995).

<sup>58</sup> Nelson Lund, *Antonin Scalia and the Dilemma of Constitutional Originalism*, 11 George Mason Legal Studies Research Paper No. LS 16-36. (Dec. 5, 2016). Available at SSRN: <https://ssrn.com/abstract=2880578>.

“disingenuous” decision-making and resulting jurisprudence is criticized as the result of value choices masquerading as neutral judicial methodology.<sup>59</sup>

### C. SPEECH PREVENTING

There can be no doubt as to the centrality of the First Amendment to United States’ democracy: “Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”<sup>60</sup> To that end, Sunstein has expressed the belief that “*properly designed* campaign finance legislation may be fully compatible with the system of free expression, insofar as those measures promote the goal of ensuring a deliberative democracy among political (though not economic) equals.”<sup>61</sup> As we have seen, however, for Justice Scalia significant and pressing issues remained regarding the interests and motivations – both foreground and background – informing that proper design. It is argued here that, in circumstances where legislators’ motives are likely to be mistrusted, no “design” under scrutiny – whether presented as “proper” or not – should be taken at face value. Indeed the very concept of a “proper” design should set alarm bells ringing since it suggests the fulfilment of some, or somebody’s, vision of campaign finance. Given Justice Scalia’s mistrust of legislative motivation, and his adoption of *Buckley’s* expansive reading of the First Amendment in the sphere of campaign finance, there can be little surprise at his resistance to efforts to condition or curb free speech in that setting, notably, and controversially, in *Citizens United* and *Wisconsin Right to Life*, irrespective of how “proper” (in the Sunstein sense of being oriented to the functioning of a deliberative democracy) the design appeared to be. The design at issue on this occasion was the BCRA, in the “genesis and consequences” of which Justice Scalia found a “wondrous irony” since “the institutions it was designed to muzzle – unions and nearly all manner of corporations – for all the corrosive and distorting effects of their immense aggregations of wealth, were utterly impotent to prevent the passage of this legislation that forbids them to criticize candidates (including incumbents).”<sup>62</sup>

*Citizens United*, a conservative, not for profit advocacy group, questioned the constitutionality of §441b of the BCRA which, in short, prohibited corporations from spending general funds on electioneering communication or speech expressly advocating the election or defeat of a candidate within 60 days of an election. Under strict scrutiny as it implicated First Amendment issues, in the Court’s majority opinion §441b failed to further a compelling government interest and, in treating the speech of corporations differently from the speech of others (namely, natural persons) violated First Amendment neutrality as to speakers and points of view.

<sup>59</sup> Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 385 (2000). See also, Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 150 (2008).

<sup>60</sup> *Citizens United*, 558 U.S. 310, 339 (2010).

<sup>61</sup> Sunstein, *supra* note 23, at 1400 (emphasis added).

<sup>62</sup> *Wisconsin Right to Life*, 551 U.S. 449, 508 (2007).

Against the strongly-worded opinion of the four dissenting Justices expressing concern that unfettered spending by corporations risked their over-influence and distortion of elections the Court's conservative majority found that non-profit corporations' independent election expenditures could not be restricted.<sup>63</sup> The decision removed *Austin's* shackles, freeing corporations and unions to spend unlimited amounts of money on electioneering and other political activities as long as they were undertaken independently of a party or candidate.

In *Austin*, with Justice Scalia in dissent, Justice Thurgood Marshall had delivered the Court's majority ruling that the government could ban electoral expenditures by business corporations in order to prevent them from deploying "resources amassed in the economic marketplace" with the purpose of "obtaining an unfair advantage in the political marketplace."<sup>64</sup> Justice Scalia rejected the idea of government being permitted to exclude actors from the marketplace of ideas, on the basis that, irrespective of how rational and egalitarian it might seem on the face of it, "government cannot be trusted to assure ... the 'fairness' of political debate"<sup>65</sup>, in that case finding it "entirely obvious" that the "object of the law we have approved today is not to prevent wrongdoing but to prevent speech."<sup>66</sup>

Here, in *Citizens United*, some twenty five years later, Justice Scalia dismissed the majority opinion in *Austin* as based on an "Orwellian" view "that too much speech is an evil that the democratic majority can proscribe."<sup>67</sup> In later defending the expansion of *Citizens United's* principles in *Wisconsin Right to Life*, Justice Scalia identified the Court's "most important constitutional task"<sup>68</sup> as ensuring freedom of political speech, further noting that "when a statute creates a regime as unworkable and unconstitutional as today's effort ... it is our responsibility to decline enforcement."<sup>69</sup> The Court has been censured for the practical consequences of *Citizens United*, which opened the floodgates to moneyed interests rather more widely than before.<sup>70</sup> For his part, however, and measured against the ability of political parties to engage in aggregate speech, Justice Scalia thought it better to "celebrate rather than condemn" the addition of corporate speech to the public debate since "to exclude or impede" it would "muzzle the principal agents of the

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<sup>63</sup> The majority was also concerned that corporations should not be granted the same free speech rights as human beings. Under the guidance of the conservative majority, *Citizens United* has been extended to embrace for-profit corporations, labor unions and other associations. See *Wisconsin Right to Life v. Fed. Election Comm'n*, 551 U.S. 449 (2007).

<sup>64</sup> *Austin v. Michigan Chamber of Comm.*, 494 U.S. 652, 659 (1990), (citing *Fed. Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)).

<sup>65</sup> *Id.* at 680.

<sup>66</sup> *Id.* at 694.

<sup>67</sup> See *Austin*, 494 U.S. 652, 678 (1990). Farber notes that "[i]t is precisely this tendency to overregulate speech activities that requires constitutional protection for speech" – see Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 561 (1991). "Orwellian" is also used by Justice Scalia to describe *Roe v. Wade*: "[T]o portray *Roe* as the statesmanlike 'settlement' of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian." *Planned Parenthood v. Casey*, 505 U.S. 833, 995 (1992).

<sup>68</sup> See *Wisconsin Right to Life*, 551 U.S. 449, 503 (2007).

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 2014* and Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

modern free economy,”<sup>71</sup> those agents being corporations rather than politicians or the people. It has been argued that the outcome of *Citizens United* is best explained as “representing a triumph of the libertarian over the egalitarian vision of free speech.”<sup>72</sup> In truth, since *Buckley*, the majority of campaign finance cases could, in broad terms, be explained in that way. The libertarian vision, Sullivan notes, “serves the end of liberty by checking government overreaching into the private order.”<sup>73</sup> This would seem to chime with Justice Scalia’s preferences for broadly construed freedom of speech and cynically approached legislative initiatives in campaign finance cases.

Basham and Polhill, arguing that elected representatives should be excluded from campaign and election rule-making and regulation, state that there is unlikely to be an improvement in political competition unless “the incumbent fox ends his tenure as guardian of the democratic henhouse”<sup>74</sup> but, whatever the concerns over the self-interest of legislators, an equivalent and equally difficult set of issues arises when courts, rather than legislatures, are permitted to determine the fate of campaign finance regulation. Do courts, insulated from politics as they supposedly are (but clearly are not) possess the requisite institutional and democratic competence to allow themselves to overrule the conclusions of legislators on political realities? In the immediate aftermath of *Buckley*, Leventhal took the view that, where such realities are involved and there is a substantial possibility that a statute might improve the health of democracy, it should be upheld and judged on its results.<sup>75</sup> Judicial deference in such cases may therefore be “extremely appropriate . . . since legislators have first-hand knowledge.”<sup>76</sup> This was the approach taken by the Supreme Court in four campaign finance cases of the early 2000s, at the tail end of the Rehnquist Court. The cases – identified by Hasen as the “New Deference Quartet”<sup>77</sup> – diluted

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<sup>71</sup> *Citizens United*, 558 U.S. 310, 393(2010). Justice Scalia unconvincingly attempted to depict corporations and political parties in the same guise, arguing that both could speak for individuals who had associated together, that the nature of the speech does not change, have less value or lose its potency according to its source of funding and that, because the First Amendment did not mention “speakers”, but concerned “speech”, no category of speakers could be excluded.

<sup>72</sup> Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010).

<sup>73</sup> *Id.* at 155.

<sup>74</sup> *Uncompetitive Elections and the American Political System*, Cato Institute Policy Analysis No. 547, 30 June 2005 at 15.

<sup>75</sup> Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 346 (1977).

<sup>76</sup> Marlene Arnold Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815, 823 (1974),

<sup>77</sup> See Hasen, *supra* note 10 at 674. The cases comprising the New Deference Quartet are *Nixon v. Shrink Missouri PAC*, 528 U.S. 377 (2000), *Fed. Election Comm’n v. Colorado Repub. Fed. Campaign C’tee*, 528 U.S. 377 (2000), *McConnell v. Fed. Election Comm’n* 540 U.S. 93 (2003) and *Fed. Election Comm’n v. Beaumont* 539 U.S. 146 (2003). Hasen identifies *Nixon v. Shrink Missouri* as the most significant of the four cases: in respect of contribution limits, it raised the threshold for constitutional challenge of contribution limits and reduced the level of scrutiny for review of contribution limits. In addition, a more expansive definition of corruption was adopted, thus easing government’s justification for campaign finance regulations, as well as proof of corruption being made easier to evidence 674-75.

*Buckley's* dogma but, in so doing, exhibited “increasing incoherence”<sup>78</sup> when set against its rather more definite standards, due to the “strained reasoning”<sup>79</sup> employed to read an equality rationale into campaign finance jurisprudence which forcefully disavowed it. As might be imagined, Justice Scalia did not embrace “new deference”, which would, in any case, fall to a reaffirmation of *Buckley* by the Roberts Court. As such, the characterization of “deference quartet” case *McConnell* as a “precarious . . . victory for reform”<sup>80</sup> seems apposite and of wider relevance and application than to *McConnell* alone.

Schauer maintains that campaign finance cases should not be treated as a means of deciding between “competing visions of democracy.”<sup>81</sup> Instead, he claims that they are cases concerning “the devices of democracy [which] may have political valence and reflect substantive political values [but] are . . . in some rough and ready way, procedural.”<sup>82</sup> Thus it is necessary to “treat the question of ‘Who Decides?’ as distinct from the question of what is to be decided.”<sup>83</sup> Only in this way can we “recapture the possibility that one could simultaneously believe campaign finance reform to be a good idea while believing that legislative decisions about campaign finance reform were suspect.”<sup>84</sup> The basis for Schauer’s argument is that “[a]ll of the devices of democracy are antecedent to substantive democratic decisions” and are “likely to be misdecided if subject to actual and substantively influenced democratic processes.”<sup>85</sup> Legislative decisions about campaign finance regulations thus “merit the protections inherent in constitutionalization” since “if debates about the procedures to be employed . . . might be driven by concerns about which procedures would best facilitate the substantive agendas of various groups, then we might prefer to give the courts . . . a larger role to play,”<sup>86</sup> though turning the courts into “trustbusters of political cartels”<sup>87</sup> is, itself, thick with difficulty.

#### IV. JUDGING DEMOCRACY: PARADOX AND DILEMMA

Persily urges judicial intervention in campaign finance cases, where “crafty linedrawing”<sup>88</sup> risks thwarting majority will and threatens to undercut the idea of meaningful choice for the electorate through eliminating or reducing the possibility of competition for control of the legislature. In assessing the role played by judges

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<sup>78</sup> *Id.* at 676.

<sup>79</sup> *Id.*

<sup>80</sup> Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELEC L. J. 147, 149 (2004).

<sup>81</sup> Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1341. (1994)

<sup>82</sup> *Id.* at 1326.

<sup>83</sup> *Id.* at 1345.

<sup>84</sup> *Id.* at 1346.

<sup>85</sup> *Id.* at 1337.

<sup>86</sup> *Id.*

<sup>87</sup> Persily, *supra* note 25, at 650.

<sup>88</sup> *Id.* at 658.

in election law cases, Ortiz identifies what he calls the “democratic paradox”<sup>89</sup> and Ringhand a “definitional dilemma.”<sup>90</sup> As will become clear, not every Justice would be trapped by the paradox, yet every Justice would appear to be caught in the definitional dilemma.

### A. PARADOX

Ortiz argues that campaign finance regulation – of whatever hue, and premised upon whatever basis – should be functionally redundant. A central normative assumption of democracy is that voters are civically competent; a central normative assumption of campaign finance regulation is that voters are not civically competent:

To the extent Americans are ... engaged, informed voters who carefully reason through political arguments, we hardly need the kind of protection that campaign finance regulation affords us. Even if one side of a political race dramatically outspends the other, voters can be relied on to sort through the merits and ultimately decide on the right candidate or policy. ... [T]he equality-protecting and other rationales underpinning most forms of campaign finance regulation are premised on doubts about voters’ civic capabilities. This is the democratic paradox of campaign finance reform.<sup>91</sup>

Of course, where a democracy appears not to be functioning correctly, or the people seem to be making the “wrong” choices, legislative correction might be attempted, which may, in turn, require consideration by or intervention from the Supreme Court which, according to Ortiz, “manipulates its assumptions about individual political behavior in a way that should trouble us.”<sup>92</sup>

Ortiz identifies two distinctive approaches taken to voters’ civic competence by the Supreme Court. One approach conceives of the voter as a “civic smarty” and the other as a “civic slob.”<sup>93</sup> A “civic smarty” is engaged in active, well-informed deliberation. By contrast the “civic slob” is passive, and ill-informed as a result. If a Justice conceives of voters as civic slobs – even if that conception is unarticulated – that will almost inevitably dispose that Justice towards campaign finance regulation as a means of better ensuring a well-functioning deliberative democracy. It then becomes impossible for that Justice to see voters as anything but civic slobs since their rehabilitation to civic smarties would remove the *raison d’être* for the regulation and, by extension, the precedential framework and what it supports. By contrast, Justices who envisage voters as civic smarties will bear no pre-disposition to regulation, trusting in the system and its users to deliberate and register preferences as required. For Ortiz “[d]eregulationists have had the better

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<sup>89</sup> Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893 (1998).

<sup>90</sup> Lori Ringhand, *Defining Democracy: The Supreme Court’s Campaign Finance Dilemma*, 56 HASTINGS L. J. 77 (2004).

<sup>91</sup> Nicholson, *supra* note 76, at 895.

<sup>92</sup> Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. R. 1, 4 (1995).

<sup>93</sup> *Id.*

of the debate because ... champions of campaign finance regulation can never argue their case successfully. To make their argument work, the regulationists must recognize what they have been reluctant to admit: that we are at least partly civic slobs.”<sup>94</sup>

As indicated previously, Justice Scalia’s approach to adjudicating campaign finance exhibited a healthy regard for the abilities of citizens to make informed choices without government interference in fundamental political rights in order for them to do so. As is also apparent, Justice Scalia favored no more than minimum regulation in the campaign finance sphere since that was least intrusive of important democratic rights. On the face of it, therefore, Justice Scalia’s night-watchman approach to campaign finance regulation, combined with his faith in the people as civic smarties inclined to make the right choices, meant that he was not trapped by the paradox. He might, however, have fallen victim to the definitional dilemma. This is neither unexpected nor unusual since, by Ringhand’s yardstick, seemingly any Justice holding a view about what makes democracy, and adjudicating accordingly, would be so placed. In what follows, it will be argued that, given Justice Scalia’s concerns about legislators’ self-interest, his expansive reading of free speech and his approach to constitutional interpretation, while he would escape Ortiz’s democratic paradox through placing trust in voters’ civic competence, he would easily be caught by Ringhand’s definitional dilemma.

### B. DILEMMA

If, on any reasonable understanding of democracy, campaign finance regulation contributes to producing democratic institutions that are essentially undemocratic, it may be thought reasonable that judges should intervene to remedy that defect. On this view, intervention is justifiable in the interests of democracy itself but may be problematic if judicial conceptions of democracy and the rights required to sustain it are divergent. Adjudicating campaign finance places the judiciary in what Ringhand claims is an unacknowledged and overlooked “democracy defining dilemma”<sup>95</sup> where the rights they are being asked to protect are both contested and undefined. Given the lack of consensus on the scope and nature of the rights implicated in campaign finance cases, in order to provide a framework or foundation for adjudication, a judge must envisage, but need not articulate explicitly, a conception of democracy on which to base his or her opinion. Judicial conceptions of democracy are, thus, implicit in and underpin Justices’ campaign finance opinions. They are inextricably intertwined with the Justices’ own democratic views and values – what Ortiz calls “submerged normative judgments”<sup>96</sup> – because, importantly, they are chosen rather than being constitutionally compelled<sup>97</sup> (although the Justices may present them that way).

For Ringhand, the definitional dilemma has three consequences. Firstly, she argues, campaign finance cases come to rest on “unchallenged” yet “deeply

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<sup>94</sup> Ortiz, *supra* note 92, at 5.

<sup>95</sup> Nicholson, *supra* note 76, at 77.

<sup>96</sup> Ortiz, *supra* note 92, at 11.

<sup>97</sup> Nicholson, *supra* note 76, at 80 (“Moreover, they have been able to do this without persuasively demonstrating, or often even arguing, that their preferred definition of democracy is in any way constitutionally compelled.”).

contested and controversial<sup>98</sup> definitions of democracy, the preservation of which mandates constitutional restraints on legislative experimentation.<sup>99</sup> Although these restraints are the product of beliefs in concepts about which there is disagreement and division, they are made to appear both legitimate and necessary. Secondly, “disputed” and “shifting” judicial assumptions about democracy lend a certain incoherence and abstruseness to campaign finance jurisprudence.<sup>100</sup> Thirdly, because the democracy-defining dilemma is not confronted by the judiciary, the provenance of the rights being asserted is uncertain, which in turn means that issue of whether campaign finance regulation is constitutionally mandated is obscured.<sup>101</sup> By way of example, in campaign finance cases, as has been indicated, Justice Scalia exhibited a high degree of vigilance where legislators’ self-interest was likely to manifest. As has also been indicated, he supported disclosure of the sources of campaign contributions as an unquestioned good. We have seen that in *McIntyre v Ohio Elections Commission*<sup>102</sup> the views of elected legislators were unquestioningly accepted by the dissenting Justice Scalia, on the bases of established legislative practice and legislators’ practical familiarity with elections.<sup>103</sup> While Justice Scalia’s dissent in *McIntyre* may be viewed as evidence of a judicial philosophy of restraint, and one which gives elected branches the final say, in deploying legislative expertise to support his position on disclosure, it might also be argued to reveal exactly the kind of judicial shifting and expediency in adjudication to which Ringhand refers. It clearly does not sit with a professed skepticism of legislative motive in campaign finance cases.

Current campaign finance jurisprudence, as subject to the definitional dilemma, superficially bears the hallmarks of activist liberal decision-making, whereby Justices seek to preclude governmental intrusion into the rights and liberties guaranteed by the Constitution. Accordingly, where campaign finance decisions, viewed simplistically, seemingly demonstrate Supreme Court justices striking at legislation which interferes with constitutional rights they may, in fact, reveal the Court’s conservatives cleaving to principles that narrow and restrict those rights as they apply to ordinary people, while simultaneously enlarging them for the wealthy, and erecting a barrier to important electoral, economic and social reforms. Kairys<sup>104</sup> claims that both a liberal and a conservative judiciary will see itself as protecting freedom and the other as permitting unwarranted governmental intrusion. The difference lies in their respective stances as to what kind of government activity constitutes, and counts as, permissible interference. Thus, where liberals favor less intrusive government in the area of individual autonomy and personal freedom, and more intrusive government in economic regulation and electoral or democratic reforms, conservatives demonstrate antithetical tendencies. They will most likely support measures aimed at “compelled conformity,”<sup>105</sup> yet balk at

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<sup>98</sup> *Id.* at 8.

<sup>99</sup> *Id.* at 79-80.

<sup>100</sup> *Id.* at 80.

<sup>101</sup> *Id.*

<sup>102</sup> 514 U.S. 344 (1995).

<sup>103</sup> *Id.* at 381, 377.

<sup>104</sup> DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME: A CRITIQUE OF THE CONSERVATIVE SUPREME COURT (1993).

<sup>105</sup> *Id.* at 5.

attempted governmental intrusion into the operation of markets, property rights and the advantages of wealth. In this sense, tenured judges may have as much impact on the campaign finance system as incumbent politicians. That impact need not engender change, however. The stasis produced by ideological divergence between regulationists and deregulationists is well illustrated by McConnell whose reading of campaign finance adjudication, after *Citizens United* but prior to Justice Scalia's death, was that the majority of the Justices condemned *Buckley's* distinction between contributions and expenditures, but for different reasons, and would deal with it in different ways. The conservative wing of the Court, naturally including Justice Scalia, he argues, would eliminate the distinction entirely by affording constitutional protection to contributions as well as expenditures, whereas the liberal wing would erase the distinction by removing the constitutional protection afforded to independent expenditures. This "produces a standoff."<sup>106</sup> On McConnell's reading, therefore, the death of Justice Scalia has reduced the likelihood of constitutional protection being extended beyond *Buckley's* limits since the conservative wing is diminished. For Justice Scalia, however, it was "not ... a liberal versus conservative issue" but "an issue of constitutional interpretation."<sup>107</sup>

## V. CONCLUSION

Ortiz provides three possible explanations for *Buckley's* holding that election expenditure limits are offensive to the First Amendment: that, irrespective of the government's interest, the First Amendment simply forbids control of speech in that way;<sup>108</sup> that money follows popular support and, thus, poses no overall threat to political processes;<sup>109</sup> that, because it adds information and points of view to the ideas marketplace, money can only enhance, rather than undermine, individual decision-making.<sup>110</sup> The first reason, claims Ortiz, "rests only on textual fundamentalism or on the policy judgment that the dangers of the congressional remedy were worse than the disease."<sup>111</sup>

In describing his approach to the task of constitutional interpretation, Justice Scalia declared that he was "first of all a textualist, and secondly an originalist."<sup>112</sup> In his own view textualism means that "you don't care about the intent and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words."<sup>113</sup> Although a disinterest in intent might seem at odds with an interest in legislative self-interest in campaign finance cases, the originalist in Justice Scalia enabled intent to be measured in some rough, ready and anecdotal

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<sup>106</sup> Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L. J. 412, 456 (2013).

<sup>107</sup> Justice Antonin Scalia, *A Theory of Constitution Interpretation*, Catholic University of America, Washington DC, address delivered Oct. 18, 1996.

<sup>108</sup> Ortiz, *supra* note 92, at 14.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Justice Antonin Scalia, *supra* note 107.

<sup>113</sup> *Id.*

way.<sup>114</sup> Moreover, in the campaign finance sphere, two fundamental and long-accepted premises also underlie Justice Scalia's approach. First is the idea that the Bill of Rights was intended to prevent government from encroaching upon the liberties of citizens: "[t]he premise of our Bill of Rights ... is that there are some things—even some seemingly desirable things—that government cannot be trusted to do"<sup>115</sup> and, second, the broad assumption is that "there is no such thing as too much speech."<sup>116</sup> Placed together with Ortiz's assessment of *Buckley*, and in the context of an expansive reading of speech,<sup>117</sup> a particular reading of democracy, which Ortiz traces to *Buckley*, would inevitably lead to the consistency in campaign finance cases that Justice Scalia's campaign finance jurisprudence, for the most part, exhibits. It led that way because jurisprudential coherence and consistency emerges more readily out of broad premises and deregulation in a manner that it cannot arise where extensive regulation and fine market adjustments provide the basis for democracy's processes and operation.

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<sup>114</sup> In *Austin*, "I am confident, in other words, that Jefferson and Madison would not have sat at these controls; but if they did they would have turned them in the opposite direction;" "but then there is the special element of corporate wealth: What would the Founders have thought of that?;" "This is not an argument that our democratic traditions allow" and looking back to the late 18th century for proof that corporations should enjoy the same free-speech rights as individuals and that the press carried corporate speech by way advertisements as well as news stories on their front pages, 494 U.S. 652, 693 (1990).

<sup>115</sup> *Id.* at 692.

<sup>116</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 259 (2003).

<sup>117</sup> In *Citizens United*, Justice Scalia's textual originalism provided the foundation for the most expansive of readings of the First Amendment in the campaign finance sphere, even in the context of an expansion of *Buckley's* expansive premises.



## THE SEXUAL ORIENTATION CASES

Ian Loveland\*

*Department of Law, City, University of London*

### ABSTRACT

*This paper assesses Scalia's contribution to a series of cases, spanning much of his thirty years tenure on the court, which addressed issues relating to sexual orientation discrimination. The argument put forward is that these cases severely undermine any claim that Scalia might make to having been a distinguished judge in an intellectual or juridical sense. The pervasive theme of Scalia's opinions in these matters is that of a constant failure to respect traditional tenets of legal reasoning and a compulsive inclination to engage in abusive castigation both of the litigants challenging the discriminatory laws and his judicial colleagues who did not agree with his viewpoint.*

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\* Professor of Public Law, School of Law, City, University of London

## I. INTRODUCTION

When Antonin Scalia was appointed to the Supreme Court in 1986, the notion that Congress, the federal government or the States were constitutionally prohibited from imposing all sorts of discriminatory laws, policies and practices on non-heterosexual people solely because of those people's sexual orientation would have struck most legally literate observers as fanciful if not absurd.<sup>1</sup> There was by that time a groundswell of academic literature pressing such arguments through an extension of the privacy jurisprudence which had emerged in the 1960s to invalidate State proscription of contraception and been built on in *Roe v. Wade* and subsequent abortion judgments,<sup>2</sup> and as well growing political pressures within some States to recognize sexual orientation as a legitimate classification for equality law purposes. But the fact that little more than thirty years later we seem to be arriving at a position in which a majority of the federal judiciary is reading the constitution in just such a prohibitory way offers a remarkable illustration of the rapidity with which supposedly fundamental moral principles within United States society can evolve and change.

It is hardly a revelation to note that Justice Scalia saw few constitutional barriers to such discriminatory treatment, whether in federal or state law. Scalia sat in a cluster of notable cases involving sexual orientation discrimination while he served on the Supreme Court, running from *Hurley v. Irish American Gay Lesbian and Bisexual Group of Boston, Inc.*<sup>3</sup> in 1995 through to *Obergefell v. Hodges*<sup>4</sup> in 2015. This paper assesses the judgments offered or joined by Justice Scalia in six of those cases.<sup>5</sup> My primary interest is to use this issue as a vehicle to explore the hypothesis that Scalia, whatever his personal political ideologies, was nonetheless a distinguished judge – even perhaps a great one – in a purely juridic and intellectual sense.<sup>6</sup> In short terms, the argument presented here is that any such portrayal is quite

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<sup>1</sup> Most notably in 1976, the Supreme Court had summarily upheld (425 U.S. 901 (1976)) a 2-1 Court of Appeals judgment upholding Virginia's criminalization of male to male sexual relations; *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (1975). On the state of the law on this issue up to the late 1970s see especially Rhonda Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1978-1979).

<sup>2</sup> See e.g. David A.J. Richards, *Homosexuality and the Constitutional Right to Privacy*, N.Y. U. REV. L. & SOC. CHANGE 311 (1979); *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1978-1979).

<sup>3</sup> 515 U.S. 557 (1995). The court was Rehnquist, C.J. (Nixon/Reagan 1972/1986), Stevens (Ford 1975), O'Connor (Reagan 1981), Scalia (Reagan 1986), Kennedy (Reagan 1988), Souter (Bush 1990), Thomas (Bush 1991), Ginsburg (Clinton 1993, and Breyer (Clinton 1994).

<sup>4</sup> 576 (U.S.), 135 S. Ct. 2584 (2015).

<sup>5</sup> The list is not exhaustive. For a much more thorough analysis of the first half of Scalia's tenure on the Court see JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE* (2002).

<sup>6</sup> Such comments came predictably, from right-leaning blogs and magazines; see e.g. Mark Joseph Stern, *Antonin Scalia Will Be Remembered as One of the Greats*, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/02/antonin\\_scalia\\_was\\_a\\_truly\\_great\\_supreme\\_court\\_justice.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_a_truly_great_supreme_court_justice.html), SLATE, (Feb.13 2016 8.44 PM); Jeffrey Rosen, *What Made Scalia Great* (2016) THE ATLANTIC (Feb. 2016) <http://www.theatlantic.com/politics/archive/2016/02/what-made-antonin-scalia-great/462837/>. They also came from legal academics who one

unsustainable. While one can find sound doctrinal (or if one prefers constitutional) reasons to support the substantive conclusions that he defended in these cases, Scalia himself did a poor job of building and presenting his arguments. This failing lies in part in matters of intellectual rigor and/or honesty: Scalia's opinions repeatedly mischaracterized the positions adopted by members of the court with whom he disagreed and invoked quite absurd analogies to sustain his own. It also lies in Scalia's repeatedly derogatory, almost demonizing portrayal, of the litigants and organizations seeking to promote the cause of sexual orientation equality. All in all, his opinions offer a most unappetizing constitutional dish.

