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The Legacy of Justice Antonin Scalia: Remembering a Conservative Legal Titan's Impact on the Law

Edited by Elizabeth H. Slattery

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Abstract:
Americans lost a legal titan with the passing of Justice Antonin Scalia in February 2016. Scalia believed that the Constitution and the laws should be interpreted based on their actual text and original public meaning, minimizing the potential impact of a judge's personal views or biases on the law. Thus, constitutional provisions could be discerned through dictionaries from the Founding Era, the common-law tradition, and foundational documents like Blackstone's Commentaries to understand what things meant at the time the Constitution was written. Using these methods, in his nearly 30 years on the Court, Antonin Scalia worked tirelessly to clarify criminal law and procedure, advance structural aspects of the Constitution like separation of powers that safeguard our liberties, and harmonize the Court's Religion Clauses jurisprudence with the text and history of the Constitution. His method of judging not only affected the course of the law, but also influenced his fellow justices and a generation of law students, lawyers, and lower court judges who interpret the Constitution as it was written and not how they wish it had been written.

Introduction

Elizabeth H. Slattery

In February 2016, Americans lost a legal titan with the passing of Justice Antonin Scalia. Conservatives mourn the loss of a standard-bearer, and liberals remember a worthy opponent.

You may recognize the names of a handful of Supreme Court justices: the Great Chief Justice John Marshall, whose leadership of the Supreme Court in its early years truly made it a co-equal branch of government; Joseph Story, whose *Commentaries on the Constitution* inform the way we think about constitutional principles to this day; Chief Justice Earl Warren, who led the Court during the turbulent civil rights era and also headed the commission that investigated John F. Kennedy's assassination. Antonin Scalia joins the ranks of the justices whom history will remember. Few have made a mark as influential as Justice Scalia's.

President Ronald Reagan nominated Scalia to the Supreme Court of the United States in 1986. In his nearly 30 years on the Court, Scalia helped to bring about a revolution in constitutional interpretation. When he arrived at the Court, legislative history was considered more instructive than the text of a statute for determining its meaning. Likewise, a majority of the justices thought they should weigh policy options as though they were legislators charged with deciding what the law ought to be rather than judges who determine what the law requires.

Scalia thought otherwise. Along with other champions of originalism and textualism, including Edwin Meese III, Clarence Thomas, Robert Bork, and others, Scalia believed that the Constitution

and the laws should be interpreted based on their actual text and original public meaning. Thus, constitutional provisions could be discerned through dictionaries from the Founding Era, the common-law tradition, and foundational documents like Blackstone's Commentaries to understand what things meant at the time the Constitution was written. Through this commitment to the text and original public meaning, judges would minimize the potential impact of their personal views or biases on the law.

"We Are All Originalists"

This push for originalism and textualism caused a huge shift in the law. During Justice Scalia's time on the bench, these methods of constitutional interpretation went from being derided by judges and academics[1] to being employed by a majority of Supreme Court justices. At the Senate hearing considering her nomination to the Supreme Court in 2010, Elena Kagan explained that the Founders wrote "a Constitution for the ages" containing broad principles, and judges should "apply what they say, what they meant to do. So in that sense, we are all originalists."[2]

To show how ubiquitous originalism and textualism had become during Justice Scalia's tenure on the Court, consider *District of Columbia v. Heller*.[3] Writing for the majority, Justice Scalia found that the Second Amendment recognizes the right of individuals—not just militias—to keep and bear arms for self-defense. Looking at dictionaries, treatises, and other sources from the time when the Second Amendment was drafted, he worked out the meaning of each word and phrase contained within the amendment. Justice Scalia concluded:

> Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.[4]

What is truly remarkable about this case is that even the dissenting opinion by Justice John Paul Stevens looked at the history and text of the Second Amendment.[5] Though four justices would have reached a different conclusion, all nine agreed that the meaning of the Second Amendment should be derived from looking at the common-law tradition and what influenced the Founders when they wrote that language rather than modern sensibilities about the safety of guns.

Thus, Scalia's originalist and textualist method of judging influenced his colleagues on the Supreme Court—including his ideological opponents—in addition to a generation of law students, lawyers, and lower court judges who interpret the Constitution as it was written and not how they *wish* it had been written.

Justice Scalia's Impact on Criminal Law, Separation of Powers, and Freedom of Religion

In addition to influencing the way judges go about judging, Justice Scalia made substantial contributions to several areas of the law. He wrote for the majority of the Court in a number of cases involving criminal law and procedure, advancing the integrity of the criminal justice process.

- An unlikely ally for criminal defendants, for example, Scalia helped to revive parts of the Sixth Amendment—for example, the Confrontation Clause, which was at issue in *Crawford v. Washington*.[6]

- He championed a property rights–based approach to Fourth Amendment searches and seizures in cases like *United States v. Jones*, holding that attaching a GPS tracking device to a suspect's car is a "search."[7]

- When asked about his majority opinion striking down a state's sentencing system that gave judges too much power, he explained, "It's not because I'm in love with the jury.... It's because I'm in love with the Constitution."[8]

Justice Scalia also was a strong defender of the constitutional separation of powers among the branches of government, and he was not shy about chastising members of each of the branches when they stepped out of line.

- In *Lujan v. Defenders of Wildlife*, he wrote for the majority that Congress may not authorize uninjured individuals to sue a government official for

an alleged failure to enforce the law, noting that Congress may not "transfer from the president to the courts the chief executive's most important constitutional duty."[9]

- He wrote a concurring opinion in *National Labor Relations Board v. Noel Canning*, a case challenging President Obama's sham "recess" appointments, because he would have gone further than the majority opinion in limiting the President's ability to make legitimate recess appointments.[10]

- His dissent from *King v. Burwell* took the Court's majority to task for subverting clear legislative text to save the Affordable Care Act from itself.[11]

In the area of the First Amendment's Religion Clauses, Justice Scalia advanced displays of religion in several cases involving crèches, crosses, and the Ten Commandments on public property[12] and supported prayer in state legislatures and public schools.[13] His most notable contribution is the often-vilified opinion in *Employment Division v. Smith*,[14] upending decades of the Court's free exercise jurisprudence in favor of having legislatures rather than courts weigh the interests of the government against accommodations to religious believers.[15] He explained:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.[16]

The New "Great Dissenter"

Justice John Marshall Harlan, author of the lone dissent in the notorious *Plessy v. Ferguson*,[17] was known in his day as "the Great Dissenter." After Justice Scalia's 30 years on the Court, it might be time to crown a new Great Dissenter. Scalia's acerbic pen never failed to zero in on the flaws of the majority's argument. From the "interpretive jiggery-pokery" and "pure applesauce" of *King v. Burwell*[18] to his dripping-with-sarcasm discourse on "classic, Platonic golf" in *PGA Tour, Inc. v. Martin*,[19] Scalia used colorful language to drive his point home.

Justice Ruth Bader Ginsburg, a longtime friend and frequent sparring partner, said that Scalia's dissenting opinions improved her majority opinions. Before the Court issued its opinion in *United States v. Virginia*,[20] requiring the all-male Virginia Military Institute to admit women, Scalia gave her an advance copy of his dissent. She said this "ruined my whole weekend" but resulted in a stronger majority opinion.[21]

One of his most famous dissents came from a case upholding the constitutionality of the independent counsel statute. Justice Scalia wrote:

> That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that "a gradual concentration of the several powers in the same department," can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.[22]

In a case involving whether a student Bible club could meet on public school property, Justice Scalia described the Court's multi-pronged *Lemon* test for evaluating Establishment Clause challenges:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under.... The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.[23]

Justice Scalia dissented from the majority decision in *Obergefell v. Hodges*, which created a constitutional right to same-sex marriage, stating that:

> If I ever joined an opinion that began "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," I would hide my 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.[24]

The Enduring Legacy

Justice Scalia's commitment to the Constitution will live on in his many colorful opinions, which likely will continue to appear in law students' textbooks and court opinions for generations to come. This *Special Report* describes Justice Scalia's legacy in the law. The essays that follow delve further into his jurisprudence in three specific areas.

- Professor Stephanos Bibas describes Scalia's efforts to clarify criminal law and procedure.
- Professor Josh Blackman discusses Scalia's view of the structural aspects of the Constitution that safeguard our liberties, such as the separation of powers.
- And Professor Richard Garnett examines whether Scalia was a friend or foe of religious freedom and evaluates his impact on the Religion Clauses.

As the authors demonstrate, Justice Scalia's contributions to the criminal law, separation of powers, and Religion Clauses will be guideposts for future cases in these areas. His method of interpreting constitutional provisions in light of their text and original public meaning has been taken up by the next generation of originalist lawyers and judges. Justice Scalia's legacy will continue to flourish.

Justice Scalia's Originalism and Formalism: The Rule of Criminal Law as a Law of Rules

Stephanos Bibas

Far too many reporters and pundits collapse law into politics, assuming that the left–right divide between Democratic and Republican appointees neatly explains politically liberal versus politically conservative outcomes at the Supreme Court. The late Justice Antonin Scalia defied such caricatures.

Justice Scalia was a jurist through and through, not a politician, and for the most part practiced what he preached. His consistent judicial philosophy made him the leading exponent of originalism, textualism, and formalism in American law, and over the course of his three decades on the Court, he changed the terms of judicial debate. Now, as a result, supporters and critics alike start with the plain meaning of the statutory or constitutional text rather than loose appeals to legislative history or policy.

Justice Scalia's approach was perhaps most striking and counterintuitive in criminal law and procedure. He was known to confess that as a policy matter, he favored vigorous law enforcement and punishment, but as a jurist, he championed a principled understanding of the rule of law. His approach helped to preserve individual liberty, make the law clearer and more consistent and transparent, give citizens better notice, promote democratic accountability, and check prosecutors' and judges' power.

Sometimes, his principles led to politically conservative results, as with Eighth Amendment limits on punishments; in other areas, such as the Sixth Amendment's Confrontation and Jury Trial Clauses, he was criminal defendants' best friend. Whatever the outcome, Justice Scalia strove to follow his principles, and in doing so, he promoted important values of the rule of law.

A Consistent Methodology

The first thing to note about Justice Scalia's methodology is that he had one. Many jurists drift along, cobbling together a congeries of decisions without articulating how one decides. Justice Scalia, by contrast, was famed as the leading proponent of originalism and formalism.

Justice Scalia championed the Constitution's original understanding. Before him, many originalists seemed to focus on the Framers' subjective intent, a hazardous inquiry given the paucity of sources and the difficulty of separating sincerity from propaganda.

Rather than plumbing the Framers' minds, Justice Scalia took an objective approach. He asked what the words of the text meant at the time they were enacted. Thus, his originalism was a species of textualism.[1] In the Scalia era, litigators learned to put less emphasis on legislative history and more on the words of the Constitution or statute itself, supplemented by dictionary definitions and the like.

