

# The Jurisprudence of Justice Scalia: A Critical Appraisal

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## I. INTRODUCTION

I am not a fan of Justice Antonin Scalia's work on the United States Supreme Court. When the Justice Scalia fan club is formed, I'm not joining. Since I'm liberal and he's conservative, this is hardly a surprise. But my dislike for Justice Scalia's jurisprudence is much greater than an ideological disagreement. To be blunt, there is a disingenuousness to Justice Scalia's decision-making and a meanness to his judicial rhetoric that I believe are undesirable and inappropriate.

In this paper, I want to make three points. First, Justice Scalia's approach to the Religion Clauses is unduly restrictive and would leave little constitutional protection for either free exercise or the Establishment Clause. Second, Justice Scalia's jurisprudence is founded on the premise that the Supreme Court should decide cases without Justices making value choices.<sup>1</sup> I believe that this is impossible and that Justice Scalia, and all the Justices, constantly and inevitably make value choices in deciding constitutional cases. What disturbs me about Justice Scalia's jurisprudence is that by denying that it is making value choices, it pretends that its decisions are a result of a neutral judicial methodology. As a result his value choices are not defended, but rather hidden behind a claim that the results have been discovered not chosen.

Justice Scalia's unique contribution to constitutional theory has been his jurisprudence of "original meaning."<sup>2</sup> His central idea is that the meaning of the Constitution is fixed and that it is discoverable by looking at the text and the practices at the time the Constitution was written. I argue below that this is an undesirable method of constitutional interpretation and one that Justice Scalia uses selectively when it leads to the conservative results he wants, but ignores when it does not generate the outcomes he desires.<sup>3</sup>

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<sup>1</sup> See *infra* notes 22-29 and accompanying text.

<sup>2</sup> See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

<sup>3</sup> See *infra* notes 37-52 and accompanying text.

Third, Justice Scalia's opinions are distinctive because of his frequent sarcasm and pointed attacks on his colleagues.<sup>4</sup> No doubt, this makes his opinions among the most interesting to read and to teach. Justice Scalia writes superbly and uses far more colorful language, far more frequently than anyone else on the Supreme Court. But I am greatly distressed by the message that his sarcasm and that his attacks on other Justices transmit to law students and to attorneys about how it is appropriate to speak and to talk to one another in judicial settings.

No one would deny Justice Scalia's great intellect or the passion with which he holds and expresses his views. But these enormous strengths should not hide the fact that Justice Scalia's method for interpreting the Constitution and the rhetoric of his opinions are very troubling.

## II. JUSTICE SCALIA ON THE RELIGION CLAUSES: LITTLE IS LEFT

As Professor Kathleen Sullivan demonstrates in her elegant paper, Justice Scalia very narrowly interprets both the Free Exercise Clause and the Establishment Clause and leaves little room for judicial protection under either.<sup>5</sup> Ultimately, Justice Scalia would leave to the political process both the protection of free exercise of religion and the safeguards of the Establishment Clause. Justice Scalia's views on the Free Exercise Clause have gained support from a majority of the Court, but his position on the Establishment Clause never has gained the necessary five votes.

Justice Scalia's approach to the Free Exercise Clause was adopted in *Employment Division, Department of Human Resources v. Smith*, in which the Court expressly and dramatically changed the law of the clause.<sup>6</sup> *Smith* involved a challenge by Native Americans to an Oregon law prohibiting use of peyote, a hallucinogenic substance. Specifically, individuals challenged the state's determination that their religious use of peyote, which resulted in their dismissal from employment, was misconduct disqualifying them from receipt of unemployment compensation benefits.

Justice Scalia, writing for the majority, rejected the claim that free exercise of religion required an exemption from an otherwise valid law. Scalia said that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."<sup>7</sup> Scalia thus declared

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<sup>4</sup> See *infra* notes 71-83 and accompanying text for a long list of examples.

<sup>5</sup> See Kathleen Sullivan, *Justice Scalia and the Religion Clauses*, *infra* 22 U. HAW. L. REV. 449 (2000).

<sup>6</sup> 494 U.S. 872 (1990).

<sup>7</sup> *Id.* at 878-89.