A. *BOWERS V. HARDWICK (1986)*

*Bowers v. Hardwick*<sup>7</sup> was of course decided shortly before Scalia was appointed to the Supreme Court. Scalia's confirmation hearings were held on August 5 and 6 that year.<sup>8</sup> *Bowers* had been argued on March 31, and judgment was handed down on June 30. Scalia had made it clear at the outset of the hearing that he would not answer questions on specific Supreme Court decisions,<sup>9</sup> which may be why *Bowers* was not raised expressly. The nearest that the Senate came to the case was a question from Joe Biden:

Senator BIDEN. Do you believe that there is such a thing as a constitutional right to privacy, not delineating whether, for example, the right to terminate a pregnancy relates to the right to privacy or the right to engage in homosexual activities in your home is a right to privacy, or the right to use contraceptives in your home is a right—but, in a philosophic sense, is there such a thing as a constitutionally protected right to privacy?  
Judge SCALIA. I don't think I could answer that, Senator, without violating the line I've tried to hold.<sup>10</sup>

*Bowers* was a profoundly contentious decision both within the Court and outside it.<sup>11</sup> The bench was split 5-4. Justice White delivered the majority opinion, joined by Chief Justice Burger and Justices Powell, Rehnquist and O'Connor;<sup>12</sup> the dissenters

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might think ought to know better, e.g. Cass R. Sunstein, *The Scalia I Knew Will Be Greatly Missed* (2016) <https://www.bloomberg.com/view/articles/2016-02-14/the-scalia-i-knew-will-be-greatly-missed>, and even from President Obama: 'Barack Obama praised Scalia as a "brilliant legal mind" who was "one of the towering legal figures of our time" and "one of the most consequential judges and thinkers to serve on the supreme court".'; <https://www.theguardian.com/law/2016/feb/13/supreme-court-justice-antonin-scalia-dead-at-79>.

<sup>7</sup> 478 U.S. 186 (1986).

<sup>8</sup> A transcript of the confirmation hearings is available at <https://www.congress.gov/supreme-court/GPO-CHRG-SCALIA.pdf>.

<sup>9</sup> *Id.* at 33.

<sup>10</sup> *Id.* at 102.

<sup>11</sup> For a variety of perspectives see DAVID A.J. RICHARDS, *THE SODOMY CASES: BOWERS V. HARDWICK AND LAWRENCE V. TEXAS* (2009); Kendall Thomas, *The Eclipse of Reason*, VA., L. REV. 1805 (1993); Randi Maurer, *Bowers v. Hardwick: A Giant Step Backwards for Privacy Rights*, LOY. L.A. L. REV. 1013 (1987); Marc S. Spindelman, *Reorienting Bowers v. Hardwick*, 79 N.C. L. REV. 359 (2001). For a kaleidoscopic set of views on one convenient location see the collection of essays in 79 VA L.R. 1419 (1993).

<sup>12</sup> Chief Justice Burger and Justice Powell filed concurring opinions.

were Justices Blackmun, Brennan, Marshall and Stevens.<sup>13</sup> The case is a powerful illustration both of the way that the ratio of a judgment can be misrepresented by the court that makes it and of the way that the misrepresentation takes hold both in legal and popular consciousness.

The easy assumption is that the ratio of *Bowers* is that a State was entitled to attach even quite severe criminal sanctions to adults who consensually engaged in private in homosexual sexual activities. However, the Georgia statute at issue in *Bowers* criminalized various sexual practices irrespective of the sexual orientation of the participants. The clause in issue (Georgia Code Ann. §16-6-2 (1984) provided simply that: “(a) A person commits the offence of sodomy when he [or she] performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another”. It was therefore entirely possible for heterosexuals to commit ‘sodomy’ with each other under Georgia law whether through anal (whether penetrative or not) or oral sex. While Mr. Hardwick was gay, and was obviously concerned to establish that Georgia could not prevent him having sex with other men, his suit was argued on the basis that consensual private sexual activity between adults was a privacy interest that States could restrict only through laws that could withstand strict scrutiny analysis. On that basis, Mr. Hardwick had been successful before the Court of Appeals for the Seventh Circuit.<sup>14</sup> This was also how the case was characterized by Justice Blackmun for the dissenters:<sup>15</sup>

This case is no more about “a fundamental right to engage in homosexual sodomy,” as the Court purports to declare, *ante* at 478 U. S. 191, than *Stanley v. Georgia*, 394 U. S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz v. U.S.*, 389 U. S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.” *Olmstead v. U.S.*, 277 U. S. 438, (1928) (Brandeis, J., dissenting).

Justice White’s majority opinion however presented the question in much narrower terms:

The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy....<sup>16</sup>  
[R]espondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.<sup>17</sup>

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<sup>13</sup> Brennan (Eisenhower 1956), White (Kennedy 1962), Marshall (Johnson 1967), Burger (Nixon 1969) Blackmun (Nixon, 1970), Rehnquist (Nixon 1972), Powell (Nixon 1972), Stevens (Ford 1975), and O’Connor (Reagan 1981).

<sup>14</sup> 760 F 2d. 1202 (7th Cir. 1985).

<sup>15</sup> 478 U.S. 186, 199 (1986).

<sup>16</sup> Justice White presumably meant this to read ‘to engage *with other homosexuals* in sodomy *as defined in Georgia law*.’ Whether Georgia could proscribe ‘sodomy’ by a bisexual man with a woman (whatever her sexual orientation) was a question apparently beyond the majority’s imagination.

<sup>17</sup> 478 U.S. 186, 191 (1986).

Having defined the question in that way, Justice White was able to conclude that none of the by then long and eclectic line of privacy-liberty case law<sup>18</sup> had any bearing on the issue. The matter was easily resolved. Since ‘sodomy’ had long been regarded as a crime in the USA (and was criminal in all States until 1961)<sup>19</sup> it could not possibly be regarded as a fundamental right in the senses envisaged in *Palko v. Connecticut*, i.e. that it was ‘implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed’;<sup>20</sup> or, more helpfully as a guideline, per Powell, J. in *Moore v. East Cleveland*: “deeply rooted in this Nation’s history and tradition.”<sup>21</sup>

The majority judgment is very cursory. It certainly makes clear that there is no need for the Court to subject Georgia law to strict scrutiny, and rather suggests that even if the law were subject to rational basis review no argument could be made against its constitutionality:<sup>22</sup>

[R]espondent asserts that there must be a rational basis for the law, and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed... . Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

The majority in effect upheld a State law other than the one before it. But in doing so the majority confirmed that it was constitutionally quite acceptable for a political majority in a State to attach severe sanctions to homosexual behavior, for no reason other than that the majority found homosexuality morally distasteful, so long as that majority sentiment was shared and had been given legal effect by many other State majorities.<sup>23</sup>

The dissenting view rested on the premise that the Georgia law interfered not with a right to homosexual sodomy, but with: “the fundamental interest all individuals have in controlling the nature of their intimate associations with

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<sup>18</sup> On inter alia, schooling and educ. *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925): sterilization, *Skinner v. Oklahoma*, 316 U.S. 535 (1942): and contraception and abortion *Griswold v. Connecticut* 381 U.S. 479 (1965). *Eisenstadt v. Baird*, 405 U.S. 438 (1972). *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>19</sup> Justice White lists the various laws, but does not explore what ‘sodomy’ meant in each of them, or whether such laws proscribed just homosexual activity or included heterosexual behavior as well.

<sup>20</sup> 302 U.S. 319, 325-26 (1937).

<sup>21</sup> 431 U.S. 494,503 (1977).

<sup>22</sup> 478 U.S. 186, 196 (1986).

<sup>23</sup> For a fascinating ‘inside’ view of the dynamics of the decision-making process in *Bowers*, and especially the role of Justice Powell, see MURDOCH & PRICE, *supra* note 5, at chs. 12-13.

others.”<sup>24</sup> Justice Blackmun was equivocal as to whether the law should therefore be subject to strict scrutiny or rational basis review, but indicated that the question was not relevant because the law would not pass even rational basis scrutiny if the only evidentially credible basis advanced for its enactment was majoritarian disapproval (what he termed ‘animus’) towards homosexuals:

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one’s value system cannot be a legally cognizable interest, *cf. Diamond v. Charles*, 476 U. S. 54, 476 U. S. 65-66 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.<sup>25</sup>

While the majority judgment affirmed the constitutionality of legislation criminalizing gay sexual activity, in the years immediately following *Bowers* the legislative trend was firmly towards more widespread decriminalization. Almost twenty years were to pass before *Bowers* was squarely revisited by the Court. In the interim, three further sexual orientation cases, all involving civil rather than criminal law issues, received the Court’s attention.

*B. HURLEY V. IRISH AMERICAN GAY LESBIAN AND BISEXUAL GROUP OF BOSTON, INC. (1995)*

Justice Scalia was a silent adherent to a unanimous court opinion in *Hurley v. Irish-Am. Gay Lesbian and Bisexual Group of Boston, Inc.*<sup>26</sup> The issue presented in *Hurley* revolved around the efforts of the Respondent (referred to in the judgment as GLIB) to participate as a group in Boston’s annual St. Patrick’s Day Parade. The parade had grown by the 1990s into a major cultural event, rooted in celebration in part of the Irish roots of many of Boston’s residents and in part of the evacuation of British troops from the city during the war of independence. Although the event had initially been run by the city itself, since 1947 the parade had been organized – with a city license – by the South Boston Allied War Veterans Council (hereafter referred to as the Veterans Council).

The Veterans Council had refused to allow GLIB to march in the parade. GLIB then sued the Veterans Council under the Massachusetts public accommodations law, which prohibited: “[A]ny distinction, discrimination or restriction on account of [specified criteria] relative to the admission of any person to or treatment in any place of public accommodation, resort or amusement”.<sup>27</sup> That legislation dated from 1865, and was initially targeted only at race discrimination. Its scope however

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<sup>24</sup> *Id.* at 206.

<sup>25</sup> *Id.* at 213.

<sup>26</sup> 515 U.S. 557 (1995). The court was Rehnquist, C.J. (Nixon/Reagan 1972/1986), Stevens (Ford 1975), O’Connor (Reagan 1981), Scalia (Reagan 1986), Kennedy (Reagan 1988) Souter (Bush 1990), Thomas (Bush 1991), Ginsburg (Clinton 1993), and Breyer (Clinton 1994), JJ. On the positions of the individual Justices prior to the judgment being written *see* MURDOCH & PRICE, *supra* note 5, at 428-34.

<sup>27</sup> Mass. Gen. Laws s.272.98 (1992); <https://malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter272/Section98>.

had been incrementally extended, and sexual orientation discrimination was added in 1989 during the Governorship of Michael Dukakis.<sup>28</sup> The law was accepted to be applicable both to public sector bodies and to private sector individuals or organizations if they provided ‘public accommodation...’. The Massachusetts courts concluded that the Veteran Council’s refusal did amount to a breach of the public accommodation laws (it not being contested that the parade was a ‘public accommodation’ or ‘amusement’ within the statute) and granted GLIB injunctive relief requiring the Veterans Council to allow GLIB to join the parade.<sup>29</sup>

Rather curiously, on the Veteran Council’s appeal to the Supreme Court, GLIB did not argue the case on the basis that the Veterans Council’s activities amounted to state action (through the license granted by the city) under the Fourteenth Amendment,<sup>30</sup> which would have opened the door to the assertion that the liberty and equal protection interests of GLIB’s members were being infringed by the city’s failure to make GLIB’s participation in the parade a term of the license.<sup>31</sup> This had the possibly unhappy consequence that the case was effectively argued on the basis that the Massachusetts’ courts’ use of the public accommodation law infringed the liberty interests of the Veteran’s Council under the First Amendment.

The Supreme Court also proceeded on the basis that – as a matter of fact – the Veterans Council did not and would not exclude any individual from the parade because of her sexual orientation;<sup>32</sup> the exclusion was rather of GLIB, a collectivity; and exclusion was not imposed because of GLIB’s members’ sexual orientation per se, but because of the message that GLIB’s participation in the parade would communicate to other participants in and watchers of the parade. This characterization of the issue fed directly and smoothly into a clearly established tenet of First Amendment jurisprudence; namely that freedom of expression (and no sensible case could be made that the parade was not expressive activity) necessarily entails a freedom to disassociate oneself from expression that one does not wish to endorse. The Court formed no view on the reason underlying the Veteran Council’s decision to exclude GLIB, but saw no need to do so: “...[W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to be beyond the government’s power to control”.<sup>33</sup>

Whether (some members of) the Court designedly obscured or displaced the sexual orientation discrimination dimension of *Hurley* is a matter for speculation. But the case was decided in a political context within which an increasing number of States (or of municipal governments within them) were beginning to proscribe and/or restrict various manifestations of such discrimination.<sup>34</sup> *Hurley* raised an

<sup>28</sup> <http://www.nytimes.com/1989/11/01/us/a-gay-rights-law-is-voted-in-massachusetts.html>.

<sup>29</sup> *Irish-Am. Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 418 Mass. 238, 636 N.E. 2d 1293 (Mass. 1994).

<sup>30</sup> The point had been raised and lost in the trial court. The argument would have been a strong one in the light of such authorities as *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Jones v. Mayer*, 392 U.S. 409 (1968); *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972).

<sup>31</sup> Essentially the argument successfully made in respect of a challenge to racial discrimination by a nominally private body in *Burton v. Wilmington Parking Auth.*, 366 U.S. 715 (1961).

<sup>32</sup> 515 U.S. 557, 572 (1995).

<sup>33</sup> 515 U.S. 557, 575 (1995).

<sup>34</sup> See MURDOCH & PRICE, *supra* note 5, at ch. 16.

obvious First Amendment cloud over the extent of the constitutionality of such initiatives.<sup>35</sup> Unsurprisingly however, in a political landscape as variegated as that of the United States, it was not long before such actions were met by a reaction which provided the Court – and Justice Scalia – with the opportunity to confront the question more directly.

### C. *ROMER V. EVANS* (1996)

The Court, although its composition was unchanged, could not maintain a united front just a year after *Hurley* when delivering judgment in *Romer v. Evans*.<sup>36</sup> Justices Kennedy, Stevens, O'Connor, Souter, Ginsburg and Breyer, joined in a decision invalidating a recent amendment to the Colorado constitution, over a Scalia-authored dissent joined by Chief Justice Rehnquist, and Justice Thomas.

In a nice illustration of the often fragmented nature of the governmental system in the United States, the titular 'defendant' in the case was Roy Romer, the then (Democrat) Governor of Colorado. Romer found himself defending the constitutionality of a state constitutional provision which he had opposed and campaigned against prior to its adoption. The provision, known as 'Amendment 2' was adopted in 1992.<sup>37</sup> It read:

**No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation.**

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.<sup>38</sup>

Amendment 2 was subject to injunctive litigation in the state courts before it came into effect. Richard Evans, a gay man, was the lead plaintiff in the action, although he was joined by a variety of other individuals, pressure groups and

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<sup>35</sup> The Veterans Council did not expressly root its arguments in the freedom of religion clause of the First Amendment, but the possibility of deploying such arguments to attack state law prohibiting sexual orientation discrimination laws was well established by that time; see for example Lucien Dhooge, *Public Accommodation Statutes and Sexual Orientation: Should There Be a Religious Exemption for Secular Businesses?*, WM. & MARY J. WOMEN & L. 319 (2105).

<sup>36</sup> 517 U.S. 620 (1996).

<sup>37</sup> Colorado uses the initiative device for constitutional reform (Constitution Art V s. 1; [http://tornado.state.co.us/gov\\_dir/leg\\_dir/olls/constitution.htm#ARTICLE\\_V\\_Section\\_1](http://tornado.state.co.us/gov_dir/leg_dir/olls/constitution.htm#ARTICLE_V_Section_1)). A simple majority of votes cast in favor of the proposed amendment is all that is required. In the amendment 2 ballot, the majority in favor was 813,000 to 710,000. See Stephen Zamansky, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 BOSTON COL. L. REV. 221 (1993); MURDOCH & PRICE, *supra* note 5, at ch. 16.

<sup>38</sup> See *Romer v. Evans*, 517 U.S. 620, 623 (1996).

local municipalities.<sup>39</sup> The Colorado Supreme Court was invited to accept that sexual orientation was a suspect category under the Fourteenth Amendment Equal Protection Clause,<sup>40</sup> to subject Amendment 2 to strict scrutiny and to find that the Amendment could not pass the test. Although the Court took the latter two steps, it reached them not through equal protection analysis but by holding that Amendment 2 breached a ‘fundamental right’ of gay people. The court’s reasoning was that if Amendment 2 was effective, gay people could only gain the protection of anti-sexual orientation discrimination by securing a further amendment to the State Constitution. All other groups could gain protection vis-à-vis their own particular defining characteristics through state legislation, or via local government by-laws, or by alterations to government agencies’ policies. The Supreme Court was notably unimpressed by the arguments advanced by the State to justify the Amendment, these being variously the need to protect the religious freedom of service providers whose religious beliefs required them to refuse service to gay people, the need not to undermine the views expressed by parents disapproving of homosexuality to their children, the need to protect the privacy interests of people who did not wish to associate with homosexuals and finally, the need to respect the wishes of the electoral majority.<sup>41</sup>

The case was taken on appeal to the United States Supreme Court, being argued in October 1995 and decided in May 1996. The Colorado Supreme Court’s judgment was upheld by a 6 (Kennedy, Stevens, O’Connor, Souter, Ginsburg and Breyer, J.J.) to 3 (Rehnquist, C.J., Scalia and Thomas, J.J.) majority. The majority upheld the Colorado Supreme Court’s decision that Amendment 2’s requirement that non-heterosexuals had to seek through constitutional amendment what all other groups could achieve through ordinary legislative or governmental processes was properly seen as infringing upon a ‘fundamental right’. The conclusion seemed however to rest at least implicitly on a suggestion that sexual orientation should be recognized as a suspect category – and so a trigger for strict scrutiny – for equal protection purposes. Formally however, the majority view on the equal protection question was that Amendment 2 could not even pass rational basis scrutiny because it amounted in essence to a majoritarian attempt to stigmatize and disfavor a specific group. The majority invoked the decision in *Dep’t. of Agriculture v. Moreno*<sup>42</sup> to sustain this point:

[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.<sup>43</sup>

<sup>39</sup> Denver, Boulder and Aspen (all liberal enclaves within the State) had already enacted anti-sexual orientation discrimination ordinances. Amendment 2 was in part a backlash from the conservative heartlands of Colorado against such metropolitan cultural initiatives. See Jean Hardisty, *Constructing Homophobia: Colorado’s Right Wing Attack on Homosexuals*, PUBLIC EYE (1993) (archived at <http://www.publiceye.org/magazine/v07n1/conshomo.html>).

<sup>40</sup> For an analysis of the state of equal protection jurisprudence at this time see especially, Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, TEMPLE L. REV. 937 (1991).

<sup>41</sup> See Ian Loveland, *A Fundamental Right to Be Gay Under the Fourteenth Amendment*, PUBLIC LAW 601 (1996).

<sup>42</sup> 413 U.S. 528, 534 (1973).

<sup>43</sup> *Romer*, 517 U.S. 623, 634 (citing *Moreno*, 413 U.S. 534) (emphasis in original).

At its core, Kennedy's opinion appeared to assert that a State had no constitutional capacity to allow its citizens to manifest in law their ill-will or bigotry toward a clearly defined sub-group, irrespective of how many of the State's citizens endorsed that particular point of view.

Justice Scalia's opinion for the dissenters might be thought at its strongest when it takes the majority to task for its failure to engage at all with *Bowers*. The gist of the critique would seem to be that *Bowers* manifestly permits State majorities to 'harm' gay people by criminalizing their consensual, private, sexual conduct, and so the majority conclusion in *Romer* could only be correct if *Bowers* was wrongly decided. While this would be an obviously forceful doctrinal point if that is what the issue actually was before the *Bowers* Court, the critique is of course premised on a lie (it is hard to believe it is a misunderstanding), since the Georgia law under assessment in *Bowers* applied (at least on its face) as readily to heterosexual as to homosexual sexual practices. One might have thought a judge as intellectually rigorous as Scalia, J. was supposed to be would have noted this flaw in the *Bowers* majority opinion, but it seemed to pass him by. This endorsement of an essentially mendacious majority judgment is however, perhaps the intellectual high point of his dissent in *Romer v. Evans*.

Initially one might think Scalia is on firmer ground when he makes the observation that several States have rendered polygamy unlawful except through the mechanism of constitutional amendment.<sup>44</sup> This, Scalia suggests, manifests just the same kind of majority disapproval of particular sexual mores as is pursued by Amendment 2. The analogy is plainly a silly one, as polygamy is a question of social choice (at least for the men) rather than, as is sexual orientation, an innate characteristic.<sup>45</sup> Absurd analogies abound however in Scalia's judgment, presumably because he cannot or will not accept that a person's sexual orientation is not simply a matter of choice. In the following passage for example, Scalia combines an attack on the majority for suggesting that there is something mean-spirited about the sentiments underlying Article 2 with a casual equation of same sex marriage to murder and animal cruelty:

The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct.<sup>46</sup>

That Scalia can equate a person's consensual sexual activities with committing murder is better described as unhinged than unsound. The comparison with animal

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<sup>44</sup> *Id.* at 649.

<sup>45</sup> The gradual shift towards acceptance of this perspective among the U.S. medical profession – and its more gradual infiltration into judicial thinking – is incisively traced by Richard Posner, *SEX AND REASON* (1992) ch.11.

<sup>46</sup> 517 U.S. 620, 644 (1996).

cruelty is of similar quality, if of lesser degree, and the inapposite nature of the homosexuality/polygamy analogy has already been noted.

A subsequent passage is striking more for its constitutional illiteracy than its logical shortcomings. In criticizing the majority view that subjecting gay people to an atypically onerous lawmaking process is constitutionally objectionable, Scalia offers the following proposition:

What the Court says is even demonstrably false at the constitutional level. The Eighteenth Amendment to the Federal Constitution, for example, deprived those who drank alcohol not only of the power to alter the policy of prohibition *locally* or through *state legislation*, but even of the power to alter it through *state constitutional amendment* or *federal legislation*. The Establishment Clause of the First Amendment prevents theocrats from having their way by converting their fellow citizens at the local, state, or federal statutory level; as does the Republican Form of Government Clause prevent monarchists.<sup>47</sup>

This is a remarkably silly observation. It ignores of course the rather basic point that while the Colorado Constitution is subject to the limits of the national Constitution, the national Constitution is a legal construct of unlimited competence. No provision of the Constitution can be argued to be unconstitutional.

While Scalia castigates the majority for assuming that the people who voted for Amendment 2 were motivated by animus towards homosexuality, he does not trouble himself to offer any evidenced explanation of just what that motivation was. Nor does Scalia bother to disguise his own clear ‘animus’ towards homosexuality, which rather suggests that if he had even addressed the point that his judicial role would require him to cast aside his own cultural opinions while forming his judgment he had decided there was no need to do so. The comparison of homosexuality to murder was remarked upon above. In a similarly derogatory vein, when touching upon the issue of welfare support for widowed spouses, Scalia equates the “‘life partner’” (Scalia J.’s “...”) of a gay person with a heterosexual person’s ‘long time roommate’. The “...” themselves betoken an obvious distaste for same-sex coupledness, while the suggestion that such a couple are in an analogous position to ‘room-mates’ is a manifest belittling of gay relationships. The use of “...” as a means to connote disdain for the litigants also appears whenever Scalia mentions the notion of sexual “orientation”, something which he seems to equate with what he later refers to – again in “...” - as an “alternative life style”.<sup>48</sup>

Matters of style shade back as well into questions of substance. Scalia devotes much of his judgment to asserting that the only effect of Amendment 2 is to make it harder for gay people to gain ‘preferential treatment’.<sup>49</sup> Assuming the comment to be bona fide, the proposition is quite extraordinary. In what way is one afforded ‘preferential’ or ‘special’ treatment’ by a State law or municipal ordinance which provides that one’s sexual orientation (without the “...”) is per se a justification for, inter alia, being sacked from a job or refused access to a local sports facility?

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<sup>47</sup> *Id.* at 648.

<sup>48</sup> Repeatedly, but not exclusively, at 517 U.S. 620, 643 (1996). The alternative life style label is at 645.

<sup>49</sup> Especially at *id.* 636-37.

Scalia's major concern however seems to be that the Court is faced with a conspiracy between the unholy alliance of an unrepresentative lawyer elite which is improperly sympathetic to sexual orientation equality, and a disproportionately powerful gay mafia:<sup>50</sup>

The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, see Record, Exh. MMM, have high disposable income, see *ibid.*; App. 254 (affidavit of Prof. James Hunter), and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.<sup>51</sup>

All in all, the dissent is not very impressive stuff.

#### D. *BOY SCOUTS OF AMERICA V. DALE* (2000)

Scalia merely assented to the majority judgment in *Boy Scouts of America v. Dale*<sup>52</sup> five years later. The case had a superficial resemblance to *Hurley*, in that the Boy Scouts had been successfully sued under New Jersey's public accommodations law (which as in Massachusetts prohibited sexual orientation discrimination) by a gay man who had been dismissed from his position as an Assistant Scoutmaster because he was homosexual. While the more cynical and salacious observer might surmise that a fair few homosexually-inclined men in the United States of the 1950s, 1960s and 1970s kept firmly locked in their closets same-sex sexual experiences they encountered in the embrace (metaphorical and literal) of the Boy Scouts of America, the organization itself showed no inclination to publicize such activities. Indeed, the Boy Scouts of America had apparently been concerned about the implications of sexual orientation equality for some years, and had indeed filed an amicus curiae brief before the Supreme Court in *Hurley* urging reversal of the state court decision.<sup>53</sup>

Mr. Dale had by all accounts been an extremely successful scout. His difficulties with the organization began when, having moved on to university he came out not just to his family and friends but to the wider public by involving himself in various gay-rights lobbying activities. This evidently came to the attention of the Boy Scouts of America, which promptly expelled him from the organization. The New Jersey courts, undeterred it seems by *Hurley*, found in Mr. Dale's favor.

The Supreme Court, unchanged in composition since *Romer v. Evans* changed its alignment in *Dale*, with Justices O'Connor and Kennedy joining the *Romer*

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<sup>50</sup> He is appalled for example that most law schools do not permit sexual orientation discrimination in their hiring policy, even though – once again grasping for the absurd – it is apparently acceptable for them not to hire someone because *inter alia* he [sic] 'eats snails'; *id.* at 652-53.

<sup>51</sup> *Romer v. Evans*, 517 U.S. 620, 644-45 (1996) (Scalia, J., dissenting).

<sup>52</sup> 530 U.S. 640 (2000). On Mr. Dale's view of the case – and of the Boy Scouts – see especially MURDOCH & PRICE, *supra* note 5, at 496-509.

<sup>53</sup> 515 U.S. 557, 559 (1995).

dissenters (Chief Justice Rehnquist, and Justices Scalia and Thomas) to overturn the State courts decision, with Justices Stevens, Souter, Ginsburg and Breyer dissenting.

The majority saw no difference between the issues before the Court in *Hurley* and *Dale*. The crux of the Boy Scouts' case was that Mr. Dale's continued membership of the organization would run counter to the message that the Boy Scouts wished to communicate to their own members and the world at large about the organization's view of homosexuality:

The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean".<sup>54</sup>

Requiring the Boy Scouts to retain Mr. Dale as a member would compromise the clarity of this message, and thus fell foul of the Boy Scouts' First Amendment entitlements vis-à-vis the State.

The dissenters drew a bright line between the *Hurley* and *Dale* factual scenarios. The parade in issue on *Hurley* was seen as an inherently and entirely expressive activity. Insofar as the Boy Scouts promulgated a view on homosexuality however, (and the dissenters were not convinced that the organization had ever clearly put forward any such view), Mr. Dale's membership did nothing to propagate a competing perspective:

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.<sup>55</sup>

The judgment in *Dale* held back legislative attempts to advance the political cause of sexual orientation equality. Scalia, such an advocate of political majoritarianism in *Romer*; was notably quiet – indeed wholly invisible – in respect of that position in *Dale*. That silence may perhaps be explained in a principled way by the overt presence of First Amendment issues in *Dale* which did not feature in *Romer*. Just three years later, finding himself in the minority, he had no compunction in reasserting his *Romer* viewpoints in even more strident terms.

### E. *LAWRENCE V. TEXAS (2003)*

One might instinctively think there is something problematic about a constitutional order resting on deeply entrenched moral norms in which the final appellate court can hold that within the space of twenty years a previous judgment on an important

<sup>54</sup> 530 U.S. 640, 650 (2000) (Rehnquist, C.J.). Presumably no irony was intended in the Boy Scouts' choice of key words.

<sup>55</sup> 530 U.S. 640, 694-95 (2000) per Stevens, J.

issue can and should be overturned. Such a state of affairs might suggest a distinct lack of certainty in the constitution's content. Concerns of that sort would obviously be mitigated as a matter of practicality if such reversals occurred very infrequently. And as a matter of doctrine one might think that the concern should be further attenuated if the previous judgment is reversed not because it is wrong now; but that it was wrong when it was decided.<sup>56</sup> But that was just the position taken by the Supreme Court in *Lawrence v. Texas*<sup>57</sup> in 2003 in respect of its (not very much earlier) judgment in *Bowers*.<sup>58</sup>

The bench in *Lawrence*, as in *Dale*, remained the same as in *Romer* seven years earlier. The majority in *Lawrence* consisted of Justice Kennedy, J. (authoring the opinion), joined by Justices Stevens, Souter, Ginsburg and Breyer, with Justice O'Connor concurring in the result. Chief Justice Rehnquist, and Justice Thomas joined Scalia in dissent. The Court's membership had however changed markedly from its composition in *Bowers*. Among the *Bowers* majority, White, Burger and Powell had gone, as had Brennan, Blackman and Marshall among the dissenters. Only Stevens (a dissenter), and Rehnquist and O'Connor (for the majority) remained.

