

## WILL THE REAL JUSTICE SCALIA PLEASE STAND UP?

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How will history judge Justice Antonin Scalia? He is well-known for scathing dissents and fiery rhetoric as well as his strong advocacy for textualism and originalism. His constant public rant that the Constitution is “dead, dead, dead”<sup>1</sup> has become a mantra for his textual and historical approach to constitutional law. For example, in his recent dissent in *Obergefell v. Hodges*, the same-sex marriage case, he claimed to be so offended by the majority’s “living Constitution” approach that he said the following: “A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.”<sup>2</sup>

Justice Scalia’s rejection of judicially created rights and limitations that do not have strong textual or historical support is a narrative that should not, however, hold up over time. His entire body of work reflects a Justice who loudly, proudly, and repeatedly calls for textualism and originalism but who in reality decides cases the same way as those judges who self-avowedly believe in a living and flexible Constitution. Over and over, where Justice Scalia’s policy goals are important enough, he leaves textualism and originalism far behind.

Of course, no Justice can be perfectly—or perhaps even mostly—consistent. But, given the extremism with which Justice Scalia claims to be a textualist and originalist, and the harsh critiques of his fellow Justices for failing to live up to those ideals, Justice Scalia should at least be reasonably consistent in adhering to the method he urges so strongly. Still, he has not been. Moreover, if even Justice Scalia cannot consistently adhere to a textual and historical approach to constitutional interpretation, maybe that failure says something important about how judges should approach constitutional cases.

This Essay describes just some of the many areas of constitutional law where Justice Scalia has reached out far beyond the Constitution’s text and history to adopt legal rules and limitations that are inconsistent with both. It turns out that, with the exception

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1. Chris Gentilviso, *Scalia: Constitution Is ‘Dead, Dead, Dead’*, HUFFINGTON POST (Jan. 29, 2013, 1:50 PM), [http://www.huffingtonpost.com/2013/01/29/scalia-constitution\\_n\\_2574902.html](http://www.huffingtonpost.com/2013/01/29/scalia-constitution_n_2574902.html).

2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting).

of a few rights disfavored by Justice Scalia (abortion,<sup>3</sup> gay rights,<sup>4</sup> and substantive due process in general<sup>5</sup>), he quite consistently rules in favor of plaintiffs challenging governmental decisions regardless of whether text or history justify those results—and often where both text and history, taken seriously, would even preclude those results.

### I. FEDERALISM

In his Tenth and Eleventh Amendment jurisprudence, Justice Scalia ignores unambiguous text when limiting the powers of the federal government. The Tenth Amendment clearly states that Congress can only exercise those powers enumerated in the Constitution<sup>6</sup> while the Supremacy Clause is equally clear that, when it does so, Congress' authority is plenary absent the violation of another constitutional provision.<sup>7</sup> This reading of the plain text of the Constitution goes all the way back to the landmark commerce clause case *Gibbons v. Ogden*<sup>8</sup> written by Chief Justice John Marshall in 1824.<sup>9</sup>

In *New York v. United States*,<sup>10</sup> and again in *Printz v. United States*<sup>11</sup> (the latter of which Justice Scalia wrote), however, the Court adopted an anti-commandeering limitation on Congress' enumerated powers that prevents Congress from requiring state legislatures and state executives to implement federal law<sup>12</sup> (this rule perplexingly does not apply to state judges<sup>13</sup>). Such a rule has no basis in the text of the Constitution (the Tenth Amendment and the Supremacy Clause) and is inconsistent with specific statements by the founding fathers that Congress could render the states "auxiliary" to the enforcement of federal laws.<sup>14</sup> In other words, the Justices, including Scalia, simply made the rule up. The anti-commandeering principle may be excellent public policy (and thus fair game for judges who believe in a flexible, living Constitution) by ensuring the proper balance between the states and the federal government, but the rule is not based on the text or history of our Constitution.<sup>15</sup>

Justice Scalia's Eleventh Amendment jurisprudence is also famously anti-textual. The Eleventh Amendment states that the

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3. See *Planned Parenthood v. Casey*, 505 U.S. 833, 979–80 (1992) (Scalia, J., concurring in part and dissenting in part).