“that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability of the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>8</sup>

Justice Scalia’s opinion then reviewed the cases where Free Exercise Clause challenges had been upheld and said that none involved Free Exercise Clause claims alone. All involved “the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, . . . or the right of parents to direct the education of their children.”<sup>9</sup> The Court said that *Smith* was distinguishable because it did not involve such a “hybrid situation,” but was a free exercise claim “unconnected with any communicative activity or parental right.”<sup>10</sup>

Moreover, the Court said that the line of cases preventing the government from denying benefits to those who quit their jobs for religious reasons applied only in the context of the denial of unemployment benefits;<sup>11</sup> it did not create a basis for an exemption from criminal laws. Scalia wrote that “[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.”<sup>12</sup>

The Court expressly rejected the use of strict scrutiny for challenges to neutral laws of general applicability that burden religion. Justice Scalia said that “[p]recisely because ‘we are a cosmopolitan nation made up of people of almost every conceivable religious preference,’ and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.”<sup>13</sup> The Court said that those seeking religious exemptions from laws should look to the democratic process for protection, not the courts.

*Smith* radically changed the test for the Free Exercise Clause. Strict scrutiny was abandoned for evaluating laws burdening religion; neutral laws of general applicability only have to meet the rational basis test, no matter how much they burden religion. For instance, prior to *Smith*, if a county had a law prohibiting all consumption of alcoholic beverages, there is no doubt that a free exercise exemption could have been obtained by a priest who wanted to use wine in communion or a Jewish family that wanted to use wine at a

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<sup>8</sup> *Id.* at 879 (citation omitted).

<sup>9</sup> *Id.* at 881 (citations omitted).

<sup>10</sup> *Id.* at 882.

<sup>11</sup> *See id.* at 872. *See, e.g.,* *Sherbert v. Verner*, 374 U.S. 398 (1963) (state may not deny benefits to those who quit jobs for religious reasons).

<sup>12</sup> *Smith*, 494 U.S. at 884.

<sup>13</sup> *Id.* at 888 (citation omitted).

Sabbath or Seder dinner. Yet, after *Smith*, it is clear that the priest or the Jewish family would lose in their free exercise claim. The prohibition of the consumption of alcohol is a neutral law of general applicability; it applies to all in the county and was not motivated by a desire to interfere with religion.

Justice Scalia has also emphasized deference to majoritarianism in his interpretation of the Establishment Clause of the First Amendment. To my knowledge, in his almost fourteen years on the Court, Justice Scalia has never voted in favor of an Establishment Clause claim or against the government in an Establishment Clause case. Justice Scalia's very narrow reading of the Establishment Clause is evident in his dissenting opinion in *Lee v. Weisman*.<sup>14</sup> In *Lee*, the Court declared unconstitutional clergy-delivered prayers at public school graduations. Justice Kennedy, writing for the Court, said that "the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here . . . . The State's involvement in the school prayers challenged today violates these central principles [of the Establishment Clause.]"<sup>15</sup>

But Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, vehemently dissented and disagreed with the view that there was anything coercive about a clergy-delivered prayer at a public school graduation.<sup>16</sup> Scalia said that even if a student did feel subtly coerced to stand during the prayer, this was acceptable because "maintaining respect for the religious observance of others is a fundamental civic virtue that government . . . can and should cultivate."<sup>17</sup> For Scalia, the prohibition of prayer constitutes impermissible hostility to religion. He wrote:

The reader has been told much in this case about the personal interest of [the plaintiffs], and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is not that, and has never been. . . . But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.<sup>18</sup>

Under Justice Scalia's approach, little ever will violate the Establishment Clause.<sup>19</sup> The Free Exercise Clause would be violated under this approach

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<sup>14</sup> 505 U.S. 577 (1992).

<sup>15</sup> *Id.* at 586-87.

<sup>16</sup> *See id.* at 632 (Scalia, J., dissenting).

<sup>17</sup> *Id.* at 638 (Scalia, J., dissenting).

<sup>18</sup> *Id.* at 645 (Scalia, J., dissenting).

<sup>19</sup> Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123, 134. Professor Sherry argues that the coercion test "makes the Establishment Clause redundant. Any

only by the government creating its own church, or by force of law requiring religious practices, or by favoring some religions over others. Justice Scalia ignores the importance of the Establishment Clause in preventing the government from making those of other religions feel unwelcome and keeping the government from using its power and influence to advance religion or a particular religion.<sup>20</sup> Justice O'Connor expressed this view when she wrote:

An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.<sup>21</sup>

Thus, Justice Scalia takes an extremely narrow view of the protections of both the Free Exercise Clause and the Establishment Clause. As to both, he emphasizes deference to majoritarian government decision-making. He gives no weight to the need for the judiciary to enforce these clauses, especially to protect those of minority religions.

