

JUSTICE ACCOSTED: A REVIEW OF BRUCE ALLEN MURPHY'S *SCALIA: A COURT OF ONE*

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I. NINO V. THE NINOPATH	396
II. WHY SCALIA IS NOT THE "FRAUD" LIBERALS LIKE TO THINK HE IS ...	400

America's increasingly polarized political culture takes a toll on many things. Bruce Allen Murphy's *Scalia: A Court of One*¹ offers a small but telling illustration.

Murphy's thesis is simply stated: Scalia—the arch-conservative Supreme Court Justice liberals love to hate—is a bully, an attention-hound, and a hypocritical fraud who (thank goodness!) has not been particularly effective on the Court because of his uncompromising ideological rigidity and his intemperate personal attacks on his fellow Justices.

What I find most instructive is not that such an overtly negative, Rita-Skeeter-ish-type² biography should be written, but how favorably it has been reviewed.

Thus, Kevin J. Hamilton praises the book in a review for the *Seattle Times* as “a terrific start to understanding Justice Scalia and his impact on American constitutional law.”³ Paul M. Barrett, writing in the *San Francisco Chronicle*, lauds Murphy's “fair-minded biography.”⁴ Glenn C. Altschuler gushes in the *Boston Globe* that the book “delivers a withering as-

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1. BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* (2014) [hereinafter Murphy].

2. An allusion, of course, to the scandal-loving, fact-twisting, poison-pen author of *The Life and Lies of Albus Dumbledore* in the *Harry Potter* tales of J. K. Rowling. For more on this “enchantingly nasty” character, see J. K. Rowling, *HARRY POTTER AND THE GOBLET OF FIRE* 303–07 (2000) and J. K. ROWLING, *HARRY POTTER AND THE DEATHLY HALLOWS* 22–28 (2007).

3. Kevin J. Hamilton, “*A Court of One*”: *Justice Scalia, Sociable Friend, Formidable Foe*, *SEATTLE TIMES*, Aug. 11, 2014, (book review), http://seattletimes.com/html/books/2024291574_scaliacourttonexml.html.

4. Paul M. Barrett, *Scalia: A Court of One*, *SAN FRANCISCO CHRONICLE*, June 13, 2014, (book review), <http://www.sfgate.com/books/article/Scalia-A-Court-of-One-by-Bruce-Allen-Murphy-5551650.php>.

sault on its subject.”⁵ Dwight Garner, reviewing the book for the *New York Times*, writes that the “book does not read, despite its blunt criticisms, like a book-length put-down,” but rather as “a sensitive and scholarly reading of Justice Scalia’s intellectual life.”⁶ An anonymous reviewer for *Kirkus Reviews* describes Murphy’s work as a “deeply probing biography” that offers “a thorough, evenhanded study” of its subject.⁷ Dahlia Lithwick, writing in *The Atlantic*, happily opines that in Murphy, Scalia “has met a timely and unintimidated biographer ready to probe,” who “painstakingly reviews the evidence” for Scalia’s patently false claim that “no [judicial] act of his is ever grounded in his personal faith.”⁸ And Andrew Cohen, in a review for *The Week*, gives the book a big thumbs-up for showing what a “striving, conniving political animal” Scalia really is, and confidently predicts that “100 years from now it surely will animate the discussion of Scalia’s place in constitutional history.”⁹

Such reviews tell us more about the uncivil, deeply divided political climate in which we live than they do about the merits of Murphy’s book.

I. NINO V. THE NINOPATH

There are currently two biographies of Justice Scalia, each with distinctive strengths and weaknesses. The first was Joan Biskupic’s *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia*.¹⁰ Biskupic’s book is well-written, balanced, and based on extensive personal interviews with Justice Scalia himself, his family, and colleagues. While critical of Scalia’s positions on issues such as freedom of the press, women’s equality, and *Bush v. Gore*, it offers a generally appreciative portrait of Scalia the man. Biskupic’s book is less helpful, however, on Scalia’s early life, his judicial philosophy, and his intellectual contribution.

Murphy’s biography is longer, more in-depth, and more extensively re-

5. Glenn C. Altschuler, “*Scalia: A Court of One*” by Bruce Allen Murphy, *BOSTON GLOBE*, June 10, 2014, (book review), <http://www.bostonglobe.com/arts/books/2014/06/09/book-review-scalia-court-one-bruce-allen-murphy/I6XBTBaCTwoEvIhuFYdrYK/story.html>.

6. Dwight Garner, *A Justice Alone, Even if Surrounded*, *NEW YORK TIMES*, June 10, 2014, (book review), <http://www.nytimes.com/2014/06/11/books/scalia-a-court-of-one-by-bruce-allen-murphy.html>.

7. *Scalia: A Court of One*, *KIRKUS REVIEWS*, April 10, 2014, (book review), <https://www.kirkusreviews.com/book-reviews/bruce-allen-murphy/scalia/>.