Rather than plumbing the Framers' minds, Justice Scalia asked what the words of the text meant at the time they were enacted. In the Scalia era, litigators learned to put less emphasis on legislative history and more on the words of the Constitution or statute itself.

Objective-meaning originalism, he emphasized, respects the democratic decisions of those who voted to enact the text. Moreover, it preserves the separation of powers, a value often overlooked in the criminal law.[2]

Originalism safeguards the Framers' and legislature's prerogative to make and amend laws. It also protects the right to a jury, the "spinal column of American democracy"—the only right that appears in both the body of the Constitution and the Bill of Rights.[3] The Bill of Rights is replete with jury protections, including the Fifth Amendment's Grand Jury Clause, the Sixth Amendment's guarantee of criminal petit juries, and the Seventh Amendment's guarantee of civil petit juries.

The Framers valued juries as essential checks on all three branches of government. Legislatures pass overly broad criminal statutes, which may sweep in morally faultless conduct and sympathetic defendants, but juries apply them to the facts. Overzealous prosecutors must persuade both a grand and a petit jury to charge and convict felony defendants,

and judges can neither override juries' decisions to acquit nor authorize retrial after an acquittal. The lay, popular voice of jurors is supposed to be a counterweight to our increasingly professionalized criminal justice system.

Most often, Justice Scalia's originalism went hand in hand with his formalism. As he famously put it, "Long live formalism. It is what makes a government a government of laws and not of men."[4] Thus, his famous essay praised "the rule of law as a law of rules."[5] Rules help to constrain judicial discretion, preserve space for democratic branches, and increase predictability. Those benefits, in his view, more than outweigh the costs of over- and underinclusive rules as well as rigidity. Of course laws need to be updated from time to time, but that is a job for legislatures, not courts.

Newspaper reporters who saw the Supreme Court of the United States as a political horse race often contrasted Justice Scalia with his supposed political opposite, Justice John Paul Stevens. But in criminal law and procedure, those two justices agreed surprisingly often. Justice Scalia's true foil was, rather, Justice Stephen Breyer.

Justice Breyer looked to the future; Justice Scalia, to the past. Justice Breyer inquired about wise policy and legislative history; Justice Scalia stuck to the text. Justice Breyer trusted technocratic experts; Justice Scalia, democracy. Justice Breyer prized efficiency, but Justice Scalia subordinated efficiency to liberty.[6] And while Justice Breyer emphasized judicial flexibility, Justice Scalia sought to protect juries. As Justice Scalia put it, the jury trial "has never been efficient; but it has always been free."[7] The two justices' approaches could not have been more different.

Criminal Procedure and the Constitution

The Confrontation Clause. Justice Scalia's contributions are clearest in his approach to two provisions of the Sixth Amendment. For one, he rescued the Confrontation Clause from near-oblivion.

For decades, courts had conflated and confounded the constitutional right to confront one's accusers with the nonconstitutional hearsay doctrines in the law of evidence that grew up well after the Founding. In 1980, the Supreme Court had interpreted the clause as establishing only a presumption in favor of live testimony. Out-of-court evidence was nevertheless admissible if it fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[8] Those mushy standards suggested multifactor balancing tests that led to inconsistent and unpredictable results.

That approach had drifted far from the text and historical understanding of the Sixth Amendment. The text calls for a rule, not a standard: "In *all* criminal prosecutions, the accused *shall* enjoy the right...to be confronted with the witnesses against him...."[9] That language says nothing about a mere presumption, nor about hearsay. Nor does it entrust judges with gauging substantive reliability. Rather, it requires them to ensure a particular procedure—"confront[ation] with the witnesses against him"—so that juries can weigh reliability for themselves.

The historical understanding of the confrontation guarantee underscored the textual guarantee. The English common-law tradition had long relied on adversarial testing and cross-examining live witnesses in open court, unlike the introduction of pretrial questioning by inquisitorial systems. In the notorious English treason trial of Sir Walter Raleigh, however, the prosecution had introduced a letter and an unsworn out-of-court statement by Raleigh's alleged accomplice and refused to bring the accusers into court for cross-examination. In reaction to this and similar abuses, English and then American law excluded *ex parte* written evidence and required live cross-examination to ensure truth. Thus, the Confrontation Clause's core purpose was to prevent the use of *ex parte* written examinations as a substitute for live testimony in open court.[10]

For years, several justices including Justice Scalia had written separately, seeking to reinvigorate the Confrontation Clause.[11] In 2004, in *Crawford v. Washington*, he succeeded. Writing for a seven-Justice majority, Justice Scalia replaced the hearsay balancing test with a bright-line rule: A witness is one who gives testimony, not just anything that falls within the jumbled hearsay rule, and testimony is a formal statement to government officers made in order to prove a fact.[12] Confrontation requires an opportunity to question a witness and challenge his account face-to-face.

No test is self-defining, and further cases had to spell out the contours of these terms. As Justice Scalia later wrote for a nearly unanimous Court, a domestic-abuse victim's statement to a police officer after a domestic-abuse incident has ended qualifies as testimony, but a 911 call right after such an

incident does not; the former was made primarily to facilitate investigating crime, while the latter was primarily a cry for help.[13]

Some of these line-drawing questions have been controversial. Even if a declarant is unavailable for cross-examination because the defendant allegedly killed her, according to Justice Scalia's opinion for the Court, the defendant has not forfeited his confrontation right by his own wrongdoing unless he killed her in order to prevent her from testifying.[14] And in some, the Court has narrowed the confrontation right over Justice Scalia's dissent. Most notably, the Court, over Justice Scalia's dissent, has been willing to find that a dying gunshot victim's statements to police were made not primarily to ensure the shooter's arrest and conviction, but to address the ongoing threat to public safety posed by a shooter on the loose.[15]

Perhaps the most questionable aspect of the *Crawford* doctrine is its expansion to forensic and scientific tests. Laboratory analysis is a far cry from the unsworn letter and out-of-court interrogation that Sir Walter Raleigh sought to confront. It is not always clear who is the relevant witness, nor what laboratory protocols, experts, and equipment a defendant needs access to in order to challenge a machine readout.[16] Nevertheless, Justice Scalia, writing for the Court, extended *Crawford* to require live testimony, not just sworn lab reports, by the lab analyst who tests drugs. The defendant's ability to subpoena the witness if desired, the Court held, is no substitute.[17]

Justice Scalia has left an enduring legacy and changed the terms of debate. He has renewed focus on the Constitution's text, structure, and history, which prize an adversarial, oral approach to criminal justice in open court.

At its best, the *Crawford* line of cases united a coalition of liberal as well as conservative justices, both formalists and those concerned more pragmatically with the unfairness of introducing unchallenged testimony. But the further the facts are from a classic out-of-court deposition, sworn statement, or police interrogation, the weaker the consensus is. The lab analyst cases, in particular, have fractured the Court. Four justices, led by Justice Scalia, supported or leaned toward applying *Crawford* broadly to forensic evidence. Four justices disagreed. Oddly enough, the swing justice in these cases has been Justice Clarence Thomas, who alone among his colleagues treats formal, sworn laboratory certificates as testimony in violation of *Crawford,* but not unsworn lab reports.[18]

On other Confrontation Clause issues, Justice Scalia likewise sometimes succeeded (and sometimes did not) in bringing along a majority of the Court. He wrote for a majority that shielding child witnesses from seeing a defendant violated the defendant's right to confront his accusers.[19] Soon thereafter, however, a majority of the Court, over Justice Scalia's dissent, upheld a child-abuse victim's testifying via one-way closed-circuit television instead of in the defendant's physical presence.[20] The majority stressed the vital need to protect child-abuse victims from further trauma; Justice Scalia's dissent emphasized the text's bright-line rule.

Justice Scalia did not always succeed in persuading the Court to apply these new rules as he would have liked. He has reproached the Court not only for promulgating vague, unpredictable legal standards (like the pre-*Crawford* standard), but also for applying ostensibly clear rules (like *Crawford* or face-to-face testimony) in strained, fact-specific, or unpredictable ways. Over his dissents, some of the Court's decisions have swung back toward looking at more factors, such as the presence of a gun, the evidence of an ongoing emergency, other indicia of reliability, and harms to children. Justice Thomas's insistence that testimony be formal has limited the breadth of *Crawford*'s reach. In addition, Justice Scalia arguably overreached in extending the Confrontation Clause woodenly to forensic analysts, where there is little text or history to illuminate what confrontation is required.

Nevertheless, Justice Scalia has left an enduring legacy and changed the terms of debate. He has renewed focus on the Constitution's text, structure, and history, which prize an adversarial, oral approach to criminal justice in open court, although there remain plenty of questions about how analogous 18th century abuses are to 21st century technologies.

The Jury Trial Clause. Justice Scalia also spearheaded the revival of another clause of the Sixth Amendment: the Jury Trial Clause.

Throughout most of the 19th and 20th centuries, judges dominated criminal sentencing, finding facts and imposing sentences within broad ranges with little if any role for juries. The Court repeatedly blessed this judicial free hand, largely unfettered by procedural rules, even when a judicial finding triggered a mandatory minimum sentence.[21] The Court refused to lay down any rule specifying what facts must be elements of crimes to be proved to a jury, offering only the most impressionistic, offhand remark in *McMillan v. Pennsylvania*: "The statute gives no impression of having been tailored to permit the [sentence-enhancement] finding to be a tail which wags the dog of the substantive offense."[22]

The Court's casual, pragmatic dismissal of a Sixth Amendment challenge in *McMillan v. Pennsylvania* conflicted both with Justice Scalia's concern for the text and with his insistence upon meaningful, firm rules.

The Court's casual, pragmatic dismissal of a Sixth Amendment challenge conflicted both with Justice Scalia's concern for the text and with his insistence upon meaningful, firm rules. In a seemingly minor immigration-crime case, Justice Scalia revived the issue in a dissent, strongly suggesting (and later arguing) that any fact that increases a maximum sentence must be proved to a jury beyond a reasonable doubt.[23] Within a few years, he succeeded in persuading Justice Thomas, converting his dissenting suggestion into law.

- *Apprendi v. New Jersey* held that prosecutors must prove any fact (other than a prior conviction) that increases a statutory maximum sentence to a jury beyond a reasonable doubt.[24]

- Justice Scalia's opinion for the Court in *Blakely v. Washington* applied the same rule to sentencing guidelines, invalidating binding guidelines triggered by judicial fact-finding.[25]

- Soon after, the Court extended *Blakely*'s logic to invalidate the U.S. Sentencing Guidelines' binding force, rendering them advisory because judges cannot find facts that trigger mandatory enhancements.[26]

- The Court also applied *Apprendi*'s logic to require juries, not judges, to find facts needed to make defendants eligible for the death penalty.[27]

In this line of cases, formalism triumphed over loosey-goosey functionalism. Justice Scalia's *Blakely* majority opinion forcefully criticized the "obvious" "subjectivity" of *McMillan*'s tail-wags-the-dog standard. The standard was so murky that people could always disagree about whether an enhancement went *"too far"* and never prove otherwise.[28] With mordant humor, the justice mocked the canine standard that would:

> require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.[29]

Justice Scalia's barbs made reading footnotes fun.