4. See *Lawrence*, 539 U.S. at 594, 602–03 (Scalia, J., dissenting).

5. See *Michael H. v. Gerald D.*, 491 U.S. 110, 121–22 (1989).

6. U.S. CONST. amend. X.

7. U.S. CONST. art. VI, cl.2.

8. 22 U.S. 1 (1894).

9. *Id.* at 30–31.

10. 505 U.S. 144 (1992).

11. 521 U.S. 898 (1997).

12. *New York*, 505 U.S. at 188; *Printz*, 521 U.S. at 935.

13. See *Printz*, 521 U.S. at 906–07.

14. THE FEDERALIST NO. 27, at 147 (Alexander Hamilton) (Am. Bar Ass'n ed., 2009).

15. See ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 75–78 (2008).

judicial power of the United States does not “extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of *another* State, or by Citizens or Subjects of any Foreign State.”<sup>16</sup> Justice Scalia has interpreted the word “another” to mean the “same,” and thus has prohibited suits for damages under federal law against a state by its own (not “another” state’s) citizens.<sup>17</sup> And lest anyone think that he interpreted an unambiguous word (another) to mean its opposite (the same) on the basis of old precedent (the 19th century *Hans* decision<sup>18</sup>), Justice Scalia has said that “the Eleventh Amendment was important not merely for what it said but for what it reflected,”<sup>19</sup> and that “behind the words of the constitutional provisions are postulates which limit and control.”<sup>20</sup> If this sounds a lot like *Griswold*’s “penumbras and emanations”<sup>21</sup> approach that Justice Scalia has ridiculed and called “garbage,”<sup>22</sup> that’s because it is substantially the same method of constitutional interpretation.

## II. FIRST AMENDMENT

Since he took the bench, Justice Scalia has consistently voted to strike down campaign finance reforms, including those restricting corporations.<sup>23</sup> Yet, as an original matter, corporations only had those rights given to them by the states. Justice Rehnquist detailed this history in *First National Bank v. Bellotti*<sup>24</sup> and argued that, where political expression is not a necessary component of their business, corporations do not have First Amendment rights to engage in such expression where there is a countervailing state interest.<sup>25</sup>

Perhaps aware of this history, Justice Scalia said the following in his concurring opinion in *Citizens United*: “Even if we thought it proper to apply the dissent’s approach of excluding from First Amendment coverage what the Founders disliked, and even if we agreed that the Founders disliked founding-era corporations; modern corporations might not qualify for exclusion.”<sup>26</sup> Why not? Because

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16. U.S. CONST. amend. XI (emphasis added).

17. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31–34 (1989) (Scalia, J., concurring in part and dissenting in part).

18. *Hans v. Louisiana*, 134 U.S. 1 (1890).

19. *Union Gas Co.*, 491 U.S. at 31.

20. *Id.* at 32 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934)).

21. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

22. Adam Serwer, *Scalia on Privacy: ‘Blah Blah Blah, Garbage’*, MSNBC (Oct. 3, 2013, 4:55 AM), <http://www.msnbc.com/the-last-word/scalia-privacy-blah-blah-blah-garbage>.

23. See *Citizens United v. FEC*, 558 U.S. 310, 385 (2010) (Scalia, J., concurring) (striking down provisions of the Bipartisan Campaign Reform Act of 2002); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (striking down statutory aggregate limits on how much money a donor may contribute in total to all political candidates or committees, because this violated the First Amendment).

24. 435 U.S. 765, 822–28 (1978) (Rehnquist, J., dissenting).

25. *Id.* at 828 (Rehnquist, J., dissenting).

26. *Citizens United*, 558 U.S. at 387 (Scalia, J., concurring).

corporations have changed dramatically? Perhaps, but that is a classic living Constitution approach.

Justice Scalia has never in his campaign finance opinions tried to demonstrate that the Founding Fathers would have privileged the free speech rights of corporations over important and valid corruption (and, for that matter, equality) concerns. In a hugely important area of law that goes to the very core of our democracy, Justice Scalia has voted to strike down statute after statute (after statute) without persuasively demonstrating that text or history require that result.<sup>27</sup>

### III. AFFIRMATIVE ACTION

Justice Scalia has also voted to strike down affirmative action statutes on the ground that the Constitution requires color-blindness (as opposed to operating as an anti-caste provision).<sup>28</sup> Not once, however, has he examined the history of the Fourteenth Amendment to determine if this alleged principle of color-blindness is consistent with the original meaning of that provision.<sup>29</sup> If he had done so, he would have discovered that at the time the Fourteenth Amendment was ratified there were federal laws giving benefits to blacks and only blacks.<sup>30</sup> There is no reasonable argument that as a purely historical matter the Fourteenth Amendment prohibits any and all racial preferences.