### III. JUSTICE SCALIA'S PHILOSOPHY OF VALUE-FREE ORIGINAL MEANING: WHEN IT SERVES HIS CONSERVATIVE AGENDA

#### A. *The Scalia Philosophy*

The core of Justice Scalia's judicial philosophy is that judges deciding constitutional cases should discover the answers in external sources; judges must not make value choices. Among his most explicit expressions of this view was in his opinion in *Michael H. v. Gerald D.*<sup>22</sup> In rejecting the claim of a biological father to visit his child, Justice Scalia argued that the general tradition of protecting parental rights is irrelevant. He declared:

Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. The need, if arbitrary

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government action that coerces religious belief violates the Free Exercise Clause." *Id.* Subsequent to the symposium and completion of this article, the Court decided *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), in which Justice Scalia joined a plurality opinion written by Justice Thomas which would allow government aid to parochial schools, including for religious instruction, so long as the government treats all religions equally.

<sup>20</sup> For an excellent criticism of the accommodation approach, see Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988).

<sup>21</sup> *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 627-28 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

<sup>22</sup> 491 U.S. 110 (1989).

decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference. . . . Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.<sup>23</sup>

Similarly, in *Stanford v. Kentucky*, the Court upheld the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen years of age as permissible under the Eighth Amendment.<sup>24</sup> Justice Scalia wrote for the Court and stated that to declare this unconstitutional would be to impose "our personal preferences" and "to replace judges of the law with a committee of philosopher-kings."<sup>25</sup>

Justice Scalia has expressed this view in other cases<sup>26</sup> and in a book, *A Matter of Interpretation: Federal Courts and the Law*.<sup>27</sup> In it he expressly rejects the idea of a "Living Constitution."<sup>28</sup> He argues that the meaning of the Constitution is "static" and writes:

As soon as discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that this is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy.<sup>29</sup>

Justice Scalia argues instead for a constitutional jurisprudence based on "original meaning." He carefully distinguishes this from an approach that searches for "original intent." He is clear that he is not searching for or relying upon the Framers' intent.<sup>30</sup> He writes: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."<sup>31</sup>

How is this original meaning found? Justice Scalia's book does not elaborate an answer, but his many decisions indicate that Justice Scalia looks to the text of the Constitution and to practices that existed at the time the Constitution was ratified. For instance, in *Printz v. United States*,<sup>32</sup> the Court declared unconstitutional the Brady Handgun Prevention Act,<sup>33</sup> and held that

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<sup>23</sup> *Id.* at 127 n.6.

<sup>24</sup> 492 U.S. 361 (1989).

<sup>25</sup> *Id.* at 379 (plurality opinion).

<sup>26</sup> *See, e.g.,* *Burnham v. Superior Court*, 495 U.S. 604 (1990).

<sup>27</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

<sup>28</sup> *Id.* at 41-44.

<sup>29</sup> *Id.* at 45.

<sup>30</sup> *See id.* at 38.

<sup>31</sup> *Id.*

<sup>32</sup> 521 U.S. 898 (1997).

<sup>33</sup> 18 U.S.C. § 922 (1998).

forcing state and local law enforcement personnel to conduct background checks before issuing permits for firearms violates the Tenth Amendment.

Justice Scalia, writing for the majority, said that “[b]ecause there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of the Court.”<sup>34</sup> Justice Scalia began by reviewing the experience in early American history and found that there was no support for requiring states to participate in a federal regulatory scheme. As to history, Justice Scalia said that Congress, in the initial years of American history, did not compel state activity and since “early Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.”<sup>35</sup>

Similarly, in other cases, Justice Scalia expressly bases his understanding of “original meaning” on the practices that occurred at the time the relevant constitutional provision was adopted. For instance, in *McIntyre v. Ohio Elections Commission*, Justice Scalia dissented from the Court’s holding unconstitutional a law that prohibited the distribution of anonymous campaign literature.<sup>36</sup> Justice Scalia focuses on the practices at the time the Constitution was written in urging upholding of the Ohio law.

### B. A Critique

There are thus two key, albeit interrelated, aspects to Justice Scalia’s judicial philosophy: an emphasis on judges discovering and not imposing values, and a search for the Constitution’s original meaning. I consider each in turn.