8. Dahlia Lithwick, *Scalia v. Scalia: Does His Faith Influence His Judicial Decision Making?*, *THE ATLANTIC*, (May 21, 2014) (book review), <http://www.theatlantic.com/magazine/archive/2014/06/scalia-v-scalia/361621/>.

9. Andrew Cohen, *Justice Scalia: Sometimes Right, Often Wrong, Never in Doubt*, *THE WEEK*, May 28, 2014, (book review), <http://theweek.com/article/index/262178/justice-scalia-sometimes-right-often-wrong-never-in-doubt#axzz34fnJU2vP>.

10. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* (2009).

searched than Biskupic's, but is less readable and makes no pretense to even-handedness. Murphy, a political science professor at Lafayette College, specializes in thick, tell-all lives of Supreme Court Justices. His earlier biographies of Abe Fortas and William O. Douglas, though valuable and deeply-researched, were sensationalistic and drew speculative, unflattering conclusions that were not always well-supported by the evidence. This book is written in a similar vein.

Unlike Biskupic, Murphy apparently conducted few interviews in researching his subject. Instead, he draws heavily on public sources and archival records, and focuses primarily on Scalia's constitutional decision making during his 28-year tenure on the Supreme Court. The result is a scholarly but sometimes plodding intellectual biography, punctuated at frequent intervals by zestful attacks on Scalia's character and—as Murphy sees it—the nonsensical “original meaning” approach to interpreting the Constitution to which Scalia pays lip-service.

The story Murphy tells is really a tale of two Scalias. As evidenced by his biographies of Fortas and Douglas, Murphy is a firm believer in the power-corrupts school of historiography. What we get, accordingly, is a rise-and-fall story about a pre-power Scalia and a post-power Scalia.

The first tale is a Horatio-Alger story about a boy who made good. Born in Trenton, New Jersey in 1936, and reared for much of his childhood in Queens, “Nino” Scalia was the only child in a pious and intellectual household of big dreams but modest means. His father, Salvatore, immigrated from Sicily as a teenager. Speaking little English when he arrived, Salvatore received a Ph.D. from Columbia University when he was nearly 50 and became a professor of Romance Languages at Brooklyn College. Hard-working and intellectually gifted, Nino finished first in his class in high school and Georgetown, graduated Summa Cum Laude from Harvard Law School, rose quickly in his early career as a corporate lawyer in Cleveland, legal academic at top law schools, and government official in the Nixon and Ford administrations. Along the way, Scalia married his law-school sweetheart, raised a model family of nine children, stayed true to his faith and his principles, was funny, gregarious, and well-liked, and seemed to do everything right. Although Murphy certainly sees seeds of Scalia's later besetting sins in his early career—notably ambition, combativeness, ideological rigidity, and an over-fondness for rules and authority—the general picture is positive and admiring.

As Murphy tells it, a far less attractive Scalia begins to emerge when President Reagan appointed him in 1982 to the U.S. Court of Appeals in Washington, D.C. As a law professor at the University of Chicago, Scalia had teamed with his conservative colleague Frank Easterbrook to revive a “textualist” approach to reading statutes and other legal texts. Roughly, such an approach looks to the original public or conventional meaning of legal texts, rather than to the subjective intentions or purposes of their au-

thors.¹¹ Scalia's commitment to both textualism and judicial restraint immediately put him at odds on the D.C. court with liberal colleagues such as David Bazelon, J. Skelly Wright, and Patricia Wald. Left-leaning law clerks at the court began to refer to Scalia as "the Ninopath" for "his almost pathological unwillingness to bend."¹² But it wasn't until President Reagan appointed Scalia to the U. S. Supreme Court in 1986 that things really begin to go downhill in Murphy's morality tale.

Once on the Court, Scalia becomes nastier and more combative. Increasingly, he issues "Ninograms" and flies into "Ninofits."¹³ Violating "prevailing ethical norms of the Court"¹⁴ against extrajudicial speechmaking, Scalia begins to give provocative speeches "outlining the terms of how he would act in the future,"¹⁵ thereby beginning "the process of politicizing the Court and launching the partisan warfare among the judges."¹⁶ As his arrogance grows, he refuses to recuse himself from cases in which his impartiality is clearly in question,¹⁷ flips rude hand gestures at reporters,¹⁸ and engages in other conduct that make him "the poster child for misbehavior and controversy"¹⁹ on the Court. As time goes on, he increasingly allows his conservative religious beliefs to influence his judicial decisions.²⁰ His grandstanding, acerbic temper, and rigid refusal to compromise make it impossible for him to build effective coalitions with conservative colleagues such as Sandra Day O'Connor and Anthony Kennedy, who, in fact, are driven to the center by his sharply-worded attacks. Though he professes to practice judicial restraint and fidelity to the Constitution's original meaning, his decisions on the Court become more and more obviously political and result-driven.²¹ Finally, the ultimate low point: *Bush v. Gore*.²² Consumed by a desire to become Chief Justice and appalled at the prospect of a Gore presidency with all that would mean for the future of the country and the Court, Scalia betrays all of his professed judicial principles and hands the presidency to Bush in a brazen act of politics that was nothing

11. See Gregory Bassham, *Textualism's Last Stand: A Review of Scalia and Garner's Reading Law*, 39 J. C. & U. L. 211, 212–13 (2013). I will have more to say about Scalia's brand of textualism below.