Interestingly, the Court later extended *Apprendi*'s logic even further than Justice Scalia was willing to go. Justice Scalia repeatedly voted to allow judges to find facts that trigger mandatory minimum sentences within an authorized sentencing range, because minimums do not exceed the range authorized by the jury.[30] The Court eventually went further, holding that juries must find any fact that raises a minimum or maximum sentence.[31]

As with *Crawford*, in the *Apprendi/Blakely* line of cases, Justice Scalia assembled a coalition of more liberal Justices Stevens, David Souter, and Ruth Bader Ginsburg together with fellow originalist conservative Justice Thomas. The divide on the Court was not between left and right as conventionally understood, but between the formalists (Justices Stevens, Souter, Ginsburg, Scalia, and Thomas, and later Justices Sonia Sotomayor and Elena Kagan) and the pragmatists (Chief Justice William Rehnquist, Justices Sandra Day O'Connor, Anthony Kennedy, and Breyer, and later Justice Samuel Alito and sometimes Chief Justice John Roberts).

And as with *Crawford*, that coalition did not always hold fast. Though five justices in *Booker* found that the U.S. Sentencing Guidelines violated the Sixth Amendment, Justice Ginsburg switched sides on the remedial question. Thus, instead of insisting that juries find guidelines-enhancement facts, the *Booker* remedial opinion invalidated the guidelines' binding force and left judges in charge of applying the now-advisory guidelines. The irony is that the Sixth Amendment jury-trial guarantee produced not a clear rule operated by juries, but a fuzzier standard that entrusts more power and discretion to judges.

The *Apprendi/Blakely* line of cases landed an important symbolic blow for juries, underscoring their constitutional role, but well over a decade later, the impact of this doctrine remains unclear. Juries are still an endangered species, as plea bargaining remains rampant and resolves 19 out of 20 cases. Sentencing guidelines still leave judges with lots of power that is hidden from view and unchecked by juries. Justice Scalia would have dynamited the entire edifice of the U.S. Sentencing Commission as violating the separation of powers, but his lonely dissent to that effect drew no other takers.[32] As with *Crawford*, problems persist in applying an 18th century right to novel and unanticipated 21st century realities.

The Fourth Amendment

Justice Scalia also surprised many observers in his somewhat civil-libertarian approach to the Fourth Amendment. On certain issues, he advocated clear rules that favored law enforcement, such as the objective (rather than subjective) test for the reasonableness of a stop.[33] When it came to defining searches and reasonableness, however, his originalism and formalism led him to support rules that very often favored criminal suspects.

Take the issue of what qualifies as a search in the first place. When an object is in plain view of police who are already lawfully present there, they may seize it without a warrant. Many justices were willing to extend the plain-view doctrine to allow a trivial additional intrusion by police, but not Justice Scalia. Writing for the Court in *Arizona v. Hicks*, he held that police may not move a stereo turntable even a few inches to view and record its serial number without first getting a warrant supported by probable cause.[34]

Unlike many other conservative members of the Court, Justice Scalia was also willing to recognize a variety of intrusions, new and old, as searches.

- His opinion for the Court in *Kyllo v. United States* held that pointing a thermal-imaging device at a house to detect heat emanating from it counts as a search;[35]

- Likewise, in *Florida v. Jardines*, he wrote for the Court in holding that a trained drug-sniffing dog's sniffing of a suspect's front porch and front door constituted a search and required a warrant;[36] and

- His opinion for a majority of the Court in *United States v. Jones* held that attaching a GPS tracking device to a suspect's car and tracking his movements qualified as a search.[37]

In all three of these cases, he rejected the amorphous, unpredictable reasonable-expectation-of-privacy test in favor of bright-line rules rooted in the common law of trespass upon an owner's property rights.

Justice Scalia was also far more willing than many other justices to clearly demarcate searches that were categorically unreasonable. While he was willing to allow drug testing based on individualized suspicion, he dissented from allowing suspicionless searches,[38] and in dissent in *Maryland v. King*, he argued that routine, suspicionless cheek swabs of arrestees to collect their DNA were unreasonable searches: "The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment."[39] As he memorably put it, "I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."[40]

Justice Scalia enforced the Fourth Amendment vigorously, starting from common-law baselines.

In that vein, the justice was the key fifth vote in *Arizona v. Gant* to limit searches of cars incident to arrest. Such searches can include looking for weapons or all destructible evidence only if the area is still within the suspect's reach. Once the suspect is handcuffed

and away from the car, police may search the car only for evidence of the crime of arrest. So when a suspect has been arrested for driving with a suspended license and handcuffed in the back of a patrol car, police may not then rummage around the car in search of drugs or the like. The Court drew this test from one of Justice Scalia's earlier concurrences.[41]

Justice Scalia enforced the Fourth Amendment vigorously, starting from common-law baselines. That led him to reject subjective privacy tests in favor of those that are grounded in trespass and property law. As to vehicle searches, he acknowledged that "the historical practices the Framers sought to preserve" were unclear, so he relied upon "traditional standards of reasonableness."[42]

The justice was quite right that common law and history can often provide clearer baselines than circular reasoning about expectations of privacy, but as Justice Alito has observed, these historical sources cannot provide definitive verdicts on 21st century technological searches, such as DNA analysis or assembling a mosaic of data points from long-term GPS tracking.[43] Justice Scalia did not have all the answers, but at least he began with the right questions.

The Eighth Amendment

Justice Scalia consistently opposed extending the Eighth Amendment's Cruel and Unusual Punishment Clause to forbid capital punishment. The Constitution expressly references the long-settled practice of capital punishment, and judges may not use evolving standards of decency to trump the textual and historical warrant for the death penalty. "[P]assionate and deeply held" views opposing capital punishment, he wrote, are "no excuse for reading them into a Constitution that does not contain them," particularly since doing so would "thrust a minority's views upon the people."[44] In that vein, he dissented from the Court's holdings that a state may not execute a defendant for the crime of raping a child and that it may not execute defendants who are mentally retarded or were under 18 years of age.[45]

Justice Scalia also opposed much of the Court's intricate regulation of capital sentencing procedures. In particular, he rejected the *Woodson/Lockett/Eddings* doctrine requiring unfettered admission of all mitigating evidence in capital sentencing as being starkly at odds with the requirement of rules to channel and guide the capital sentencing process. "To acknowledge that 'there perhaps is an inherent tension' between [the two] line[s] of cases," he wrote in *Walton v. Arizona*, "is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II."[46] That position was not only formalist in embracing rules over unfettered discretion, but also originalist in supporting a textually and historically approved punishment that used to be prescribed for many cases.

Justice Scalia's position in *Walton v. Arizona* was not only formalist in embracing rules over unfettered discretion, but also originalist in supporting a textually and historically approved punishment that used to be prescribed for many cases.

The justice likewise opposed invalidating various noncapital sentences as cruel and unusual, though he could not persuade a majority of his colleagues to agree. He advanced a series of textual and historical arguments to show that the clause forbids only certain modes of punishment and legally unauthorized punishments, not disproportionality between a particular crime and its particular punishment.[47] (While that position is a reasonable one, recent originalist scholarship has argued powerfully for reading the clause to require retributive proportionality.[48]) He also joined in dissenting from recent decisions that restricted sentences of life imprisonment without parole for juvenile defendants.[49]

Substantive Criminal Law

Justice Scalia's insistence on clear rules informed his reading of substantive criminal statutes, often in ways that benefitted defendants. The justice was famous for vigorously advancing the rule of lenity as a corollary of his textualism. If a legislature unambiguously criminalizes conduct, it gives potential violators clear notice and fair warning;[50] if it does not, prosecutors and judges may not take it upon themselves to stretch wording to cover borderline criminal conduct.

There certainly is room to question Justice Scalia's emphasis on notice, which, as he admitted, is necessarily a fiction in practice: Few if any prospective thieves or tax evaders spend their spare time reading

statute books. But lenity gives legislatures a clear background rule against which they can legislate and requires the democratic process to authorize criminal punishment and stigma.[51] If legislatures dislike restrained readings of criminal statutes, they remain free to amend them to make them broader and clearer.

The frequency with which Justice Scalia applied the rule of lenity underscored his willingness to follow his principled methodology even where it produced results he might not personally like.

The justice voted to apply lenity to a wide range of crimes, from money laundering to carjacking to tax evasion,[52] and in doing so, he focused solely on whether the text was clear, without recourse to legislative history.[53] He did sometimes find statutory text clear enough to preclude recourse to lenity, even where other justices disagreed,[54] but the frequency with which he applied the rule of lenity underscored his willingness to follow his principled methodology even where it produced results he might not personally like.

Justice Scalia's emphasis on clear rules, notice, and fair warning also led him to strike down laws that were simply too vague to salvage. He advocated invalidating the residual clause of the Armed Career Criminal Act as violating the due process requirement of fair notice. After advancing this position in repeated dissents for years, he ultimately won a majority of the Court over to his side last year, writing for the Court in striking down the residual clause.[55] He also would have gone further than the Court did to rein in honest-services fraud. While the majority of the Court limited that statute to bribery and kickbacks, Justice Scalia would have invalidated the entire provision as too vague to salvage and beyond the power of judges to rewrite.[56]

Conclusion

In short, Justice Scalia defied simplistic ideological labels. In doing so, he underscored one of his favorite themes: that law is (or at least should be) much more than politics. His methodologically conservative embrace of formalism, clarity, rules, and especially textualism and originalism often put him on the side of criminal defendants, even though his personal sympathies were pro-prosecution.

Often, he could not persuade a majority of his colleagues to follow his originalist principles to his logical conclusion.

- He was no fan of the Fourth Amendment exclusionary rule, but the most he could do was to dissuade his colleagues from expanding it by balancing the rule's speculative deterrent benefits against its concrete costs.[57]

- In a trio of cases, Justice Scalia dissented from extending the right to effective assistance of counsel to plea bargaining, as doing so "embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves."[58]

- In dissent, he criticized *Miranda* as "a milestone of judicial overreaching" and the Court's reaffirmation of it as "the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."[59]

He had a rhetorical gift for sharpening the nub of almost any issue, piercing the prosy fog of the U.S. Reports.