#### 1. *The impossibility of value neutral judging*

Is it possible that Justice Scalia really is, as he argues, simply “discerning” the results in constitutional cases, rather than dictating them? Is it mere coincidence that in virtually every case Justice Scalia discerns from the Constitution the conclusion is consistent with his conservative personal ideology? Justice Scalia, for example, discerns from the Constitution a strict prohibition of affirmative action,<sup>37</sup> no protection for abortion rights,<sup>38</sup>

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<sup>34</sup> *Printz*, 521 U.S. at 905.

<sup>35</sup> *Id.*

<sup>36</sup> 514 U.S. 334 (1995).

<sup>37</sup> See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring).

<sup>38</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 979-1002 (1992) (Scalia, J., dissenting).

permissibility of school prayer,<sup>39</sup> strong protection for states and state sovereign immunity,<sup>40</sup> condemnation of unwed mothers and fathers,<sup>41</sup> and so on. It leads one to believe that the original meaning of the Constitution and the Republican platform are remarkably similar.

Yet, as I argue below in criticizing the philosophy of original meaning, in these cases Justice Scalia is very much making a personal value choice and then invoking the history that he wants to support it. Consider affirmative action as an example. Justice Scalia's writings emphasize the importance of judicial deference to democratic decision-making.<sup>42</sup> Yet, in the area of affirmative action, Justice Scalia shows no deference to majoritarian decision-making; he is consistent in his willingness to strike down affirmative action even when it is approved by popularly elected legislatures.<sup>43</sup> But he does not justify this, and cannot justify it, based on his philosophy of original meaning. No one would doubt that the original meaning of the Equal Protection Clause was to benefit African-Americans, not white males, and there is overwhelming historical evidence that affirmative action was widespread around the time that the Fourteenth Amendment was adopted.<sup>44</sup> Yet here, where history does not support his conclusions, Justice Scalia ignores it. Justice Scalia has simply imposed his conservative ideology which opposes affirmative action to strike down the acts of the democratic process.

Consider as another example Justice Scalia's consistent votes in favor of protecting state sovereign immunity.<sup>45</sup> Justice Scalia finds in the Constitution a broad principle of sovereign immunity that protects state governments from suit in federal and state courts. He obviously cannot base this on the text of the Constitution. The Eleventh Amendment only prevents a state from being sued in federal court by citizens of other states and there is no constitutional provision that protects states from being sued by their own citizens.<sup>46</sup>

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<sup>39</sup> See *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting).

<sup>40</sup> See *Printz v. United States*, 521 U.S. 898 (1997); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627 (1999).

<sup>41</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>42</sup> See SCALIA, *supra* note 27, at 44-46.

<sup>43</sup> See, e.g., *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

<sup>44</sup> For an excellent detailing of the extent of affirmative action at this time, see Stephen A. Siegel, *The Federal Government's Power to Enact Color Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. REV. 477 (1998).

<sup>45</sup> He wrote the majority opinion in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 627 (1999); he elaborated his views in *Pennsylvania v. Union Gas*, 491 U.S. 1, 42 (1989) (Scalia, J., concurring in part and dissenting in part); he was in the majority in cases such as *Alden v. Maine*, 527 U.S. 706 (1999); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); and *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000).

<sup>46</sup> In *Alden v. Maine*, 527 U.S. 706 (1999), the Supreme Court held that state governments



Instead, Justice Scalia must base this conclusion on the premise that states had sovereign immunity prior to the adoption of the Constitution and the original meaning was to preserve this. There are huge problems with this conclusion from the perspective of a theory of original meaning. First, it ignores the text of the Constitution, specifically the Supremacy Clause. The Constitution, in Article VI, says that the Constitution is the supreme law of the land. Yet, Justice Scalia finds a principle nowhere stated in the Constitution, sovereign immunity, to be higher than the Constitution itself. A state cannot be sued for violating the Constitution because of its sovereign immunity. Yet, Chief Justice John Marshall, long ago, declared:

If any one proposition could command the universal assent of mankind, we might expect it would be this – that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. . . . The nation, on those subjects on which it can act, must necessarily bind its component parts.<sup>47</sup>

Second, the original meaning of the Constitution is unclear as to sovereign immunity. Certainly, it is possible to point to some evidence as to the importance of sovereign immunity. But there is equal, and likely better, historical evidence that the original meaning was not to protect sovereign immunity. Justice Souter has explained:

There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable. Whether one looks at the period before the framing, to the ratification controversies, or to the early republican era, the evidence is the same. Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common-law power defeasible, like other common-law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common-law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it. Natural law thinking on the part of a doubtful few will not, however, support the Court's position.<sup>48</sup>

In other words, Justice Scalia cannot claim to have simply discovered sovereign immunity in the original meaning of the Constitution. As a conservative he has the traditional conservative desire to protect state governments and enforce federalism. He has made a value choice to favor

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cannot be sued in state court without their consent. Justice Kennedy wrote the majority opinion, which Justice Scalia joined.