12. Murphy, *supra* note 1, at 104.

13. *Id.* at 178.

14. *Id.* at 171.

15. *Id.* at 172.

16. *Id.*

17. *Id.* at 298–307.

18. Bassham, *supra* note 11, at 348–50.

19. *Id.* at 350.

20. *Id.* at 362–67.

21. *Id.* at 320, 386.

22. 531 U.S. 98 (2000).

short of a judicial coup d'état.²³

Clearly, we have here all the elements of a classic Hollywood arrogance-of-power thriller. Of course, alert readers might wish to know how Murphy could glean all this merely from the public sources he consulted in researching his subject. And the answer, of course, is that he couldn't. Instead, Murphy far too often substitutes editorializing and amateur psychologizing for sober, responsible scholarship.

Did Scalia violate “prevailing ethical norms” of the Court in making speeches and writing books defending a particular interpretive approach to constitutional decision-making? If he did, then the same charge can be leveled against Justices William Rehnquist,²⁴ William Brennan,²⁵ Stephen Breyer,²⁶ and many other recent members of the Supreme Court.²⁷

Did Scalia's Ninograms and Ninofits drive conservative justices such as Sandra Day O'Connor and Anthony Kennedy towards the middle, effectively leaving Scalia as a “Court of one” and resulting in liberal victories on issues such as abortion, gay rights, and the death penalty? As Seth Stern notes, the real check on Scalia's effectiveness on the Court has probably been his uncompromising originalism, not his personality or his verbal attacks on his colleagues. As Stern says, it is far from “clear whether a cuddler yet equally inflexible Scalia would have done any better at building majorities.”²⁸

Did Scalia covet and actively campaign for the Chief Justiceship after the death of William Rehnquist in 2005? Perhaps. But as Stern notes, Murphy's only evidence for this conclusion—other than his psychic mind-reading powers—is contemporary press speculation fueled by public speeches Scalia gave at the time.²⁹

Murphy's various charges against Scalia strike me as a mixed bag.

23. *Id.* at 270.

24. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 306–19 (1987).

25. William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

26. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* (2010). It is misleading to suggest, as Murphy does, that Scalia spoke specifically about how we would rule in future cases. The great majority of his talks were “stump speeches” in which he discussed in general terms his approach to judging.

27. For a list of books written by Supreme Court Justices, see Ronald Clark, *353 Books by Supreme Court Justices*, SCOTUSblog, <http://www.scotusblog.com/2012/03/351-books-by-supreme-court-justices/>.

28. Seth Stern, *The Conservative Justice Liberals Love to Loathe*, WASH. POST (June 13, 2014), http://www.washingtonpost.com/opinions/2014/06/13/58c8d308-e678-11e3-a86b-362fd5443d19_story.html.

29. *Id.*

Some seem to be pretty well-documented, others are exaggerated, while some are wholly false.³⁰ I do not have space for anything like an adequate discussion of them here. So let me pick just one accusation to examine in detail: that of result-driven judicial activism. Does Scalia, as Murphy and many other liberal critics claim,³¹ often abandon his originalist principles and instead decide cases by resort to his conservative personal or political values? In short, does Scalia practice the very kind of result-oriented activism that he so strongly condemns?

II. WHY SCALIA IS NOT THE “FRAUD” LIBERALS LIKE TO THINK HE IS

To cut to the chase: The answer is “sort of.” No charge of frequent or overt inconsistency can be sustained, but there are aspects of Scalia’s approach to constitutional interpretation that are based on his conservative values and that lend themselves to a certain degree of judicial freewheeling.

Scalia himself has strongly denied that he ever allows his personal values to influence his decisions as a judge. He called Geoffrey Stone’s accusation that his rulings were influenced by his conservative religious beliefs a “damn lie.”³² He also exchanged much-publicized barbs with Judge Richard Posner, who in a sharply critical review of Scalia and Garner’s book, *Reading Law*, suggested that a number of Scalia’s high-profile decisions were motivated by politics, not by his professed originalist methodology.³³ “I often come to decisions I don’t like,” Scalia insists.³⁴ Referring in a speech to his vote in *Texas v. Johnson*³⁵ to strike down laws that ban flag-burning as a political protest, Scalia remarked, “I don’t like scruffy, bearded, sandal-wearing people who go around burning the United States flag.”³⁶ In another speech he stated: “I have my rules that confine me. I’m looking for the original meaning, and when I find it I am handcuffed. I

30. In a series of blogs for *National Review Online*, Ed Whelan has pointed out a number of significant factual errors in Murphy’s book, including a grossly inaccurate description of Scalia’s dissent in the important presidential-powers case, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). See Ed Whelan, *Bruce Allen Murphy’s Scalia: A Court of One* (April 21, 2014), <http://www.nationalreview.com/bench-memos376159/bruce-allen-murphys-scalia-court-one-part-1-ed-whelan>.