One can certainly raise legitimate questions about how far to take Justice Scalia's approach. Elsewhere, I have given him two cheers, not three, criticizing his formalism as sometimes too rigid and impractical and his originalism as stretching beyond its textual and historical foundations.[60] Many of the Framers' 18th century criminal procedural rules have no clear answers for 21st century problems: Think of scientific and forensic experts, high-tech searches, electronic privacy, or a plea-bargaining assembly line that the Court is unwilling to dynamite.

Nevertheless, Justice Scalia's animating concerns will remain enduring touchstones of our law: the importance of protecting the roles of legislatures, juries, and the people; ensuring fair notice; and preserving liberty by limiting judicial discretion and prosecutorial power. His criminal jurisprudence is thus a microcosm of a principled judicial approach to law more generally, and he will be greatly missed.

Scalia Yells *Stop*: Standing Athwart History to Protect the Separation of Powers

Josh Blackman

In the inaugural issue of *National Review*, William F. Buckley defined the publication's new mission statement. The magazine, he wrote, "stands athwart history, yelling Stop, at a time when no one is inclined to do so, or to have much patience with those who so urge it."[1] Throughout his three-decade tenure on the Supreme Court of the United States, Justice Antonin Scalia would often be the only one yelling *Stop* when few if any of his colleagues were willing even to pause. Through his dissents, Justice Scalia attempted to pull the emergency brake on the majority's runaway logic train. With sharp reasoning, vivid rhetoric, and sometimes acerbic wit, Scalia's mission was not to persuade the current members of the Court, but to speak to a future generation.

In the words of Chief Justice Charles Evans Hughes, the dissent is "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the Court to have been betrayed."[2] The reasoning of a dissent often stands the test of time and may ultimately turn into a majority opinion. Justice Benjamin Cardozo wrote that a justice in dissent speaks "to the future," with his "voice pitched to a key that will carry throughout the years."[3] Justice Scalia enjoyed telling law school crowds that he wrote his dissents "for casebooks. There's no other reason to write them."[4] Scalia wanted the next generation of attorneys to study his dissents with the sincere hope that one day his views would prevail.

This essay focuses on two of Justice Scalia's opinions involving the separation of powers: first, his dissent in last year's Obamacare case upholding the payment of subsidies on the federal exchange, *King v. Burwell*, and second, his concurring opinion in *National Labor Relations Board v. Noel Canning*, which in effect was a dissent.

King v. Burwell

The Affordable Care Act (ACA) allows states to sell federally subsidized insurance policies through online exchanges. If a state declined to establish an exchange—states could not be forced to act—the federal HealthCare.gov would operate as a backup exchange. The Obama Administration treated the federal exchange as equivalent to the state exchanges in all respects, so the same level of subsidies would be available on HealthCare.gov to reduce premiums.

But then a benefits lawyer from South Carolina named Tom Christina read the 3,000-page law. To his surprise, he observed that under Section 36B of the ACA, subsidies were limited to plans "enrolled in through an Exchange *established by the State*."[5] In December 2010, Christina presented his findings that the subsidies were available only on the state exchanges and not on the federal exchange.

After the Treasury Department learned of Christina's discovery, it issued a regulation interpreting Section 36B that treated state exchanges and the federal exchange identically: The subsidies would be available on both. The IRS rule was challenged and appealed to the Supreme Court in the case of *King v. Burwell*.[6] If the justices ruled against the government, over 6 million people in 34 states that did not establish exchanges would lose their subsidized policies—that is, unless Congress acted.

During oral arguments, which I attended, Justice Scalia challenged Solicitor General Donald Verrilli about whether the consequences of invalidating the IRS rule would be so dire. "What about Congress?" Scalia charged. "You really think Congress is just going to sit there while all of these disastrous consequences ensue?"[7] "Congress adjusts, enacts a statute that takes care of the problem," Scalia continued. "It happens all the time. Why is that not going to happen here?"

Verrilli's answer channelled the Obama Administration's philosophy about the separation of powers in our gridlocked government. "Well, *this* Congress, Your Honor?" The clear emphasis was on *this*. Adam Liptak reported in *The New York Times* that Verrilli "all but rolled his eyes" at Justice Scalia as the "the courtroom erupted in knowing laughter."[8] From my vantage point, Justice Scalia did not appear amused by this comment. Verrilli continued, "You know, I mean, of course, theoretically—of course, theoretically they could."[9]

Scalia shot back, "I don't care what Congress you're talking about. If the consequences are as

disastrous as *you* say," with the emphasis on *you*, "so many million people without insurance and whatnot, yes, I think this Congress would act."[10] Verrilli changed the topic and returned to a question from Justice Alito. That exchange resonated long after the hearing was over.

Three months later, the Chief Justice wrote the majority opinion (joined by five others), finding that the statute could be read to provide subsidies for plans enrolled on the federal exchange.[11] Justice Scalia delivered what would be his last dissent read from the bench. At the conclusion of the Chief's announcement of the majority opinion, in an even-handed tone, he handed the case off. "Justice Scalia has filed a dissenting opinion in which Justice Thomas and Justice Alito have joined." There was a brief moment of silence and Justice Scalia interjected, "Indeed."[12]

"Words no longer have any meaning if an Exchange that is *not* established by a State is 'established by the State.'"

"Words no longer have any meaning if an Exchange that is *not* established by a State is 'established by the State.'" He paused deliberately between the first six words. "It's hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words 'established by the State.' And it is hard to come up with a reason to use those words other than the purpose of limiting credits to state Exchanges."[13]

"Under all the usual rules of interpretation," Scalia paused, "the Government should lose this case."[14] He then emitted one of the most potent lines from his written opinion: "But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved."[15] This was a direct assault on the Chief Justice, who now twice saved the ACA. Because Scalia was the most senior Associate Justice, he sat right next to the Chief Justice, but that would not stop him from ridiculing the Chief's opinion.

Scalia continued, "[T]his Court has no free-floating power 'to rescue Congress from its drafting errors.'"[16] Whereas Chief Justice Roberts viewed his decision as deferring to the democratic process, to which Congress is politically accountable, Scalia rejected the majority opinion's "twistifications"[17] as anti-democratic. "It is Congress's responsibility to make laws, and this Court's responsibility only to interpret them," he said. "It is up to our country's elected lawmakers, not its unelected judges, to repair statutes that have unintended consequences, or that do not work out in practice."[18]

Roberts thought the role of the Court was to give less weight to text in order to read statutes in a way that reflects his vision of the congressional plan. Scalia disagreed: "[W]e have no authority to ignore the law because we believe Congress must have intended something else."[19] Any Congress, including this Congress, "should amend the law to conform to its intent."[20]

In the penultimate portion of his opinion, Scalia directed his ire at the Chief Justice. "Today's decision changes the usual rules of statutory interpretation for the sake of the Affordable Care Act. That, alas, is no novelty."[21] Scalia described the Chief's 2012 opinion in *NFIB v. Sebelius* as "revis[ing]" and "transform[ing]" two "major parts of this law in order to save them from unconstitutionality."[22] With *King v. Burwell*, the "Court today has turned its attention to a third.... The Court concludes that this limitation would prevent the rest of the Act from working as well as hoped. So it rewrites the Act to make tax credits available everywhere."[23]

NFIB v. Sebelius and *King v. Burwell* "will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and that it is prepared to sacrifice all the usual interpretive principles, that it is prepared to do whatever it takes to uphold and assist its favorites."

Then came Scalia's pièce de résistance: "We really should start calling this law SCOTUScare."[24] The chamber erupted in laughter. Reporter Tony Mauro noted that "even Roberts smiled when Scalia gave the audience his money quote."[25] This was the first time the wire-service acronym SCOTUS (Supreme Court of the United States) was used by the Court.

Scalia closed with an admonition for the Court:

> But this Court's two decisions concerning the Act will surely be remembered through the years. The interpretive somersaults they have performed will remain as astounding precedent, cited by lawyers to confuse our jurisprudence. And these two cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and that it is prepared to sacrifice all the usual interpretive principles, that it is prepared to do whatever it takes to uphold and assist its favorites.[26]

Scalia's powerful dissent illustrated how there are special rules for Obamacare. A majority of the Court, he wrote, was willing to save Congress from its own mistakes. Such a role is inconsistent with the separation of powers.

National Labor Relations Board v. Noel Canning

Over the past two presidencies, Senators of both parties have consistently blocked nominations to the five-member National Labor Relations Board (NLRB). During the Bush Administration, Senate Democrats filibustered President Bush's nominees to the NLRB, so it dropped down to only two members. In *New Process Steel, L.P. v. NLRB*, the Supreme Court held that the NLRB, when reduced to two members, lacked a quorum to decide cases.[27]

After the change in Administration, Senate Republicans filibustered President Obama's nominees to the NLRB. With the board on the verge of losing its quorum, in January 2012, President Obama purported to make three recess appointments to the board.[28] The appointments came during a 72-hour gap between pro forma sessions of the Senate. The Office of Legal Counsel in the U.S. Department of Justice, which advises the President on constitutional matters, issued an opinion determining that these pro forma sessions did not qualify as actual sessions of the Senate. As a result, they determined that the Senate was in a break for almost three weeks.[29]

In 2012, the newly constituted five-member majority of the NLRB determined that the Noel Canning Corporation, a Pepsi-Cola distributor, violated federal labor laws. Noel Canning challenged the adverse ruling in federal court on the grounds that the board lacked a valid three-member quorum and could not enter a judgment against it. Even though the board was fully staffed with five members, Noel Canning asserted that "three of the five Board members had been invalidly [recess] appointed, leaving the Board without the three lawfully appointed members necessary for it to act."[30]

In *NLRB v. Noel Canning*, the Supreme Court unanimously rejected the constitutionality of these purported recess appointments. The majority opinion by Justice Breyer concluded that the Senate—and not the President—gets to decide when the Senate is in recess. Recess appointments are not permitted where the Senate holds pro forma sessions, even if no business is transacted.

In *NLRB v. Noel Canning*, Justice Scalia rejected "the majority's insistence on deferring to the Executive's untenably broad interpretation of the power, [which] is in clear conflict with our precedent and forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government."