The adherents to Kennedy's opinion followed the methodology of Justice Blackmun's dissent in *Bowers*. That case, like this one, was not about sodomy, whether homosexual or otherwise:

That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.<sup>59</sup>

Having criticized the *Bowers* majority for 'misapprehending' the nature of the liberty entitlement before it, Justice Kennedy also took issue with its contention that homosexual sexual relations had been criminalized for many years by many of the States. Kennedy's reading of history was that no State had criminalized such activities until the 1970s, and since then only nine had done so. Nor was there evidence to support the proposition that the tiny number of reported prosecutions for sodomy en masse from the nineteenth century onwards contained a significant proportion of same sex, consensual participants.

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<sup>56</sup> The most spectacular example is surely the court's 1942 decision in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) to overrule the judgment given just three years earlier in *Gobitis v. Minersville Sch. Dist.*, 310 U.S. 586 (1940); (the pledge of allegiance to the flag in schools cases).

<sup>57</sup> 539 U.S. 558 (2003).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 567.

The *Lawrence* majority also criticized its *Bowers* predecessor for paying no attention to the fact the European Court of Human Rights in *Dudgeon v. United Kingdom*<sup>60</sup> had held that the criminalization of consensual homosexual activities between adults was incompatible with the Convention, suggesting that this was a helpful indicator (but surely no more than) as to the constitutionality of criminalizing such behavior. In narrow doctrinal terms, however, the *Lawrence* majority derived most assistance from two post-*Bowers* authorities. The first, obviously, was its recent judgment in *Romer*. The second, rather more tenuous in its relevance to *Bowers*, was the abortion judgment in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>61</sup> which was invoked to underscore the point that such issues were connected by a more abstract constitutional principle:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>62</sup>

Justice O'Connor, while concurring in the result, based her judgment on the Equal Protection Clause because the Texas statute, unlike the Georgia law challenged in *Bowers*, applied only to homosexual conduct. She did not go so far as to accept that sexual orientation was a suspect category for equal protection purposes, in which event state law would be subject to strict scrutiny rather than rational basis review.<sup>63</sup>

Scalia had not set the intellectual bar for dissenting judgments very high in *Romer*, but it is safe to say that he did not clear it in *Lawrence*. While his opinion identifies several weaknesses in the reasoning of both Justices Kennedy and O'Connor, it is overall a splenetic rant more suited to a locker room than a court.

The judgment begins with an implicit demonization of the litigants who have had the apparent temerity to challenge the rectitude of the *Bowers* majority's opinion, casting them as having: "engaged in a seventeen year crusade"<sup>64</sup> to have *Bowers* overturned. But Scalia also broadens the targets for abusive rhetoric beyond those singled out in *Romer*. The new bête noir that appears in *Lawrence* is 'foreign law' and especially the judgment of the European Court of Human Rights in *Dudgeon* which Scalia denounces as a "foreign mood, fad or fashion."<sup>65</sup>

As the opinion proceeds, Scalia continues to indulge his fondness for inappropriate metaphor. While he no longer brackets gay sex with murder, he does portray it in the same light for the purposes of majoritarian proscription as, inter

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<sup>60</sup> [1981] ECHR 5.

<sup>61</sup> 505 U.S. 833 (1992). See Ian Loveland, *Affirming Roe v. Wade? Planned Parenthood v. Casey*, PUBLIC LAW 14 (Spring 1993).

<sup>62</sup> 505 U.S. 833, 851 (1992).

<sup>63</sup> On the internal dynamics of the judgments see Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, THE NEW YORKER (Mar. 12, 2012).

<sup>64</sup> 539 U.S. 558, 586 (2003). The use of 'crusades' presumably being intended to denote ideological extremism.

<sup>65</sup> *Id.* at 599.

alia, “prostitution” and “recreational use of heroin”, “adult incest” and “obscenity” and “child pornography” and “bestiality.”<sup>66</sup>

Nor, he contends, could any credible argument be made that such laws are empirically redundant or obsolete. Scalia notes that he has uncovered: “203 prosecutions for consensual adult homosexual sodomy reported...from the years 1880-1995.”<sup>67</sup> Quite why Scalia sees this as a powerful rebuttal to the suggestion of the law’s practical obsolescence is a mystery. 203 prosecutions is an average of fewer than 2 per year. In 1995, the population of the United States was 266.3 million people. Obviously the population was much smaller in 1880, but even then it comprised 50.2 million people. Assuming even as few as 2% of the then population engaged in same sex sodomy just once a month (one cliché or demonization that Scalia does spare us is that gay people have sex more often than straights), those 203 prosecutions (Scalia does not tell us how many of those led to convictions) are in quantitative terms of infinitesimally minimal significance.

Scalia then matches ludicrous metaphor with ludicrous hyperbole in a cringing echo of his opinion in *Romer*:

This effectively decrees the end of all morals legislation. If, as the court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above mentioned laws [inter alia prostitution, adult incest and child pornography] can survive rational basis review.<sup>68</sup>

That there are many ways of ‘promoting’ majoritarian sexual morality that do not entail criminalizing people whose sexual preferences do not follow majoritarian tastes is a point on which Scalia does not dwell. His main concern however appears to be the implications that the majority opinion has for the States’ capacity to prohibit same-sex marriage:

Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, *ante*, at 18; and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” *ante*, at 6; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution,” *ibid.*? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.<sup>69</sup>

Scalia’s views on that specific issue are entertainingly revealed in an account of a moot he judged at NYU law school in 1996.<sup>70</sup> Suffice it to say that he did not appear

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<sup>66</sup> 539 U.S. 558, 592, 598 & 599 (2003) respectively.

<sup>67</sup> *Id.* at 597.

<sup>68</sup> *Id.* at 599.

<sup>69</sup> *Id.* at 604-05.

<sup>70</sup> MURDOCH & PRICE, *supra* note 5, at 517-22.

receptive to the suggestion that either the liberty or equal protection dimensions of the Fourteenth Amendment could preclude States from forbidding same sex marriage. He would have wait over ten years however to take those views from the pretend courtroom to the real one.

F. *UNITED STATES V. WINDSOR (2013)*

The specific target of the litigation in *U.S. v. Windsor*<sup>71</sup> was s.3 of the federal Defense of Marriage Act (1996) (hereafter ‘DOMA’). S.3 was an interpretation clause, which provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or wife”.

S.3 was intended to apply to all federal measures in which marriage was a relevant criterion. It was presumably designed to disqualify same sex spouses from receiving any benefits or other favorable treatment which Congress granted to married couples. No States actually recognized same sex marriage at that time, and the Act appeared to be a pre-emptive strike lest any State (or perhaps Canada) should do so in future. The bill had been approved by 342–67 in the House, and by 85–14 in the Senate.<sup>72</sup> That it was then signed rather than vetoed by the President may surprise observers with an inaccurately rose-tinted view of Bill Clinton’s liberal political credentials. The bill passed through Congress shortly before the 1996 presidential elections; Clinton was evidently worried that rejecting it would lose him more votes than signing it would win.<sup>73</sup>

The bill’s proponents in Congress were manifestly motivated by the animus (homophobic bigotry is perhaps the more apt descriptor) which had escaped Scalia’s attention in *Romer* and *Lawrence*. Its sponsor in the house, Bill Barr (Republican Georgia), told his colleagues that the United States was in dire peril from the onward march of the gays:

The very foundations of our society are in danger of being burned....  
The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundation of our society: the family unit.<sup>74</sup>

<sup>71</sup> 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013). For a more detailed analysis, see Ian Loveland, *A Right to Engage in Same Sex Marriage in the United States?* EUR. HUM. RTS. L. REV, 10 (2014).

<sup>72</sup> For a brief recall of some of the opposing voices see <http://tv.msnbc.com/2013/03/28/speaking-out-who-opposed-doma-during-1996-debate/>.

<sup>73</sup> The weight of votes for the measure was clearly more than sufficient to overturn a Presidential veto.

<sup>74</sup> CONG. REC. (H 4782; July 12, 1996). See also the speech of Cliff Stearns, (Rep., Fla) speaking to Barney Frank, the gay Democrat from Massachusetts: “You do not threaten

Congressman Funderbunk (Republican North Carolina) had apparently not anticipated the judgment in *Dale*, for he was terribly concerned about the fate of the Boy Scouts of America, who were apparently: “being told to abandon their moral code of 80 years and to place young boys under homosexual men on camping trips or face financial ruin.”<sup>75</sup>

The few Democrats who opposed the bill saw no bona fide motive behind it. Senator Charles Robb (Democrat, Virginia) announced “I feel very strongly that this legislation is fundamentally wrong, and feeling as I do it would not be true to my conscience or my oath of office if I fail to speak out against it.”<sup>76</sup> Senator Barbara Boxer (Democrat, California) was more scathing. The bill was: “ugly politics. To me, it is about dividing us instead of bringing us together. To me, it is about scapegoating. To me, it is a diversion from what we should be doing.”<sup>77</sup> Her colleague Charles Robb, a Virginia Democrat, was equally forthright: “I feel very strongly that this legislation is fundamentally wrong, and feeling as I do it would not be true to my conscience or my oath of office if I fail to speak out against it.”<sup>78</sup>

DOMA’s supporters had accurately anticipated that States would begin to legalize gay marriage however. By 2013, 13 States (and Washington DC) had legislated to allow same-sex marriage,<sup>79</sup> although 35 expressly prohibited it.<sup>80</sup> The problem that DOMA posed for Windsor related to federal inheritance tax. Ms. Windsor had married her wife in Canada in 2007. When her wife died, Ms. Windsor was presented with a bill for federal inheritance tax, from which she would have been exempt had her spouse been a man.

The composition of the Court had changed notably since *Lawrence* was decided. Chief Justice Roberts (Bush 2005) had replaced Rehnquist, and Justice Alito (Bush 2006) had taken O’Connor’s seat. Both might sensibly have been thought unreceptive to either the liberty or equal protection arguments against sexual orientation discrimination. Sonia Sotomayor (2009, Obama) had been appointed to the Court on David Souter’s retirement, and Elena Kagan (2010, Obama) took the seat vacated by John Paul Stevens. Both would likely be supportive of those arguments.

Given his judgment in *Lawrence*, Kennedy’s alignment with Breyer, Ginsburg, Sotomayor and Kagan in a 5- 4 judgment invalidating DOMA s.3 was predictable. The majority’s reasoning in Kennedy’s opinion was not entirely compelling. Its core was the assertion that marriage was demonstrably a privacy right that amounted to a liberty interest under the Fifth Amendment. That assertion is of course uncontroversial. The more difficult proposition to sustain is that the liberty interest in marriage is indifferent to the genders of the married couple.

To an extent, the majority sidestepped that historically difficult question by focusing on the motivation that underlay DOMA. Drawing on the Congressional

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my marriage but you do threaten the moral fiber that keeps this nation together. You threaten the future of families which have traditional marriage at their very heart...”. (142 CONG. REC. (H 7488; July 12, 1996).

<sup>75</sup> 142 CONG. REC. (H 7487; July 12, 1996).

<sup>76</sup> 142 CONG. REC. (S 10121; Sept. 10, 1996).

<sup>77</sup> 142 CONG. REC. (S 10065; Sept. 9, 1996).

<sup>78</sup> 142 CONG. REC. (S 10121; Sept. 10, 1996).

<sup>79</sup> California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington.

<sup>80</sup> <http://edition.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts>.

debates, Kennedy saw little scope to doubt that those motives were: “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality”; and to protect: “the traditional moral teaching reflected in heterosexual-only marriage laws”.<sup>81</sup> This led to the conclusion that: “The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status and so a stigma upon all those who enter into same sex marriages...”<sup>82</sup> and that the “essence” of DOMA was: “interference with the equal dignity of same sex marriages”.<sup>83</sup> The majority did not in terms confirm that the constitutional barrier to Congress discriminating against same sex marriage also meant that States could not do so, but it was hard to resist the conclusion that *Windsor* would not lead to that result.

This seemed to be Scalia’s primary concern in another hyperbolic, almost hysterical dissent. He was manifestly unconvinced by the majority’s assertion that its conclusion addressed only the constitutionality of DOMA:

In my opinion, however, the view that *this* Court will take of State prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion... The real rationale of today’s opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by ‘bare desire to harm’ couples in same sex marriages.<sup>84</sup>

Scalia saw no meaningful barrier to altering the language used in the majority opinion to reach embrace state laws. If DOMA humiliates same sex spouses by according their relationship an inferior (i.e. married only for state law purposes) status, then it would seem logical that state laws prohibiting same-sex marriage entirely humiliates gay couples by according their relationships an inferior (i.e. non-married) status. That Scalia foresaw and vehemently disapproved of where the majority was likely to go in a subsequent case dealing with state laws perhaps explains in part the vitriolic nature of his dissent, although as noted above his opinions in both *Romer* and *Lawrence* had already displayed that unhappy quality.

His analytical starting point was a perfectly proper one; namely that the majority was overstepping the legitimate boundaries of its constitutional role by interfering in a political dispute that should be left to elected legislators to resolve. He was however unable and/or unwilling to make that point in a dispassionately judicial style:

This case is about power in several respects. It is about the power of people to govern themselves, and the power of this Court to pronounce the law. Today, 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

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<sup>81</sup> *Id.* at 16.

<sup>82</sup> 570 U.S. \_\_\_, 133 S.Ct. 2675, 2693 (2013) (Kennedy, J.).

<sup>83</sup> *Id.* The Fifth has no Equal Protection Clause in its text, but that concept has been implied into the Fifth since the Court’s judgment in *Bolling v. Sharpe*, 347 U.S. 497 (1954), which, decided alongside *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), held that racial segregation in Washington, D.C. schools breached an implied equal protection provision within the liberty clause of the Fifth.

<sup>84</sup> 570 U.S. \_\_\_, 133 S.Ct. 2675, 2709 (2013) (Scalia, J. dissenting).

this democratically adopted legislation. The Court's errors on both points spring forth from the same diseased roots: an exalted conception of the role of this institution in America.<sup>85</sup>

There is certainly some force in Scalia's substantive point that the majority's opinion is not securely rooted in authority, although expressing that view by deriding the opinion as "rootless and shifting"<sup>86</sup> might better be categorized as abuse rather than rebuttal. He puts his case rather better in noting that the majority seems not squarely to have decided if it is dealing with a rational basis rather than strict scrutiny standard of review. As in his earlier judgments however, Scalia maintained a Nelsonian blindness to the realities of the motives of the legislators who supported the law under challenge. He denounced the majority's conclusion that the Act sprang from homophobic hostility as "quite untrue."<sup>87</sup> The assertion is bizarre in the face of the speeches in the Congressional Record referred to by the majority, and Scalia does not draw upon any part of the Congressional Record which reveals a "rational" basis for DOMA motivated by some more palatable concerns. He suggests that one rational basis for the Act would be to avoid difficult choice of law problems which might arise given that some States allowed same-sex marriage and some did not; although he is unable to show any member of Congress making that point during the Act's passage.<sup>87</sup>

Scalia does eschew in *Windsor* however the direct demonization of gay activists that he indulged in both in *Romer* and in *Lawrence*. But while that is a welcome move towards a judgment displaying what Scalia himself calls at the end of his opinion "the judicial temperament", he counterbalances that move and compromises his judgment's intellectual weight by his casual, caustic dismissal of *Lawrence* as the case that declared: "a constitutional right to homosexual sodomy,"<sup>88</sup> He does not accept that the case was really about a right of privacy for adults of sound mind to engage in consensual, non-violent sexual behavior in their own homes. Homophobic bigotry does not lose its character just because it is expressed obliquely rather than head-on; a point of which Scalia was surely aware but with which he chose not to engage.

### G. *OBERGEFELL V. HODGES* (2015)

It took barely a year for Scalia's prediction in *Windsor* to bear fruit. In *Obergefell v. Hodges*<sup>89</sup> the Court split in just the same way as in *Windsor* on the question of whether States could indeed limit marriage to 'heterosexual' couples.<sup>90</sup> The majority's reasoning also followed the path laid out in *Windsor*. While some weight

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<sup>85</sup> *Id.* at 2697-98.

<sup>86</sup> *Id.* at 2705.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2708.

<sup>89</sup> 576 U.S. \_\_\_, 135 S.Ct. 2584 (2015).

<sup>90</sup> The facetiously inclined might note that State laws restricting marriage to that between 'a man and a woman' do not prevent bi-sexuals marrying each other, nor a lesbian marrying a gay man. And insofar as such couples might raise children in a long term settled relationship, such marriages would presumably hit all of the right buttons of 'traditional' views as to what marriage is and what marriage is for.

was accorded to an equal protection analysis, the judgment is based primarily on the conclusion that the right to marry is a liberty issue which entitles any and all adults to marry any other adult he/she might wish, and which liberty States could restrict only for reasons that would survive strict scrutiny review.<sup>91</sup>

Justice Kennedy presents marriage as an evolving social phenomenon. This was presumably done to pre-emptively rebut the argument that the ‘liberties’ embraced by the Fourteenth Amendment comprised only those things that had a longstanding empirical root in the fabric of American life; a quality which same-sex marriage obviously lacked:

...[M]arriage was once viewed as an arrangement by the couple’s parents based on political, religious, and financial concerns; but by the time of the Nation’s founding it was understood to be a voluntary contract between a man and a woman.... As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity...As women gained legal, political, and property rights, and *as society began to understand that women have their own equal dignity, the law of coverture was abandoned....* These and other developments in the institution of marriage over the past centuries were *not mere superficial changes*. Rather, *they worked deep transformations* in its structure, affecting aspects of marriage long viewed by many as essential....<sup>92</sup>

This presumption of constant evolution enables the majority to assert that the gender identity of spouses is an ‘aspect’ - and a ‘deep’ aspect – of marriage, but is not an *indispensable* element of it. Rather its essential character may lie in spouses’ reciprocal desire for companionship and emotional intimacy, which is a quality not dependent on sexual orientation.

The majority offers a similarly ‘evolutionary’ perspective on the issue of ‘equal dignity’ by equating the long term rejection of the subordinate status of women vis-à-vis men with the more recently emerging attitudinal changes in modern American society to homosexuality:

Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity.... Same-sex intimacy remained a crime in many States.... For much of the 20th century, moreover, homosexuality was treated as an illness....Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable....<sup>93</sup>

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<sup>91</sup> Which presumably – at least at present – enables States to retain restrictions based on, inter alia, age, mental competence, consanguinity and polygamy.

<sup>92</sup> 576 U.S. \_\_\_, 135 S.Ct. 2584, 2595 (2015) (Kennedy, J. for the Court).

<sup>93</sup> *Id.* at 2596.

After rooting this notion of ‘dignity’ in the 1960s contraception cases, Justice Kennedy then finds it having been applied, albeit not under that label, in three ‘marriage cases’ in which State prohibitions were invalidated. In the first, *Loving v. Virginia*,<sup>94</sup> the Warren Court struck down Virginia’s laws which forbade marriage between a white and non-white person. In the second, *Zablocki v. Redhail*,<sup>95</sup> the Burger court held that Wisconsin’s law which prevented fathers who defaulted on child support payments from marrying was unconstitutional. And in the third, *Turner v. Saffley*,<sup>96</sup> the court invalidated a Missouri law which precluded any prison inmate from marrying unless the prison governor considered there were compelling reasons to allow the inmate to do so. Since the majority took the view – as in *Romer* and *Lawrence* – that the effect of laws prohibiting same sex couples from marrying was to stigmatize gay people, and that their motivation was simply moral disapproval of homosexuality, the laws simply could not withstand constitutional scrutiny.

Scalia’s dissent is notably short in *Obergefell*. Equally notably, he seems here to underline the shift he made in *Windsor* in no longer demonizing the advocates of same-sex marriage. Indeed, he refers to them – and their opponents – in perfectly respectful terms. They are apparently not ‘crusaders’ any more:

[P]ublic debate over same sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately but respectfully attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote...<sup>97</sup>

Silly metaphor has also been expunged from Scalia’s analysis. There is no suggestion of that prohibiting murder, incest or prostitution has anything valuable to tell us about whether we might also prohibit sexual orientation discrimination. Indeed, there is even a suggestion that Scalia is acknowledging the stylistic and substantive excesses of his own opinions in *Romer*, *Lawrence* and *Windsor*: “It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so”.<sup>98</sup> The great bulk of the opinion is however a marvelous example of such ‘extravagance’, taking the form of a petulant diatribe against the majority of the Court. The second paragraph sets the tone:

Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs

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<sup>94</sup> 388 U.S. 1 (1967).

<sup>95</sup> 434 U.S. 374 (1978).

<sup>96</sup> 482 U.S. 78 (1978).

<sup>97</sup> 576 U.S. \_\_\_, 135 S.Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

<sup>98</sup> *Id.* at 2630.

the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.<sup>99</sup>

The crux of this argument in substantive terms is of course simple. It is very hard credibly to view same sex marriage as a liberty in the orthodox *Palko* sense, if it is a legal status which has not been recognized by any State at all until very recently and which at present is recognized only by a minority of them. The same problem would attend any assertion that sexual orientation is a suspect category for equal protection purposes. This was in essence the argument made in restrained terms by Chief Justice Roberts. Scalia's brief opinion however is an unrelenting tirade of sarcasm and abuse:<sup>100</sup>

The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie ...

.... Of course the opinion's showy profundities are often profoundly incoherent. "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality." (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie.

... Rights, we are told, can "rise ... from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era." (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?)... .

... [T]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation...

But what really astounds is the hubris reflected in today's judicial Putsch... .

There are also substantive shortcomings in Scalia's judgment. Although he does not engage with the animus argument, he offers no explanation of why the States that prohibited same sex marriage chose to do so. That the relevant majorities in each State did do so is apparently all that is required. The main weakness in the judgment however is the way in which Scalia continually misrepresents the nature of 'the People'. Scalia constantly equates 'the People' in the sense of the Article V amendment process (ie 'the People' with the power to amend the constitution) with the United States' fifty geographically discrete lawmaking majorities which pass legislation or constitutional amendment under State constitutions. But these majorities are obviously not 'the People' in a sovereign sense. They are no more than a cluster of 'mini-Peoples', many of them comprising no more than a tiny

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<sup>99</sup> *Id.* at 2627.

<sup>100</sup> 576 U.S. \_\_\_, 135 S. Ct. 2584, 2630 n. 22, 2630, 2629 (2015).

minority of the true ‘People’. That ‘People’ can reverse the majority decision in *Obergefell* whenever and however it should choose to do so. A new amendment along the lines of: “Marriage may only be contracted between an adult man and an adult woman, and no institution of the Federal government nor any institution of any State’s government shall recognize as valid for any purposes any marriage, wherever or whenever entered into, between persons of the same gender” would achieve that result. If that is what ‘the People’ of the United States want the law to be, the *Obergefell* majority offers no obstacle to them doing so. It may be in practical political terms very unlikely that such a majority will emerge, but that is the point of having a constitutional order resting on deeply entrenched laws. And of course if ‘the People’ had ever felt so strongly that marriage should be an exclusively heterosexual legal status we might wonder why that view was never made clear in the text of the constitution.

Scalia manages to match substantive nonsense with stylistic excess in a section of his judgment in which he asserts that the majority are “... willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.”<sup>101</sup>

This is also a remarkably foolish statement. One does not “stand against” the Constitution by advocating that its text be changed or its interpretation altered. The ability to make such arguments is a basic tenet of the entire constitutional system. Did critics of *Dred Scott* or of *Plessy* or of *Lochner*<sup>102</sup> “stand against” the constitution? Of course not. And neither does anyone who advocates constitutional amendment to forbid same-sex marriage, or who raises the issue again before the courts in the hope of having *Obergefell* reversed.

Scalia concludes, with no apparent irony, with this criticism of the majority opinion:

The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.<sup>103</sup>

‘Clear thinking and sober analysis’ are without doubt traits demanded of judges, especially those who exercise as much power as the members of the United States Supreme Court. It is perhaps rather a shame that those qualities seemed to be in such short supply in Scalia’s own judgment in this case.

## II. CONCLUSION

Insofar as one can find a constitutionally principled rationale underlying Scalia’s position in this line of cases, it presumably lies in his insistence on the need for the Supreme Court to acknowledge and to respect the dividing line between

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<sup>101</sup> *Id.* at 2630.

<sup>102</sup> *Dred Scott v. Sanford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 567 (1896); *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>103</sup> 576 U.S. \_\_\_, 135 S. Ct. 2584, 2630 (2015).

law and politics (and courts and politicians/electorates). He – along presumably with Rehnquist, Thomas and Alito – evidently roots his jurisprudence firmly in the appropriate sphere of judicial restraint in the face of majoritarian political lawmaking, while the shifting majorities who have disagreed with them are abandoning the proper judicial role to engage in not just un- but anti- ‘democratic’ cultural engineering. The fascinating irony here is that a judge who eschews ‘politics’ produces judgments replete with substantive sentiments and styles of expression which fit more readily in the world of demagogic politicking than of dispassionate judicial analysis. The substantive analysis is shot through with misrepresentation of opposing argument and inapposite metaphor, while the style in which that substance is couched descends frequently into abuse, hyperbole and hysteria.

Were one to search for a judicial precursor of such judgments, the examples that spring most readily to mind are Roger Taney’s mendacious misuse of original intent jurisprudence in *Dred Scott v. Sandford*<sup>104</sup> and James McReynolds’ splenetic dissents from the Court’s pro-New Deal and (timid) racial equality judgments in the 1930s.<sup>105</sup> But perhaps a nearer ideological bedfellow can be found a little closer (chronologically if not institutionally) to home in the presidential campaign of Donald Trump. It is hardly a surprise that Trump joined in the ‘he was a great judge’ fanfare after Scalia’s death, and promised that as President he would seek to appoint judges in a similar mold.<sup>106</sup> Both men persistently displayed in their respective legal and political spheres a disdain for the truth of their empirical observations and a contempt for the arguments advanced by their opponents. Those are unhappy qualities in a politician; they are an obscenity in a judge.

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<sup>104</sup> (1857) 19 Howard 393. The nature of and basis for Taney’s dishonesty are nicely unpicked by Donald Bogan, *The Maryland Context of Dred Scott*, AM. J. LEGAL HIST. 381 (1990-91).

<sup>105</sup> See especially his comments in the law school desegregation case, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) at 353: For a long time, Missouri has acted upon the view that the best interest of her people demands separation of whites and negroes in schools. Under the opinion just announced, I presume she may abandon her law school, and thereby disadvantage her white citizens without improving petitioner’s opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races.

<sup>106</sup> Nico Lang, *Donald Trump Vows to Appoint Supreme Court Justice ‘In the Mold of Scalia’*, THE ADVOCATE (2016) <http://www.advocate.com/election/2016/10/10/donald-trump-vows-appoint-supreme-court-justice-mold-scalia>.



# SCALIA’S LEGACY: ORIGINALISM AND CHANGE IN THE LAW OF STANDING

James E. Pfander\*  
*Northwestern Pritzker School of Law*

## ABSTRACT

*Perhaps no single Justice fashioned as many changes to the law of standing as that most gifted originalist, Antonin Scalia. It was Justice Scalia who first deployed twentieth century standing rules to invalidate a citizen suit provision; who promoted the prudential rule against the adjudication of generalized grievances to constitutional status; who pressed to constitutionalize the adverse-party rule; who reconfigured informer litigation to preserve the injury-in-fact requirement; and who recently re-packaged the Court’s old prudential standing doctrine as a merits-based inquiry into the plaintiff’s statutory right to sue. That he has done so much to re-work modern litigation in the name of fidelity to the workways of eighteenth century lawyers “in the English courts at Westminster” testifies to his considerable rhetorical skills. In this essay, I evaluate Justice Scalia’s contributions to this important body of jurisdictional law and then step back to consider his legacy.*

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## I. INTRODUCTION

Among the many distinctive features of his jurisprudence,<sup>1</sup> Justice Antonin Scalia expressed a preference for clear rules, for text-based approaches to statutory interpretation, and for a focus on the original meaning of the Constitution as the surest guide to that document's interpretation. He defended originalism at every opportunity, arguing that it best complied with the framers' own view of the interpretive process and best constrained an activist judiciary. By hewing closely to the original meaning, federal judges would avoid the cardinal sin of reading their own policy preferences into the document. That judicial diffidence, in turn, would preserve the lawmaking primacy of the elected branches of government. In the face of constitutional doubts, judges should stay their hands and allow the political branches of government to update governing law to meet the exigencies of the day.<sup>2</sup> Building on these ideas, Justice Scalia mounted withering criticisms of such decisions as *Planned Parenthood v. Casey*<sup>3</sup> (reaffirming the constitutional right to an abortion) and *Obergefell v. Hodges*<sup>4</sup> (recognizing a constitutional right to same-sex marriage). He invariably took the position that, although it was hard to do well, originalism remained the best mode of constitutional interpretation. In time, his view became widely shared, particularly among lawyers, judges and academics who shared his political commitments.