31. See, e.g., Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 389–95 (2000); Paul F. Campos, *Why Antonin Scalia is a Fraud*, SALON (Oct. 9, 2012), http://www.salon.com/2012/10/09/why_antoin_scalia_is_a_fraud/ (claiming that “Scalia is an intellectual fraud who uses a phony methodology to get whatever judicial outcomes align with his political preferences”).

32. Murphy, *supra* note 1, at 364.

33. Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012) (book review), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

34. Biskupic, *supra* note 10, at 8.

35. 491 U.S. 397 (1989).

36. *Id.*

cannot do *all* the mean conservative things I would love to do to this society.”³⁷

Scalia freely admits that his voting record on the bench cannot be completely squared with the complex and sophisticated theory of legal interpretation recently set forth in *Reading Law*.³⁸ As we shall see, Scalia’s views on adjudication have evolved somewhat over the years. But his overall record, as Margaret Talbot has noted, “is remarkably free of contradiction.”³⁹

Scalia has described himself as both an “originalist” and a “textualist” when it comes to interpreting the Constitution. He is an originalist because he believes that the Constitution means what it originally meant, and he is a textualist because he looks to the original “public” or “ordinary” meaning of legal texts—what the texts conventionally *say*—rather than to the subjective intentions or purposes of their drafters or adopters. In broad strokes, Scalia’s professed method of constitutional interpretation and adjudication is as follows:

1. In deciding constitutional cases, judges should (ordinarily) seek to discover and apply the “original meaning” of constitutional language. The only exceptions are when there are overriding pragmatic reasons for not applying original meaning, such as a conflict with settled precedent or deference to the ruling of a higher court.⁴⁰
2. As with any legal text, the original meaning of the Constitution is its original public meaning. By “original public meaning,” Scalia means roughly the ordinary or conventional meaning of language, as that language was understood in its original context. More precisely, the original public meaning of a constitutional text is the meaning it would have conveyed to a hypothetical rea-

37. Quoted in Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER (March 23, 2005), at 55.

38. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). Scalia explains these divergences as resulting either from “the demands of stare decisis or because wisdom has come too late.” *Id.*

39. Talbot, *supra* note 37, at 54.

40. For Scalia’s view of the role of *stare decisis* in constitutional decision making, see Scalia & Garner, *supra* note 38, at 411–13; and ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 138–40 (Amy Gutmann ed., 1997) [hereinafter *Interpretation*]. Scalia once described himself as a “faint-hearted originalist” because he would not be willing to apply original meaning if doing so would be too strong a medicine to swallow (as it would be, for instance, if judges were to uphold the constitutionality of flogging as a punishment for crime). Antonin Scalia, *Originalism: The Lesser Evil*, U. CIN. L. REV. 849, 864 (1989). Scalia has since repudiated this view, and now claims he would not strike down a law that authorized flogging. See MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013).

sonable reader at the time the text was enacted.⁴¹ In many cases, the original public meaning of a constitutional provision is clear and unambiguous. If so, no further inquiries are needed; the language must be applied in its original conventional or ordinary meaning. If the language of a constitutional provision is unclear in context, judges should seek to determine and apply the “objectified” public meaning of the provision—that is, the meaning that a reasonable and appropriately informed citizen of the time would have given it.⁴² This search for an objectified meaning may require significant historical research. However, the purpose of the search is not to discover the constitutional equivalent of legislative intent. It doesn’t matter what James Madison or any other framer or ratifier thought a particular constitutional phrase meant or implied. What matters is what linguistically permissible meaning a hypothetical reasonable reader at the time of enactment would have attributed to the phrase. In this way, Scalia hopes to avoid familiar problems with “summing” disparate legislative intentions, or pretending that there was a conscious, shared legislative intent, when the realities of modern lawmaking make this all but impossible.

41. *Interpretation*, *supra* note 40, at 17. I am oversimplifying here. Scalia’s account of original public meaning also involves complexities about what kinds of context can and cannot be consulted by judges in ascertaining original meaning, as well as how judge-made interpretive rules—so-called “canons of construction”—affect meaning. For more on such complexities, see Bassham, *supra* note 11, at 213–16.

42. In his early years on the Court, Scalia frequently stated that judges should consult “tradition” when interpreting vague, abstract, or ambiguous constitutional language. See RALPH A. ROSSUM & ANTONIN SCALIA, JURISPRUDENCE: TEXT AND TRADITION 218 n. 5 (2006) (citing cases). Sometimes when Scalia speaks of “tradition” he seems to be referring both to the original public meaning of a text and to the way *later generations* understood and applied that text. See, e.g., *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting); *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting). Giving later generations a “meaning vote,” as it were, is clearly inconsistent with Scalia’s originalist methodology, and talk of “tradition” has largely dropped out of his more recent discussions of that methodology. One likely area in which Scalia would continue to look to post-enactment tradition is that of substantive due process. Scalia has argued that in deciding which rights should be considered “fundamental” for purposes of due-process analysis, courts should look to “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *Michael H. v. Gerald D.*, 491 U.S. 110, 127n. 6 (1989) (Scalia, J., plurality opinion). It should be noted, however, that Scalia accepts substantive due process only on grounds of *stare decisis*. See Scalia & Garner, *supra* note 38, at 413. Thus, this is not an exception to his view that constitutional meaning is fixed at the time of enactment.