Justice Scalia penned a concurrence on behalf of the Chief Justice and Justices Thomas and Alito. Yet it read more like one of his characteristic blunderbuss dissents. Scalia concurred with the majority in the judgment but found that the Constitution does not permit recess appointments during *intra*-session breaks (that is, sessions during a single session of Congress). Rather, the Constitution permits recess appointments only during *inter*-session breaks (that is, the time between the end of one session and the beginning of another session). Justice Scalia rejected "the majority's insistence on deferring to the Executive's untenably broad interpretation of the power, [which] is in clear conflict with our precedent and forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government."[31]

Yet all nine justices—with Justice Scalia's nudging—ultimately agreed with one very important conclusion: Executive power beyond the Constitution's structure does not provide a "safety valve" for

"congressional intransigence." During oral arguments, Justice Kagan began a line of questioning that energized the entire Court and set the tenor for the discourse. She asked Solicitor General Donald Verrilli about the usage of the recess-appointment power in recent years. Now, it is "not mostly used to deal with emergencies arising from congressional absence," Kagan stated.[32] Rather, for "most modern Presidents, and I say this sort of going back to President Reagan, Presidents of both parties essentially have used this clause as a way to deal, not with *congressional absence,* but with *congressional intransigence*."[33]

The Solicitor General replied with a functional argument. If the President did not make the recess appointments, "the NLRB was going to go dark. It was going to lose its quorum."[34] The Solicitor General offered a gloss on executive power: The board's inability to act would bolster the President's inherent authority, justifying an expanded recess-appointment power.

Justice Alito continued Justice Kagan's line of questioning and noted that the government's gloss on Article II amounted to a collateral attack on the Constitution's "advice and consent" requirement and the role of the Senate in the separation of powers. He charged that the Solicitor General was "making a very, very aggressive argument in favor of executive power now and it has nothing whatsoever to do with whether the Senate is in session or not."[35] In other words, the government's position was entirely independent of the Recess Appointments Clause during normal circumstances but relied on a flexible reading of that clause during tough, intractable times. "When the Senate acts, in your view, irresponsibly and refuses to confirm nominations," Alito continued, "then the President *must be able* to fill those positions. That's what you're arguing."[36]

The Chief Justice was not assuaged by the Solicitor General's convictions. The "compromise" the Framers of the Constitution reached, Roberts charged, is that "the President will nominate and the Senate, *if it so chooses*, can confirm a nominee."[37] Whether to do so, or not, is entirely within their discretion. The Chief returned to Justice Kagan's line of questioning: "You spoke of the *intransigence* of the Senate. Well, they have an *absolute right not to confirm nominees* that the President submits."[38]

The Court's opinion in *Noel Canning* found that gridlock and congressional intransigence is not a license to expand executive powers. That is part of the political ball game and not a justification to test the separation of powers. All nine justices agreed on this point.

Justice Breyer's analysis began by clarifying the narrow scope of the recess-appointment power: "*[T]he Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States*."[39] In the case of "some very unusual circumstance—a national catastrophe," Justice Breyer explained, the President may be able to exercise heightened executive powers.[40] But "political opposition in the Senate would not qualify as an unusual circumstance." This last point, Justice Breyer said, "should go without saying—except that JUSTICE SCALIA compels us to say it."[41]

Such a self-evident point was clearly lost on the Solicitor General, who argued that "political opposition" was sufficient to trigger these inherent powers.

Justice Scalia, who apparently egged on the majority to make this point, articulated the Obama Administration's position much more clearly. (Justice Scalia also took the unorthodox step of quoting Justices Kagan and Ginsburg's comments from oral arguments, where they seemingly agreed with Justice Scalia about the fact that the Senate is effectively always available, and the recess-appointment power no longer serves that stopgap function.) Responding to Justice Breyer's observation that this "should go without saying—except that JUSTICE SCALIA compels us to say it," Justice Scalia restated the case: The majority is "seemingly forgetting that the appointments at issue in *this very case* were justified on those grounds and that the Solicitor General has asked us to view the recess-appointment power as a 'safety valve' against Senatorial 'intransigence.'"[42]

Justice Scalia emphatically rejected the Solicitor General's admonition that the recess-appointment power is a "safety valve" for "intransigence." The decision to confirm appointees rests solely with the Senate: "So if the Senate should refuse to confirm a nominee whom the President considers highly qualified; or even if it should refuse to confirm any nominee for an office, thinking the office better left vacant for the time being," that is the Senate's prerogative.[43] This conclusion echoes the Chief Justice's comment during oral argument: The Senate has an "*absolute right not to confirm nominees* that the President submits."[44] The President's recess-appointment power "would not be triggered during a 4-to-9-day break," Scalia stressed, "no matter how

'urgent' the President's perceived need for the officer's assistance."[45]

During oral arguments in *New Process Steel* four years earlier, Justice Scalia alluded to the President's bully-pulpit power as a means to break the deadlock on appointments to the NLRB. "If you want to solve the crisis that you are so worried about," he said, "the only way to solve it is to say: 'Boy you know...Armageddon [is] coming; we are going to not be able to act at all.'"[46] Scalia observed, "That would solve the crisis." But what cannot be done is to cite the emergency as a justification to expand the scope of the executive's powers. Scalia put it plainly: The NLRB going "dark" was not a sufficient "national catastrophe" to justify bending the separation of powers.

Even though all nine justices rejected the Administration's position that congressional intransigence gives rise to exercising broad executive power, there was a dispute between the majority and the concurring opinion over the utility and desirability of an efficient government. The majority rejected "JUSTICE SCALIA's interpretation of the Clause [which] would defeat the power of the Clause to achieve that objective."[47] Scalia would limit the clause only to those vacancies that arise during the recess. Justice Breyer's parting salvo is harsh:

> JUSTICE SCALIA would render illegitimate thousands of recess appointments reaching all the way back to the founding era. More than that: Calling the Clause an "anachronism," he would basically read it out of the Constitution. He performs this act of judicial excision in the name of liberty. We fail to see how excising the Recess Appointments Clause preserves freedom.[48]

Justice Scalia returned fire, offering a very different vision of what promotes liberty. He charged that the majority's "decision transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates."[49] Such deference "to the Executive's untenably broad interpretation of the power is in clear conflict with our precedent," Scalia feared, and "forebodes a diminution of this Court's role in controversies involving the separation of powers and the structure of government."[50]

Justice Scalia made the point clearly that "convenience and efficiency" are not goals of our governmental structure; rather, they are sacrificed for our freedom. The "constitutional provisions designed to establish 'a structure of government that would protect liberty,'" Scalia observed, are not premised on "the narrow-minded assumption that their only purpose is to make the government run as efficiently as possible."[51] "'Convenience and efficiency,' we have repeatedly recognized, 'are not the primary objectives' of our constitutional framework."[52] Such inconveniences are not bugs, but "calculated features" of our Constitution. Scalia reasoned that "Congress must either anticipate such eventualities" by not letting vacancies lapse "or be prepared to be haled back into session" through the President's powers to convene Congress.[53] Scalia continued, "The troublesome need to do so is *not a bug* to be fixed by this Court, but a *calculated feature* of the constitutional framework."[54]

To Justice Scalia, neither intransigence nor a desire for efficiency is a justification to expand the executive's Article II powers.

Though "the Constitution's government-structuring provisions can seem 'clumsy' and 'inefficient,' they reflect 'hard choices...consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.'"[55] Testifying before the Senate Judiciary Committee, Justice Scalia put it bluntly: "Americans should learn to love gridlock.... The framers [of the Constitution] would say, yes, 'That's exactly the way we set it up. We wanted power contradicting power (to prevent) an excess of legislation."[56] Or, to quote James Madison, "Ambition must be made to counteract ambition."[57]

To Justice Scalia, neither intransigence nor a desire for efficiency is a justification to expand the executive's Article II powers. Gridlock, in this sense, is the constitutionally ideal form of government.

Conclusion

Justice Scalia's powerful opinions vigorously defended the separation of powers. In *King v. Burwell*, he rejected the Court's decision to ignore the plain text of the Affordable Care Act to decide what

Congress really meant. In *NLRB v. Noel Canning*, he successfully persuaded the majority to recognize that congressional opposition is not a license to expand executive powers. However, he was still in dissent over the question of whether gridlock is a bug or feature of our Constitution. In either case, whether he persuaded his colleagues or not, his separate opinions created a lasting record and tribute to his powerful three decades of service on the Court.

Justice Scalia, Religious Freedom, and the First Amendment

Richard W. Garnett

When Justice Antonin Scalia died last February, the Supreme Court and the country lost a distinctive, engaging, and compelling voice. Justice Scalia was a gifted writer, a rigorous thinker, a caring teacher and mentor, and a generous public servant. For nearly 30 years, he challenged, inspired, amused, and sometimes infuriated readers.

Like other justices, he had opinions; unlike many other justices, he wrote opinions that are worth reading. True, his prose could sometimes be sharp (though its barbedness was often exaggerated by his critics), but it was always clear and never forgettable. In many cases involving a wide range of questions—about the reach and limits of federal authority, the separation of powers, the regulation and taking of private property, constraints on law enforcement, the right to own and possess firearms, statutory interpretation, administrative law, speech regulations, abortion and marriage, and on and on—Justice Scalia helped to reframe and refocus the debate even when he did not control or concur in the outcome.

At the end of Justice Scalia's tenure, the Court was and had been for many years closely divided, at least with respect to those ideologically salient, so-called culture wars matters on which the press tends to fixate. (As Court watchers know but many in the public do not appreciate, the vast majority of the Court's decisions are not politically charged or close.) His passing, combined with the fact that three sitting justices are over 77 years old (the average retirement age for justices is now about 78), makes it likely that the Court's philosophical orientation, and perhaps also many of its doctrines regarding "hot button" issues, may change markedly in the next few years. It could be that the Court's recently concluded 2015 term, which was shaped in several dramatic instances by Justice Scalia's absence, will be seen as marking the end of an era that began with Scalia's confirmation and William Rehnquist's elevation to Chief Justice in 1986.[1] We will see.

Justice Scalia's voice and views were particularly important and influential in cases involving the First Amendment and religion. This is not because he drove the relevant doctrines in a new direction by authoring many controlling opinions. In fact, he wrote only one (a landmark one, true, but still only one):[2] In *Employment Division v. Smith*, Justice Scalia announced for the Court that the First Amendment's Free Exercise Clause does not require exemptions from "neutral" and "generally applicable laws" that burden the exercise of religion. This ruling prompted criticism on both sides of the congressional aisle and across the political spectrum and eventually resulted in the near-unanimous passage of the Religious Freedom Restoration Act (RFRA) of 1993.

Already, the Court's loss of Justice Scalia has resulted in uncertainty and volatility regarding the religious-freedom question that is at the heart of his judicial legacy.

In recent years, the act itself and state laws modelled on it have become controversial, with some commentators and activists charging that RFRA has been transformed from a needed protection for vulnerable minorities into a weapon for conservatives seeking to undermine abortion rights, contraception coverage, and antidiscrimination laws.[3] When he signed the act into law, President Bill Clinton called religious freedom "the most precious of American liberties."[4] Today, however, it appears to be standard journalistic practice when discussing RFRA-type proposals to put "religious freedom" in "scare quotes."