This Essay evaluates one of the key claims of Justice Scalia's jurisprudence, his claim that consistent application of originalist precepts will constrain federal judges and preserve the law-making role of the political branches. This Essay conducts the evaluation by looking closely at Justice Scalia's role in the development of Article III standing doctrine. Article III of the U.S. Constitution defines the jurisdiction of the federal courts by specifying the "cases" and "controversies" to which the judicial power of the United States shall "extend."<sup>5</sup> It does not, however, define the

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<sup>1</sup> Justice Scalia conducted an ongoing seminar on interpretive method, both in the law review articles he wrote, see note 2 *infra*, and in his numerous public appearances. For a useful assessment of Justice Scalia's role in the development of originalist precepts, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 248-49 (2009) (describing Justice Scalia as a leading proponent of the change from original intent to original meaning as the touchstone of originalist inquiry). On the manifold character of originalism, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (emphasizing the many and varied forms of originalist inquiry). For criticisms of Justice Scalia's consistency in adhering to his original meaning construct, see Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383 (2007). On the politics of adherence to originalism, see Robert Post & Reva Siegel, *Originalism as Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006). For an early and influential criticism of original intent, one that helped push adherents to original meaning, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 907 (1985) (arguing that the framers interpreted the Constitution's language and structure and did not rely on the personal intentions of the participants).

<sup>2</sup> For his own account of his originalist, rules-based jurisprudence, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>3</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

<sup>4</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting).

<sup>5</sup> U.S. CONST., art. III, § 2.

characteristics of the individual claimants who have standing to pursue such claims in federal court. In the absence of any constitutional text on which to base a body of standing law, the Supreme Court has chosen to rely on the “case-or-controversy” requirement of Article III. Thus, some eighty years ago, Justice Felix Frankfurter explained that the federal “[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’”<sup>6</sup> In an early law review article, then-Judge Scalia recognized that the emphasis on the case-or-controversy language was misplaced; he expressed a preference for reliance on equally general features of Article III’s reference to “judicial power” as a textual predicate for standing limits.<sup>7</sup>

But his position evolved. By the end of his career on the bench, Justice Scalia had come to view the case-or-controversy language as the cornerstone of standing law. Indeed, in a revealing opinion, he argued that the case-or-controversy language imposed a requirement of concrete adverseness between contending parties that he in turn found to be missing in an important challenge to the legality of the Defense of Marriage Act.<sup>8</sup> More importantly, Justice Scalia consistently took a narrow view of Congress’s power to confer standing on individuals through the exercise of its legislative authority. His opinion in *Lujan v. Defenders of Wildlife*<sup>9</sup> invalidated a citizen-suit provision that sought to authorize concerned environmentalists to mount legal challenges to agency action. Later decisions argue for similar constraints on congressional power in other settings.<sup>10</sup> Finally, Justice Scalia worked to eliminate prudential doctrines, preferring in the absence of perceived constitutional limits to define the right of individuals to sue by reference to the text of applicable legislation.<sup>11</sup> In all of these settings, Justice Scalia played a leading role in re-shaping jurisdictional law that runs counter to his professed adherence to the method of originalist interpretation.

In tracing the arc of Justice Scalia’s standing jurisprudence, this Essay begins with a brief sketch of the law as of the date he arrived on the Court. Next, the Essay describes the many consequential changes the Justice made to standing law. Finally, the Essay evaluates those changes in light of the evidence we can collect about the likely original meaning of Article III of the Constitution. After concluding that Justice Scalia could not justify his standing decisions by reference to his own originalist precepts, the Essay shows that the jurisprudential style or method in his opinions most closely resembles the form of common-law constitutionalism that he was quick to criticize in other settings. He was, in short, something of a living constitutionalist in the realm of standing law and was only too ready to invalidate generous federal legislative grants of standing on the ground that they violated judge-made limits on the right of individuals to sue. One might be tempted to dismiss Justice Scalia’s standing doctrine as the work of a hypocrite, but that

<sup>6</sup> *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.)

<sup>7</sup> See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983).

<sup>8</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2702 (2013) (Scalia, J., dissenting) (characterizing the adverse-party requirement not as a prudential requirement “that we have invented,” but as an “essential element of an Article III case or controversy”).

<sup>9</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>10</sup> See *FEC v. Akins*, 524 U.S. 11, 29 (1998) (Scalia, J., dissenting).

<sup>11</sup> See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

would miss something essential about the rhetorical power of his legal opinions. By preserving the myth of originalist constitutionalism and avoiding inconvenient historical truths, Justice Scalia performed the inevitable judge's task of fashioning new law out of old. By choosing to deny or obscure his tactics in the standing cases, Justice Scalia could continue to deploy originalist methodology as a sledgehammer in assailing the judge-made law with which he disagreed.

## II. STANDING LAW BEFORE JUSTICE SCALIA'S ARRIVAL

Our brief evaluation of the law of standing when Justice Scalia took the oath of office in 1986<sup>12</sup> begins with the 1984 decision in *Allen v. Wright*.<sup>13</sup> There, the Court articulated three ideas that were central to the law of standing at the time. First, the Court confirmed that Article III limits the federal courts to handling actual "cases" and "controversies" the better to preserve the separation of powers. Second, the Court identified three elements to the constitutional inquiry: the plaintiff must have suffered a personal injury; the injury must be "fairly traceable" to the challenged action; and relief from the injury must "likely" follow from a favorable decision. Third, the Court maintained a distinction between what it called the prudential standing doctrine, comprised of "judicially self-imposed limits on the exercise of federal jurisdiction," and what it called standing's "core component derived directly from the Constitution."<sup>14</sup>

The Court's application of these principles also illustrated a key feature of its standing jurisprudence, a reluctance to entertain suits aimed at compelling the government to regulate third parties more closely. The plaintiffs sued the Internal Revenue Service, seeking declaratory and injunctive relief that would compel the Service to deny tax-exempt status to the all-White private schools that popped up in the South after courts ordered the desegregation of the public schools. Although the African-American plaintiffs were said to have alleged a proper injury to their right to integrated schooling, the Court found that an order directing the IRS to apply more stringent standards would not necessarily affect the financial viability of the private schools and would not necessarily improve the plaintiffs' prospects for integrated education. The claims failed the fair traceability requirement because the chain of causation running from the IRS rule on tax exemption to an increase in the number of Whites attending public schools was "far too weak."<sup>15</sup> For the Court, the absence of any clear statutory standards to govern the IRS's decision on tax exemption for racially discriminatory schools counseled against judicial involvement; after all, the Court explained, the Constitution assigns the executive responsibility for enforcement of federal law and the plaintiffs' suit proposed to restructure that enforcement role.<sup>16</sup>

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<sup>12</sup> Justice Scalia joined the Court in 1986, after having spent four years on United States Court of Appeals for the District of Columbia Circuit and some years before that as a law professor, first at the University of Virginia and, after a hitch in the Justice Department, at the University of Chicago.

<sup>13</sup> See *Allen v. Wright*, 468 U.S. 737 (1984).

<sup>14</sup> *Allen*, 468 U.S. at 751.

<sup>15</sup> *Id.* at 759.

<sup>16</sup> *Id.* at 761.

In a second revealing pre-Scalia standing decision, the Court decisively curtailed the doctrine of taxpayer standing. Taxpayers can, of course, challenge the imposition of taxes on themselves, on both statutory and constitutional grounds. But their status as taxpayers does not give them a concrete or personal stake in every government decision to spend federal money; the impact of any expenditure on any particular citizen's tax liability has been regarded as too diffuse to warrant standing.<sup>17</sup> The Warren Court created an exception to this rule in *Flast v. Cohen*, recognizing taxpayer standing to challenge the appropriation of federal money to a religious enterprise in violation of the First Amendment's prohibition against the establishment of religion.<sup>18</sup> In *Valley Forge Christian College v. Americans United for Separation of Church and State*, however, the Court denied standing to challenge the transfer of surplus federal property to a religious institution. There was no specific federal appropriation to challenge, only the exercise of executive discretion in the disposal of surplus property, and therefore the claims were said to fail the *Flast* test.<sup>19</sup> *Valley Forge* underscored the Court's growing reluctance to entertain "generalized grievances," claims on behalf of a large group of citizens who were all similarly affected by proposed government action. It resembled in some respects the Court's earlier refusal to allow citizens to mount challenges either to the congressional practice of keeping the CIA's budget a secret or to the executive's practice of issuing military commissions to sitting members of Congress.<sup>20</sup>

A third set of cases explored the contours of what the Court would describe in *Allen v. Wright* as the prudential standing doctrine. On the view expressed in several cases, standing law included both a core constitutional component and a prudential component. A claim might satisfy the constitutional minima, but still fail the prudential standing test, at least in the absence of a fairly clear signal from Congress. Thus, in *Flast v. Cohen*, Justice Harlan dissented from the majority's decision to grant standing, but added that he would defer to a decision by Congress to allow the claim.<sup>21</sup> Similarly, in *Warth v. Seldin*, the Court paid heed to the counsels of prudence in refusing to permit a challenge to the zoning rules adopted by a city in New York that were said to have foreclosed the construction of low-income housing and thereby to have excluded minority homeowners.<sup>22</sup> But here again, the Court explained that Congress could override that prudential reluctance through the adoption of a statute that clearly authorized such litigation to proceed in federal court. Following Justice Harlan's dissent in *Flast*, the *Warth* Court explained that the ban on the adjudication of generalized grievances was a matter of prudence over which Congress could exercise significant control.<sup>23</sup>

<sup>17</sup> See *Frothingham v. Mellon*, 262 U.S. 447 (1921) (no standing to challenge federal financial support for state programs to reduce maternal and infant mortality).

<sup>18</sup> See *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>19</sup> See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

<sup>20</sup> See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (no citizen standing to enforce the constitutional prohibition on executive offices for members of Congress); *United States v. Richardson*, 418 U.S. 166 (1974) (no citizen standing to require Congress to publish a public account of the expenditure of public money on the CIA).

<sup>21</sup> See *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting).

<sup>22</sup> See *Warth v. Seldin*, 422 U.S. 490 (1975).

<sup>23</sup> *Id.* at 499-500.

### III. THEN-JUDGE SCALIA'S CRITIQUE OF STANDING DOCTRINE

One can learn much about Justice Scalia's broad concerns with the content of standing law from a relatively brief paper, published in 1983 as a revised version of a lecture he delivered at a law school.<sup>24</sup> In the paper, then-Judge Scalia identified three features of standing law as puzzling or in need of repair. First, and most generally, he expressed concern with the willingness of federal courts to move beyond the adjudication of the private law claims of individuals to the public law claims of public interest groups, often in the environmental arena. He thus contrasted the venerable decision in *Marbury v. Madison*, and its emphasis on the role of the courts in deciding on "the rights of individuals," with a recent case that halted the construction of a nuclear power plant at the behest of a loosely affiliated "coordinating commission" that objected to the project.<sup>25</sup> Second, he took issue with the prudential standing doctrine, explaining that the Court had failed to identify its authority "for simply granting or denying standing as its prudence might dictate."<sup>26</sup> He explained that the Court should ask instead whether "a legal right exists" and do so by stressing the intent of Congress. Such an approach would preserve congressional control of the right to sue, and refocus the analysis from one of judicial prudence to one of legislative intent.<sup>27</sup>

Third, and in some ways most significantly, Judge Scalia argued that the federal courts really had no business at all in hearing generalized grievances.<sup>28</sup> These were claims to challenge government action that, as in the taxpayer cases, affected all citizens the same way. The very generality of the injury meant that no individual could claim a concrete, personal and particularized injury of the kind necessary to support standing. Some may feel more strongly about the matter, but then they were free to persuade everyone else of the wisdom of their view.<sup>29</sup> They should do so, Judge Scalia believed, through the democratic process rather than through the courts. Courts should be reserved for those asserting the rights of a minority, rights that cannot be well managed through legislation.<sup>30</sup> It followed that Congress could not confer standing to sue when individuals were seeking redress for a generalized grievance. For Judge Scalia, it was clear, for example, that an environmental claim on behalf of "all who breathe" would receive a fair hearing in the "normal political process" and thus could not claim a place on federal dockets, even were Congress to have passed a law conferring standing in such a case.<sup>31</sup> Judge Scalia thus signaled a willingness to invalidate acts of Congress conferring standing on citizens to litigate

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<sup>24</sup> See Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, *supra* note 7.

<sup>25</sup> See *id.* at 883-85 (contrasting *Marbury v. Madison*, 5 U.S. 137, 170 (1803) with *Calvert Cliffs Coordinating Comm'n v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971)).

<sup>26</sup> See Scalia, *The Doctrine of Standing*, *supra* note 7, at 885-86.

<sup>27</sup> *Id.* at 885 (acknowledging that standing "is largely within the control of Congress" and arguing that congressional intent should control).

<sup>28</sup> *Id.* at 894-95.

<sup>29</sup> *Id.* at 894.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 895-96.

generalized grievances. Such invalidation was essential, Judge Scalia believed, to the preservation of the properly limited role of the federal courts in a governmental system of coordinate and separate branches.<sup>32</sup>

As for the methodology Judge Scalia used in deriving his criticism of standing law, his essay was primarily structural and doctrinal. While he did invoke the historical example of *Marbury*, and did call for a “return to the original understanding,” his essay did not explore the historical origins of standing law at the time of the framing of the Constitution.<sup>33</sup> Early in the essay, he commented briefly on the problems with the textual hook for the development of Article III’s standing law. Standing, he explained, had been made a part of Article III through the “case-or-controversy” formulation “(for want of a better vehicle)”; this was “surely not a linguistically inevitable conclusion,” but it was nonetheless “an accurate description of the sort of business courts had traditionally entertained.”<sup>34</sup> On this view, then, Article III assumed that the federal courts could handle the sorts of matters that courts had traditionally handled. While no text defined or required individual standing, the very idea of a court system exercising judicial power implied limits on the sorts of claims that were proper grist for the judiciary. After this initial brush with history, Judge Scalia leapt forward to 1944, using an administrative law case to illustrate what he regarded as the traditional doctrine of standing as it had evolved by the mid-twentieth century.<sup>35</sup> When at the end of the essay, he called for a return to the venerable old days of strict standing law, he invoked cases from the 1920s and 1930s.<sup>36</sup>

#### IV. JUSTICE SCALIA AND STANDING DOCTRINE

*Lujan v. Defenders of Wildlife*. Of the many standing cases he wrote, Justice Scalia’s most far-reaching decision, *Lujan v. Defenders of Wildlife*, tackles several of the problems he had identified in his earlier essay.<sup>37</sup> The suit was brought to challenge the interpretation of a federal environmental consultation requirement; previous administrations had interpreted the law to require inter-agency consultation in an effort to reduce the environmental impact of new programs. The Reagan administration re-interpreted the statute to discontinue consultation as to projects set to take place overseas. As a consequence, federal agencies were offering financial support for development projects affecting the habitat of endangered species (the Nile crocodile, the Asian elephant) without having first evaluated its environmental impact. The public interest group Defenders of Wildlife sued to contest the new interpretation, arguing that the consultation requirement applied to all federal programs, at home and abroad.

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<sup>32</sup> Hence, the emphasis on separation of powers in the title of the Essay.

<sup>33</sup> See *id.* at 893 (invoking *Marbury*); *id.* at 897-98 (praising more restrictive recent decisions as a “reversion to former theory” and suggesting that future decisions would give greater weight to separation-of-powers concerns).

<sup>34</sup> *Id.* at 882.

<sup>35</sup> *Id.* at 883 (citing *Stark v. Wickard*, 321 U.S. 288 (1944)).

<sup>36</sup> *Id.* at 898 (citing *Frothingham v. Mellon*, 262 U.S. 447 (1923) and *Ex parte Levitt*, 302 U.S. 633 (1937) as venerable examples of a properly restrained approach to standing law).

<sup>37</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Justice Scalia viewed the suit as implicating the separation-of-powers concerns that lay at the heart of his conception of standing's function. In curtailing consultation, the government's action threatened an injury that could be considered a kind of generalized grievance; degradation of the environment affects "all who breathe" or all who appreciate animals in their native habitat.<sup>38</sup> What's more, allowing the suit to proceed would put the federal courts in the position of evaluating the degree to which the government should enforce the consultation rules, thus potentially interfering with the executive branch's primacy in deciding how strictly to enforce the law. Finally, the plaintiffs were said to have failed to articulate an injury that a decision in their favor would redress. They argued that, as members of a group who had been to the habitat in years past, they had an ongoing interest in the species' survival. But they all lived in the United States, far from the habitat in question and could not claim an immediate injury.<sup>39</sup> (Justice Scalia also concluded that an order requiring consultation would not necessarily alter the nature of the projects and their potential impact on the affected species, but he garnered only four votes for the proposition that the claimed failed the redressability prong of Article III.<sup>40</sup>)

Significantly, Justice Scalia spoke for a majority in concluding that the citizen suit provision of the statute, authorizing any person to sue, was constitutionally invalid in purporting to allow a generalized grievance to proceed in court.<sup>41</sup> The core constitutional restrictions were, according to Justice Scalia, derived from the case-or-controversy requirement of Article III and they restricted the federal courts to suits aimed (as *Marbury* taught) at vindicating the rights of individuals. In this litigation, by contrast, the plaintiffs sought to vindicate the public interest in governmental observance of the Constitution and laws. To be sure, Congress had attempted to convert the public interest into individual rights held in common by all. But such conversion, if permitted, would allow Congress to transfer to private suitors the president's power to enforce the law in violation of the constitutional injunction that the president "take care that the laws be faithfully executed."<sup>42</sup> Thus, with Justice Kennedy's qualified agreement, Justice Scalia succeeded in giving voice to his view that standing imposed constitutional limits on Congress's power to authorize individuals to pursue generalized grievances, especially where the suits in question were seen as interfering with the executive branch primacy in law enforcement and thus threatening the separation of powers. Only those with a constitutionally sufficient injury in fact were free to invoke the citizen suit provisions.<sup>43</sup>

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<sup>38</sup> See *Lujan*, 504 U.S. at 573 (characterizing the suit as a generalized grievance).

<sup>39</sup> *Id.* at 563-66 (concluding that prior visits to some relevant habitat and non-specific plans to visit again in the future did not establish the connection necessary to satisfy environmental standing).

<sup>40</sup> *Id.* at 568-71.

<sup>41</sup> *Id.* at 571-78.

<sup>42</sup> *Id.* at 577 (quoting the Take Care Clause, U.S. Const., art. II, § 3).

<sup>43</sup> Significantly, Justice Scalia acknowledged some fragmentation in standing doctrine, identifying in particular the reluctance of the Court to insist on redressability in cases asserting procedural rights claims. *Id.* at 572 n.7. But those cases did not do away with the injury requirement. Justice Kennedy's concurring opinion took some steps to minimize the potential impact of the decision by reaffirming that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* at 580 (Kennedy, J., concurring).

*Vermont Agency of Natural Resources v. United States ex rel. Stevens*. Justice Scalia's decision in *Lujan* attracted a good deal of attention, both from a dissenting Justice who characterized it as a "slash and burn" foray through environmental standing law and from a largely critical academic audience.<sup>44</sup> It also triggered a good deal of research into the origins of standing law. Scholars observed that, in contrast to Justice Scalia's assertions, it was not at all uncommon in England, and in the United States of the early Republic, to find private suitors pursuing claims on behalf of the public. Scholars pointed to a variety of public actions, including mandamus and other prerogative writ proceedings, in which litigants could sue without identifying an injury in fact or a specific interest.<sup>45</sup> In addition, scholars pointed to *qui tam* litigation, suits brought by "informers" to recover penalties from those who had submitted false claims to the United States. *Qui tam* informers could not allege a personal injury in fact, but eighteenth century practice in both England and in the United States allowed such suits to proceed. *Qui tam* certainly formed part of the tradition of Anglo-American litigation, and posed a challenge to the claim that only those with an injury in fact could invoke the judicial power of the United States.<sup>46</sup>

Justice Scalia tackled the problem of *qui tam* litigation in *Vermont Agency*, litigation brought to recover a penalty against an agency of the state government for the benefit of the United States and the informer, Jonathan Stevens.<sup>47</sup> Under the terms of the False Claims Act, first enacted in 1863 and reinstated in 1986, informers were required to notify the Department of Justice that a prospective defendant had defrauded the government through the assertion of false claims. On notification, the government could pursue the claim itself or defer to the private litigant. If the action was successful under either scenario, the private informer would keep a share of the penalties assessed against the defendant, and would recover her attorney's fees as well. The action thus presented a challenge to the coherence of standing law. The plaintiff clearly had a concrete stake in the action with the opportunity to secure a bounty as a result of successful litigation. But a bounty, while it created a concrete stake, was not necessarily designed to remedy any personal injury to the plaintiff herself.

Or at least that's how Justice Scalia understood the problem. His opinion explained that "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing." Instead, the "interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right."<sup>48</sup> Justice Scalia found that this crucial connection was missing:

<sup>44</sup> See *Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting). See generally Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Gene Nichol, *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993).

<sup>45</sup> See Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); cf. Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

<sup>46</sup> See Evan H. Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989).

<sup>47</sup> See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 725 (2000).

<sup>48</sup> *Vermont Agency*, 529 U.S. at 772.

A *qui tam* relator has suffered no such invasion—indeed, the “right” he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. As we have held in another context, however, an interest that is merely a “byproduct” of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.<sup>49</sup>

Something, it seemed, would have to give.<sup>50</sup>

Justice Scalia resolved the tension between the undoubted pedigree of *qui tam* litigation and his own carefully constructed injury-in-fact requirement with an adroit move. He chose to treat the informer as the assignee of the government’s interest in recovering penalties for false claims. The government had doubtless suffered an injury-in-fact and doubtless had standing to sue. The provisions of the False Claims Act could “reasonably be regarded as effecting a partial assignment of the Government’s damages claim.”<sup>51</sup> Although the Court had not previously recognized the representational standing of assignees, Justice Scalia identified cases that assumed the viability of such litigation including that brought by subrogees. In the end, then, Justice Scalia found “that the United States’ injury in fact suffices to confer standing on respondent Stevens.”<sup>52</sup>

Having located an injury-in-fact, Justice Scalia turned to the history of *qui tam* litigation both in England and in the courts of the United States:

*Qui tam* actions appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the Constitution. Although there is no evidence that the Colonies allowed common-law *qui tam* actions (which, as we have noted, were dying out in England by that time), they did pass several informer statutes expressly authorizing *qui tam* suits. . . . Moreover, immediately after the framing, the First Congress enacted a considerable number of informer statutes. Like their English counterparts, some of them provided both a bounty and an express cause of action; others provided a bounty only.<sup>53</sup>

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<sup>49</sup> *Id.* at 772-73. For the byproduct quote, see *Steel Co.*, 523 U.S. at 107.

<sup>50</sup> Justice Scalia had previously suggested that a bounty would suffice to give the plaintiff a concrete interest in the outcome of litigation, thereby satisfying that portion of justiciability law. See *Lujan*, 504 U.S. at 572-73 (distinguishing the injury claims of the plaintiffs from the “unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government’s benefit, by providing a cash bounty for the victorious plaintiff”). But he was later to reject a bounty as the basis for standing. See *Vermont Agency*, 529 U.S. at 773.

<sup>51</sup> *Id.* at 773.

<sup>52</sup> *Id.* at 774. On this point, the Court was unanimous. But Justice Scalia was unable to locate any prior decisions upholding the right of Congress to provide for an assignment of injuries in fact. And at least some language in prior opinions had assumed that the injury in fact must be personal to the plaintiff. See, e.g., *Lujan*, at 581 (Kennedy, J., concurring) (observing that “the party bringing suit must show that the action injures him in a concrete and personal way.”).

<sup>53</sup> *Id.* at 776-77.

That answered the standing puzzle. Justice Scalia found the history “well nigh conclusive” with respect to the question whether *qui tam* actions were “cases and controversies” of the sort traditionally amenable to, and resolved by, the judicial process.<sup>54</sup> But he was careful to add that it was the history combined with the prior theoretical justification that left “no room for doubt” as to Article III standing.<sup>55</sup>

*Steel Co. v. Citizens for a Better Environment*. During the 1970s, with the development of prudential standing doctrines that seem in retrospect to turn on an evaluation of relevant statutes, the Court would sometimes assume the existence of its jurisdiction in order to reach the merits of a claim. These cases led to a doctrine of hypothetical jurisdiction, under which the lower federal courts would presume their jurisdiction and then deny a claim on the merits where doing so served to simplify the judicial task.<sup>56</sup> These cases typically arose where the lower court perceived the merits issue to be relatively simple and straightforward and the jurisdictional issue to be quite complex. In dismissing the action without first resolving the jurisdictional issue, the federal courts were careful to refrain from exercising doubtful jurisdiction to impose liability on a defendant; the orders would typically dismiss the plaintiff’s action on the merits, resulting in a Rule 12(b)(6) dismissal (for failure to state a claim) rather than a Rule 12(b)(1) dismissal (for lack of subject matter jurisdiction).<sup>57</sup>

Justice Scalia confronted and overthrew this doctrine of hypothetical jurisdiction in *Steel Co. v. Citizens for a Better Environment*.<sup>58</sup> The plaintiff environmental group sued the company for failing to file information about its emissions, in violation of federal environmental law. The perceived standing problems arose from the fact that the defendant company took advantage of the required notice and brought itself into compliance by submitting the required information to federal and state regulatory agencies in advance of the litigation. The plaintiffs nonetheless sought declaratory and injunctive relief as to past violations as well as the imposition of penalties, payable to the federal government, and the costs of litigation. The Court could have resolved the case by finding that the statute did not permit the recovery of these various items in a suit brought after the defendant has come into compliance with federal reporting obligations. Alternatively, the Court could evaluate the plaintiffs’ standing under Article III to pursue these claims.

The Court found that sound practice required a threshold evaluation of standing as an issue of subject matter jurisdiction before any assessment of what the statute permitted or required. Jurisdictional issues come first. That, in turn, necessitated a clear distinction between what counted as jurisdictional and what counted as a merits determination. For Justice Scalia, the answer was clear. Interpretation of the statute went to the merits and must await the jurisdictional/standing determination.<sup>59</sup> Justice Scalia therefore proceeded to an evaluation of standing and

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<sup>54</sup> *Id.* at 777.

<sup>55</sup> *Id.* at 778.

<sup>56</sup> *See, e.g., United States v. Troescher*, 99 F.3d 933, 934, n. 1 (1996) (characterizing the practice of “assuming” jurisdiction for the purpose of deciding the merits—the “doctrine of hypothetical jurisdiction”).

<sup>57</sup> For the relevant authority at both the Supreme Court and lower court level, see *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 114-120 (1998) (Steven, J., dissenting) (collecting authority).

<sup>58</sup> *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

<sup>59</sup> *Steel Co.*, 523 U.S. at 93-101.

concluded that, under the specific statutory scheme, none of the remedies sought would redress the injuries on which the plaintiffs based their claim of standing. The action for declaratory and injunctive relief would have no influence on a defendant who admitted prior violations but had come into compliance for the future. The action for the imposition of penalties for past non-compliance would punish the defendant for past violations of the law, but the penalties were payable to the federal government rather than to the plaintiffs. The situation was unlike a standard suit for damages, therefore, in which the plaintiff seeks personal monetary redress for a past violation. Standing was clearly available for that sort of retrospective claim, but here the statute did not authorize the plaintiffs to collect such compensation as a result of any injury they had suffered.<sup>60</sup>

Justice Scalia thus achieved three important goals. He bolstered the rule that the federal courts must always conduct a pre-merits evaluation of the plaintiffs' standing and other elements of subject matter jurisdiction. Second, he called for the separation of jurisdiction and merits, distinguishing statutes that specify the elements of a cause of action and the available remedies from those that confer jurisdiction. Finally, he considerably strengthened the rigor of the required assessment of redressability, ruling that penalties and other costs that flow from successful litigation must bear a causal connection to the injuries on which the plaintiffs base their claimed right to invoke the power of the federal courts. In doing so, he relied on some early decisional law that called for a threshold evaluation of jurisdictional issues, but otherwise appeared to be engaged in standard doctrinal analysis.<sup>61</sup>

*Lexmark International, Inc. v. Static Control Components, Inc.* Having reworked the rules governing injury in fact and redressability, Justice Scalia took on the doctrine of prudential standing in *Lexmark International, Inc. v. Static Control Components, Inc.*<sup>62</sup> The plaintiff sued the manufacturer of generic replacement toner cartridges for certain printers, alleging copyright violations. Defendant counterclaimed under the Lanham Act, alleging that the plaintiff engaged in false advertising in touting to its customers the importance of using original cartridges. The parties agreed that the false advertising counterclaims met the constitutional test for standing. But that left unresolved whether the defendant, as a competitor, fell within the "zone of interests" protected by the Lanham Act's prohibition against false advertising; perhaps the Act only protected consumers. The zone-of-interests test had arisen as part of administrative law, aimed at determining which parties could bring suit to challenge agency action. It was among the forms of prudential standing doctrine that Justice Scalia had criticized in his 1983 essay.