3. In seeking to formulate and apply the original public meaning of constitutional texts, judges are not bound by the “specific intent” or expected applications of those texts. What is binding is what Scalia calls the “import” of constitutional language, the legal principle or rule the language was originally understood to enact.⁴³ Thus, it is irrelevant whether informed Americans in 1868 did not believe that the newly-enacted Equal Protection Clause of the Fourteenth Amendment banned segregated public education. The language of the clause is general and was clearly understood to prohibit state-sponsored discrimination against blacks.⁴⁴ The only time when expected applications are binding is when they are built into the import of constitutional language. In Scalia’s view, this is the case with a number of constitutional provisions, including the Eighth Amendment’s ban on the infliction of cruel and unusual punishments. Since, Scalia argues, the “whole purpose” of a constitution is “to prevent change,”⁴⁵ many abstract or broadly-worded constitutional phrases must be understood more narrowly than their words suggest. Fearing erosion of cherished values and suspicious of judicial activism, the Founders “meant to nail down current rights, rather than aspire after future ones.”⁴⁶ Thus, the Eighth Amendment prohibits only punishments *generally thought to be cruel* at the time the amendment was adopted. Scalia claims that the Equal Protection Clause and the Due Process Clauses also had relatively narrow original meanings that were “well understood and accepted”⁴⁷ at the time of adoption. In such cases, no sharp distinction can be drawn between the

43. *Interpretation*, *supra* note 40, at 144.

44. *See* Scalia & Garner, *supra* note 38, at 87–88.

45. *Id.* at 40.

46. *Id.* at 135. Scalia recognizes that constitutional language is sometimes intentionally elastic. Thus, the Fourth Amendment’s ban on “unreasonable searches and seizures” is not, and was not intended to be, limited to the sorts of searches familiar to Americans in 1791. The Framers deliberately chose language that was broad enough to apply to types of searches they did not, and could not, have foreseen. *See* *Kyllo v. U. S.*, 533 U.S. 27 (2001) (Scalia, J., opinion of the Court) (holding that use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a “search” within the meaning of the Fourth Amendment). Scalia stated in his Senate nomination hearings in 1986 that he believed “that there are some provisions of the Constitution that may have a certain amount of evolutionary content within them.” *Quoted in* Murphy, *supra* note 1, at 130.

47. Scalia & Garner, *supra* note 38, at 85.

“import” of constitutional language and its expected applications.

Now that we have a clear picture of Scalia’s professed originalist methodology, we can ask how consistently he applies it. Is it true that Scalia regularly makes judicial decisions that are fueled more by politics than by principle?

Who is it that accuses Scalia of inconsistency? Interestingly, the charges come from both the left and the right. Let’s start with the latter. The three most common conservative charges are that Scalia: (1) sometimes engages in amateurish, result-driven “law office history” by allowing his conservative values to skew his historical judgments of original public meaning; (2) is too deferential to non-originalist precedent, such as the doctrine that the Fourteenth Amendment “incorporates” most of the Bill of Rights, making those provisions binding on the states; (3) and often adopts “liberal,” non-originalist positions on free-speech cases.

First, the charge of law office history: this was a much-publicized⁴⁸ accusation raised by two prominent conservative judges, Richard Posner and J. Harvey Wilkinson, in connection with Scalia’s majority opinion in *D.C. v Heller*,⁴⁹ the landmark gun-control case, in which the Court ruled for the first time that the Second Amendment protects an individual’s right to own firearms for purposes of self-protection. Wilkinson argued that the decision was not defensible on originalist grounds, because a right to bear arms in self-defense could not be inferred either from the text of the Second Amendment or from a fair historical investigation of the original public meaning or understanding of the text.⁵⁰ Judge Posner went farther, claiming that the historical evidence pretty clearly does *not* support a personal right to bear arms, and that Justice Scalia twisted history in order to arrive at the result that accorded with his conservative preferences.⁵¹

Suppose Wilkinson and Posner are correct in thinking that Scalia got the historical evidence wrong in *Heller*. What follows? Only that originalist approaches like Scalia’s aren’t guaranteed to produce correct answers, even in terms of their own standards of correctness. But isn’t this true of pretty much *any* plausible theory of constitutional interpretation? Only implausible, formalistic theories of constitutional adjudication leave no room for mistaken inferences, inadequate research, or errors of judgment. Unless Wilkinson and Posner can show that Scalia knew or should have known

48. See, e.g., Adam Liptak, *Ruling on Guns Elicits Rebuke from the Right*, NEW YORK TIMES (Oct. 20, 2008), <http://www.nytimes.com/2008/10/21/washington/21guns.html?pagewanted=all>.