What was expected to be one of the 2015 term's most significant cases, *Zubik v. Burwell*, a dispute involving the application of the Affordable Care Act's contraception-coverage mandate to religious institutions, resulted only—probably because of Justice Scalia's absence—in a mysterious and inconclusive punt.[5] A few days later, the Court refused to grant review in another closely watched religious-freedom case over the strong dissent of three justices.[6] Already, the Court's loss of Justice Scalia has resulted in uncertainty and volatility regarding the religious-freedom question that is at the heart of his judicial legacy.

Misplaced Criticism of Justice Scalia

According to Professor Ralph Rossum's study, Justice Scalia aimed to "harmonize" the First Amendment's Religion Clauses and "consistently

read [the Clauses] to mean that no religion should be preferred to any other religion and that no person should enjoy privileges or suffer penalties because of his religious beliefs."[7] He did this, according to many commentators, by adopting a "narrow free exercise and narrow establishment rights"[8] approach that, with respect to both clauses, is "deferential to political outcomes."[9]

Justice Scalia's many academic critics tend to regard his understanding and approach as dangerously "majoritarian" and insufficiently sensitive to and protective of the rights of vulnerable, unfamiliar, or unpopular religious minorities.[10] Some also charge that his stated emphasis and reliance on neutrality, deference to politically accountable actors, and continuity with history and tradition are "fig lea[ves]" intended to cover his privileging of religion and even of Christianity.[11]

These criticisms of Justice Scalia's approach are misplaced. It is true that history, tradition, and deference play crucial parts in Justice Scalia's work and thought regarding the meaning of the First Amendment, the place of religious faith and believers in public life, and the role of the federal judiciary in enforcing the free-exercise and no-establishment guarantees. It is not the case, though, contrary to some observers' unfounded and mean-spirited accusations,[12] that he was motivated by sectarian loyalties, "theocratic" commitments, frustration with diversity, or indifference to minorities.

Justice Scalia's Religion Clauses jurisprudence is not so much about majoritarianism as it is about "institutional competence, comparative advantage, federalism, and the limits of judicial review."

That Justice Scalia favored a "narrow[ing]" of the Religion Clauses—more precisely, of their judicially enforceable content—does not mean that he undervalued religious freedom. His approach is better seen as reflecting well an appropriate—indeed, the judicial virtue of[13]—humility with respect to judges' ability and authorization to determine the policy implications of abstract political theories, to resolve reasonably contested moral questions, to eliminate divisiveness and offense from public discourse and the public square, and—most important, perhaps—to construct and apply rules that depend on mind-reading and speculations about psychology. Justice Scalia's Religion Clauses jurisprudence, in other words, is not so much about majoritarianism as it is about "institutional competence, comparative advantage, federalism, and the limits of judicial review."[14]

Justice Scalia often liked to raise listeners' eyebrows and grab their attention by celebrating our "dead" Constitution. As he put it:

> The only good Constitution is a dead Constitution. The problem with a living Constitution in a word is that somebody has to decide how it grows and when it is that new rights...come forth. And that's an enormous responsibility in a democracy to place upon nine lawyers, or even 30 lawyers.[15]

In saying this, he echoed his friend and longtime colleague, the late Chief Justice William H. Rehnquist. Ten years before Justice Scalia joined the Court, Rehnquist had written a short but provocative essay called "The Notion of a Living Constitution," in which he conceded the "ideological sex appeal" of the phrase and allowed that "[a]t first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution. It would seem that only a necrophile could disagree."[16] In fact, though, what grounded Rehnquist's—and Scalia's —doubts about "living constitutionalism" was not cultural nostalgia or political stand-pat-ism but, instead, a reluctance to vest unelected judges with a "roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country."[17]

Justice Scalia's work in Religion Clause cases reflected, fairly consistently, this reluctance and the humility it exemplified. He did not regard the Religion Clauses as calling for close judicial supervision of political decisions and outcomes. In his view, these constitutional provisions make important but limited demands on governments and officials. To be sure, the First Amendment is, at least in part, counter-majoritarian and takes some actions, policies, and goals off the table. Still, Justice Scalia did not think that the undoubted importance of religious freedom demands that courts take the entire matter of its protection for themselves.

Assessing Scalia's Impact on Religion Clauses Jurisprudence

As noted, Justice Scalia authored only one controlling majority opinion in a Free Exercise Clause case and, strikingly, wrote none (or maybe one[18]) applying the Establishment Clause, so it is worth emphasizing two points that are important for understanding and assessing his legacy and impact.

First, that he did not write many majority opinions about the Religion Clauses should not obscure the fact that for three decades, he was part of an evolving majority that managed over that time to move the Court's Religion Clauses doctrines significantly. In very general terms, this move could be described as a retreat from strict, no-aid separationism to a more accommodating and deferential traditionalism, and, again, Justice Scalia helped make it happen.

Second, Justice Scalia contributed to this shift not only through his votes, but also through his colorful and compelling explanation, elaboration, and defense of it—and also his witty and sometimes sharp criticisms of missteps along the way—in many concurring and dissenting opinions. In other words, although his opinions did not, strictly speaking, often serve as controlling, binding precedents for lower court judges, they still set or reset the terms of the debate and captured the attention of scholars, students, journalists, and citizens.

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To highlight just one example, in a 1993 case called *Lamb's Chapel v. Center Moriches Union Free School District,* which involved a local rule that denied permission to use public-school facilities for a religiously themed film series on family life, Justice Scalia wrote separately to insist on the unworkability of the Court's so-called *Lemon* test[19] for Establishment Clause violations:

> As to the Court's invocation of the *Lemon* test: like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six-feet under: our decision in *Lee v. Weisman*...conspicuously avoided using the supposed "test," but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart... and a sixth has joined an opinion doing so....
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will.... When we wish to strike down a practice it forbids, we invoke it[.] Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts[."] Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[20]

It is unlikely that any law student who reads these lines will be able to avoid picturing, forever, the Court's supposed black-letter rule as a pet zombie.

The Religion Clauses Cases: Resources, Acknowledgement, and Accommodation

The Supreme Court's Religion Clauses cases can be usefully grouped in a few broad categories.[21] First, there are the many and well-known cases dealing with public resources (like computers, textbooks, bus services, scholarships, vouchers, etc.) and religious institutions (parochial schools, religiously affiliated hospitals, church-affiliated social welfare agencies, etc.). The issue in these disputes is whether the funding or assistance in question, even though it stops well short of setting up anything like a national church or official state religion, constitutes, for one reason or another, an "establishment" of religion. For well over a century, this was *the* law-and-religion controversy in the United States, and as many scholars have documented, it was closely connected to the anti-Catholicism that runs through most of American history.[22]

A second category includes controversies over whether, or to what extent, governments and public officials may acknowledge religion through expression, symbols, monuments, rituals, and so on. This broad grouping could include the various and recurring rulings involving prayer at football games and town-council meetings and Nativity scenes and war memorial crosses on public property. On the one hand, a consensus runs through these cases that the government's actions should have a "secular purpose," should not coerce religious observance, and—more controversially—should not "endorse" religion. On the other hand, there is an equally evident reluctance, considering America's history and traditions, to require our political communities and leaders to ignore the role that religious faith has played and continues to play in the social, civic, and political arenas.

The third category—and the one that seems to be receiving the most judicial and political attention these days—is for cases about the extent to which governments may or must accommodate religious believers and religiously motivated conduct through exemptions from otherwise applicable laws and regulations. *Smith*, the famous "peyote case," is one example;[23] *Holt v. Hobbs*, in which the justices unanimously invalidated an Arkansas prison rule that prevented a Muslim prisoner from growing a half-inch beard in accord with his religious beliefs, is another more recent one.[24]

Given the size and scope of American governments today, and given our religious diversity, there is no way for governments to completely avoid burdening religiously motivated conduct. However, decent governments will try, to the extent possible, to find accommodations. In these cases, the Court has therefore asked when, if ever, does the Constitution or federal law require or forbid such accommodations, and what is the role of the courts in mandating or invalidating them?

This categorization of the Court's church–state cases simplifies some issues and leaves some out, but it captures most of them well enough for us to examine Justice Scalia's views and their effects.

Harmonizing the Religion Clauses with the Constitution's Text and History

When Antonin Scalia joined the Supreme Court in September of 1986, the Court's public-aid-to-religion case law was a complete mess. Or, as Justice Lewis Powell put it more gently, it lacked "analytical tidiness."[25] The outcomes yielded by the application of the *Lemon* test's requirement that government aid not "advance" religion were unpredictable and turned on what seemed like distinctions without a difference (busing to school versus busing to field trips, for example, or maps versus books[26]). The arguable high-water mark of the confusion came the year before Scalia arrived in a pair of 1985 cases involving programs that sent public school teachers into religious schools to provide remedial instruction to students who needed it.[27]

But then, something—or some things—happened. The Court's personnel changed, and a majority of the justices recovered from earlier cases a more restrained, formalist emphasis on the "neutrality" of government programs that provided assistance to children attending religious schools. In a line of cases culminating in the 2002 *Zelman v. Simmons-Harris* decision,[28] the Court moved away from speculations about whether particular aid programs might indirectly "advance" religion or cause "political divisiveness" and focused instead on the people these programs serve. Although it is perhaps surprising that Justice Scalia was silent in terms of opinion writing during this shift, he consistently endorsed and enabled it with his votes,[29] and the deference to political actors and preference for clear rules over "balancing" that the new doctrine reflected were entirely consistent with Scalia's general approach to judging.

The story in the second category is more complicated. Professors Michael McConnell, Thomas Berg, and Christopher Lund insightfully refer to this category as having to do with "Religion and the Government's Influence on Culture."[30] As they remind us, all governments "act to create and shape culture" through their laws, programs, spending, and speaking, and in the United States, these efforts will inevitably touch on religion. For most of American history, the Supreme Court had no involvement in policing or supervising this dynamic, but then came controversies and rulings about test oaths and the Pledge of Allegiance, prayer and Bible reading in schools, evolution and creation science, the Ten Commandments and the Crèche.

It is difficult to generalize about these cases during Justice Scalia's tenure, except to note that whether or not the Court found the particular display, symbol, or action at issue a permissible historical or cultural reference or an impermissible

establishment often depended on whether Justice Anthony Kennedy thought it was "coercive" or Justice Sandra Day O'Connor thought it "endorsed" religion. Generally speaking, the justices have been unable to settle on an approach and so have had to muddle through, guided by a grab bag of standards designed to operationalize the intuitions that some "ceremonial deism" and acknowledgments of religion are permissible, that even subtle coercion to religious expression or activity is unconstitutional, and that, in Justice O'Connor's words, the government should not "mak[e] adherence to a religion relevant in any way to a person's standing in the political community[.]"[31]

Justice Scalia's votes and writings reflect his view that determining the permissible extent of government acknowledgment or symbolic embrace of religion is primarily the job of political actors.