Justice Scalia rejected the idea of prudential standing, noting that the federal judiciary has a "virtually unflagging" duty to hear cases within its jurisdiction.<sup>63</sup> Instead of treating the zone-of-interests test as a matter of standing doctrine, Justice Scalia re-characterized the inquiry as one into the meaning of the relevant statute.

Whether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation,

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<sup>60</sup> *Id.* at 102-110.

<sup>61</sup> *See, e.g., Steel Co.*, 523 U.S. at 95 (quoting *Capron v. Van Noorden*, 2 Cranch 126 (1804)).

<sup>62</sup> *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

<sup>63</sup> *Lexmark*, 134 S. Ct. at 1386.

whether a legislatively conferred cause of action encompasses a particular plaintiff's claim. As Judge Silberman of the D.C. Circuit recently observed, prudential standing is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of persons ha[s] a right to sue under this substantive statute.<sup>64</sup>

In conducting the analysis, Justice Scalia called upon the courts to “apply traditional principles of statutory interpretation.” Instead of asking whether “Congress *should* have authorized” the litigation, courts were to focus instead on “whether Congress in fact did so.”<sup>65</sup> Justice Scalia drew an analogy to other cases in which the Court has narrowed judicial discretion. Courts cannot recognize a cause of action that Congress has denied; by the same token, they cannot “limit a cause of action that Congress has created merely because ‘prudence’ dictates.”<sup>66</sup>

By cashiering prudential standing doctrine in the context of the zone-of-interests analysis, Justice Scalia raised questions about other doctrines that had sometimes been labeled prudential. Attempting to answer those questions in part in a footnote, Justice Scalia acknowledged that the ban on generalized grievances had sometimes been labeled prudential but was properly understood as an element of Article III's case-or-controversy requirement.<sup>67</sup> As for third-party standing, a doctrine occasionally regarded as prudential in the past, Justice Scalia temporized. He found no reason to pass on the question in the context of the *Lexmark* case, one that did not in any case present a third-party standing question. But the proper characterization of the closely related requirement that federal courts refrain from addressing legal issues other than in the context of a dispute between adverse parties was one that would divide the Court.

*United States v. Windsor*. Dissenting opinions often sound more strident than consensus-building majority opinion and may more clearly reveal the mind of the Justice. Justice Scalia's dissents from the Court's invalidation of the Defense of Marriage Act (DOMA) in *United States v. Windsor* has both strident and revelatory features.<sup>68</sup> The Court has long held that federal courts can hear only “definite and concrete” controversies that touch upon “the legal relations of parties having adverse legal interests.”<sup>69</sup> Doubts as to the presence of adversity had arisen early on, when the government insisted on enforcing DOMA but agreed with its nominal opponent, Edith Windsor, that the law violated her constitutional rights by denying her the beneficial federal tax treatment she would have received had she been the surviving spouse of a man instead of a woman.<sup>70</sup> Yet the opinion by Justice Kennedy for a narrow five-Justice majority simply announced that the disappearance of formal adverseness did not deprive the Court of power to reach

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<sup>64</sup> *Lexmark*, 134 S. Ct. at 1387 (internal quotation marks omitted).

<sup>65</sup> *Id.* at 1388.

<sup>66</sup> *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) for its rejection of the recognition of judge-made rights to sue).

<sup>67</sup> *Id.* at 1387 n.3 (discussing the proper treatment of generalized grievances and third-party standing).

<sup>68</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

<sup>69</sup> *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937) (citations omitted).

<sup>70</sup> Recognizing that party agreement posed a jurisdictional hurdle, the Court appointed an amicus to argue that *United States* had no standing to appeal from decision below once it concluded, in agreement with *Windsor*, that DOMA was unconstitutional.

the merits.<sup>71</sup> For the majority, the adverse-party requirement was a prudential element of standing doctrine, appropriately informing the Court's discretion but not inflexibly compelling party opposition as a jurisdictional prerequisite at every stage of every case.<sup>72</sup>

Justice Scalia's sharply worded dissent characterized the adverse-party requirement not as a prudential feature of standing law "that we have invented," but as an independent and "essential element of an Article III case or controversy."<sup>73</sup> Moreover, Justice Scalia attempted to connect the adverse-party restriction to the text of Article III, placing some emphasis on the fact that the term "controversy" connotes a live dispute, or contradiction, between opposing parties.<sup>74</sup> But the Justice failed to address the meaning of Article III's grant of "judicial power" or of its reference to "cases"; both terms have suggested to other readers that federal courts may do more than simply resolve concrete disputes.<sup>75</sup> As for history, Justice Scalia depicted Article III's case-or-controversy limits as a reflection of the traditional notions of adjudication inherited from early Americans and our "English ancestors."<sup>76</sup> He thus invoked Justice Frankfurter's influential claim that the federal "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'"<sup>77</sup> He also cited an important early case in which the Court declined to hear a feigned dispute and threatened with sanctions any lawyers who contrive to present such disputes to the federal judiciary.<sup>78</sup> For Justice Scalia, then, the majority was so keen to address the constitutional question and thereby establish "judicial supremacy" over the other branches that it was willing to ignore limits on the judicial power in order to decide the question.<sup>79</sup>

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Justice Scalia did not win every battle over the way Article III limits the power of federal courts. But judging by the concerns he identified before his arrival on the Court, he broadly succeeded in re-making the law of standing along the lines sketched in his 1983 Essay. For starters, he wrote the opinion in *Lujan* that deployed Article III as a limit on Congress's power to enable citizens to challenge

<sup>71</sup> See *Windsor*, 133 S. Ct. at 2684-89 (evaluating the adverse-party requirement).

<sup>72</sup> *Id.* at 2685-88.

<sup>73</sup> *Id.* at 2702 (Scalia, J., dissenting).

<sup>74</sup> *Id.* at 2701 ("The question here is not whether, as the majority puts it, 'the United States retains a stake sufficient to support Article III jurisdiction,' the question is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor." (internal citation omitted)).

<sup>75</sup> See, e.g., Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994).

<sup>76</sup> *Windsor*, 133 S. Ct. at 2699 (Scalia, J., dissenting). See also *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J.) ("courts of Westminster"); *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 290 (1928) (Brandeis, J.) ("English . . . courts").

<sup>77</sup> *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.)

<sup>78</sup> See *Windsor*, 133 S. Ct. at 2703 (quoting *Lord v. Veazie*, U.S. 251, 49 U.S. (8 How.) 255-56 (1850), which described a contrived dispute as a contempt of court because it was aimed not at clarification of the rights of parties before the court but at curtailing the rights of a non-party).

<sup>79</sup> *Id.* at 2698.

federal agency action. While the Court had sounded many of the themes in earlier decisions, *Lujan* was the first to invalidate an act of Congress that purported to authorize broad citizen standing. (*Allen v. Wright*, by contrast, invoked the case-or-controversy limits of Article III but did not invalidate an explicit congressional grant of standing.<sup>80</sup>) In doing so, *Lujan* achieved at least three of Justice Scalia's stated goals: it cut back on environmental standing; it established Article III as a constraint on the extent to which Congress could involve the federal courts in the oversight of the exercise of government enforcement discretion in the public law context; and it firmed up the ban on the exercise of jurisdiction over generalized grievances by framing them as a violation of the separation of powers. While subsequent cases relaxed *Lujan* to some degree,<sup>81</sup> it remained a touchstone of Justice Scalia's jurisprudence.

Justice Scalia's decisions in *Steel Co.* and *Lexmark* may be equally significant. The *Steel Co.* decision imposes a fairly rigid order of operations that requires federal courts to reach and resolve the jurisdictional question of standing before tackling questions on the merits. That virtually guarantees close scrutiny of standing issues, either at the behest of the defendant or on the court's own motion. But the threshold scrutiny will extend only to matters deemed constitutional. *Lexmark* ends the doctrine of sub-constitutional prudential standing, transforming the inquiry into a merits-based assessment of the right to sue. Even there, however, Justice Scalia worked to preserve the constitutional status of the ban on the adjudication of generalized grievances. Finally, in *Vermont Agency*, perhaps his most methodologically revealing opinion, Justice Scalia bowed to the weight of historical practice in upholding the right of informers to sue under the False Claims Act. But by making the theoretical assessment of injury-in-fact essential to the analysis, Justice Scalia sought to prevent historical evidence alone from dislodging that feature of his preferred Article III standing rules.

## V. ASSESSING JUSTICE SCALIA'S CONTRIBUTIONS TO THE LAW OF STANDING

Judged by the standards of his own oft-expressed views about the proper interpretation of the Constitution, one can ask serious questions about Justice Scalia's standing jurisprudence. In other writing, Justice Scalia championed what he called the original meaning of the Constitution – that is, the meaning reasonably informed members of the legal community would have ascribed to the text at the time it became law. Justice Scalia's brand of originalism thus treated a variety of modes of analysis as potentially relevant to the explication of meaning: he considered text, structure, history, and practice in the course of constructing his interpretation of the Constitution's meaning. As with his treatment of statutory interpretation, moreover,

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<sup>80</sup> See *Allen v. Wright*, 468 U.S. 737 (1984).

<sup>81</sup> See *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998) (recognizing voter standing to compel agency enforcement action against AIPAC).

<sup>81A</sup> For descriptions of Justice Scalia's originalism, see Thomas B. Colby & Peter J. Smith, *Living Originalism*, DUKE L.J. 239-98 (2009). See also pieces from Allan, Marriott and Waldron in this collection on Scalia's distinct style of jurisprudence.

he remained suspicious of arguments based upon the “intention” of those who drafted and ratified the Constitution. While history can help inform understandings about meaning, he did not give primacy to the intentions of specific framers, except as they shed light on meaning.

Once the original meaning had been identified, Justice Scalia opposed any judicial updating. He objected to the idea of a living Constitution, by which he meant a document that took on new meaning in the hands of modern judicial interpreters. Updating was a task for politicians, not judges. Thus, Congress could certainly change applicable laws, within the limits of its constitutional authority, or the people could update the charter through the amendment process. Judicial updating was contrary, as Justice Scalia often observed, to the idea that the people were to govern themselves. That left the challenge of how to handle precedent and, here, Justice Scalia was a bit cagey. Some precedents he would wipe away, such as the decision recognizing a woman’s right to terminate her pregnancy. Other precedents he would accept, such as the constitutionality of the administrative state. He often explained that he was an originalist, not a kook; that he was a faint-hearted originalist willing to go some distance to preserve or reclaim original meaning but perhaps not all the way.<sup>82</sup> Thus, for example, he once admitted that would treat two forms of punishment differently, despite the similarity of their pedigree. Both nose cropping and the death penalty were acceptable forms of punishment when the Eighth Amendment became law in the 1790s but Justice Scalia would treat only the former, not the latter, as cruel and unusual punishment.<sup>83</sup> In adopting a selective approach to past practice and stare decisis, Justice Scalia assured himself some flexibility in deciding when to deploy a strict originalist approach and when to go with the flow of prior cases. Perhaps not so much faint-hearted as opportunistic, Justice Scalia deployed his originalist craft selectively by choosing his battles and biding his time.<sup>84</sup>

Justice Scalia’s approach to standing doctrine was decidedly that of accepting prior precedents and working within their framework to reshape the law. His opinions occasionally refer to history and tradition, but they do not set out to discover the original meaning of Article III’s extension of judicial power to specified “cases” and “controversies.” Rarely, in fact, did Justice Scalia advert to the text at all in any meaningful way, other than to invoke the case-or-controversy rule. Perhaps he recognized that the original meaning of the text could not bear the weight of accumulated doctrine; indeed, his 1983 Essay reveals that he understood the Court’s decision to hang the standing doctrine on the case-or-controversy reference more as a matter of convenience than of linguistic necessity.<sup>85</sup> True, he emphasized the importance of a “controversy” in dissenting from the majority’s relaxation of the adverse-party requirement in *Windsor*. And he treated the history of *qui tam* litigation as “well-nigh” conclusive of the existence of informer standing. But he

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<sup>82</sup> As a result of his faint-heartedness, Randy Barnett characterized Justice Scalia as not really an originalist at all, a conclusion to which many others have come. See Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 12 (2006).

<sup>83</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 16-18, 37-41 (Amy Gutmann ed., 1997).

<sup>84</sup> Thanks to Brian Jones for seeing the opportunism in Justice Scalia’s self-description as faint-hearted.

<sup>85</sup> See notes 24-36 *supra* and accompanying text.

was plainly wrong about the significance of the term “controversy” to the analysis and he allowed history to play only a supportive role in upholding informer litigation rather than a decisive one. The Justice’s approach thus appears calculated more to obscure than to clarify the history of Article III, as the next section makes clear.

## VI. TEXTUAL AND HISTORICAL PROBLEMS WITH THE CASE-OR-CONTROVERSY REQUIREMENT

*Injury-in-Fact.* While Justice Scalia was quite insistent that the injury-in-fact requirement was a crucial element of Article III standing limits, the term did not appear in the Court’s decisions until 1970.<sup>86</sup> Others have explained how the requirement took hold and came to be accepted as an element of the Court’s standing analysis.<sup>87</sup> That alone suggests that the requirement was not part of what Article III meant when it restricted the judicial power to specified cases and controversies. But a brief look at the history of non-contentious jurisdiction in the early Republic confirms that conclusion.<sup>88</sup>

Building on a practice with roots in Roman and civil law, Congress assigned a number of non-contentious matters to the federal courts in the early Republic. These *ex parte* proceedings did not require the plaintiff to set forth a personal injury in fact; rather, the party would typically file a petition in federal court, seeking to assert or register a claim of right under federal law. Nor was the plaintiff obliged to name a defendant; the proceeding assumed that the court would test the sufficiency of the plaintiff’s factual showing in an inquisitorial proceeding that does not obviously conform to the adverse-party rhetoric that now informs modern restatements of the case-or-controversy requirement.<sup>89</sup> Prominent among early examples of non-contentious jurisdiction, Congress assigned the federal courts responsibility for passing on *ex parte* petitions by aliens who sought naturalized citizenship under federal law.<sup>90</sup> Other examples abound.<sup>91</sup>

Federal courts in the late eighteenth and early nineteenth centuries took up these non-contentious matters without suggesting that the absence of injuries in fact and adverse parties barred federal adjudication. Indeed, such leading figures

<sup>86</sup> *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 159 (1970).

<sup>87</sup> See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

<sup>88</sup> See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346 (2015).

<sup>89</sup> On the history and early application of non-contentious jurisdiction in the courts of the United States, see *id.* at 1402-16.

<sup>90</sup> The practice began in 1790 under a federal statute that assigned naturalization duties to courts of record. For an account, see James E. Pfander & Theresa Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 394-95 & nn. 155-58 (2010) (describing naturalization practice in federal court under the 1790 act).

<sup>91</sup> Thus, Congress provided for pension benefit claimants to file *ex parte* applications in the federal courts, called upon revenue officials to seek by *ex parte* petition a warrant to search premises suspected harboring tax evading distilleries, and authorized federal courts to issue decrees of good prize in uncontested applications. See generally Pfander & Birk, *supra* note 88, at 1361-78.

as Chief Justice John Marshall and Justice Joseph Story accorded preclusive effect to naturalization decrees comparable to that assigned to other matters of judicial record. Not only that, Marshall and Story specifically defined the Article III reference to “Cases” in terms broad enough to encompass naturalization and other non-contentious matters. Unlike modern definitions, Marshall explained that the key to the presence of a “case” in Article III lay in a party’s “assertion of his rights in the form prescribed by law.” This formulation clearly encompasses the submission of an ex parte claim of right, such as a naturalization petition, and makes no mention of the need for an injury or an opposing party. Building on Marshall’s conception, Justice Brandeis, who was otherwise a leading architect of modern limits on justiciability, had no trouble concluding that the submission of an ex parte naturalization petition created a “case” within the judicial power.<sup>92</sup>

Non-contentious jurisdiction was not limited to the naturalization context but extended broadly across a range of administrative-style proceedings. On any particular day in antebellum America, the lower federal courts might hear uncontested applications to obtain a federal search warrant,<sup>93</sup> to claim a captured vessel as lawful prize, to initiate bankruptcy proceedings, or to claim a government pension. In addition, the courts might entertain uncontested applications for habeas or mandamus relief, such as the petition for mandamus that Edmund Randolph brought before the Supreme Court in *Hayburn’s Case*.<sup>94</sup> Even today, non-contentious matters appear on federal dockets, ranging from humble applications for the waiver of PACER fees<sup>95</sup> to top secret petitions for the approval of FISA warrants.<sup>96</sup> Uncontested bankruptcy petitions dot the judicial landscape<sup>97</sup> and courts frequently conduct ex parte proceedings in the course of managing their dockets: they approve settlements, issue consent decrees, and enter default judgments.<sup>98</sup>

A careful review of the historical record would seem to refute the injury-in-fact requirement. Plaintiffs invoking the original non-contentious jurisdiction of the federal courts do not seek redress for an injury in fact. They simply seek to

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<sup>92</sup> Tutun v. United States, 270 U.S. 568 (1926).

<sup>93</sup> See 1 Stat. 199 (1791) (specifically authorizing federal courts to hear ex parte applications for search warrants).

<sup>94</sup> 2 U.S. (2 Dall.) 409 (1792) (reproducing letters explaining circuit court refusal in pension matters to enter judgments that were subject to review by the two political branches)

<sup>95</sup> For an account, see Matthew D. Heins, Note, *An Appeal to Common Sense: Why “Unappealable” District Court Decisions Should Be Subject to Appellate Review*, 109 Nw. U. L. REV. 773 (2015); see also *In re Application for Exemption*, 728 F.3d at 1039-41 (9th Cir. 2013) (refusing to entertain an appeal from the denial of an application for waiver of PACER fees); *In re Carlyle*, 644 F.3d 694, 699 (8th Cir. 2011) (same); *United States v. Walton (In re Baker)*, 693 F.2d 925, 927 (9th Cir. 1982) (same).

<sup>96</sup> For an account of the FISA warrant process, see David S. Kris, *On the Bulk Collection of Tangible Things*, Lawfare 39 (Sept. 29, 2013), <http://www.lawfareblog.com/wp-content/uploads/2013/09/Lawfare-Research-Paper-Series-No.-4-2.pdf> [<http://perma.cc/X8UT-FED4>].

<sup>97</sup> See Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 BANKR. DEV. J. 397, 449-50 (1996) (arguing that many proceedings in bankruptcy lack party opposition and thus fail Article III’s adverse-party requirement).

<sup>98</sup> See, e.g., Fed. R. Civ. P. 23(e) (requiring district court to approve class action settlements); See Fed. R. Civ. P. 55(c) (directing the district court to conduct an inquest into damages in connection with the entry of a default judgment). As a leading treatise explains, “The hearing [conducted in a default proceeding] is not considered a trial, but is in the nature of an inquiry before the judge.” 10A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2688, at 458.

register and gain official recognition of their claim of federal right. To be sure, the trial court's *denial* of a party's non-contentious petition inflicts a concrete injury that will support review in the appellate courts.<sup>99</sup> But the initial petition alleges a claim of right or entitlement to a benefit, under the law as stated, in much the way a party might petition the Social Security Administration for the approval of a benefit claim.<sup>100</sup> One does not seek redress for an injury in submitting a petition to secure a benefit.

*The Adverse-Party Requirement.* Consider second the claim that all proceedings proper for Article III adjudication must feature opposing parties.<sup>101</sup> The requirement of concretely adverse interests appears to have arisen to counter the use of feigned or contrived proceedings brought by parties for the sole purpose of obtaining an advantageous judicial decision for use in a different setting.<sup>102</sup> (Feigned proceedings were appropriate, historically, as a way to provide the modern equivalent of a declaratory judgment in a case of genuine disagreement among the parties as to the law's meaning or application.<sup>103</sup>) As we saw earlier, Justice Scalia spoke of the adverse-party requirement as an element of the case-or-controversy requirement.<sup>104</sup> But while some ancillary forms of non-contentious practice (such as judicial inquisitions associated with the entry of default judgments) could arise from a genuine disagreement between adversaries, original non-contentious applications did not feature opposing parties. The courts were to conduct their own investigation

<sup>99</sup> Thus, in *Tutun v. United States*, 270 U.S. 568 (1926), the government appeared as an adverse party to argue that the application for naturalization did not present a case within the appellate jurisdiction of the intermediate federal appeals court.

<sup>100</sup> The leading casebook on federal jurisdiction argues that such benefit claims clearly lie beyond federal judicial power. See RICHARD H. FALLON, JR., ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 86 (7<sup>th</sup> ed. 2015) (treating *Hayburn's Case* as a decisive rejection of Congress's attempt to treat federal courts as administrative agencies).

<sup>101</sup> See, e.g., *Flast v. Cohen*, 392 U.S. 83, 95 (1968) ("In part [the terms 'case' and 'controversy'] limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) ("The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.'").

<sup>102</sup> Justice Brandeis was a leading architect of the adverse-party rule as a limit on the power of federal courts to address constitutional claims. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) ("The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.'").

<sup>103</sup> See, e.g., *Lord v. Veazie*, 49 U.S. (8 How.) 251 (1850), (castigating the parties for feigning a dispute aimed at undercutting the rights of parties not brought before the court, but recognizing the validity of a feigned controversy to settle an actual controversy between represented parties, just as an agreed-upon action for a declaratory judgment might proceed today).

<sup>104</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2685-88 (2013). One can wonder about the extent to which prudential doctrines survive the Court's recent decision in *Lexmark Int'l Inc. v. Static Control Components Inc.*, 134 S. Ct. 1377 (2014), which recast prudential standing as an inquiry into the right to sue under the applicable statute and expressed doubt as to continued legitimacy of prudential avoidance doctrines.

of the facts underlying the petition and to enter a judgment in accordance with law. While these inquisitorial duties do not readily conform to an adversarial conception of the judicial role,<sup>105</sup> federal courts have long performed such duties in connection with their handling of matters within their non-contentious jurisdiction. Given the Court's consistent approval of the adjudication of ex parte naturalization petitions, one can hardly argue that contestation by opposing parties operates as an invariable requirement of Article III.

*Conflating Cases and Controversies.* Finally, consider Justice Scalia's view that the case-or-controversy requirement establishes a unitary limit on the power of the federal courts that cuts across all of the heads of jurisdiction in Article III.<sup>106</sup> Conflation of the two terms has little support in the practice of federal courts in the early Republic or in the text of Article III itself. Article III uses the term *cases* to extend jurisdiction in the broadest terms to subjects of federal interest (cases arising under the Constitution, laws, and treaties; cases of admiralty and maritime jurisdiction; cases affecting ambassadors). *Cases* thus encompass both contentious jurisdiction over criminal and civil matters and non-contentious jurisdiction over claims of federal right.<sup>107</sup> *Controversies*, by contrast, arguably extend only to

<sup>105</sup> See *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (declaring the norm of the adversary system in civil and criminal cases to be one of reliance on the parties "to frame the issues for decision" and on courts to play "the role of neutral arbiter"); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 357 (2006) (distinguishing adversary from inquisitorial systems of procedure in respect of the rules governing procedural default); *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (implying that the rule imposing a procedural default may have a constitutional underpinning in that it distinguishes "our adversary system from the inquisitorial one"). Cf. *Sims v. Apfel*, 530 U.S. 103, 111 (2000) (distinguishing the adversary proceedings of courts from the inquisitorial approach of benefit agencies, such as the Social Security Administration, at which no party opposes the claim for benefits).

<sup>106</sup> See Martin H. Redish & Andrianna D. Kastenek, *Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006) (arguing that the adverse-party requirement applies with equal force to cases and controversies alike). Justice Stephen Field took a similar position, riding circuit. See *In re Pacific Ry. Comm'n*, 32 F. 241 (C.C.N.D. Cal. 1887) (opinion of Field, J.) (cases and controversies alike both connote a dispute or potential dispute between parties). Although a substantial literature discusses the possibly different meanings of cases and controversies in Article III, a consensus has yet to emerge. Some take the view that the broader term "case," encompasses both civil and criminal proceedings, while controversies entail only civil matters. See William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 266-67 (1990) (quoting definitions of case and controversy by St. George Tucker and Joseph Story) and James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 604-17 (1994) (adding sources to same effect). Others question the civil-criminal distinction and argue that key distinction lies in the nature of the federal judicial role. See Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994) (questioning the civil-criminal distinction and arguing instead that federal courts were expected to play a law-exposition in cases and a dispute-resolution role in controversies).

<sup>107</sup> The distinction between the federal subject-matter of cases and the party-alignment focus of controversies has been well accepted in the literature. See, e.g., *Cohens v. Virginia*, 19 U.S. 264, 378 (1821) (distinguishing between the character of the cause as definitive of cases and the alignment of the parties as key to controversies); Akhil R. Amar, *A*

civil disputes between parties aligned in opposition to one another as specified in Article III. It appears, in short, that the two categories of jurisdiction differ both in terms of their subject matter and in terms of the character of proceedings they contemplate as appropriate for judicial resolution. While the federal courts can hear non-contentious and ex parte application for the grant of federal benefits and the registration of federal interests, they cannot entertain petitions for recognition of a status governed by state law in the absence of a controversy.<sup>108</sup>

Justice Scalia delivered his opinion in *Windsor* in a federal question “case,” but he invoked the idea of contestation embedded in the term “controversy” as the justification for the adverse-party rule. While it may have been appropriate to refrain from issuing a major ruling in the absence of party opposition, Justice Scalia could scarcely (and did not attempt to) argue that the original meaning of Article III was to regard the two terms as synonymous and to impose an across-the-board requirement of contestation. Indeed, it appears that the conflation of the terms first occurred in the late nineteenth century and was picked up and incorporated into the Court’s precedents in the early twentieth century.<sup>109</sup> One might defend the use of the case-or-controversy rubric as a short-hand reference to a whole set of conceptions of the proper role of the federal judiciary. But the enterprise of filling in the meaning of such a unitary construct cannot possibly be defended on original-meaning grounds.

## VII. CONCLUSION

One can hardly overstate either the degree to which Justice Scalia remade the law of Article III standing or the degree to which he did so in the absence of support in the original meaning of the document he set about to apply. The history of non-contentious jurisdiction forecloses any argument that the federal courts were limited to suits brought by those who had suffered an injury in fact. The same history forecloses the claim that Article III invariably requires contestation; in truth, only in the “controversies” between opposing parties specified in Article III can one identify a thoroughgoing adverse-party requirement. Non-contentious “cases” arising under federal law, such as naturalization petitions, could proceed without

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*Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985) (emphasizing the federal subject matter of cases and their greater significance relative to controversies in the framers’ conception of the work of the federal judiciary).

<sup>108</sup> The inability of the federal courts to entertain state-law applications for registration of status explains in part the origins of the so-called probate and domestic relations exceptions to Article III. See James E Pfander & Michael Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533 (2014) (distinguishing ex parte “common form” probate applications that elude federal judicial power from contested proceedings); James E. Pfander & Emily Damrau, *A Non-Contentious Account of Article III’s Domestic Relations Exception*, 92 NOTRE DAME L. REV. 117 (2016) (cataloging uncontested family law matters that fall within the scope of the domestic relations exception).

<sup>109</sup> See *Muskrat v. United States*, 219 U.S. 246 (1911) (citing *In re Pacific Ry. Comm’n*, 32 Fed. 241 (C.C. Cal. 1887)). For an account, see Pfander & Birk, *supra* note 88, at 1421-24, 1439-40.

an opponent. Justice Scalia's explication of Article III will surprise the reader not because it does a poor job of refuting evidence of original meaning that cuts against his conclusions but because it fails to express any interest in what the evidence might reveal. While history can play a role in Justice Scalia's jurisprudence, it seems clear that his theoretical conception of the proper elements of the standing inquiry take precedence over original meaning. That, indeed, was the explicit message of his decision in *Vermont Agency*.

Having turned away from original meaning, Justice Scalia proceeded to exercise a form of judicial power that he had been quick to decry in other settings. He deployed his own conception of the proper limits on government action as the basis for invalidating choices made by the political representatives of the people. While he deferred to Congress in *Vermont Agency*, and upheld the propriety of informer litigation, *Lujan* invalidated the citizen-suit provisions of an environmental statute that Congress had adopted to encourage public interest groups to play a more active role in monitoring government enforcement of environmental laws. On Justice Scalia's own description of the proper judicial role, such invalidation seems hard to defend. As an invention of the late twentieth century, the injury-in-fact rule can hardly claim the sort of historical pedigree that would entitle it to be considered a part of the practice of adjudication at the time of the founding.

One can therefore usefully contrast Justice Scalia's attitude toward standing law with his incredulity at the notion that the Fourteenth Amendment's equal protection clause might invalidate state laws that forbid same-sex marriage. He pressed that idea forcefully in his opinion in *Obergefell v. Hodges*, explaining that at the time the Fourteenth Amendment became law in 1868, all of the states banned all marriages except those between one man and one woman and no one regarded such laws as unconstitutional.<sup>110</sup> That was, for Justice Scalia, the end of the story. In the case of standing law, by contrast, Justice Scalia showed scant interest in the practice of Congress and the federal judiciary at the time Article III became law and was implemented by those who participated in its drafting. Instead, much as did the majority in *Obergefell*, Justice Scalia applied an evolving body of precedents loosely organized (as he recognized in 1983) under the heading of the case-or-controversy requirement. Back then, before he joined the Court, he termed the case-or-controversy requirement a "vehicle" for the development of restrictions on the invocation of the judicial power.<sup>111</sup> In modifying that vehicle for the twenty-first century, Justice Scalia dictated a new, more demanding set of terms to Congress, terms far more restrictive than those the horse-and-buggy drafters of Article III would have recognized.