<sup>47</sup> *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

<sup>48</sup> *Alden*, 527 U.S. at 764 (Souter, J., dissenting).

state government immunity over state government accountability, but he hides it in the language of original meaning.

Consider one more example of Justice Scalia unquestionably making exactly the kind of value judgments that he purports to disavow: drug testing. In 1989, in *National Treasury Employees Union v. Von Raab*, Justice Scalia wrote a passionate dissent from the Supreme Court's approval of random drug testing for customs' workers.<sup>49</sup> Justice Scalia emphasized how the Fourth Amendment was meant to eliminate random searches based on general warrants and required individualized suspicion.<sup>50</sup> But in 1995, Justice Scalia wrote the majority opinion in *Vernonia School District v. Acton*, approving random drug testing for high school athletes.<sup>51</sup> Justice Scalia justified this latter ruling by arguing that high school students have a minimal expectation of privacy and that the intrusion of random testing is justified by the schools' interest in combatting drug abuse. This unquestionably is a value judgment, not a conclusion based on the original meaning of the Constitution, which Scalia persuasively argued in *Von Raab* disapproves random drug testing.

My point is a basic one, and one made long ago by the Legal Realists and one that I would think is virtually universally accepted. Justices deciding constitutional cases inevitably must make value choices. The Constitution's text does not answer the vast majority of constitutional cases and, as argued below, there almost never is an original meaning waiting to be found. Moreover, inevitably in constitutional cases Justices must decide whether the government's action is justified by a sufficient purpose. This balancing, such as determining whether there is an important or a compelling interest, inescapably requires a value choice by the Justice.

The great danger is that by pretending that by denying that value choices are being made the value judgments never get defended. The majority opinions, such as in all the recent sovereign immunity decisions, turn into a battle of historical evidence. The real question, how state government immunity should be weighed against state government accountability, never gets expressly discussed even though that is the key issue in the cases.

A response to my criticism could be that Justice Scalia, at times, follows his interpretive methodology even when it leads to results inconsistent with a conservative's likely beliefs. For instance, he voted that flag burning is constitutionally protected<sup>52</sup> and that the right to confrontation must be

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<sup>49</sup> 489 U.S. 656 (1989) (Scalia, J., dissenting).

<sup>50</sup> *See id.* The Court declared constitutional, over Justice Scalia's vehement dissent, random drug testing for those applying for positions or promotions in the federal Customs Service. *See id.*

<sup>51</sup> 515 U.S. 646 (1995).

<sup>52</sup> *See Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

preserved even in child abuse cases.<sup>53</sup> What is striking, however, is that all of these instances that I can identify occurred in his first few years on the Court. I cannot think of a single instance since the early 1990s in which Justice Scalia seemed to follow his interpretive methodology in a constitutional case where it would lead to other than the conservative result.

I, of course, am not criticizing Justice Scalia for making value choices in deciding cases. Every member of the Court inescapably must do so in constitutional cases. Rather, my objection is that Justice Scalia is outspoken in denying that is what he is doing and by failing to admit what is actually happening he avoids defending the value choices made.

## 2. *The philosophy of original meaning*

Justice Scalia emphasizes that the meaning of the Constitution is static and that Justices should follow the “original meaning” behind constitutional provisions. Since he disavows a search for the Framers’ intent, the evidence he looks to is historical practices at the time the Constitution was adopted. I believe that there are enormous problems with this as a jurisprudential philosophy.

First, the search for original meaning in contemporaneous practices assumes that the Constitution sought to codify those particular behaviors. Yet, there is no basis for this assumption. Even if a particular practice was universal at the time the constitutional provision was drafted and ratified, that still does not establish that the Constitution was meant to enshrine that behavior. It certainly is possible that the Framers might have wanted to embody a specific practice in the Constitution, but it also is possible that the Framers wanted the constitutional provision to disapprove the practice or that the Framers simply did not think one way or another about the specific practice when they adopted the particular constitutional provision.