Justice Scalia wrote some of his most memorable opinions—concurrences and dissents—in this area. His votes and writings in this area reflect his view that determining the permissible extent of government acknowledgment or symbolic embrace of religion is primarily the job of political actors. He thought the political process is a better guide to which official expressions and symbols are insufficiently respectful of the views of dissenters or minorities. He believed that within limits, a government that speaks for the people may express itself in the ways that a majority of that people see fit. He was reluctant to speculate about legislators' motives or the observers' subjective experiences. Three of his opinions stand out.

In *Lee v. Weisman*,[32] the Court decided that it was an unconstitutional establishment of religion to invite a member of the clergy to deliver a benediction at a middle-school graduation ceremony because of the likelihood of "public [and] peer pressure" on attending students "to stand as a group or, at least, maintain respectful silence."[33] "This pressure," the majority insisted, "though subtle and indirect, can be as real as any overt compulsion."[34]

Justice Scalia dissented, emphasizing the long history in the United States of prayers at public ceremonies and complaining that the majority's amateur discussion of "psychological coercion" went "beyond the realm where judges know what they are doing."[35] As for the concern that students might feel "subtly coerced" to stand during the benediction, Scalia noted that "maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate."[36]

In any event, he insisted, the majority asked the wrong, "precious" question in its "peer pressure" inquiry. "The coercion that was a hallmark of historical establishments was coercion of religious orthodoxy and financial support *by force of law and threat of penalty*."[37] By departing from this historical meaning, the Court's "Religion Clause jurisprudence," he regretted, "has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions."[38]

Another noteworthy dissent in this category came in the 2005 pair of Ten Commandments cases, one involving a display in a Kentucky courthouse that included a framed copy of the Ten Commandments and the other involving a monument on the grounds of the Texas state capital.[39] The Court allowed the Texas monument because Justice Stephen Breyer, the "swing vote," concluded that "as a practical matter of *degree* this display is unlikely to prove divisive,"[40] and Justice Scalia joined the Court's judgment. In the Kentucky case, though, Justice Breyer came down against the display and joined Justice David Souter's conclusion that the display had the unconstitutional "purpose" of "advancing religion."

Justice Scalia took issue not only with the majority's identification of this "purpose," but also with its premise that "the government cannot favor religious practice."[41] Recalling that "[t]hose who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality[,]" he set out a detailed and forceful critique of the idea that the First Amendment "mandates governmental neutrality between...religion and nonreligion" and contended that "historical practices...demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion."[42]

Then he added a paragraph that exemplifies and captures much about his general approach:

> ...I must respond to Justice Stevens' assertion that I would "marginaliz[e] the belief systems of more than 7 million Americans" who adhere to religions that are not monotheistic.... Surely that is a gross exaggeration. The beliefs of those citizens are entirely protected by the Free Exercise Clause, and by those aspects of the Establishment Clause that do not relate to government acknowledgment of the Creator. Invocation of God despite their beliefs is permitted not because nonmonotheistic religions cease to be religions recognized by the Religion Clauses of the First Amendment, but because governmental invocation of God is not an establishment. Justice Stevens fails to recognize that in the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling "excluded"; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication as a *people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority. It is not for this Court to change a disposition that accounts, many Americans think, for the phenomenon remarked upon in a quotation attributed to various authors, including Bismarck, but which I prefer to associate with Charles de Gaulle: "God watches over little children, drunkards, and the United States of America."[43]

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A third example involved, like *Lee v. Weisman*, religion in public schools. In *Edwards v. Aguillard*, the Court struck down Louisiana's Creationism Act, which outlawed the teaching of evolution in public schools unless it was accompanied by the teaching of "creation science," on the ground that "[t]he preeminent purpose of the Louisiana legislature was clearly to advance the religious viewpoint that a supernatural being created humankind."[44] This prompted Justice Scalia to respond by saying (among many other things):

> [T]he difficulty of knowing what vitiating purpose one is looking for is as nothing compared with the difficulty of knowing how or where to find it. For while it is possible to discern the objective "purpose" of a statute (*i.e.*, the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fund-raising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for the *sole purpose* of even a single legislator is probably to look for something that does not exist.[45]

Again, it is hard to imagine a law student who is able, after reading this, to recite the "secular purpose" requirement without thinking of drunk legislators.

As noted, Justice Scalia left his mark clearly and prominently in the third category of cases, having to do with accommodations of religion. His opinion in *Smith* is regarded by many—most, probably—of the most eminent First Amendment scholars as horribly and harmfully wrong. The case has been called a "travesty,"[46] a "tragedy,"[47] and a "sweeping disaster for religious liberty"[48] that "turned the constitutional law of religion nearly upside down."[49] As mentioned earlier, Congress (and, later, many states) tried to reverse or at least mitigate the effects of *Smith* through religious-accommodation statutes like the Religious Freedom Restoration Act.

The challenging task of deciding when and how to accommodate religious believers by exempting them from generally applicable laws is better left to elected officials, whose determinations are revisable, than to unelected judges, whose calculations are entrenched.

In fact, though, Justice Scalia's ruling is better grounded in history and tradition than his critics contend.[50] The *Smith* rule does not reflect at all a view that religious exercise is not worthy or in need of special protection and respect. Instead, Justice Scalia's argument is that the challenging task of deciding when and how to accommodate religious believers by exempting them from generally applicable laws is one that necessarily involves balancing costs, benefits, and risks and so is better left to elected officials, whose determinations are revisable, than to unelected judges, whose calculations are entrenched. He is, in fact, quite explicit in his opinion in urging officials to accommodate religious exercise and observes that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation[.]"[51] After all, when governments and officials take advantage of the "ample room" that our Constitution leaves for religious accommodations,[52] it acts in accord with what the Court more than 60 years ago called "the best of our traditions."[53]

During the quarter-century after *Smith* was decided, Justice Scalia voted consistently to reject constitutional challenges to legislative accommodations.[54] In the 1994 *Kiryas Joel* case, for example, which struck down a New York effort to accommodate special-needs children in a Hasidic community, he dissented and wrote:

> The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar. The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an "establishment" of the Empire State. And the Founding Fathers would be astonished to find that the Establishment Clause—which they designed "to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters"...—has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect. *I*, however, am *not* surprised. Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion.[55]

He interpreted post-*Smith* religious-accommodations statutes generously, in favor of those seeking exemptions.[56] He insisted that the Free Exercise Clause does not permit laws that target or discriminate against religiously motivated conduct.[57] And he joined a unanimous landmark ruling in *Hosanna-Tabor v. EEOC* that the Religion Clauses do not permit the government to interfere, through the application of employment-discrimination and other laws, with the right of religious institutions to decide who will be their ministers.[58]

It is true, and Justice Scalia acknowledged, that his approach to religious accommodations is a risky one. As the late-19th century campaign against the LDS Church shows, and as the growing hostility to traditionalists' opposition to same-sex marriage

confirms, there is no guarantee that legislatures and voters will accommodate religious exercise to the extent they should, especially when those being burdened are unfamiliar or unpopular, but—in Scalia's view, anyway—"that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[59]

Conclusion

Justice Scalia not only wrote many opinions about religion, but also was well known for and deeply committed to his own. For many seeking to integrate their religious faith and commitments responsibly and authentically with their vocations to public service and legal practice, he was a role model. Although he sat at the pinnacle of his profession for three decades, and although he was seen as one of the nation's most prominent and accomplished Roman Catholics, and although his thought and writing were praised, criticized, and carefully engaged by millions, he was humble enough to desire to be regarded a "fool[] for Christ's sake."[60] *Requiescat in pace.*

Endnotes

Introduction

1. *See, e.g.*, Speech by Justice William H. Brennan, Jr. at Georgetown University *in* Originalism: A Quarter-Century of Debate 55 (2007) (Steven G. Calabresi, ed.).
2. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 61–62 (2010) (Kagan's response to questions from Sen. Patrick Leahy), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf.
3. 554 U.S. 570 (2008).
4. *Id*. at 636.
5. Justice Stevens would not be considered a champion of originalism. In fact, he gave a speech in 1985 responding to Attorney General Edwin Meese's call for a "Jurisprudence of Original Intention," arguing that attempting to understand the original public meaning of constitutional provisions written 200 years ago would be too difficult. Justice John Paul Stevens, *Speech Before the Federal Bar Association* (Oct. 23, 1985) *in* The Great Debate: Interpreting Our Written Constitution 27 (Federalist Society ed., reprinted ed. 2005).
6. 541 U.S. 36 (2004).
7. 132 S. Ct. 945 (2012).
8. Blakely v. Washington, 542 U.S. 296 (2004); Joan Biskupic, American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia 289 (2009).
9. 504 U.S. 555, 577 (1992).
10. 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in the judgment).
11. 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting).
12. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); Salazar v. Buono, 559 U.S. 700, 729 (2010) (Scalia, J., concurring in the judgment).
13. Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting); Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).
14. 494 U.S. 872 (1990).
15. The *Smith* decision led to passage of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.
16. *Smith*, 494 U.S. at 890.
17. 163 U.S. 537 (1896).
18. *King*, 135 S. Ct. at 2500–01 (Scalia, J., dissenting).
19. 532 U.S. 661, 691 (2001) (Scalia, J., dissenting).
20. 518 U.S. 515 (1996).
21. Nikki Schwab, *A Scalia Dissent Once Ruined Ruth Bader Ginsburg's Weekend*, U.S. News & World Report (April 18, 2014), http://www.usnews.com/news/blogs/washington-whispers/2014/04/18/a-scalia-dissent-once-ruined-ruth-bader-ginsburgs-weekend.
22. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (internal citations omitted).
23. Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 398–99 (1993) (Scalia, J., dissenting) (internal citations omitted).
24. 135 S. Ct. 2584, n.22 (2015) (Scalia, J., dissenting).