49. 554 U.S. 570 (2008).

50. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 267 (2009).

51. Posner, *supra* note 33.

that he was distorting the historical record, no serious charge of inconsistency can be sustained.

A second criticism some conservatives make of Scalia's brand of originalism is that it is overly accommodating of nonoriginalist precedent. For instance, conservative constitutional scholar Ralph Rossum faults Scalia for accepting both incorporationism and a limited doctrine of substantive due process, even though neither can be squared with Scalia's originalism.⁵²

Scalia has made clear that he accepts incorporationism and—to a limited extent—substantive due process only because he considers them entrenched norms so deeply embedded in modern constitutional doctrine as to be effectively irreversible.⁵³ Scalia's acceptance of settled law is part of his general theory of constitutional adjudication, of which originalism is only a part. Rossum's real complaint, therefore, is that Scalia should adopt a *different* theory of constitutional decision making, not that he is unfaithful to the one he has.

A similar response can be made to the charge that Scalia abandons his originalist principles in supporting "liberal" positions on issues such as the constitutionality of bans on politically-motivated flag-burning⁵⁴ and racially-motivated cross-burning.⁵⁵ In point of fact, such decisions are consistent with Scalia's long-held view that "speech," for First Amendment purposes, includes any kind of "communicative activity,"⁵⁶ including expressive conduct. As he sees it, laws that target expressive conduct such as flag-burning or cross-burning "precisely because of its communicative attrib-

52. ROSSUM, *supra* note 42, at 169.

53. *See* Scalia & Garner, *supra* note 38, at 412–13.

54. *Texas v. Johnson*, 491 U.S. 397 (1989) (joining Justice Brennan's opinion for the Court striking down a Texas law that made it a crime to intentionally or knowingly desecrate a state or national flag); *U. S. v. Eichman*, 496 U.S. 310 (1990) (joining Justice Brennan's opinion reaching a similar conclusion regarding a federal statute).

55. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (invalidating a St. Paul ordinance that criminalized cross-burning and other bias-motivated acts). Speech is not the only area in which Scalia consistently adopts "liberal" positions. *See, e.g., Maryland v. King*, 569 U.S. 1958 (2013) (Scalia, J. dissenting) (arguing that Maryland's practice of collecting DNA samples from all persons arrested for serious crimes is unconstitutional); *Crawford v. Washington*, 541 U.S. 36 (2004) (expanding criminal defendants' rights to "confront" hostile witnesses); *Blakely v. Washington*, 542 U.S. 296 (2004) (invalidating mandatory sentencing guidelines that permitted judges to enhance criminal penalties based on facts that were not decided by a jury or admitted by the defendant); *Nat'l Treasury Emp. Union v. Von Raab*, 489 U.S. 656 (1989) (Scalia, J. dissenting) (arguing against the constitutionality of random drug searches for certain employees of the U.S. Customs Service).

56. Senate Confirmation Hearing on the Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States, Aug. 5–6, 1986, at 51, <http://www.loc.gov/law/find/nominations/scalia/hearing.pdf>.

utes”⁵⁷ presumptively violate the First Amendment. This is not a view he defends on originalist grounds. In fact, Scalia rarely delves into issues relating to the original meaning of the Constitution’s freedom of speech and press clauses.⁵⁸ Evidently he considers these as areas of substantially “settled law.”

Let us consider, next, charges of inconsistency frequently made by liberal critics of Justice Scalia. I shall examine four: that Scalia (1) says that he looks for “original meaning” but in reality often privileges “original expected applications;” (2) defends a distinctly non-textualist reading of the Eleventh Amendment; (3) had no proper textualist basis for concluding in *Citizens United*⁵⁹ that corporations are “persons” or that money is “speech;” and (4) blatantly abandoned all of his originalist principles in *Bush v. Gore*.⁶⁰

Many liberal critics accuse Scalia of inconsistency in his treatment of what are called original “expected applications.”⁶¹ As we have seen, Scalia professes to look for the “original meaning” of constitutional texts, not for the “original intentions” of the framers, ratifiers, or citizenry. So, for example, in interpreting the Fourth Amendment’s prohibition on “unreasonable searches and seizures,” the goal is not to determine the adopters’ scope beliefs—the specific acts they believed the Amendment would proscribe—but rather the general principle they understood the Amendment to enact—a principle that, properly understood, may not comport with all of the adopters’ specific expectations. Yet time and again, Scalia does seem to treat original expected applications as decisive.⁶² On the face of it, this is a

57. *Barnes v. Glen Theatre, Inc.*, 501 U. S. 569, 577 (1991) (Scalia, J., concurring).