Justice Scalia's treatment of standing doctrine thus more closely resembles the style of common law constitutionalism that he decried in other settings than the brand of originalism he brandished in dissent. One might dismiss his jurisprudence as the work of a hypocrite, but that would be to miss something essential in his craft. After all, his insistence in *Steel Company* on the primacy of jurisdictional inquiry has since gained a broad following on the Court. When he dispatched the doctrine of prudential standing in *Lexmark*, moreover, he wrote for a unanimous Court.

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<sup>110</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628 (2015) (Scalia, J., dissenting) ("in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so").

<sup>111</sup> Scalia, *supra* note 7, at 882.

Scalia was much more, or less, than an unrelenting originalist. He was, first of all, a talented lawyer and gifted legal stylist. On many issues of law, he acted within the existing framework to solve problems and reform the law. *Standing* law nicely illustrates this evolutionary approach, as he steadily worked to achieve the reform agenda he set out in his law review article. Although he nodded in the direction of the eighteenth-century practices of the courts of Westminster, Justice Scalia was making law for the twenty-first century and was quite willing to reshape the law to meet present needs. He was fortunate that, in most instances, there was no Justice with an originalist agenda on the other side to call attention to his handiwork.



# MISSED OPPORTUNITIES, GOOD INTENTIONS: THE TAKINGS DECISIONS OF JUSTICE ANTONIN SCALIA

Richard A. Epstein\*  
*University of Chicago*

## ABSTRACT

*The late Justice Antonin Scalia sensibly pushed his powerful originalist agenda as a bulwark against activist justices of any persuasion from enacting their policy preferences into law. But while this commitment to originalism may explain what the justices should not do, it does not explain, affirmatively, how they should interpret constitutional texts in accordance with the originalist agenda. One area in which this is most critical is the law of takings, which polices the boundary line between private rights and public power. Here it is necessary to integrate explicit constitutional provisions dealing with the terms “taken,” “private property,” “just compensation,” “public use,” and the implied “police power” into a coherent whole. The law of takings is relatively straightforward when the government takes private property into public possession. But it is far more difficult to explicate when private parties retain some interests in property after the government either occupies or regulates the use and disposition of the rest. Justice Scalia’s application of takings law to such cases of divided interests has fallen short in four key contexts: the permitting process in Nollan; rent control in Pennell; development rights in Lucas; and environmental protection schemes in Stop the Beach Renourishment. In these cases, Justice Scalia often reached the right result for the wrong reasons, often on ad hoc grounds. The correct analysis requires a far more thoroughgoing protection of private property interest in the context of both regulatory and possessory takings. This article explains how he should have handled these missed opportunities.*

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\* Laurence A. Tisch Professor of Law, New York University School of Law; The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution; The James Parker Hall Distinguished Professor of Law Emeritus and Senior Lecturer, The University of Chicago. My thanks to Philip Cooper and Julia Haines, University of Chicago Law School, Class of 2017 for their usual excellent and prompt research assistance.

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## I. INTRODUCTION

In many ways the most distinctive contribution of the late Justice Antonin Scalia was his devotion to the originalist approach to constitutional interpretation, which, roughly speaking, requires the justices to seek out the best public understandings of particular positions and terms as understood at the time of the Constitution's adoption. His enduring influence in this regard will lie in his powerful attack on advocates of the living Constitution, who on many occasions find it difficult to distinguish between their own policy preferences and the legal rules that can be fairly extracted from the constitutional text in light of its structure and historical context.<sup>1</sup> To the extent that originalism—all too often a term of art—embraces all three elements of text, history and structure, in my view it is surely right. The dangers to the rule of law, to the separation of powers, and to the legitimacy of the Supreme Court are too great if that Court is thought to be a political body governed largely, if not exclusively, by the policy goals of the people who dictate the relevant legal doctrines and frameworks. As a former administrative law professor, Scalia was far more comfortable talking about how constitutional interpretation intersects with the structural features of the Constitution. For example, his famous 1988 Taft lecture, appropriately enough, spoke quite persuasively about Taft's powerful and still-influential opinion in *Myers v. United States*,<sup>2</sup> which considered the open question of the president's removal power in light of the Constitution's separation-of-powers framework. No system of interpretation is ever error free, but Justice Scalia was surely right to insist that such errors are less frequent and less severe than those that emerge from interpretative systems that allow unmoored philosophical speculation to determine constitutional structures.<sup>3</sup>

In this regard, I think that Justice Scalia's impassioned dissent in *Obergefell v. Hodges*<sup>4</sup> captures the right mood on this issue. There is little question regarding the historical consensus that the regulation of marriage and sexuality was a matter for legislative discussion, so that the decision in *Obergefell* completed a constitutional conversion to a new set of political beliefs—one which I in general share—with no foundation in the text, history or structure of the Constitution.<sup>5</sup> Yet there is an uneasy dissonance in the *Obergefell* dissent insofar as it can be read to imply that the freedom of the People “to govern themselves” through the legislative process is subject to *no* substantive constitutional limitations at all.<sup>6</sup>

That position cannot be tenable unless the entire structure of the Bill of Rights and Reconstruction Amendments are consigned to the shadows of American constitutional law, governed perhaps only by the weak rational basis test that is frequently used to uphold state regulation of private property.<sup>7</sup> The key weaknesses

<sup>1</sup> For my defense of this position, see RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION*, ch. 3 (2014).

<sup>2</sup> 272 U.S. 52 (1926).

<sup>3</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1988–1989).

<sup>4</sup> 135 S. Ct. 2584, 2626 (2015).

<sup>5</sup> To see the development of the current law, trace the progression from *Bowers v. Hardwick*, 478 U.S. 186 (1986) through *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>6</sup> *Obergefell*, 135 S. Ct. at 2627 (Scalia, J. dissenting).

<sup>7</sup> Early consideration of this test can be found in James Bradley Thayer, *The Origin and Scope of the American Doctrine of Judicial Review*, 7 HARV. L. REV. 129 (1893).

of Scalia's broad claim in *Obergefell* are two. First, it does not tell us when constitutional protections override democratic processes. Second, it does not give rise to the proper set of interpretive techniques that should be used to reach the correct result on this balancing question. On these matters, general questions of ideological predisposition have to yield to concrete interpretive approaches, in which it is not sufficient to rely on any well-nigh-conclusive presumption that speaks about either the protection of individuals from democratic oppression or the necessity for extended and informed public deliberation over collective decisions.

Working out the correct balance between legislative decisions and individual rights in the context of the Takings Clause requires close attention to each element of the overall picture. The clause is simplicity itself: "nor shall private property be taken for public use, without just compensation."<sup>8</sup> Every word counts, such that a thorough knowledge of private law allows a justice to identify and rely on a long and continuous set of understandings about its four constituent terms—"private property," "taken," "public use," and "just compensation." Matters of constitutional history and structure also point to the critical role of an *unstated* topic, namely the police power.<sup>9</sup> That protean term is not some new-found living constitutional contrivance intended to undermine the public meaning of the Takings Clause or to upend our basic constitutional order. It has been a long-time staple of American constitutional law—one that long predates the arrival of the living Constitution<sup>10</sup>—in which it acts, within a general classical liberal framework, as an all-purpose corrective to the proper limitations on individual *and* corporate rights, whether they are protected through the Takings Clause or any other provision of the Constitution.<sup>11</sup>

To a hardline textualist, the introduction of any implied term into the Constitution, or for that matter into any statute or contract, becomes the source of genuine uneasiness. But to anyone who has worked with the historical evolution of either Roman or early English law, dealing with these unstated terms, often as a matter of necessary implication, is all in a day's work. No form of interpretation can do without these devices, and none should try. Indeed, the police power framework is just one of many implicit add-ons that inform constitutional interpretation. Justice Scalia wisely imported the entire doctrine of unconstitutional conditions into the Takings Clause in *Nollan v. California Coastal Commission*.<sup>12</sup> The Court has also applied principles of necessary implication to address intergovernmental

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<sup>8</sup> U.S. Const. amend. V.

<sup>9</sup> See *Lochner v. New York*, 198 U.S. 45, 53 (1905): "The right to purchase or to sell labor is part of the liberty protected by [the Fourteenth] amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public."

<sup>10</sup> See THOMAS COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION (1868); CHRISTOPHER G. TIEDMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER OF THE UNITED STATES (1886); ERNST FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904).

<sup>11</sup> Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 755 (Mar. 1967) (noting the Jeffersonian strand in his thought in which the police power was a means to limit the concentrated corporate power).

<sup>12</sup> 483 U.S. 825 (1987).

immunities.<sup>13</sup> One can also point to the Court’s approach to questions of immunity from taxation as between state and federal governments,<sup>14</sup> of state immunity from federal government regulation of its own activities,<sup>15</sup> and of how the Congress and the President should divide control over foreign relations and diplomatic recognition.<sup>16</sup> The issue is not whether we practice the fine and mysterious art of interpretation by implication. Rather, our only choice is whether to do that task poorly or well.

In order to deal with that question, it is critical, even for an originalist, to examine each disputed doctrine against the larger framework of the Constitution itself, which then asks the question of which view on any disputed question is consistent with its overall text, structure, and purpose. His originalist predilections made it difficult for Justice Scalia to understand that there is *no* necessary, or even implied, connection between originalism and judicial restraint. The simple observation here is that many constitutional provisions, including the Takings Clause, speak in sweeping terms. The phrase “private property,” for example, covers not only land, chattels and animals, but also a variety of partial interests in land, including mortgages, leases, mineral rights, and future interests, all of which have to be worked into the system. To make matters still more difficult, all forms of intellectual property have to be integrated into the overall takings analysis, even though certain rights, like trade secrets, patents, copyrights and trademarks, are the results of elaborate compromises of conflicting interests. In light of these complications, an approach to constitutional interpretation that elevates judicial restraint over all other values may resist the proactive development of a coherent theory of property rights that accounts for these nuances. Indeed, Justice Scalia and I once had a debate about the general question of judicial restraint before he went on the Supreme Court. In this discussion, Justice Scalia opted strongly for judicial restraint over general theoretical consistency.<sup>17</sup> I had argued that broad and ambiguous constitutional provisions should be read consonant with their general sweep and implications. In contrast, Justice Scalia, more the institutionalist and less the theorist, took less interest in the standard principles of constitutional interpretation that imitate those long-used in private law disputes under a jurisprudence that was very much a part of the common-law interpretive process employed during the founding era. As I have argued elsewhere, these implied exceptions to particular language are not based on changed social conditions, but are instead efforts to integrate indispensable and long-established concepts like necessity, self-defense, consent, assumption of risk, and the like into the interpretation of particular provisions.<sup>18</sup> There is nothing

<sup>13</sup> See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (no suit against state by Indian tribe under Indian Gaming Regulatory Act, by a five-to-four vote); *Alden v. Maine*, 527 U.S. 706 (1999) (no suit under Fair Labor Standards Act against states in federal court, by a five-to-four decision).

<sup>14</sup> *McCulloch v. Maryland*, 17 U.S. 316 (1819) (federal immunity from state taxation); *Collector v. Day*, 78 U.S. 113 (1870) (immunity of state employees from federal taxation), overruled by *New York v. United States*, 326 U.S. 572 (1946).

<sup>15</sup> See *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976) (barring regulation of wages and hours of state employees under the Fair Labor Standards Act of 1974, 29 U.S.C. § 203), overruled by *San Antonio Metropolitan Transit Auth. v. Garcia*, 469 U.S. 528 (1985).

<sup>16</sup> *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

<sup>17</sup> CATO INSTITUTE, *SCALIA V. EPSTEIN: TWO VIEWS ON JUDICIAL ACTIVISM* (1984).

<sup>18</sup> For a more systematic account, see Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J. LAW & PUB. POL. 583 (2016).

particularly modern about these ideas, all of which were very much evident in the ancient Roman and English sources. And invoking modest common-law rules like nuisance is not an invitation to make massive leaps to policy conclusions, such as the notion that government intervention is necessary in competitive markets to redress the inequality of bargaining power between large firms and ordinary workers.<sup>19</sup> The standard roster of implied terms is a powerful constraint on judicial adventurism that allows judges to avoid the greatest logical embarrassments associated with rigid textualism.

Justice Scalia contributed many important opinions on the constitutional protection of private property. In all of these, he focused his attention on the written text, paying less attention to larger questions of overall constitutional structure. This in turn resulted in him downplaying the key role of constitutional structure and the process of necessary implication. That somewhat-skewed focus undercut the coherence and generality of his opinions. To show how his thought process evolved, I shall look at four of his major decisions in chronological order. The first of these cases is *Nollan v. California Coastal Commission*,<sup>20</sup> in which Scalia's intuitions were reliable but his execution was flawed for one reason: he did not understand how various rules governing private monopoly behavior applied to the public permitting process in connection with the doctrine of unconstitutional conditions. A similar critique applies to Scalia's important concurrence in *Pennell v. City of San Jose*,<sup>21</sup> which rightly takes issue with the lawyerly decision of Chief Justice Rehnquist, but glosses over the fundamental objections applicable to all rent control statutes. The same overall verdict should be rendered on his elaborate opinion in *Lucas v. South Carolina Coastal Council*,<sup>22</sup> which suffers from two serious defects. The first is his futile effort to paper over the distinction between physical and regulatory takings by asserting that any government regulation that destroys all viable economic value is equivalent to a physical taking without explaining why the basic distinction is relevant or how it should be drawn. The second emerges from his uneasiness with the harm/benefit distinction that underlies the private law of nuisance and restitution. Finally, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>23</sup> Scalia makes errors on both sides of the takings equation. On the one side, his misunderstanding of property rights in water law leads him to misstate the law of avulsion and thus to deny the powerful prima facie takings claim against the government. Next, on the other side of the case, his failure to take into account available forms of in-kind compensation leads him to underestimate the strength of the government's defense. In this case, the two errors canceled out so that the outcome of upholding the statutory scheme was correct. But in many situations, the in-kind compensation defenses are not available to the government, so that the

<sup>19</sup> For discussion, see Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 *BOST. U. L. REV.* 72 (1992).

<sup>20</sup> 483 U.S. 825 (1987). For a more detailed account, see Richard A. Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 *N. ILL. U. L. REV.* 479 (1995).

<sup>21</sup> 485 U.S. 1, 15 (1988). For a more detailed account, see Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 *BROOK. L. REV.* 741 (1988).

<sup>22</sup> 505 U.S. 1003 (1992). For my earlier views, see Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 *STAN. L. REV.* 1369 (1993).

<sup>23</sup> 560 U.S. 702 (2010). For my more detailed commentary, see Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the Ius Naturale and Stop the Beach Renourishment*, 6 *DUKE J. CONST. LAW & PUB. POL.* 38 (2011).

Scalia approach can lead to massive underprotection of private property rights. It is no accident that three of these four cases involve beachfront property where rights in land and water come together. Those are often the hardest issues to resolve in private disputes. And because the public law of takings is parasitic on the private law, the failure to properly connect and resolve private law principles dooms the constitutional analysis. It is one thing to be any form of originalist or textualist. But no matter the degree of emphasis placed on these overlapping conceptions, it is the application of the overall system, not its general endorsement, that matters. In this case, the verdict is clear. Although Justice Scalia's instincts were often sound, his execution was just as often flawed. Those flaws have helped block the emergence of any consistent body of takings law. I now turn to these four cases.

## II. NOLLAN V. CALIFORNIA COASTAL COMMISSION

The most enduring contribution of Justice Scalia's opinion in *Nollan*<sup>24</sup> is that it imported the well-established doctrine of unconstitutional conditions into the takings doctrine.<sup>25</sup> The original Constitution had a twofold concern, seeking to set up the basic structures of government on the one side, and giving substantive protections to individuals against certain exercises of power on the other. The constant emphasis was on how private property and relations could be protected *against* government intrusion. From the beginning there was a soft underbelly to that structure, which was silent on the question of how the government should distribute various benefits to individuals. These benefits could come in the forms of direct grants of cash or property on the one hand, or in the granting of licenses and permits on the other. There is nothing about this issue that does not arise in connection with the admitted uses of government power, including the ability to license horses, cars and trucks on public roads.

Thus everyone knows that there is a deep difference between a regulation that says "if you wish to drive on Massachusetts roads, you have to agree to litigate any future divorce within the state," and a regulation that says "if you wish to drive on Massachusetts roads, you have to agree to litigate all disputes arising out of motor vehicle actions within the state in state courts." The first of these looks as though it is an effort to leverage control of power in a manner that would lead to impossible conflicts if replicated by other states. The second looks like an effort to reduce the frictions associated with resolving disputes over accidents. The former is best understood as an abuse of monopoly power, and the second as a proper application of that same power. Accordingly, the applicable branch of private law to explain these particular issues is in fact the antitrust (or competitions) law, which faces this question all the time in connection with tie-ins, exclusive dealing contracts, resale price maintenance and the like.<sup>26</sup> The key to distinguishing proper use from abuse is

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<sup>24</sup> 483 U.S. 825 (1987).

<sup>25</sup> For my longish treatment of this issue, see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993), covering the multiple permutations.

<sup>26</sup> See, e.g., *Jefferson Parish Hospital Dist. No. 2, v. Hyde*, 466 U.S. 2 (1984) (tie-in cases). For discussion of efficiency trade-offs in this area, see Christian Ahlborn, David S. Evans

to sort out efficient conditions from restrictive ones, knowing that these two stated cases are at polar extremes. There are always hard cases in the middle, but the initial task is to get the cases on the two extremes correct before trying to find the exact dividing point between them.

One reason why the problem was relatively quiescent for much of American constitutional law history is that both state and federal governments tended to operate within relatively narrow boundaries. The rise of government planning in the early twentieth century disrupted this trend, however, giving rise to restrictive mechanisms such as the building permit at issue in *Nollan*. This zoning movement is generally dated back to the Court's 1926 decision in *Euclid v. Ambler Realty Company*,<sup>27</sup> which dismissed a constitutional challenge against a very aggressive system of land use restrictions that severely limited the development of the respondent's large 68 acre plot.

From the government point of view, one limitation of the zoning system is that it often makes it difficult to tailor the particular restriction to the governed location. This in turn presents two drawbacks. First, the state could miss the optimal configuration of development on any given plot of land, which from a social point of view can be regarded as a shortcoming of the system. Second, it can lose the opportunity to extract rents by taxing or partially expropriating the gains that the landowner would otherwise achieve by exercising his constitutional rights to own and develop real estate.

These issues are especially acute in sensitive real estate zones of great value, like the California coast. The permitting scheme at issue in *Nollan* had extraction of value written all over it. The Nollans owned a dilapidated beachfront house that they wished to rip down to construct a more spacious home similar to those built on countless beachfront lots across the nation. In this situation, there was no concern that the house in question would generate any harmful effects or intrude upon the rights of neighbors or the public at large. But the California Commission knew that the value of the building permit was enormous. For purposes of this exposition, set it at \$1 million, equal to the amount that the landowner would gain on net if the new house were completed as planned. At the same time, the Commission had a legitimate state objective to connect two separate public beaches with a path that went across the private land of all the landowners in between them. It therefore told all these owners that they could gain their permits only if they dedicated a public lateral easement over their property to the Commission for general public use. That easement would, to make matters simple, reduce the Nollans' property value by \$100,000. Absent any legal restriction on the Commission's ability to make this demand, the Nollans' choice was easy: by surrendering the easement in order to obtain a permit, they would increase the value of their property by \$900,000. But this forced choice is not so simple, for it is easily distinguishable from a hypothetical permit condition that demands new builders to install septic tanks so that they do not pollute neighboring properties or public waters. In the latter case, the end of preventing intrusion on the rights of others is clearly legitimate, and the only question is whether the permit in question is needed to deal with some real or imagined peril, which in all cases will always raise issues of whether the remedy is proportionate to the harm, given the risks of both over and under-enforcement.

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& A. Jorge Padilla, *The Antitrust Economics of Tying: A Farewell to per se Illegality*, 49 ANTITRUST BULLETIN 287 (2004).

<sup>27</sup> 272 U.S. 365 (1926).

In an act of calculated defiance, the Nollans built their house without the permit and litigated the case to the bitter end. In the Supreme Court, Justice Scalia smelled a rat when it came to the Commission's actions, and consequently struck down the easement condition attached to the permit. He thus held that the lateral easement was a possessory interest in property and was therefore protected from an ordinary taking by a *per se* rule—take and you pay—just as if it had been an absolute fee simple interest.<sup>28</sup> In so doing, he had to reject the forceful argument raised by Justice Brennan in dissent, who expressed uneasiness over a challenge to a permitting transaction which resulted in the landowner greatly improving the value of his property.<sup>29</sup> Brennan took the position that if the *Nollan* buyout were not allowed, local governments would just refuse to issue building permits in the first place, leaving everyone worse off than before.<sup>30</sup> Therefore, the question is why reduce the level of discretion that local governments have in granting permits if they can retreat into their protective shells and create a tyranny of the status quo ante? In effect the Brennan approach was to invoke market arguments of mutual gain through trade to support the exaction practice.

To his lasting credit, Justice Scalia did not buy that argument. But the weakness of his general approach was apparent from the way in which he sought to deal with the fundamental challenge raised by the case. To Scalia, everything was a partial equilibrium analysis under existing law in which he was deeply reluctant to engage in any discussion based on first principles. The monopoly issues therefore never once made it explicitly into his analysis. Instead, he accepted the indefensible conceptual distinction between an outright taking of property on the one hand and a mere restriction of use on the other. By so doing, he made it clear that the framework that he developed would not apply to the various land use restrictions dealing with matters such as size, set back, and bulk of a new development. In line with earlier cases, he concluded that this takings analysis only applied to those actions that limited the landowner's right to exclude others, such as the lateral easement at issue in *Nollan*.<sup>31</sup> He then insisted that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" <sup>32</sup> This passage offers no definition of what counts as "extortion," nor does it explain why the condition has to serve the same government purpose as some development ban. To Justice Scalia, this necessary connection between purpose and restriction could be established by showing that the limitation on redevelopment was intended to ensure that people driving along the Pacific Coast Highway, located to the landward side of the Nollans' plot, had an unobstructed view of the water. This framing leaves open the question of whether the Coastal Commission could rehabilitate its restriction by determining that such ocean views are so paramount as to justify limiting all new buildings to single-story structures.

It is therefore necessary to develop a more coherent account of why the *Nollan* decision was correct in the face of these objections and doctrinal loopholes. An understanding of the private law offers a way, indeed the only way, to answer

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<sup>28</sup> *Loretto v. Teleprompter*, 458 U.S. 419 (1982).

<sup>29</sup> *Nollan*, 483 U.S. at 843–45.

<sup>30</sup> For a defense of that position, see Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 *IOWA L.J.* 1, 17–33 (2000).

<sup>31</sup> 483 U.S. at 831–32.

<sup>32</sup> *Id.* at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584 (1981)).

that question. On the first point, Justice Brennan is clearly wrong to think that the possibility of a gainful bargain of a permit for the lateral easement justifies the government action. That argument will work in any case in which the net benefit to the landowner of getting the permit is positive, even if the government takes large chunks of the land for its own use. This rationalization of massive exactions fails to situate the so-called bargain in its larger context. Suppose that A steals a ring belonging to B that is worth \$1,000 and offers to sell it back to B for \$500. A prefers the money and B prefers the ring, so there will be a bargain with mutual gain. But the huge danger here is that this bargain incentivizes A to take the ring in the first place, precisely so that he can sell it back to B, even if A only values the ring at \$200. In order to deter the original appropriation, the law must allow B to recover the ring without compensating A. Indeed, anyone would bridle at a bargain that allowed A to profit from taking the ring in the first place. All cases of ransom involve an initial taking, and one way to discourage these seizures is to prohibit the resale of the taken property and, by way of extension, to make it illegal to fence the goods to some third party. The entire situation is negative sum, and hence the Brennan mutual gain argument fails because it permits the government to profit from its uncompensated original taking, which required it to commit no resources at all.

The correct analysis therefore begins with the public choice conception that governments and voters will be more willing to acquire private property interests if they can obtain them at a price of zero. The Takings Clause therefore slows this situation down by forcing the purchase option to be exercised at market price. That risk of government faction is not limited to possessory interests. It also applies to the second form of servitudes, a restrictive covenant over land. Here too the government will haphazardly claim these intangible property rights if it can get for free what a private party would have to purchase. Hence there is no particular reason to allow regulations that restrict use to be imposed without compensation just because there is a good fit between what the state takes and what the public needs. Indeed, this is all the more reason to require payment and to let the state figure out the nexus question and the best disposition of public resources through the political process.

Once these fundamentals are established, it is possible to bring the monopoly analysis to its proper conclusion by noting the resource misallocations that follow from the exaction game, which apply across the board. There are two relevant comparisons. The first one, which is stressed in *Nollan*, is the relationship between the landowner's loss of the easement and his gain from the grant of the construction permit. The latter is greater than the former, so the easement is surrendered. The same would be done if the numbers came out the same way for restricting certain building configurations to preserve ocean views. But this is the wrong social comparison. The proper function of eminent domain is to permit transactions that use public coercion to get a net social gain, and to discourage the government from making those that do not. The just compensation requirement achieves that result. But if the government can grant permits bundled with easements, the rational calculus behind the just compensation requirement is circumvented.<sup>33</sup> Under a just-

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<sup>33</sup> See generally Richard A. Epstein, *The Bundling Problem in Takings Law: Where the Exaction Process Goes off the Rails*, 4 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 133 (2015).

compensation regime, if the easement is worth more to the government than to the landowner, the taking that leaves both parties better off can be arranged (at some positive transaction cost). But if the easement is worth less to the government than it costs the landowner, the government will not go forward with the deal. This is the socially desirable result if the lateral easement costs the owner \$200 and generates only \$100 in social benefits. If bundling is allowed, however, all these deals go through regardless of relative values. As it costs the government nothing to grant or deny a permit, the state will use this bundling power to coerce transactions even where the landowner values the easement more than the public does (assuming that the permit is still more valuable than the easement). Only if the bundling is broken will a proper form of sorting take place because the public option is exercisable only at a fair market price. And while inefficient takings are still possible under a just compensation regime, the public financial consequences of these errors will ensure better visibility and accountability, which will incentivize community groups to develop better procedures to match the amount they pay in taxes with the benefits the public receives.

Unfortunately, Justice Scalia's discussion of both "out-and-out extortion" and the requirement of fit between the easement demanded and public purpose served direct the inquiry in the wrong direction. This permissive approach that allows governments to rationalize their way into takings is one of the reasons why the exaction game proliferates today. There is no limit of its use in regulatory takings cases, including those that require property owners to build new housing at their own expense when they evict tenants after lease expiration.<sup>34</sup> The error that Scalia made from his narrow perspective generates huge negative consequences. In short, when governments can skirt the just compensation requirement by articulating a sufficiently clear nexus between the regulation and its public purpose, the Takings Clause offers little protection against coercion and inefficient transactions. So when the dust settles, Justice Brennan comes away with the lion's share of the practical gains. The social losses from the failure to unbundle the government's ability to issue permits from the government's obligation to pay actual compensation for takings are now a routine feature of modern takings law.

### III. PENNELL V. CITY OF SAN JOSE.

The second of Justice Scalia's opinions that I wish to address deals with the contentious issue of rent control, which has a long and sorry history in the United States Supreme Court. The issue first surfaces in *Block v. Hirsh*,<sup>35</sup> in which Justice Holmes justifies the operation of the system in connection with the temporary, two-year scheme put in place to deal with the run up in rental housing after the United States entered World War I. The justification proffered in *Block* was that the entire

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<sup>34</sup> *San Remo Hotel v. San Francisco City & Cty*, 41 P.3d 87 (2002) (requiring landowners to build replacement housing for evicted tenants). This principle was expanded in *California Building Industry Association v. City of San Jose*, 61 Cal. 4th. 435 (2015) (imposing affordable housing mandates even if no housing was destroyed).

<sup>35</sup> 256 U.S. 135 (1921).

scheme was legitimized by wartime emergency conditions. There was no inquiry into whether the occupation counted as a taking of private property, whether it was for public use, or whether just compensation was supplied. The next generation of rent control schemes had no emergency or time limitations, however, and the courts had to create other justifications.