As far as text is concerned, the Amendment makes no mention of race, much less racial preferences designed to further equality. And, as I have written elsewhere:

It is certainly plausible to read the word “equal” to prohibit any and all racial preferences, even those designed to foster racial equality. However, it is *equally* plausible to read the words “equal” and “laws” to justify race-based remedies that further the equality promised by the Fourteenth Amendment but sabotaged by almost 100 years of segregation, Jim Crow, and other governmental institutions designed for the express

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27. See *Citizens United*, 558 U.S. 310 (Scalia, J., concurring); *McCutcheon*, 134 S. Ct. 1434; *Davis v. FEC*, 554 U.S. 724 (2008) (holding that the “Millionaires’ Amendment” of the Bipartisan Campaign Reform Act of 2002, which relaxed limits on fundraising and spending coordination in favor of candidates running against self-financed (“millionaire”) candidates, was unconstitutional).

28. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring).

29. Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 74, 76 & n.17 (2013) (describing how Justice Scalia thoroughly explained his view of the unconstitutionality of affirmative action, yet “engaged in little discussion of the history of the Fourteenth Amendment” in his sole concurrence in *City of Richmond v. J.A. Croson Co.*); see also *J.A. Croson*, 488 U.S. at 520–21.

30. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (“From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks.”).

purpose of denying equality to African-Americans (such as the federal government backing billions of dollars of private mortgages from the 1940's to the early 1960's with well over ninety percent going to white families). In other words, the words "equal" and "laws" can be easily (perhaps even persuasively) interpreted to embrace, not prohibit, race-based measures enacted to *prevent* the kind of caste society the Fourteenth Amendment was supposed to abolish.<sup>31</sup>

In his affirmative action cases, Justice Scalia ignores original meaning completely and just assumes without any support that the word "equal" requires color-blindness across the spectrum of government decision-making despite a long history that suggests just the opposite.<sup>32</sup> This is judging by policy preference, not text and history.

#### IV. STANDING

Perhaps the biggest giveaway of all that Justice Scalia does not take either text or history seriously when he feels there are countervailing considerations is his dogmatic approach to Article III standing. The jurisdiction of the federal courts as outlined in Article III of the Constitution is predicated on the existence of either a "case" or a "controversy."<sup>33</sup> There is no debate that advisory opinions fall outside Article III as both a textual and historical matter.<sup>34</sup> But, Justice Scalia has dogmatically and emphatically insisted that every plaintiff in every federal case must suffer a unique personal injury.<sup>35</sup> This injury requirement keeps many public interest actions out of court<sup>36</sup> (a policy result Justice Scalia seems to like).

Justice Scalia has always defended the personal injury requirement on a policy basis (it furthers the separation of powers) without ever trying to ascertain the original meaning of Article III.<sup>37</sup> If he did, he would discover that "strangers to the court" were allowed at common law, and there is no evidence the Framers intended to alter that practice.<sup>38</sup> This conclusion that personal injury is not a constitutional requirement imposed by Article III was embraced by no less a conservative figure than Raoul Berger in his seminal article, *Standing to Sue in Public Actions: Is It a Constitutional*

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31. Eric J. Segall, *The Constitution According to Justices Scalia and Thomas: Alive and Kickin'*, 91 WASH. U. L. REV. 1663, 1666–67 (2014).

32. *Id.*; see also *J.A. Croson Co.*, 488 U.S. at 520–21 (Scalia, J., concurring in the judgment).

33. U.S. CONST. art. III, § 2, cl. 1.

34. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

35. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

36. M. Ryan Harmanis, Note, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729, 736 & n.40 (2015).

37. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

38. See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 279–86 (2008).

*Requirement?*<sup>39</sup> Moreover, Justice Harlan reached the identical conclusion in his dissenting opinion in *Flast v. Cohen*.<sup>40</sup>

In sum, Justice Scalia has never tried to establish that so-called “public actions” brought to vindicate the public interest are barred by the original meaning of Article III, and they are certainly not barred by its text (conventionally understood). Yet, he has consistently used a personal injury requirement to slam the courthouse doors to important lawsuits challenging governmental practices.<sup>41</sup> This may further the separation of powers and be good judicial policy, but compelling plaintiffs in all federal cases to establish personal injury is not required by text or history.