Consider as an example a case where the Supreme Court’s majority opinion focused on original meaning: *Wilson v. Arkansas*, which concerned whether the police must knock and announce before searching dwellings.<sup>54</sup> Justice Thomas wrote the opinion for the Court in which Justice Scalia joined. Justice Thomas’ majority opinion expressly followed the philosophy of original meaning and said that the answer to the constitutional issue is to be found in the contemporaneous practices that existed in 1791. After reviewing this history, Justice Thomas’ majority opinion concluded that “knock and announce” is a constitutional requirement because it was the practice in 1791 except when there were exigent circumstances.

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<sup>53</sup> See *Maryland v. Craig*, 497 U.S. 836 (1990) (Scalia, J., dissenting).

<sup>54</sup> See *Wilson v. Arkansas*, 514 U.S. 927 (1995).

It is conceivable that those drafting the Fourth Amendment had this common law rule in mind and wanted to include it in the Constitution. It also is plausible that they thought that the exceptions were too broad and that by enacting the Fourth Amendment they wanted to disapprove the on-going practice. And it also is possible that the Framers and ratifiers of the Fourth Amendment were not thinking about “knock and announce” at all. The existence of a practice tells nothing by itself as to its relationship to a constitutional provision.

Nor are practices soon after the enactment of the provision necessarily useful in determining its meaning. It certainly is possible that subsequent practice reflects the Framers’ understanding of what was constitutionally permissible under the new provision. But it also is possible that the Framers meant the amendment to outlaw the practice, but the political realities were that in governing they saw no alternative but to engage in the forbidden behavior. There is a fundamental difference between constituting a government and governing. The choices made in creating a government may not necessarily be reflected in governing. The Alien and Sedition Act of 1798 might be indicative that the Framers of the First Amendment, many of whom were still in Congress, meant to allow punishment of seditious libel. But it also might mean that those with political power and an incentive to use it acted differently than when they were creating the government.

It seems even more dubious to rely on the absence of a practice in the first Congresses to establish a constitutional limit. In *Printz v. United States*, Justice Scalia’s majority opinion stressed the absence of Congressional compulsion of states in the early Congresses as evidence of the meaning of the Tenth Amendment and the scope of Congress’ powers.<sup>55</sup> There are countless reasons why the federal government did not require state action then, including they did not think of the possibility, or they thought that their goals could best be achieved by direct federal action, or they sought to establish the federal government’s own authority, to act or political pressures at the time prevented specific mandates. To infer rejection of Congressional power from inaction is to assume the truth of one explanation to the exclusion of all others. The absence of a particular practice at a specific time does not mean that those then in power thought it unconstitutional. There are many explanations for why a type of law was not used at a given moment.

Second, the search for original meaning in contemporaneous practices assumes a unanimity or near unanimity, about what was occurring at the time of the ratification of the Constitution. As to most issues, this rarely was present. The result is that the Court simply looks back and finds some practices to support the conclusions it wants to reach. More than a quarter of

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<sup>55</sup> See *Printz v. United States*, 521 U.S. 898, 905-09 (1997).

a century ago, Alfred Kelly complained of what he called “law office” history practiced by the Supreme Court.<sup>56</sup> Practices often varied. The Court picks and chooses from its reading of history and selects those practices that confirm the conclusion that it wants for each. The Court purports that history is the basis for the discovery of its conclusion, when in reality history seems to be no more than a part of the justification for conclusions reached on other grounds.

A powerful example of this is a series of Supreme Court decisions according judges absolute immunity to suits for money damages.<sup>57</sup> The Supreme Court has based its holding of absolute immunity largely on its view that judges historically had absolute immunity at common law in 1871 when § 1983 was adopted. Yet, a closer look at history reveals that judges had absolute immunity in only thirteen of thirty-seven states that existed in 1871.<sup>58</sup>

The point is that Justice Scalia, and others who follow the philosophy of original meaning, look at history out of its context to support a particular conclusion. They tend to use history when it offers that support and ignore it when it doesn't. Consider Justice Scalia's approach to equal protection. He is a vehement critic of affirmative action, consistently finding it unconstitutional.<sup>59</sup> He also emphasized original meaning in his sole dissent in *United States v. Virginia*, in arguing that Virginia should be able to exclude women from the Virginia Military Institute.<sup>60</sup> From these cases, one gets the sense that Justice Scalia sees the original meaning of the Equal Protection Clause was to protect white males.