58. In comments off the Court, Scalia has made clear that he thinks the original meaning of “freedom of speech” is roughly “speech rights generally recognized by the founding generation.” See Lauren Rubenstein, *Justice Scalia Delivers Defense of Originalism at Hugo Black Lecture*, News @ Wesleyan (March 26, 2012), at <http://newsletter.blogs.wesleyan.edu/2012/03/26/scaliahugoblack/>; Laurence Tribe, *Comment*, in *Interpretation*, *supra* note 40, at 79–80 (reporting a similar oral pronouncement). This is consistent with his general view that the Bill of Rights was intended to protect then-recognized rights, not open the door to novel rights. See *Interpretation*, *supra* note 40, at 135.

59. *Citizens United v. Fed. Election Commission*, 558 U. S. 310 (2010) (holding that corporate political speech is protected by the First Amendment).

60. 531 U. S. 98 (2000).

61. See, e.g., Jack M. Balkin, *LIVING ORIGINALISM* 100–01 (2011); Ronald Dworkin, *Comment*, in *Interpretation*, *supra* note 40, at 120–21.

62. See, e.g., Scalia & Garner, *supra* note 37, at 407 (claiming that the Eighth Amendment’s prohibition of cruel and unusual punishments permits any manner of imposing the death penalty “that is less cruel than hanging, which was an accepted manner in 1791”); *Id.* at 400 (arguing that historical inquiry demonstrates that the Second Amendment was understood to guarantee a right to keep and bear arms for personal use, including self-defense); Mark Sherman, *Death Penalty, Abortion, ‘Homosexual*

glaring inconsistency.

We have seen, however, that Scalia believes that with many constitutional texts no sharp distinction can be drawn between original meaning and expected applications. Since, in his view, the whole purpose of a constitution is to prevent change and to nail down existing rights, it would make no sense for the adopters to enact abstract principles that later generations could use to recognize novel rights and to abridge traditional ones. True, the adopters often used broad and general language (“equal protection of the laws,” “freedom of speech,” “due process of law,” “cruel and unusual punishments”), but as with similar phrases in state constitutions, it was well-understood that such language had relatively narrow and precise meanings.

While I have argued elsewhere against this view of original meaning,⁶³ it is by no means wholly implausible. If the Constitution’s “majestic generalities” were understood to enact broad, elastic principles, one would expect to find some evidence of this in early case-law and in the writings of early constitutional commentators such as Joseph Story. What we find, instead, are usually interpretations far narrower than the words suggest.⁶⁴ Such readings were in accordance with then-widely accepted canons of legal interpretation, including the maxim that general language should be construed “equitably” so as not to violate the intent or purpose of the lawmaker.⁶⁵ Moreover, the founding generation was opposed to judicial policymaking,⁶⁶ something that obviously would have been invited had the framers intended their language to be highly abstract or to have evolving

Sodomy’ Are Easy Cases, HUFFINGTON POST (Oct. 5, 2012) (quoting a 2012 speech by Justice Scalia in which he states, “The death penalty? Give me a break. It’s easy. Abortion? Absolutely easy. Nobody ever thought the Constitution prevented restrictions on abortion. Homosexual sodomy? Come on. For 200 years, it was criminal in every state”).

63. See Bassham, *supra* note 11, at 218–28; and Gregory Bassham, *Justice Scalia’s Equitable Constitution*, 33 J. C. & U. L. 143, 164 (2006) [hereinafter *Equitable*].

64. See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) (providing evidence that terms such as “due process,” “privileges and immunities,” and “equal protection of the law” were originally understood much more narrowly than their words might suggest); and JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 1851–1902 (1833) (assigning distinctly narrow meanings to terms like “freedom of speech,” “free exercise of religion,” and “establishment of religion”). Story’s explication of the Establishment Clause is startling to modern ears. On his view, even overt governmental support for Christianity would not constitute an “establishment of religion.” *Id.* at §1867.

65. See William N. Eskridge, Jr., *Textualism, the Unknown ideal?*, 96 MICH. L. REV. 1509, 1523–26 (1998) (book review). Scalia, of course, purports to reject such “equitable” interpretations. I have argued, however, that in practice Scalia often embraces something very similar to an equitable approach. See *Equitable*, *supra* note 63, at 157–63.

66. See Berger, *supra* note 64, at 300–11.

meanings. The fact that only one federal law was declared unconstitutional between 1789 and 1856 is further evidence that original meanings were believed to be narrow.⁶⁷ So, too, is the way that federal and state judges consistently resisted the broad readings of constitutional language urged by opponents of slavery.⁶⁸

The issue here is not whether Scalia is correct in this view of the original public meanings of the Constitution's general phrases, but whether he sticks to that reading consistently. So far as I can see, he does.⁶⁹

Another area in which liberals frequently charge Scalia with inconsistency is that of Eleventh-Amendment state sovereignty jurisprudence.⁷⁰ The Eleventh Amendment, proposed by Congress in 1794 and quickly ratified by the states in 1795, was a repudiation of the Supreme Court's decision in *Chisholm v. Georgia*,⁷¹ permitting States to be sued in federal court by citizens of other States and denying that States are truly "sovereign" in a federalist system of government in which ultimate sovereignty lies with the people. The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to 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." On its