Justice Scalia's Originalism and Formalism: The Rule of Criminal Law as a Law of Rules

1. 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, 23, 38 (Amy Gutmann ed., 1997).
2. *See id.* at 40–42.
3. Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).
4. Scalia, *supra* note 1, at 25.
5. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1175 (1989).
6. Blakely v. Washington, 542 U.S. 296, 313 (2004) (Scalia, J., majority opinion) (responding to Justice Breyer's dissent).
7. Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring). He prefaced his concurrence: "I feel the need to say a few words in response to Justice Breyer's dissent. It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State," but "[t]he founders of the American Republic were not prepared to leave it to the State" and its judges. *Id.*

8. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
9. Emphasis added.
10. Crawford v. Washington, 541 U.S. 36, 44–45, 50 (2004).
11. Lilly v. Virginia, 527 U.S. 116, 140–43 (1999) (Breyer, J., concurring); White v. Illinois, 502 U.S. 346, 361–65 (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment).
12. *Crawford*, 541 U.S. at 51.
13. Davis v. Washington, 547 U.S. 813, 826–32 (2006).
14. Giles v. California, 554 U.S. 353 (2008).
15. Michigan v. Bryant, 562 U.S. 344, 361–77 (2011); *id.* at 379 (Scalia, J., dissenting).
16. *See* David A. Sklansky, *Hearsay's Last Hurrah*, 2009 Sup. Ct. Rev. 1, 71–75.
17. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–11 (2009).
18. *Compare id.* at 329 (Thomas, J., concurring), *with* Williams v. Illinois, 132 S. Ct. 2221, 2259–61 (2012) (Thomas, J., concurring in the judgment).
19. Coy v. Iowa, 487 U.S. 1012, 1020–21 (1988).
20. Maryland v. Craig, 497 U.S. 836, 857, 860–61 (1990) (Scalia, J., dissenting).
21. Williams v. New York, 337 U.S. 241, 250–52 (1949); McMillan v. Pennsylvania, 477 U.S. 79, 85–86 (1986).
22. *McMillan*, 477 U.S. at 88.
23. Almendarez-Torres v. United States, 523 U.S. 224, 260 (1998) (Scalia, J., dissenting) (strongly suggesting this argument in invoking the canon of constitutional avoidance); Monge v. California, 524 U.S. 721, 740–41 (1998) (Scalia, J., dissenting) (advancing the argument substantively).
24. 530 U.S. 466, 490 (2000).
25. 542 U.S. 296, 303–05 (2004).
26. United States v. Booker, 543 U.S. 220 (2005).
27. Ring v. Arizona, 536 U.S. 584, 609 (2002).
28. *Blakely*, 542 U.S. at 307.
29. *Id.* at 311 n.13.
30. Harris v. United States, 536 U.S. 545, 567 (2002); Alleyne v. United States, 133 S. Ct. 2151, 2167 (2013) (Roberts, C.J., joined by Scalia & Kennedy, JJ., dissenting).
31. *Alleyne*, 133 S. Ct. at 2155 (majority opinion).
32. Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).
33. Whren v United States, 517 U.S. 806, 813 (1996).
34. Arizona v. Hicks, 480 U.S. 321, 324–27 (1987).
35. Kyllo v. United States, 533 U.S. 27, 34–35 (2001).
36. Florida v. Jardines, 133 S. Ct. 1409, 1414–17 (2013).
37. United States v. Jones, 132 S. Ct. 945, 949–52 (2012).
38. *Compare* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (Kennedy, J., joined inter alia by Scalia, J.) (upholding drug testing of train employees involved in train accidents), *with* Nat'l Treasury Employees Union v. von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (rejecting routine drug testing of Customs officers because of the lack of individualized suspicion).
39. Maryland v. King, 133 S. Ct 1958, 1980 (2013) (Scalia, J., dissenting).
40. *Id.* at 1989.
41. Arizona v. Gant, 556 U.S. 332, 335 (2009) (expressly crediting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment); *id.* at 351–54 (2009) (Scalia, J., concurring)).
42. *Id.* at 351–54 (Scalia, J., concurring).
43. *Jones*, 132 S. Ct. at 957 (2012) (Alito, J., concurring in the judgment).
44. Callins v. Collins, 510 U.S. 1141 (1994) (Scalia, J., concurring in denial of certiorari).
45. Kennedy v. Louisiana, 554 U.S. 407, 447 (2008) (Alito, J., joined by Roberts, C.J. and Scalia and Thomas, JJ., dissenting) (child rape); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (mentally retarded); Roper v. Simmons, 543 U.S. 551, 607 (2005) (Scalia, J., dissenting) (16- and 17-year-olds).
46. Walton v. Arizona, 497 U.S. 639, 656–57, 664 (1990) (Scalia, J., concurring in part and concurring in the judgment).
47. Harmelin v. Michigan, 501 U.S. 957, 966–85 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.).
48. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899 (2011).

49. Miller v. Alabama, 132 S. Ct. 2455, 2477 (2012) (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ., dissenting); Graham v. Florida, 560 U.S. 48, 97 (2010) (Thomas, J., joined by Scalia & Alito, JJ., dissenting).
50. United States v. R.L.C., 503 U.S. 291, 308–09 (1992) (Scalia, J., concurring in part and concurring in the judgment).
51. Antonin Scalia, *Associated Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1990).
52. *E.g.*, United States v. O'Hagan, 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part); *R.L.C.*, 503 U.S. at 307 (Scalia, J., concurring in part and concurring in the judgment); *see also* Holloway v. United States, 526 U.S. 1, 20 (1999) (Scalia, J., dissenting) (finding that statute unambiguously favored defendant but arguing in the alternative that any ambiguity should be construed in favor of defendant); Smith v. United States, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting) (same); Moskal v. United States, 498 U.S. 103, 131–32 (1990) (Scalia, J., dissenting) (same).
53. *R.L.C.*, 503 U.S. at 307 (Scalia, J., concurring in part and concurring in the judgment).
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55. Johnson v. United States, 135 S. Ct. 2551, 2555–57 (2015); Sykes v. United States, 564 U.S. 1, 28 (2011) (Scalia, J., dissenting); James v. United States, 550 U.S. 192, 228–32 (2007) (Scalia, J., dissenting) (suggesting this possibility without yet embracing it).
56. Skilling v. United States, 130 S. Ct. 2896, 2935 (2010) (Scalia, J., concurring in part and concurring in the judgment).
57. Hudson v. Michigan, 547 U.S. 586, 591, 594–99 (2006).
58. Lafler v. Cooper, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting); *see also* Missouri v. Frye, 132 S. Ct. 1399, 1414 (2012) (Scalia, J., dissenting); Padilla v. Kentucky, 559 U.S. 356, 388 (2010) (Scalia, J., dissenting).
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Scalia Yells *Stop*: Standing Athwart History to Protect the Separation of Powers

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9. Transcript, *supra* note 7, at 54.
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11. King v. Burwell, 135 S. Ct. 2480 (2015).
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13. *Id.* at 1:09.
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15. *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting).
16. Opinion Announcement, *supra* note 12, at 7:45.
17. Jeffrey Rosen, *John Roberts*, Atlantic (Nov. 2012), http://www.theatlantic.com/magazine/archive/2012/11/john-roberts/309131/ ("Engaging in what Marshall's archrival, Thomas Jefferson, called a 'twistification,' [in the first challenge to Obamacare, NFIB v. Sebelius] Roberts joined the conservatives in rejecting the mandate's legality according to Congress's power to regulate interstate commerce, but joined the liberals in upholding the mandate as an expression of Congress's power to levy taxes.").
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19. *Id.* at 9:20.
20. *Id.* at 9:15.
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25. Tony Mauro, *Hugs and Harangues: Inside the Court for the Health Care Ruling*, Law.com (June 25, 2015), http://www.law.com/sites/articles/2015/06/25/hugs-and-harangues-inside-the-court-for-the-health-care-ruling/?slreturn=20160701085739.
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30. NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014).
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33. *Id.* at 18–19 (emphasis added).
34. *Id.* at 19.
35. *Id.* at 20.
36. *Id.* (emphasis added).
37. *Id.* at 22 (emphasis added).
38. *Id.* (emphasis added).
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41. *Id.*
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47. *Noel Canning*, 134 S. Ct. at 2577.
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49. *Id.* at 2592 (Scalia, J., concurring).
50. *Id.*
51. *Id.* at 2597 (quoting Bowsher v. Synar, 478 U.S. 714, 722 (1986)).
52. *Id.* at 2597–98 (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2009) (internal citation omitted)).
53. *Id.* at 2610. *See* U.S. Const. art. II, § 3 ("[The President] may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper....").
54. *Noel Canning*, 134 S. Ct. at 2610 (emphasis added).
55. *Id.* (quoting I.N.S. v. Chadha, 462 U.S. 919, 959 (1983)).
56. David G. Savage, *Justice Scalia: Americans "Should Learn to Love Gridlock,"* L.A. Times (Oct. 5, 2011), http://articles.latimes.com/2011/oct/05/news/la-pn-scalia-testifies-20111005.
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Justice Scalia, Religious Freedom, and the First Amendment

* Research assistance was provided by Oliver Coughlin, a second-year student at Notre Dame Law School.

1. Mark Sherman, *Supreme Court Leans Left in Term Unsettled by Scalia's Death*, Associated Press (June 28, 2016) (quoting Steven Shapiro, national legal director for the American Civil Liberties Union).
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3. *See, e.g.*, Nicole Hemmer, *A Weapon for Discrimination: Indiana's New Law Shows How Concerns over "Religious Freedom" Can Lead to Discrimination*, U.S. News (Mar. 31, 2015).
4. President William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993 (Nov. 16, 1993), *available at* http://www.presidency.ucsb.edu/ws/?pid=46124.
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10. *See*, e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. Haw. L. Rev. 385 (2000).
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13. *See, e.g.*, Richard S. Myers, *The Virtue of Judicial Humility*, 13 Ave Maria L. Rev. 207 (2015).
14. Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 Cardozo L. Rev. 1815 (2011).
15. Bruce Allen Murphy, *Justice Antonin Scalia and the "Dead" Constitution*, N.Y. Times (Feb. 14, 2016).
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18. *See supra* note 2.
19. Lemon v. Kurtzman, 403 U.S. 602 (1971).
20. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring).
21. This description of the categories is adapted from Richard W. Garnett, *Chief Justice Rehnquist, Religious Freedom, and the Constitution*, *in* The Constitutional Legacy of William H. Rehnquist 1 (Bradford P. Wilson, ed., 2015).
22. *See, e.g.*, Richard W. Garnett, *American Conversations With(in) Catholicism*, 102 Mich. L. Rev. 1191 (2004).
23. Employment Div. v. Smith, 494 U.S. 872, 879 (1990).
24. Holt v. Hobbs, 135 S. Ct. 853 (2015).
25. Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring).
26. Senator Daniel Patrick Moynihan memorably asked, "What will they do with atlases, which are maps in books?"
27. Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985).
28. 536 U.S. 639 (2002). For a detailed account of this transition, see Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 Tex. Rev. L. & Pol. 301 (2000).
29. It should be noted that Justice Scalia was an important player in the articulation of the Court's doctrine on "standing" and on the extent to which that doctrine has been relaxed or ignored in the Establishment Clause context. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), and Hein v. Freedom from Religion Foundation, Inc., 551 U.S. 587 (2007) (Scalia, J., concurring).
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52. Corp. of Presiding Archbishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987).
53. Zorach v. Clauson, 343 U.S. 306, 314 (1952).
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56. *See, e.g.*, *Holt*, 135 S. C.t. at 867; Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).
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