Yet, a far more persuasive argument can be made that the original meaning of the Equal Protection Clause was to help African-Americans. For example, legal historian, Professor Stephen Siegel has powerfully documented that the historical practices around the time of the ratification of the Fourteenth Amendment strongly support the constitutionality of affirmative action.<sup>61</sup> Yet for all his purported devotion to history as the guide for original meaning, Justice Scalia never mentions this history because it does not support his vehement opposition to affirmative action.

Third, it is not desirable to have the modern world governed by the practices of a vastly different time over 200 years ago. A commitment to following

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<sup>56</sup> See Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

<sup>57</sup> See, e.g., *Mireles v. Waco*, 502 U.S. 9 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978).

<sup>58</sup> See Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 326-27 (1969). See also J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 899.

<sup>59</sup> See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring); *Bush v. Vera*, 517 U.S. 952, 999-1003 (1996) (Scalia, J., concurring in the judgment).

<sup>60</sup> See *United States v. Virginia*, 518 U.S. 515, 566-601 (1996) (Scalia, J., dissenting).

<sup>61</sup> See Stephen A. Siegel, *The Federal Government's Power to Enact Color Conscious Laws: An Originalist Inquiry*, 92 NW. L. REV. 477 (1998).

contemporaneous historical practices would lead to abhorrent conclusions. Justice Brennan explained this when he stated:

[D]uring colonial times, pillorying, branding, and cropping and nailing of the ears were practiced in this country. Thus, if we were to turn blindly to history for answers to troubling constitutional questions, we would have to conclude that these practices would withstand challenge under the cruel and unusual clause of the [E]ighth [A]mendment.<sup>62</sup>

Under Justice Scalia's philosophy of original meaning *Brown v. Board of Education*<sup>63</sup> was clearly wrongly decided.

The same Congress that approved the Fourteenth Amendment also voted to segregate the District of Columbia public schools.<sup>64</sup> Similarly, under Justice Scalia's philosophy of original meaning, as expressed in his scathing dissent in *United States v. Virginia*, there is no constitutional protection for women under the Equal Protection Clause. There is no evidence that the drafters of the Equal Protection Clause sought to protect women from discrimination and in the 19th century discrimination against women was endemic.<sup>65</sup> I believe that any philosophy of constitutional interpretation that tells us that *Brown* was wrongly decided or that women are not protected under the Equal Protection Clause is simply unacceptable.

Moreover, for so many constitutional cases, there is no original meaning to be found. An example of the absurdity of the search for original meaning where none exists can be found in a decision from last Term in which Justice Scalia joined Justice Thomas' majority opinion: *Florida v. White*.<sup>66</sup> The issue is whether a warrantless seizure of an automobile violates the Fourth Amendment. Justice Thomas began his legal analysis by stating: "In deciding whether a challenged governmental action violates the Fourth Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed."<sup>67</sup> He then goes on and describes a broad automobile exception to the Fourth Amendment's warrant requirement.

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<sup>62</sup> William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 327 (1986).

<sup>63</sup> 349 U.S. 249 (1954).

<sup>64</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 360 (1986). This legislation was later declared unconstitutional in *Bolling v. Sharpe*, 347 U.S. 497 (1954). *But see* Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that the Framers of the Fourteenth Amendment did intend to desegregate public schools).

<sup>65</sup> See, e.g., *The Slaughter-House Cases*, 83 U.S. 36, 81 (1872) (stating that the Equal Protection Clause was meant only to protect racial minorities and never would be extended beyond this).

<sup>66</sup> 526 U.S. 559 (1999).

<sup>67</sup> *Id.* at 563.

What relevance is original meaning in deciding First Amendment issues such as whether the government can prohibit indecent speech over the internet<sup>68</sup> or how the government can regulate commercial speech<sup>69</sup> or what types of campaign finance regulation reform are permissible.<sup>70</sup> All of these involve issues about which there is just no original meaning to be found. The only way to find an original meaning would be to state it at such a high level of abstraction that it could be invoked to support any conclusion the Court wants to arrive at.

Justice Scalia's purported search for original meaning provides little constraint on his decision-making. That is why, almost without exception, he can follow his original meaning philosophy and come to the conservative results he prefers. Another Justice could follow original meaning and use it to justify liberal results. Justice Scalia's constitutional jurisprudence falsely assumes an ascertainable original meaning that can be determined from historical practices and wrongly assumes that it should control modern constitutional decision-making.