#### V. FOURTH AMENDMENT

Justice Scalia has, at times, pretty much conceded in his own opinions that he believes the Constitution’s text can mean something very different today than it meant yesterday (in other words, the Constitution is alive, alive, alive, not dead, dead, dead). For example, in *Minnesota v. Dickerson*,<sup>42</sup> the question was whether the Fourth Amendment allows the police to seize contraband during a search permissible under *Terry v. Ohio* (which held that searches incident to arrest to discover weapons are valid<sup>43</sup>). The Court held that the search in *Dickerson* was “unreasonable” and violated the Constitution because the officer felt for contraband in the defendant’s pocket, which the officer had already searched for weapons.<sup>44</sup>

Justice Scalia wrote a concurring opinion containing this typical refrain: “I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification.”<sup>45</sup> Therefore, Justice Scalia said, the right to be free from “unreasonable searches and seizures,” must be construed in light of what those words meant when the Constitution was ratified. Justice Scalia then went back to first principles suggesting that he was unsure whether the *Terry* rule was a proper interpretation of the original meaning of the Fourth Amendment. He doubted that “the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to

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39. Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 827 (1969).

40. 392 U.S. 83, 120 (1968) (Harlan J., dissenting).

41. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see also *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661-63 (2013) (unanimous).

42. 508 U.S. 366, 368 (1993). The following perspective on Scalia’s originalism and *Dickerson* was first offered in Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 398–400 (1995). See also Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 428–29 (1998).

43. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

44. *Dickerson*, 508 U.S. at 378.

45. *Id.* at 379 (Scalia, J., concurring).

such indignity.”<sup>46</sup> Justice Scalia then went on, however, to articulate a flexible approach to that question consistent with a “living Constitution.” He said that, “even if a ‘frisk’ prior to arrest would have been considered impermissible in 1791 . . . perhaps it is only since that time that concealed weapons capable of harming the interrogator quickly . . . have become common— which might alter the judgment of what is ‘reasonable’ under the original standard.”<sup>47</sup> In other words, even if the Framers had specifically considered the legality of protective frisks prior to arrest, and even if they had decided that such frisks were illegal, the same issue may be decided differently by later judges because of changes since the Constitution was adopted. But if, according to Justice Scalia, the interpretation of the word “unreasonable” to a given set of facts can change, why can’t the meaning of phrases like “cruel and unusual punishments,” “equal protection,” “liberty,” and “due process,” also change? He has never provided any kind of answer (principled or otherwise) to that question.

#### CONCLUSION

Justice Scalia ended his biting and scathing dissent in *Obergefell v. Hodges* as follows:

Hubris is sometimes defined as o’erweening pride; and pride, we know, goeth before a fall. The Judiciary is the “least dangerous” of the federal branches because it has “neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm” and the States, “even for the efficacy of its judgments.” With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the “reasoned judgment” of a bare majority of this Court—we move one step closer to being reminded of our impotence.<sup>48</sup>

As this essay has shown, however, Justice Scalia time and time again has acted aggressively to replace the value judgments of the states and Congress without demonstrating that text or history required that decision. Across broad and important areas of constitutional law including campaign finance reform, affirmative action, federalism, separation of powers, and justiciability, Justice Scalia has simply imposed his own policy views on the “people” on questions “properly left to them.”

There is no “hubris” in reasonable disagreement among judges and scholars about the meaning of the Constitution’s vague provisions. But there is enormous “hubris” when a Supreme Court Justice makes repeated, bold, and unprofessional claims against fellow Justices in the face of identical behavior by the Justice making

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46. *Id.* at 381 (Scalia, J., concurring).

47. *Id.* at 382 (Scalia, J., concurring).

48. 135 S. Ct. 2584, 2631 (2015) (Scalia, J., dissenting).

the accusations. In other words, Justice Scalia has no standing to call others out (especially as loudly and as often as he does) for privileging policy over law when he does it all the time himself. Hopefully, history will judge Justice Antonin Scalia accordingly.