*Pennell*<sup>36</sup> involved a challenge to San Jose's rent-control system, an ordinance that claimed a very different set of government rationales:

These needs include but are not limited to the prevention of excessive and unreasonable rent increases, the alleviation of undue hardships upon individual tenants, and the assurance to landlords of a fair and reasonable return on the value of their property.<sup>37</sup>

The phrase "fair and reasonable return" is a strong signal that rental housing in San Jose was being treated as a public utility, a characterization which should be enough to condemn the rule to constitutional oblivion without further ado. The standard rationale for rate regulation is that the firm has a monopoly position as a common carrier or a public utility. Given the lack of market competition in such circumstances, the government may impose rate regulation that does not deprive the firm of a risk-adjusted competitive rate of return. Indeed the best recent opinion dealing with these issues was written by Chief Justice Rehnquist in *Duquesne Light Co. v Barasch*,<sup>38</sup> which developed the various approaches that could be adapted to set appropriate rates.<sup>39</sup> But in a city-wide housing market there are no monopoly profits, and hence any rate regulation scheme necessarily reduces returns on the one side and increases costs on the other side, so that the return in question is *necessarily* less than the competitive rate. That is all that is needed to decide the case. All the particulars of a given rate-regulation scheme only explain the magnitude of the loss, which is not relevant given that none of these schemes contain any provision for the compensation of the aggrieved landlord.

Nonetheless, Rehnquist trots out the usual rational-basis review arguments, namely that rent control is justified under some standard of "consumer welfare," without once asking whether or not a system of price controls that favors sitting tenants could ever benefit the class of tenants as a whole.<sup>40</sup> In addition to the complete exclusion of landlord welfare from this social calculus, this failure to consider that rent control systemically advantages current tenants over prospective tenants severely undercuts the consumer welfare justification. The superficial nature of the argument leads to an unfortunate situation in which all particular disputes are decided on collateral points that never arise under a correct initial analysis.

In *Pennell*, the question was whether a statutory "hardship to tenant" provision should allow the hearing officer to reduce the rents below those required under the fair rate of return formula. Clearly, if the statute is unconstitutional without this provision, its addition is not needed to make unconstitutional a provision that

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<sup>36</sup> 485 U.S. 1 (1988).

<sup>37</sup> San Jose Municipal Ordinance 19696, § 5701.2.

<sup>38</sup> 488 U.S. 299 (1989).

<sup>39</sup> *Id.* at 316 ("The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public.").

<sup>40</sup> *Pennell*, 485 U.S. at 13.

is already unconstitutional. But Rehnquist, ever the proceduralist, chooses not to reach that question. Even if the property owner has standing, the issue is not yet ripe because the particular provision has not been invoked in a concrete case. *Pennell* therefore lets an issue of major concern fester because it has yet to be applied, putting the problem off to a later day. But that patient approach seems unwise whenever there is a facial challenge to a particular provision that can be resolved without the collection of further facts in the specific case. This issue, for example, is quite different from a situation in which a court is asked to determine the proper scope of an injunction before the nature and source of the potential damage is established. There should be no question that a rent control statute that inevitably sets below-market rates will always run afoul of relevant legal principles regardless of case-specific facts.

To his great credit, Justice Scalia pushes the envelope in his concurrence and decides that ripeness claims notwithstanding, it is incumbent upon the court to look at this critical issue on its merits. At this point he concludes in a justly well-known passage that:

The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that “public burdens . . . should be borne by the public as a whole,” this is the only manner that our Constitution permits.<sup>41</sup>

In essence, this powerful position claims that all subsidies to particular groups should come from general revenues, not from particular individuals. That claim was especially potent in *Armstrong*, the case cited by Justice Scalia, because the issue there involved materialmen’s liens that had been placed on two United States Navy boats. The liens were imposed in the ordinary course of business because the general contractor had not paid the subcontractors for their work. In those cases, the general private-law rule is that any contractor has an action against the property on which the work was done, unless the owner has signed a lien waiver, which was not done in this case. Once the liens were imposed, however, the United States sailed the boats out of Maine waters, thereby dissolving the lien. The general proposition relied on in *Pennell* was that the private contractor in *Armstrong* should not be required to singlehandedly foot the bill for supplying public services to the United States. Rather than imposing its operating costs on individual citizens, the government must fulfill its obligations by drawing from general revenues.

In takings law, there is a powerful association between the exact language used in the case and the ultimate outcome. Whenever this *Armstrong* dictum is quoted,

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<sup>41</sup> *Id.* at 21–22 (internal citation omitted) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The full relevant passage from *Armstrong* reads: “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

full compensation is awarded and the costs of social programs are paid for from public revenues. Alternatively, compensation is almost never awarded in those cases where the compensation principle is framed in the weak language offered by Justice Brennan in *Penn Central Transportation Co. v. City of New York*:<sup>42</sup>

The question of what constitutes a “taking” for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.<sup>43</sup>

At this point, Brennan concludes that the taking of air rights, a recognized property interest under New York State law, is not compensable because it is a mere restriction on use. Yet there is no explanation as to why the takings protection should apply more in one case than in the other, when the same public choice dynamics encourage the government, whether by dissolving a lien on a ship, imposing rent control laws, or enacting landmark preservation laws, to foist the costs of particular social programs on a small group of property owners. This discontinuity is apparent in *Pennell*’s refusal to invalidate restrictions on private property that imposed public burdens on a narrow slice of the population. Justice Scalia’s concurrence failed to understand the power of *Armstrong*’s basic proposition. In so doing, he missed a golden opportunity to launch a broader attack on rent control by using the same public choice dynamic that condemns the hardship for tenant exception to condemn the rent control system as a whole.

The simple proposition is that the public, not the particular landlord, should be forced to bear the costs imposed by making housing available at below-market rents. The easiest way to achieve this end is for the state to offer tenants rent supplements to cover the difference between the market rate and the control price. These elements will have the added benefit of improving public deliberation, for now the public that wants to provide these benefits has to bear these costs. The net effect will be to reduce the frequency and extensiveness of programs as the price goes up.

Justice Scalia tries to wiggle out of this generalization, claiming, “[s]ingling out landlords to be the transferors may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem.”<sup>44</sup> But the point is incoherent because landlords are not the source of the high-rent problem. Rather, it is the result of either shifts in supply or demand, or the imposition of some entry barrier, like zoning laws, that should be removed unless justified on health or safety grounds. And it is hard to conclusively say that landlords are the beneficiaries of “high rents” given that they take the full

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<sup>42</sup> 438 U.S. 104 (1978).

<sup>43</sup> *Id.* at 123–24.

<sup>44</sup> *Pennell*, 485 U.S. at 22.

risk of falling rents. It would be equally ill-advised to say that current homeowners are the beneficiaries of high housing prices when they also bear the risk of falling prices. For all we know, property owners may have bought into the market at its peak. The general rule is that both landowners and landlords take the risk of a decline in price just as they might gain from an increase. A system of rent control that denies the upside while forcing the landlords to bear the downside hardly makes them beneficiaries.

In the end, Justice Scalia relies on an ad hoc distinction that makes no sense. The proper approach instead recognizes that any transfer of a term of years at below-market rents is a taking of a long-recognized and fully vested leasehold interest. But two obstacles prevented Justice Scalia from reaching that view. The first was his unwillingness to develop a systematic theory of property rights. The second was his view that judicial restraint requires only incremental adjustments to the law. His position here, as in *Nollan*, breaks new ground that only some other justices are prepared to follow. But his ad hoc approach also prevents the development of a fully articulated position, and in the end helps entrench the basic, but indefensible, rent control scheme.

## IV. LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

### A. BACKGROUND

The third of Justice Scalia's decisions that I shall critique, *Lucas v. South Carolina Coastal Council*,<sup>45</sup> is also an exercise in missed opportunities. In this case, Justice Scalia again came out with the correct result, but again his flawed logic blocked the adoption of an intellectually coherent approach. The basic problem in the case was simple. The terrain of South Carolina's coastline on the Isle of Palm was, and is, intrinsically unstable in that the beach expanded and contracted in significant ways over relatively short periods of time. The expansions added to property, but the contractions threatened to knock individual structures into the ocean. Any party who bought beachfront property had to be aware of that risk, and thus had to calibrate his construction efforts to minimize the associated costs. Whether individual landowners used setbacks, sea walls, or stilts to keep the ocean at bay is a second-order question here, unlike in *Stop The Beach Renourishment v. Florida*. The correct design approach for a beachfront property owner is to adopt measures in keeping with the configuration, use, and value of his particular property, a decision that could be made separately by each individual landowner in deciding on whether or not to build.

Nonetheless, in 1988 the South Carolina legislature stepped in by passing the Beachfront Management Act<sup>46</sup> that prohibited Lucas, like all other owners of vacant plots, from building anything at all on the two beachfront lots that he had purchased for \$975,000 prior to the enactment of the statute. Lower courts determined that the passage of the statute rendered both of these plots "valueless," so the question before the Supreme Court was whether this statute constituted a taking of the land. South Carolina's initial argument was that the development freeze in South

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<sup>45</sup> 505 U.S. 1003 (1992).

<sup>46</sup> S. C. Code Ann. § 48-39-250 *et seq.* (Supp. 1990).

Carolina's beachfront statute did not work a taking of private property because the land remained in Lucas's hands. According to the state, the want of any physical occupation took the case out of the per se compensation rule for occupations that had been articulated in *Loretto v. Teleprompter*<sup>47</sup> some years before. Instead, the government asserted that a regulatory prohibition on building was governed by the far laxer *Penn Central* ad hoc balancing test discussed above.<sup>48</sup> Under that test, courts weigh the extent of the property deprivation against the state's interest, which in this case was the protection of the beach by creating a "buffer from high tides, storm surge [and] hurricanes."<sup>49</sup>

So here we have the basic counterpoint. On the one side is the explicit question of whether private property has been taken. On the other are questions over the scope of police power, whether the taking is justified as to its choice of ends, and whether the means chosen to reach those ends are also legitimate. Justice Scalia comes out with the right result that there is indeed a taking in this particular case. But like his earlier approaches in *Nollan* and *Pennell*, he sacrifices theoretical coherence in order to limit the scope of his opinion. Let us look at both sides of the issue.

### B. THE PRIMA FACIE TAKING

The first side of the equation asks if private property has been taken, Justice Scalia's opinion in *Lucas* uses a process of imperfect analogical reasoning to get to what he regards as the ideal structure. But as with all cases of analogical reasoning, the process is only as good as the initial exemplar to which the comparison is made. In selecting a model for illustrating a prototypical taking, Scalia had a choice between two reference points on the opposite ends of the spectrum. The first of these is the *Loretto* decision, which limits the per se compensation rule to cases of physical occupation. The logical extension of that rule was good enough to cover the issue in *Nollan*, but it does not quite work in connection with the prohibition in *Lucas*, under which the property owner is indeed left in exclusive and undisturbed possession of the premises. Most objective observers would regard any total prohibition on all development of land as a big deal, tantamount to a taking. However, it may well be that leaving the property vacant does not leave it "valueless," as the trial court found, because even if the owner cannot build, he can still enter the land for other activities like sports and picnics, or sell it off to a neighbor for use as a side yard.

That riposte quickly leads to the next challenge. Suppose that the property owner has the absolute right to exclude all others from the land, but has no right to enter that land at all, for any purpose whatsoever, or to sell or lease it to anyone else. The Court's earlier decision in *Kaiser Aetna v. United States*<sup>50</sup> stated that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."<sup>51</sup> But just what happens if the right to exclude is protected while the

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<sup>47</sup> 458 U.S. 419 (1982).

<sup>48</sup> *Penn Central*, 438 U.S. at 1015–23.

<sup>49</sup> *Lucas*, 505 U.S. at 1075 (Stevens, J. dissenting).

<sup>50</sup> 444 U.S. 164 (1979).

<sup>51</sup> *Id.* at 179–180. The most famous defense of this position is found in Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. (1998).

right to enter the property for any reason is removed? Clearly it takes a gutsy person to say that property right has not been taken, especially if the owner remains liable in tort for personal injuries caused by dangerous conditions on the premises, which he is not allowed to enter and correct. Something is deeply amiss with the entire enterprise of separating the fundamental property right to exclude from others in the bundle—like disposition, use and development—and then subsequently relegating the latter group to second-class status.

Yet that relegation is what Justice Scalia champions when he takes the view that Supreme Court precedent, starting with *Pennsylvania Coal v. Mahon*,<sup>52</sup> holds that the Takings Clause reaches not only “direct appropriation[s],” but also covers *some* regulations as well.<sup>53</sup> But which ones? In *Mahon*, Justice Holmes insisted that protection against takings only covered those regulations that went “too far,”<sup>54</sup> without ever once explaining why some unspecified difference in degree flipped the liability switch from the on to the off position.<sup>55</sup> This amorphous sliding scale mechanism which sometimes finds a taking, and sometimes does not, is the worst possible way to model discontinuities. Instead, the correct approach in all cases has two steps. First, the preliminary takings inquiry simply asks the yes/no question of whether the government has restricted the exercise of a private property right. If yes, there is a taking. Only then does the aforementioned question of regulation severity become relevant in determining the level of compensation required under a maxim that states, “The more you take, the more you pay.” Under this model, differences in degree cleanly correspond to the amount of compensation owed, a result that can only be reached by jettisoning the view that there is any categorical distinction between regulations and takings. Small differences in how the government frames an intrusion on private property (i.e., as a regulation or as an invasive taking) should not produce huge differences in outcome. Instead, the on-off switch for whether a taking has occurred should correspond to other bright-line rules that govern social conduct, such as boundary lines for land, road dividers for highways, and fair and foul lines for sports contests. Exceptions only come up in rare cases, usually after one party has deviated from the rules, say by forcing another over a boundary line. Thus the doctrine of last clear chance in torts, for example, requires adaptations made in good faith when one party knows that the other party has already deviated from the rules of the road, and in this instance the party that has to make the adjustments is uniformly protected by some form of a good faith rule.<sup>56</sup> Just as other areas of law prefer bright-line rules with narrow categorical exceptions, so should takings law eliminate the ambiguous sliding-scale analysis for determining at what point a regulation is severe enough to constitute a compensable taking.

Nonetheless, Justice Scalia tries to avoid this conceptual objection by placing the tipping point so that the imposed regulation becomes compensable whenever there is a “deprivation of all economically feasible use” of the property taken.<sup>57</sup> Again, his *Lucas* opinion offers no acceptable explanation for this discontinuity.

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<sup>52</sup> 260 U.S. 393 (1922).

<sup>53</sup> *Lucas*, 505 U.S. at 1014.

<sup>54</sup> 260 U.S. at 415.

<sup>55</sup> I discuss this point at great length in, Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589 (2013).

<sup>56</sup> See Restatement (Second Law of Torts), §§ 822 & 826.

<sup>57</sup> 505 U.S. at 1016 n.7.

At one point he claims that this “total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.”<sup>58</sup> But by the same token he never explains why a partial deprivation of economic value is not equivalent to a partial physical appropriation that would be compensable under the *Loretto* rule. Instead, he adds an apologetic footnote, beginning with the word “regrettably,” that only sows further confusion on the area.<sup>59</sup>

The key problem here is the oft-discussed “denominator question” that poses this brain teaser: what happens when the government requires a landowner to leave 90 percent of land in its natural state in order to receive permission to develop the other 10 percent? One way to look at this is as a 100 percent loss of use of 90 percent of the land, at which point full compensation is owed for the associated loss in value. But the alternative is to look at it as a partial taking of the entire plot of land—that is, a 90 percent loss of use for the whole parcel—a partial devaluation for which the *Penn Central* test could well deny any compensation due to the retained use of the 10 percent. Whether that tipping point is at 90 percent, 80 percent, or elsewhere is still, after nearly 40 years of litigation, anybody’s guess.

The only reason this impasse arises is because Justice Scalia buys into the flawed *Penn Central* paradigm. He thinks that the issue is the *ratio* of the value retained to the overall value. The correct approach, however, is to order compensation for the amount of the property taken, regardless of the fraction left behind. This straightforward before-and-after comparison makes the choice between physical and regulatory takings irrelevant. If the value of a \$100,000 plot of land is reduced to \$20,000 when construction is blocked on 90 percent of the property, \$80,000 is owed either way. Nor is it possible to attack this approach as a devious form of “conceptual severance,” which Professor Margaret Radin insisted is a dangerous ploy intended to subvert the *Penn Central* rule by letting property owners divide their land into small chunks so that the numerator occupies a fraction of the (shrunken) denominator.<sup>60</sup> But there is no need to engage in any such artifice if the analytical framework asks the right question: how much property has been taken? What is utterly irrelevant *in all cases* is the amount of property left in the hands of the owner, or the ratio between the property taken and the property left behind.

In principle, it is impossible to devise the correct approach to the takings issue so long as the empty distinction between physical takings and regulatory takings remains doctrinally dominant. The point is evident enough from the landmark regime imposed in *Penn Central*, where the loss of air rights could be regarded as the partial taking of the fee simple or the entire taking of the air rights. Justice Brennan’s entire apparatus of regulatory takings, uncritically accepted by Justice Scalia, goes astray by insisting that the existence of a compensable taking depends on the ratio of the particular incident taken to the value of the parcel as a whole.<sup>61</sup>

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<sup>58</sup> *Id.* at 1017.

<sup>59</sup> *Id.* at 1016 n.7 (“[T]he rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.”).

<sup>60</sup> Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM L. REV. 1667 (1988).

<sup>61</sup> *Penn Central*, 438 U.S. at 130–31 (“In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the ‘landmark site.’”).

The situation does not get any easier in a world of regulatory takings if the Court is asked to distinguish between two different hypothetical regulations. The first does not allow the state to use the air rights, but only to block the owner's use of them. The second lets the state develop those air rights or sell them to someone else. Under the *Penn Central* approach, only the second action is certainly compensable, despite the fact that both regulations equally impair the owner's property rights. The correct reformulation of this analysis is therefore a rule which always requires some compensation under a standard stating that "The more you take the more you pay," so that all the nuances come out on the valuation question, not the threshold compensability question. This approach is perfectly universal whether the case involves air rights, mineral rights, liens, or covenants. That formulation also should always take into account any "severance damages" to any portion of property retained, just as it should take into account any added value to the property that the owner retained.<sup>62</sup> Only this approach is sufficient to eliminate the risk of strategic government behavior, for otherwise the state will be tempted to first regulate without compensation and then later acquire outright possession and ownership of the now-useless property at bargain prices. The correct rule requires compensation for the loss in value each step of the way.

That uniform approach is exactly how it should be, because the twin fundamental concerns in takings cases—fairness to the landowner, and constraints on government rent-seeking behavior—loom every bit as large with a zoning or a landmark preservation scheme as they do with the direct occupation of property. Indeed, given the potentially greater reach of land use regulations, the dangers of unfairness or strategic behavior are greater with widespread but slanted regulation than with isolated occupation cases. In all cases, there is no need to guess in advance which of these schemes is likely to prove more successful than others.<sup>63</sup> It is quite enough to wait for the outcome of events like the taking in *Lucas* before making the decision.

Indeed, *Lucas* offers an instructive explanation of how matters can go awry. Once the Supreme Court held that the South Carolina beachfront law worked a taking, the trial judge forced the state to take title to the property by paying Lucas its full market value. Naturally, the state had set aside no budget for that expenditure, so it sold the land to two new owners for full market value, and these new owners in turn built their own oceanfront homes.<sup>64</sup> Incentives matter.

### C. POLICE POWER JUSTIFICATIONS

Justice Scalia is every bit as confused in *Lucas* when dealing with the question of whether there was any police power justification for taking the property. As noted above, the centrality of nuisance in the police power literature rests on the simple

<sup>62</sup> For the complications, see *United States v. Miller*, 317 U.S. 369 (1943).

<sup>63</sup> For one articulation of that political process claim, see Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–45 (1991). For my response, see Richard A. Epstein, *The Unfinished Business of Horne v. United States Department of Agriculture*, 11 N.Y.U. J. LAW & LIBERTY 734 (2016).

<sup>64</sup> Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 COLO. L. REV. 331, 366 (2004): "In November 1993, Lucas's oceanfront lots went at auction for \$730,000."

proposition that the state is allowed to act as the agent of the public at large in responding to threats that neighbors impose. If private actors do *not* have a valid cause of action against their neighbor, then the government, as their agent, cannot rise above their position by claiming some novel set of rights. If that is allowed, then all interest groups will seek to remove cases from the tort system into the administrative process. Instead, just as the private neighbor must purchase relief if it wants to secure additional rights that are not protected by the law of nuisance, the government cannot expand the police power to avoid the compensation requirement of the Takings Clause.<sup>65</sup> Thus it will not do to say that the beautification of the general region offers a police power justification for prohibiting all construction on the site. The desire to enhance the open spaces along the beach surely counts as a valid public use, which, unlike the exercise of the police power, always requires the payment of compensation.

This key distinction inevitably gives rise to some complex marginal cases, but the basic lines of nuisance law are clear in two key respects: First, no one person has the right to a view over the land of a neighbor, and no one can acquire that right by building first. Otherwise, there is a senseless race to early development in which everyone is a loser. Second, competition from a nearby business does not constitute a nuisance. Instead, the nuisance law hones in on pollutants, noises, vibrations, odors and similar invasions. There is an inveterate tendency, even among private law scholars, to claim that the principles of nuisance law are muddy and indeterminate,<sup>66</sup> but it is critical not to be distracted by a set of marginal examples in an area whose principles are capable of coherent and rational development.<sup>67</sup>

Given this principled view of nuisance and the police power, it is very clear that the state cannot come up with any rationale that would justify preventing the reconstruction of new buildings on land, especially when the proposed structures are in keeping with those already there. Beautification may well be a good reason to impose restrictions on land, but if so, such restrictions take an interest in private property for public use and thus require compensation. It could also be argued that perhaps a total end to construction is needed to prevent injury to someone caught on the beach during the storm, but that wildly improbable consequence does not justify blocking construction on the beach, or indeed anywhere else. Perhaps some building safety requirements may be imposed, but these are surely less restrictive than an outright ban on construction. In effect, the police power system requires a two-stage analysis, one dealing with ends and the other with means. The class of ends can be rigorously defined, and beautification is not among them. The potential for future harm is far more difficult to pinpoint but here, as with private remedies, the correct approach is to make some good faith effort to minimize the sum of two errors—blocking projects that should be allowed to go forward, and permitting projects that

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<sup>65</sup> For a fuller articulation of these principles, see Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

<sup>66</sup> See the sources cited by Justice Blackmun in *Lucas*, 505 U.S. at 1055 n.19 (Blackmun, J. dissenting) (“There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.”) (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, *PROSSER AND KEETON ON THE LAW OF TORTS* § 616 (5th ed. 1984)).

<sup>67</sup> For historical context, see Joel Brenner, *Nuisance Law and the Industrial Revolution* 3 J. LEGAL STUD. 403 (1974).

should be blocked due to legitimate public safety concerns. This particular case is one where the balance of possible errors heavily favors the landowner.

Nonetheless Justice Scalia manages to confuse this position in an untoward burst of linguistic skepticism, asserting:

[T]he distinction between “harm preventing” and “benefit-conferring” regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas’s land is necessary in order to prevent his use of it from “harming” South Carolina’s ecological resources; or, instead, in order to achieve the “benefits” of an ecological preserve.<sup>68</sup>

Pure doubletalk. If Justice Scalia actually meant what he said about collapsing the longstanding distinction between harms and benefits, he would rob takings law of any and all coherence. His extreme form of linguistic skepticism seriously compromises the rule of law by making every case indeterminate. Thus when I do not hit you, I have conferred on you a benefit. When I have not given you a handout, I have inflicted a harm. When I do nothing to you either way, I have both harmed and helped you at the same time. The only way to avoid these absurdities is to look back to the common law rules that link harm to the infliction of a nuisance, and benefit-conferring relationships to those which support an action for restitution, as when I rescue your animals from danger when you are not in a position to do so.

In the end, Justice Scalia reluctantly, but inconclusively, makes his way back to the standard usages when he reverts to the Restatement provision defining public and private nuisances,<sup>69</sup> but not before he cites a large number of legal sources that proclaim the incoherence in the law of nuisance due to the difficulties associated with making coherent causal judgments. Thus at one point, he quotes from a well-known article by the late Professor Joseph Sax to the effect that “[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses.”<sup>70</sup> Note that under this test, both the private and the public law of nuisance falls to pieces, because any case can come out any way. That result is not possible with the traditional view that stresses the nontrespassory nature of the invasion as the heart of the tort.<sup>71</sup> In dealing with this issue, H.L.A. Hart and Tony Honoré hit the nail on the head when they attack this view by saying:

It is fatally easy and has become increasingly common to make the transition from the exhilarating discovery that complex words like “cause” cannot be

<sup>68</sup> *Lucas*, 505 U.S. at 1024.

<sup>69</sup> *Id.* at 1025 (citing RESTATEMENT (SECOND) TORTS, § 821B, 822).

<sup>70</sup> *Id.* (citing Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 49 (1964) (alterations in original)).

<sup>71</sup> *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 689 (N.C. 1953): “[T]he feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that any substantial nontrespassory invasion of another’s interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance”.

simply defined and have no “one true meaning” to the mistaken conclusion that they have no meaning worth bothering about at all, but are used as a mere disguise for arbitrary decision or judicial policy. This is a blinding error, and legal reasoning will never be understood while it persists.<sup>72</sup>

Scalia falls into just this hyperrealist trap, so that his *Lucas* decision is infected with an acute dose of legal realism that makes it impossible for him to see clearly through the fog. Even though he comes out the right way in this case, his opinion articulates no clear principle that allows him to deal with the next case. Thus the extent of the government’s ability to invoke the police power in controlling nuisance remains wholly unclear, as does the takings rule for cases in which the government restriction on land use is at most partial. Finally, there is no guidance for cases when the scope of the initial restriction may be overbroad, and is therefore amenable to being cut down to avoid a takings challenge.

These intellectual confusions come at a very high price. For example, the elastic definition of harm allows governments to obtain large swathes of land for nature preserves without compensation: after all, preservation of any site is arguably necessary to prevent injury to animal or plant life. Yet what is missing in this broad definition of harm is any notion of externalization that one person’s actions inflict on the person or property of *another*. In those cases, where one person degrades one portion of his own land in order to benefit another, he bears the full cost of his own losses, and thus is far less willing to harm his own property than someone else’s, which is why the tort law is imposed for harms on strangers but never for self-inflicted losses.

Ideally, therefore, these habitat conservation cases should *always* come out in the opposite direction under a rule that requires the government to pay for such restrictions. Under the current regime, however, landowners know that the government can swoop in at any moment and freeze land development due to environmental concerns. This fear of future, uncompensated restrictions creates a powerful incentive for individuals to proactively destroy habitat so that the government cannot later assert an interest in preserving this habitat.<sup>73</sup> The current system also makes it all too easy for the government to, at no cost to itself, designate certain land as protected habitat, and then issue a building permit only if the landowner agrees to “mitigate” the damage by purchasing other land for government use at his own expense to cure the supposed loss.<sup>74</sup> There is of course no requirement that the harm identified by the government threaten the land of *others*, as is required as part of a nuisance remedy in classical tort law. Indeed, this tactic of extracting concessions by withholding private development rights is yet

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<sup>72</sup> H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 3 (1959).

<sup>73</sup> The wrong result on this issue was reached by the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Justice Scalia offered a technical dissent on the basis statutory language, *id.* at 714, which nowhere addressed any of the incentive questions raised by the case. For my views, see Richard A. Epstein, *Babbitt v. Sweet Home Chapters of Oregon: The Law and Economics of Habitat Preservation*, 5 SUPREME COURT ECONOMIC REVIEW 1 (1996).

<sup>74</sup> For an illustration of this process, see *Koontz v. St. Johns River Water Management Dist.* 133 S. Ct. 2586 (2013). It is perfectly correct to insist that nuisances be mitigated. But it is wholly incorrect to insist that ordinary development be mitigated when there is no nuisance to control.

another version of the *Nollan* bundling mistake discussed above.<sup>75</sup> In the end, *Lucas* carves out a narrow island in which compensation is required, but in effect *expands* the scope of government control by blessing regulation without compensation for virtually any partial taking of land, even in those cases where there are no common law nuisances involved. With the decision in place, the scope of government overreach only increases.

This point, moreover, has not been lost on defenders of the modern progressive state. In writing about these issues in a memorial tribute to Justice Scalia, Professor Cass Sunstein offers high praise for how the *Lucas* decision raised the full range of issues needed to undertake the “total taking” inquiry. He cites the passage from Justice Scalia’s *Lucas* opinion that relies on *Penn Central* to observe that the relevant factors include

among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s proposed activities, the social value of the claimant’s activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.<sup>76</sup>

Given this laundry list of factors, it is easy for Sunstein to announce happily that “*Lucas* is an excellent illustration of living constitutionalism.”<sup>77</sup> Unfortunately, his observation is all too true. By relying on a random set of relevant factors of indeterminate importance, the test permits any result in any case for any reason at any time. Such an approach guarantees that *Lucas* will be a one-hit wonder, which is what actually happened in the case. Knowing full well that the total taking approach would put it at major financial risk, South Carolina amended its Beachfront Management Act to authorize the Coastal Council to issue “special permits” in select circumstances that would allow for the construction of new units, or the reconstruction of old ones, on the seaward side of the statutory baseline.<sup>78</sup> Justice Scalia refused to allow the subsequent passage of this statute to deter his constitutional review. But his victory was for one case and one case only.<sup>79</sup> Going forward, every legislature everywhere will follow the South Carolina example by integrating safety valves into construction bans in order to escape the per se *Lucas* rule. But by design the concessions will be minor, and the burdens of proof heavy, with only the hardest of souls making their way through the regulatory maze. The key point is that the “total taking” rule expounded in *Lucas* allows states to easily skirt the principle by purportedly leaving something to landowners, thus removing cases from the total taking approach in *Lucas* and putting the entire field of land use regulation back into the rational basis world of *Penn Central*. No wonder Sunstein admires the *Lucas* opinion. Its calculated prolixity makes the constitutional protection of property rights stillborn the day that *Lucas* was decided.