#### IV. THE RHETORIC OF JUSTICE SCALIA'S OPINIONS

No Justice in Supreme Court history has consistently written with the sarcasm of Justice Scalia. No doubt, this makes his opinions among the most entertaining to read. He has a great flair for language and does not mince words when he disagrees with a position. But I think that this sends exactly the wrong message to law students and attorneys about what type of discourse is appropriate in a formal legal setting and how it is acceptable to speak to one another.

Examples of this abound. Consider a few. In dissenting opinions he describes the majority's approaches as "nothing short of ludicrous" and "beyond absurd"<sup>71</sup>, "entirely irrational"<sup>72</sup> and not "pass[ing] the most gullible scrutiny."<sup>73</sup> He has declared that a majority opinion is "nothing short of preposterous" and that it "has no foundation in American constitutional law and barely pretends to."<sup>74</sup> He talks about how "one must grieve for the

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<sup>68</sup> See *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>69</sup> See *Greater New Orleans Broadcasting v. United States*, 527 U.S. 123 (1999).

<sup>70</sup> See, e.g., *Nixon v. Shrink Missouri PAC*, 120 S. Ct. 897 (2000) (upholding state law limiting contributions to political candidates).

<sup>71</sup> *Lee v. Weisman*, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting).

<sup>72</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 684 (1990) (Scalia, J., dissenting).

<sup>73</sup> *Morgan v. Illinois*, 504 U.S. 719, 748 (1992) (Scalia, J., dissenting).

<sup>74</sup> *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting).

Constitution" because of a majority's approach.<sup>75</sup> He calls the approaches taken in majority opinions "preposterous"<sup>76</sup> and "ridiculous" and "so unsupported in reason and so absurd in application [as] unlikely to survive."<sup>77</sup> He speaks of how a majority opinion "vandalizes . . . our people's tradition."<sup>78</sup>

Perhaps most famously, in *Webster v. Reproductive Health Services*, he pointedly attacked Justice O'Connor for not joining him in overruling *Roe v. Wade* and said that her position "cannot be taken seriously."<sup>79</sup> He talks about how her opinion "preserves a chaos that is evident to anyone who can read and count."<sup>80</sup> He describes how "irrational is the new concept that Justice O'Connor introduces into the law" and complains that her approach is "the least responsible."<sup>81</sup>

In other cases, he says that he must "respond to a few of the more outrageous arguments in today's majority opinion, which it is beyond human nature to leave unanswered."<sup>82</sup> He describes majority opinions as "nothing less than Orwellian" and talks about how he is "appalled" by majority approaches.<sup>83</sup>

My question is a simple one: is this how we want to teach law students to speak in their briefs and in courts? One of the primary audiences for Supreme Court opinions is law students. The message that they take from reading Justice Scalia's opinions is that this is an acceptable way to characterize positions with which they disagree and to talk about their adversaries.

In some of these opinions, I agree with Justice Scalia's conclusions, in others I disagree. Nothing is gained substantively or rhetorically by calling a colleague's position "appalling" or "ludicrous" or "ridiculous." But in all of them, his sarcasm and his dismissive rhetoric are enormously troubling to me. At a time, when the bar is rightly increasingly concerned about civility among lawyers, Justice Scalia sets exactly the wrong example.

## V. CONCLUSION

Justice Scalia has served on the Court since 1986 and now is in his fifteenth full Term. Undoubtedly, he is a hero to conservatives and a villain to liberals.

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<sup>75</sup> *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

<sup>76</sup> *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 735 (1994) (Scalia, J., dissenting).

<sup>77</sup> *Grady v. Corbin*, 495 U.S. 508, 542, 543 (1990) (Scalia, J. dissenting).

<sup>78</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 163 (1994) (Scalia, J., dissenting).

<sup>79</sup> *Webster v. Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

<sup>80</sup> *Id.* at 535.

<sup>81</sup> *Id.* at 537.

<sup>82</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

<sup>83</sup> *Id.* at 995, 998.



Yet, if it is possible to put ideology aside, I'd suggest that Justice Scalia should be criticized by all – conservatives as well as liberals – for the constitutional philosophy he espouses which hides rather than defends value choices and for the tone and rhetoric of his opinions.