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<sup>75</sup> See *supra* note 30 and accompanying text.

<sup>76</sup> *Lucas*, 505 U.S. at 1030–1031 (internal citations omitted), quoted in Cass Sunstein, *In Memoriam: Justice Antonin Scalia*, 130 Harv. L. Rev. 22, 25 (2016).

<sup>77</sup> Sunstein, at 26.

<sup>78</sup> S. C. Code Ann. § 48-39-290(D)(1) (Supp. 1991).

<sup>79</sup> *Lucas*, 505 U.S. at 1010–1014.

## V. STOP THE BEACH RENOURISHMENT

The last of the cases, *Stop the Beach Renourishment*,<sup>80</sup> involves a form of environmental regulation that should be praised for its sophistication. Justice Scalia rightly upholds the Florida system, but again does so for reasons that reveal a fundamental misunderstanding of the entire logic of environmental protection. At issue in *Stop the Beach* was the constitutionality of Florida's Beach and Shore Preservation Act,<sup>81</sup> which set out an elaborate procedure whereby government intervention could be used to protect valuable beachfront property from erosion. The problem here is a ticklish one because the protection of beachfront property normally involves the creation of a seawall. In principle, each beachfront owner could erect an individual wall to protect his own land, but this would be ineffective. Beachfront lots tend to be narrow so as to maximize the number of property owners that have direct access to the beach. Consequently, individual walls are both expensive and ineffective against surging storm waters that will simply flow around their ends. Yet at the same time, it is difficult to secure voluntary cooperation among neighbors to build a common wall that could do the job at lower cost with greater effectiveness. There is, in other words, the classic collective action problem to which well-focused government intervention could supply a solution.<sup>82</sup>

In this case, the statutory scheme contained these key elements. First, the wall was to be erected along an "erosion control line"<sup>83</sup> where it provided the best level of protection. Second, the public gained an easement of access over the private land that lay to the seaward side of the wall. Third, the owners of the beachfront properties retained their view rights. The wall did not prevent owners from reaching the beach, and the government could not build any structure on the beach that blocked the view from the properties.

In an attempt to stop this plan, the private owners claimed a taking of "(1) the right to receive accretions to their property; and (2) the right to have the contact of their property with the water remain intact."<sup>84</sup> The former "accretions" claim refers to the common law rule whereby slow additions and losses to beachfront property belong to the landowner. In this case, the landowners would no longer receive these accretions because additions at the water's edge would now accrue to the state. The second claim refers to the fact that the wall necessarily impaired unlimited access to the beach.

The proper response to these claims is one that first admits both charges as true, but then demonstrates that the property owner has received in-kind compensation for the restrictions in question. That in-kind compensation refers to the package of benefits generated by the wall, including the protection against the loss of further land by erosion and the preservation of view and beach-access rights. If the value of these equals or exceeds the losses in question, the prima facie taking is compensated and no additional compensation is necessary. In this case, in-kind compensation is presumed, as the wall confers a significant benefit by solving the

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<sup>80</sup> 560 U.S. 702 (2010).

<sup>81</sup> 1961 Fla. Laws ch. 61-246, as amended, Fla. Stat. §§ 161.011-161.45 (2007).

<sup>82</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

<sup>83</sup> *Stop the Beach*, 560 U.S. at 710.

<sup>84</sup> *Id.* at 711.

collective action problem faced in organizing the response needed to stop erosion. A more fine-grained inquiry could ask whether the scheme has provided full or only partial compensation to each beachfront owner, which could be answered by comparing the fair market value of the properties before and after the scheme is put into place. As a first approximation it looks as though all the landowners are in about the same position, so that in general it is best to use the average benefit to assess individual cases. A different procedure would be required if individual owners were so uniquely situated that some derived little benefit from the wall—for example if one of the affected properties sat on a rocky outcrop that was immune to flooding. In the instant case, however, there is no suggestion that any of the landowners did not benefit from wall’s protection, so solving the heterogeneity problem could wait until another day.

In dealing with this statutory scheme, Justice Scalia does not mention the just compensation side of the equation, but contents himself with asking whether a taking has taken place. He then veers into a discussion of whether judicial takings of private property should be compensated, to which he gives the sensible answer that the prohibition against takings applies as much to the judicial as the legislative branch of government.<sup>85</sup> That question is raised because the decision of the Florida Supreme Court below denied that property owners had either the right to accretions or the right to have littoral (i.e. beachfront) land remain in contact with the water. In dealing with this issue, Justice Scalia followed prior Florida case law, most notably *Martin v. Busch*,<sup>86</sup> which took the view that once the state drained water from a lake, it continued to retain ownership of the land that had been previously below the mean-high water line.<sup>87</sup> That point may be true enough, but it hardly follows from *Martin* that the former lakefront owner should not recover compensation for his loss of access rights to the lake. As a general matter of water law, the ultimate sin is the diversion of water from its proper channel. That action is usually subject to an injunction when done by a private party, and so it follows that the state’s exercise of eminent domain for the same purpose carries with it an obligation to compensate for the loss of access rights.

Nonetheless, Justice Scalia finds that the state is entitled to drain those lands because it is permissible for Florida courts to treat “state-created avulsions” in the same fashion as natural ones. It is at just this point that the opinion goes off the rails. The notion of avulsion is used in opposition to the notion of a gradual change by alluvion.<sup>88</sup> In the latter case, a gradual movement of a boundary line induced by water movement does not result in any change in ownership. Under long established legal principles, the riparian or littoral owner continues to own the land.<sup>89</sup> Any other rule would create tiny useless slivers of shorefront land that could be reduced to ownership by the first occupier, thereby blocking the primary landholder’s much-needed access to the water. But by the same token, an avulsion, or a violent shift in the location of land brought on by natural forces, requires a very different solution. Under the natural law (where there is no state at all), land that

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<sup>85</sup> *Id.* at 713–14.

<sup>86</sup> 112 So. 274 (Fla. 1927).

<sup>87</sup> *Id.* at 287.

<sup>88</sup> For a discussion of these points, see *Nebraska v. Iowa*, 143 U.S. 359 (1892).

<sup>89</sup> For an early discussion, see Justinian, INSTITUTES Book II, Title I, §§ 20–22; Gaius INSTITUTES, Book II 70–72; William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND ch. 16 (1766).

had been formerly occupied by the water was now divided between its two former riparian owners, usually by a thread down the middle of the river. It is only after the formation of government that the state can claim ownership of the lakebed.<sup>90</sup> And at the new location of the waterway, a system of riparian rights was installed in the same manner that was used at the original watercourse. However, these rules for avulsions have one important caveat: sudden changes in waterways *never* refer to changes wrought by private individuals. For example, a landowner could not invoke the law of avulsion and obtain full title to a river by damming up its natural course and redirecting it to his own land.<sup>91</sup>

The rules for government action are no different. If the state diverts water from a river for its own use, it has to compensate the downstream riparian or littoral owners for the loss of their water rights. Any state court that held that the state was entitled to divert water into its own reservoir would surely commit a judicial taking. The only real question in these cases is whether the state is entitled, even with compensation, to make the appropriate diversion.<sup>92</sup> Avulsions are only acts of God. It makes no more sense to speak of a man-made diversion as an act of God than it does to speak of arson as an act of God. Justice Scalia thus hopelessly confuses the common law categories. Yet once this confusion is made, the case becomes simple, at least for Justice Scalia. Since there was no antecedent property right at common law, there is no place for protecting either riparian or littoral owners under the Takings Clause.

The result under Florida law may seem counter-intuitive. After all, the landowners' property has been deprived of its character (and value) as oceanfront property by the State's artificial creation of an avulsion (i.e. the wall and easement that cuts off waterfront access). Perhaps state-created avulsions ought to be treated differently from other avulsions insofar as the property right to accretion is concerned. But nothing in prior Florida law makes such a distinction, and *Martin* suggests, if it does not indeed hold, the contrary.<sup>93</sup>

Under Justice Scalia's analysis, the outcome of *Stop The Beach* therefore does not change even if one removes the key features that made it a sensible statute: the protection of the land and the preservation of access and view. Indeed, under the majority's rule that simply permits the state to claim title to avulsions, it would be possible to cut off access to lakes and rivers under all circumstances without giving nearby landowners a dime in compensation. Or the state could build on that newly acquired strip of land a massive structure that blocked the former owner's view. The entire body of water law is a delicate interplay that is designed to protect against those extreme results. It would be a great tragedy to allow the misguided notion of an artificial, state-created avulsion to upend several thousand years of water law. But just this result is reached due to the Court's unwillingness to fully analyze the Takings Clause.

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<sup>90</sup> BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 16. "But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry."

<sup>91</sup> See, e.g., *Stratton v. Mountain Hermon Boys School*, 103 N.E. 87 (Mass. 1913).

<sup>92</sup> See, e.g., *Adams v. Greenwich Water Co.*, 83 A.2d 177, 179 (Conn. 1951), involving an "action to enjoin the defendant [water company] from diverting and from attempting to take by condemnation, any of the waters of [the Mianus River]."

<sup>93</sup> *Stop The Beach*, 560 U.S. at 730–31.

## VI. CONCLUSION

The central message of this paper is that constitutional interpretation is an impossible task absent a mastery of the private law concepts on which the Constitution relies. This proposition is of vital importance for anyone who wants to give a coherent account of how the Constitution protects private property—the most central concept of private law around which all else is organized. That last notion has a long and complex history as it applies to both land and water. For the most part, the longstanding private law systems governing these questions have worked out ingenious accommodations to competing claims over private resources.

This set of understandings is necessarily brought over into public law whenever the state seeks to act in ways that disadvantage private landowners. In some cases, these government actions are fully justified. In other cases, they are fully compensated. But in many cases neither is true. A faithful application of the Takings Clause seeks to draw boundary lines on property regulation and acquisition, which it can only do if it fully grasps how the principles of limited government apply in this context. No government can simply “redefine” rights in a manner that justifies its action. Instead when it acts, it must do so as the agent for all or part of the public. Where private parties can enjoin the action of their neighbors without compensation, the government actor can do the same, but subject to the same limitations on injunctive relief. And where the government takes or regulates land for public use, it must offer compensation—monetary or in-kind—to the private owner. In all of these cases, Justice Scalia was never able to articulate or apply the central propositions of takings law in a comprehensive and orderly fashion, and thus his decisions have an erratic quality even when, by the introduction of offsetting errors, they reach the correct result in individual cases. And that difference surely matters. Get the right logic in *Nollan*, and it becomes possible to develop a coherent approach to exactions that covers both physical and regulatory takings. Get the right logic in *Pennell*, and it is possible to root out the rent control laws and their systematic deleterious effects on residential rental housing. Get the right result in *Lucas* by the right logic, and the constitutional oversight over abusive land-use regulation is avoided. Get the right logic in *Stop the Beach*, and dangerous environmental overreach can be thwarted. In each of these cases, the deficiencies in Justice Scalia’s opinions have nothing to do with the grand and recurring disputes over the relationship between textualism and originalism. Rather, they concern the technical program of constitutional interpretation that easily goes astray. But lest one be too hard on him, none of his colleagues on the bench have been able to develop a coherent view of this field either, which will continue to limp along, case by case, unless and until the Court articulates and applies the systematic principles that underlie this field.



## POSTSCRIPT: ORIGINALISM AND JUDICIAL AUTHORITY

Jeremy Waldron\*  
*New York University*

Of course what one wants, in a volume like this, is a reply not by me but by Justice Scalia himself to the assessments and criticisms offered in these six essays. Sadly, that is impossible, and I shall not attempt in my comments here to channel Antonin Scalia or to say what I think he would or should have said.

Nor can I respond to everything in the essays presented here. They pursue a variety of themes in a variety of ways, some focusing on the distinctive features of Scalia's own approach to adjudication, some focusing on patterns of judicial decision-making in which he has participated substantially, but often as one justice among others. Jane Marriott's discussion of campaign finance is an example here; as she notes, Scalia has "rarely authored a majority campaign finance opinion for the Court."<sup>1</sup> Some are assessments of patterns of dissent (for example, Ian Loveland's discussion of the sexual orientation cases) rather than Scalia's participation in the actual crafting of Court decisions (James Pfander's essay on the law of standing is an example).

Brian Jones and Austin Sarat are convinced that Justice Scalia became, in the eyes of many people, a "sacred symbol" in the higher judiciary—one of a long and romantic line of "brilliant and elegant philosopher judge[s]" that include Sir Edward Cook, Oliver Wendell Holmes and Louis Brandeis.<sup>2</sup> There was a sense that his death posed a particular crisis for conservatives, not just because it might change the balance on the Court but because it meant the loss of an icon of judicial conservatism, one whose presence had had a transformative impact on American adjudication.

I am not sure I would use the term "sacred symbol," even on the definition given at the end of this essay.<sup>3</sup> Its use by Jones and Sarat is a little confusing since they associate it with the fact that Justice Scalia revealed and humanized his personality as a judge rather than making himself into a mere mouthpiece of a particular jurisprudence.<sup>4</sup> If there was something sacred in his jurisprudence, it was his readiness to desacralize the pieties of his colleagues. If he was an icon, it was in the midst of his iconoclasm. He wrote clearly, straightforwardly, and unequivocally about what seemed to him to be at stake both in particular cases but also and above all in the theory and ethos of interpretation. Also, as Jim Allan emphasizes,<sup>5</sup> Justice Scalia made himself more than usually available for

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\* University Professor, School of Law, New York University.

<sup>1</sup> Jane Marriott, *Tenured Fox in the Democratic Henhouse?*, 6 BR. J. AM. LEG. STUDIES 41 (2017).

<sup>2</sup> Brian Christopher Jones and Austin Sarat, *Justices as "Sacred Symbols": Antonin Scalia and the Cultural Life of the Law*, 6 BR. J. AM. LEG. STUDIES 7 (2017).

<sup>3</sup> *Id.* at 23.

<sup>4</sup> *Id.* at 16-18.

<sup>5</sup> James Allan, *One of My Favorite Judges: Constitutional Interpretation, Democracy and Antonin Scalia*, 6 BR. J. AM. LEG. STUDIES 25, 29-31 (2017).

lectures and debates outside the courtroom. His interventions—some subsequently published, many just remembered in anecdotes like Allan’s—lent substance and richness to jurisprudential views that necessarily required abbreviation in the context of judicial opinions.

Many of these essays reflect on Justice Scalia’s originalism—his view that modern judges should approach constitutional interpretation by looking for something called the original understanding of the language used in the text of the Constitution. We should understand “cruel and unusual” as it was understood in 1791 and “equal protection of the laws” as that phrase was understood in 1868.

I will come back to this issue of textual understanding in a moment. But actually, it is one of the virtues of these essays that they also consider dimensions of originalism that go beyond textual interpretation. For example, James Pfander’s thoughtful essay on Scalia’s contributions to the law of standing emphasizes not just the original understanding of the text of Article III of the Constitution—words like “Cases” and “Controversies”—but also to the original understanding of the practices that the Article implicitly refers to.<sup>6</sup> I mean things like the practices of the Common Law at the time of the framing of the Constitution, which will help us understand what the Constitution’s immediate audience understood when they heard a phrase like “judicial power.”

Here is another example. Richard Epstein is adamant that an originalist should pay attention to *structural* features of the Constitution—that is, to the way in which the Takings Clauses, for example, in the Fifth and Fourteenth Amendments were understood to fit together into a general charter regulating the powers of government with regard to private property.<sup>7</sup> Original understanding of text is not the beginning and end of originalism. In addition, originalism comprises original understanding of constitutional structure and the relation of text to constitutional principles that were taken for granted by those who drafted the constitution. And Epstein makes a good case that Justice Scalia’s contributions to the Court’s takings jurisprudence sometimes fell short of these dimensions of originalist understanding. Scalia is usually denounced for being too conservative, but Professor Epstein criticizes him for not going far enough in the protection of private property from state regulation. In this connection, Epstein makes the important point that “there is *no* necessary, or even implied, connection between originalism and judicial restraint.”<sup>8</sup> Originalism is sometimes seen as a strategy for judicial restraint, but whether it restrains judges or empowers them ought to depend on what the original understanding of judicial authority was, as well as on the original understanding of the terms of the Constitution that judges are supposed to apply. If the text of the Constitution speaks “in sweeping terms,” then that implies that judges have sweeping powers, and to try to limit that power one would have to be an anti-originalist, acting on one’s personal preference for deprecating judicial authority. Epstein worries that Scalia pulled back from the radical implications of his (Epstein’s) conception of the takings restriction on grounds of judicial restraint. And although in other areas, Scalia adverted to underlying constitutional structures and principles (like separation of powers),

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<sup>6</sup> James Pfander, *Scalia’s Legacy: Originalism and Change in the Law of Standing*, 6 BR. J. AM. LEG. STUDIES 85 (2017).

<sup>7</sup> Richard Epstein, *Missed Opportunities, Good Intentions: The Takings Decisions of Justice Antonin Scalia*, 6 BR. J. AM. LEG. STUDIES 109 (2017).

<sup>8</sup> *Id.* at 113 (emphasis in the original).

Epstein believes Scalia is open to criticism for not having followed through on the original understanding that “broad and ambiguous constitutional provisions should be read consonant with their general sweep and implications.”<sup>9</sup> Whatever one thinks of Epstein’s particular argument about property, this is a powerful and important philosophical point about the understanding of originalism.

James Allan is critical of Justice Scalia’s originalism in a way that takes us back to the issue of textual understanding. Scalia’s originalism he says, is “new originalism” and Professor Allan favors an older version.<sup>10</sup> The older originalism interprets text according to the meaning intended by its authors, whereas the new originalism interprets text according to the way in which contemporary audiences—contemporary with its original promulgation—would have understood it. Authors’ intention or audience’s understanding?—that is the question. Allan claims that if we stick with original understanding, as Scalia did, then we face the problem of constructing an idealized version of the eighteenth century audience whose understanding this version of originalism is supposed to privilege. He implies that the older originalism faces no such difficulty, presumably because many fewer people were involved in authoring the Constitution than in understanding it. But that won’t do at all. The authors of the Constitution are not its framers (who were relatively few), but those by whose authority it came into force. These are the thousands of citizens who ratified it in the thirteen states in 1787-1791 and/or the many other states involved in the ratification of the Fourteenth Amendment a hundred years later. Either way we face the difficulty of constructing a public meaning out of a great many individual understandings. In fact, it is arguable that the scale of the problem is more or less the same on both sides. In the case of a constitution whose authority derives from popular ratification, its authorship—the number of its authors—is roughly the same order of magnitude as its addressees. That’s the point about popular sovereignty.

The other difficulty I have with Allan’s account is that he says nothing about the distinction between the two brands of originalism so far as interpreting legislation is concerned. Justice Scalia felt very strongly about this and furiously resisted the notion that statutes should be interpreted in the light of historic legislative intent, particularly to the extent that such intent was supposed to be disclosed otherwise than through the statutory text.<sup>11</sup> There are powerful reasons for textualism, as opposed to intentionalism, in the case of statutes, and those carry over into the constitutional context. Scalia’s textualism is really the nerve of his originalism—Jane Marriott makes this clear at the end of her paper<sup>12</sup>—and it is unfortunate that Professor Allan fails to understand this point.

Much of Allan’s enthusiasm for the jurisprudence of Justice Scalia has to do with the latter’s support for democracy and his suspicion of any practice of judicial review that goes beyond the settled terms of the constraints laid down in the Constitution (as originally intended or as originally understood). I wish Professor Allan had had the opportunity to address Professor Epstein’s insistence (mentioned earlier) that originalism is not necessarily a doctrine of judicial restraint. Whether

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<sup>9</sup> *Id.* at 113.

<sup>10</sup> Allan, *supra* note 5, at 33.

<sup>11</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997).

<sup>12</sup> Marriott, *supra* note 1.

it is or not depends on what the terms of the constitution and particularly the Bill of Rights actually are. If the constitutional constraints as laid down in 1787, 1791, and 1868 are modest and rule-like (like the norm, that the President must have attained the age of thirty-five years), that is one thing. But if they use value-terms like “cruel” or “unreasonable” or potentially sweeping terms like “equal protection of the laws,” that is something quite different. Those who authored and ratified such terms must have known that they require those who interpret them to make evaluative judgments in their own voice, and that such judgments may differ from age to age. The eighteenth and nineteenth century authors were well-educated men, who knew that what one age regarded as cruel, for example, might not have been regarded as cruel, by an earlier generation. We must assume that they decided to use the term “cruel” in full recognition of this possibility, not in denial of it, nor in the hope that people would read it as something other than a value-term (perhaps as an historical record of an earlier generation’s evaluations). Of course this makes it difficult to sustain Allan’s equation between originalism and judicial restraint. But as Epstein points out, if we are originalists we have to follow original understandings where they lead us, and not just in the direction given by our own—his and my—political antipathy to judicial review.

As I say, Allan and I share an antipathy to strong judicial review, arguing strenuously against its introduction in legal systems that do not have it (like New Zealand, for example, and the United Kingdom). But we must not project that antipathy onto Justice Scalia. He was sworn to uphold the Constitution of the United States and without any doubt that required him to strike down state and federal laws that the Constitution condemned as well as upholding those that it did not. I know from talking to him that Scalia understood both sides of this equation. He understood (a) why there were such things as constitutional constraints; he also understood (b) what was lost when a democratically-enacted piece of legislation was struck down. On both sides, he thought an originalist understanding of the Constitution was called for. But I think it would be a mistake to cite (b), by itself, as a ground for an overly restrictive originalism. Whether constitutional constraints should be read narrowly or broadly depends, for an originalist, on nothing but the way in which they were originally understood. And that is always an open historical question.

Some of these issues come to a head in Ian Loveland’s essay. Professor Loveland is concerned with the rearguard battles that Scalia fought against the striking down of laws penalizing homosexual activity or disempowering people on account of their sexual orientation. Loveland rightly draws attention to the ill-tempered tone of some of Justice Scalia’s interventions, particularly in dissent. One of his dissents (in *Obergefell v. Hodges*) Loveland calls “a petulant diatribe.”<sup>13</sup> Another (Scalia’s dissent in *Lawrence v. Texas*) is described as: “a splenetic rant more suited to a locker room than a court.”<sup>14</sup> Evidently Loveland does not rejoice, as James Allan does, in the “scathing” and “combative” quality of Scalia’s speech and writing.<sup>15</sup> Overall, Professor Loveland does not have a high opinion of Scalia’s ability as a judge. He acknowledges that opinions may differ on Justice Scalia’s rather narrow reading of the Constitution. Maybe, says Loveland, “one can find

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<sup>13</sup> Ian Loveland, *The Sexual Orientation Cases*, 6 BR. J. AM. LEG. STUDIES 59 (2017).

<sup>14</sup> *Id.* at 73.

<sup>15</sup> Allan, *supra* note 5, at 29, 30.

sound doctrinal (or if one prefers constitutional) reasons to support the substantive conclusions that [Justice Scalia] defended in these cases.”<sup>16</sup> But he thinks Scalia sometimes fell short of standards of honesty.<sup>17</sup> And he submits that whatever good reputation Scalia has, even after his death, is quite unsustainable.<sup>18</sup>

I believe, however, that in three instances Loveland’s criticisms of Justice Scalia miss the mark. First, he says that, in his dissenting opinion in *Romer v. Evans*, Scalia “equate[s] a person’s consensual sexual activities with committing murder.”<sup>19</sup> Loveland says that this equation “is better described as unhinged than unsound.”<sup>20</sup> In fact Justice Scalia made no such equation. At most, he said that it was not inappropriate for citizens of Colorado to disapprove of homosexual conduct any more than it was inappropriate for them to disapprove against other acts they regarded as reprehensible, like murder. This is an analogy, not an equation. Like all analogies, it draws attention to just one similarity between two activities without in any way claiming that the analogue and the activity analogized to it are identical in other respects. In the passage that Professor Loveland is concerned about, the only similarity adverted to is that some citizens of Colorado may find both forms of conduct reprehensible. Scalia points to this similarity just in order to refute the general proposition that it is always constitutionally inappropriate for voters or legislators to exercise their powers on the basis of what they judge reprehensible.

Secondly, Loveland claims that Scalia *demonized* the petitioners—those seeking to overturn state anti-sodomy laws—in his dissent in *Lawrence v. Texas*. But all Loveland can cite as evidence for this is Scalia’s saying that the petitioners “engaged in a seventeen year crusade” to have *Bowers v. Hardwick* overturned.<sup>21</sup> Is “crusade” a demonizing word? Maybe when Al Qaeda talked about coalition armies in Iraq and elsewhere as crusaders, it was a way of demonizing the West. But I don’t think anyone would put that interpretation on Scalia’s use of the term. Loveland is evidently sensitive to this point, by the way, since he feels he has to add a footnote saying “The use of ‘crusades’ presumably being intended to denote ideological extremism.”<sup>22</sup>

Thirdly, in his comments on the *Obergefell* decision, Professor Loveland says that Scalia’s dissent is weakened by the way in which he “continually misrepresents the nature of ‘the People’.”<sup>23</sup> Scalia complained that the Court’s decision in *Obergefell* took away from the people the right to define marriage as they please. As Loveland observes, he seems to have been referring to the people of the various states: the right of the people of Michigan to define marriage as they please, the right of the people of Ohio to define marriage as they please, and so on. Loveland thinks this is a mistake—he calls it “substantive nonsense”<sup>24</sup>—because by focusing on these “mini-Peoples” (Loveland’s phrase), Scalia ignores the fact that *the people of the United States* retain the right to overturn *Obergefell* through the medium of

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<sup>16</sup> Loveland, *supra* note 13, at 61.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 60-61.

<sup>19</sup> *Id.* at 68.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 73.

<sup>22</sup> *Id.* at 73, n. 64.

<sup>23</sup> *Id.* at 81.

<sup>24</sup> *Id.* at 82.

an Article V amendment to the Constitution if they want to. I don't know whether Justice Scalia regarded this right of the people of the United States as important or unimportant in this context. (Loveland himself says that it is "very unlikely" that majority support for such an amendment will ever emerge among the American people as a whole. By the way, the implication that all it would take is a majority of "the People" is another mistake in Loveland's analysis: the terms of Article V are strenuously *super*-majoritarian.) But the reason why Scalia focused on the peoples of the respective States is that, in the American federal system, family law (including the rules for marriage) is a matter for the States not the federal government. So, at least in the first instance, the effect of *Obergefell* is to deprive state legislators and those who vote for them of the right to control marriage law through democratic enactments. That is the "threat to American democracy" that Scalia is referring to and that is the democratic process which—as Loveland generously notes<sup>25</sup>—Scalia said was working "at its best" before *Obergefell* was decided.

Jane Marriott is also interested in Scalia's views on democracy, though in a different context. Her essay is about campaign finance laws, and the reasons Scalia gives for striking down such laws as unconstitutional. Both in the campaign finance cases and (as we have seen) in other contexts too, Scalia shows great faith in democratic decision-making. He has, says Professor Marriott, "a healthy regard for the abilities of citizens to make informed choices without government interference,"<sup>26</sup> and he wants to protect the exercise of that capacity from regulations that might threaten it. But campaign finance regulation is itself a product of that democratic capacity; so surely such regulations should also command respect as an instance of the very self-government that Scalia says he favors.

Marriott argues that there is a sort of definitional dilemma here that Scalia never properly confronts—definitional with regard to "democracy."<sup>27</sup> I wonder whether it really is all that much of a dilemma. No one thinks that the integrity of the democratic process is naturally or magically secure nor that it is invulnerable to attack by the very majorities it empowers. By and large, majority decision-making in a legislature might be a healthy and legitimate mode of decision, but there are things that can be done or permitted that will undermine that. Defenders of campaign finance restrictions believe that allowing money—perhaps particularly corporate money—to affect democratic politics will yield a less respectable politics. Opponents say that limiting the influence of money—which is perhaps a way of limiting speech—affects the conditions on which sound democratic decision-making is predicated. This is a genuine disagreement. Like Professor Allan, we may favor its being resolved—like all disagreements—through majority-voting in the legislature.<sup>28</sup> But as I said in my comments on Allan's piece, Scalia, as a sworn justice in the American system, did not have the luxury of considering that issue in the abstract. He had to consider it in the light of the First Amendment's protection of free speech, which he was sworn to uphold. He had no choice therefore but to separate the two questions: (1) Is a given range of campaign contributions protected by the First Amendment's commitment to free speech? and (2) Do the campaign contributions in question make it more likely or less likely that democracy will

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<sup>25</sup> *Id.* at 80.

<sup>26</sup> Marriott, *supra* note 1, at 44, 54.

<sup>27</sup> *Id.* at 54-56.

<sup>28</sup> Allan, *supra* note 5, at 38-39.

work as it is supposed to work? We can argue endlessly, if we like, about the interpretation of “freedom of speech” in the First Amendment. But question (1) is not the same as question (2), and unless we run them together we are not really caught on the horns of Marriott’s dilemma.

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