67. I am speaking, of course, of *Marbury v. Madison* (1803) (striking down section 13 of the Judiciary Act of 1789).

68. See generally ROBERT COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975).

69. The one possible exception that sticks out is Scalia's originalist reading of the Equal Protection Clause. He seems to take the view that the Clause, at its core, bans state-sponsored racial discrimination. He acknowledges, however, that the Clause also prohibits denials of equal-protection "on the basis of age, property, sex, 'sexual orientation,' or for that matter even blue eyes and nose rings." *Interpretation, supra* note 40, at 148. This makes it sound like he accepts a fairly abstract reading of the Clause. But this isn't the case. For Scalia immediately adds that in determining the scope of "equal protection" we must stick to the "time-dated" expectations at the time of adoption. *Id.* at 149. Scalia does accept, *on grounds of settled precedent*, certain non-originalist constructions of equal-protection. For example, he acknowledges that the Clause prohibits discrimination in voting rights (*Bush v. Gore*, 531 U. S. 98 (2000)), although this was clearly not the understanding of the adopters. Berger, *supra* note 64, at 52–64. See also *U. S. v. Virginia*, 518 U.S. 515 (1996) (Scalia, J. dissenting) (accepting intermediate scrutiny as the proper standard for evaluating classifications based on sex, despite the fact that this was clearly not the original understanding). On the whole, then, Justice Scalia's approach to equal protection analysis appears to be consistent with both his originalism and his general theory of adjudication.

70. See, e.g., Balkin, *supra* note 61, at 454 n. 39; Herman Schwartz, *The States' Rights Assault on Federal Authority*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 160 (Herman Schwartz ed., 2002); Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1622 (2000). The charge is also made by some conservatives. See, e.g., ROSSUM, *supra* note 42, at 106–14; Randy E. Barnett, *The People or the State: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1752 (2007).

71. 2 U. S. (2 Dall.) 419 (1793).

face, the meaning of the amendment is narrow and precise. Yet for over a century the Supreme Court has interpreted the amendment broadly, as affirming a robust doctrine of sovereign immunity. Under this broader reading, courts have extended this immunity to suits in federal *or State* courts filed by a State's *own citizens*, federal corporations, tribal sovereigns, and foreign nations. Justice Scalia supports this wider reading, arguing that "the Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of immunity . . . was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away."⁷² The critics' claim is that such an expansive reading is justifiable, at best, by appeal to the underlying "purpose" or "intent" of the Eleventh Amendment's framers—a nontextualist approach that Scalia rejects.

Given his general approach to legal interpretation, there are two ways in which Justice Scalia could reply. One is to note that he does *not* equate textualism with literalism or "strict constructionism." He recognizes that original public meanings may be significantly broader or narrower than a literal reading would suggest.⁷³ Thus, he could argue that the original "import" of the Eleventh Amendment was a good deal broader than its words alone would indicate.

A second possible response would be to retain a more or less literal reading of the Eleventh Amendment, but argue for a strong principle of state sovereign immunity on *structural* grounds. Scalia joined Justice Kennedy's majority opinion in *Alden v. Maine*,⁷⁴ making just such an argument. Kennedy acknowledged that no doctrine of sovereign immunity that applied to *state* courts interpreting *state* law could be grounded in the Eleventh Amendment, which of course only applies to federal courts. Instead, he reasoned that the Constitution's "structure" and "history" make clear that States' immunity from suit is a fundamental aspect of the sovereignty they enjoyed prior to entering the Union.⁷⁵ Justice Scalia agrees, claiming

72. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 44–45 (1989) (Scalia, J., dissenting).

73. See Scalia & Garner, *supra* note 38, at 37 (arguing that, on textualist grounds, an ordinance banning "vehicles" from public parks should be interpreted as applying only to *sizable wheeled* vehicles, not to baby carriages or snowmobiles, as a literal reading would suggest. Likewise, he would argue that although the First Amendment literally applies only to "law[s]" that "Congress" may enact, a proper textualist reading would recognize that it also applies to acts of the President, courts, police, administrative agencies, the military, public schools, etc.

74. 527 U.S. 706 (1999).

75. It is by no means clear that Kennedy was correct in this originalist analysis. A serious case can be made that Article III, Section 2, of the original Constitution did, as originally understood, put at least a significant dent in the traditional doctrine of sovereign immunity. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 332–36 (2005). One strong textual argument for this—noted by several Justices in

that the principle of sovereign immunity is an “axiom of our jurisprudence”⁷⁶ and implicit in the structure of our federalist system of divided sovereignty.

But is such a structuralist interpretation consistent with Scalia’s textualism? Yes, Scalia recognizes that legal interpretation is a “holistic endeavor”⁷⁷ and that legal texts “must be construed as a whole.”⁷⁸ Textualists need not be “strict constructionists” or “clause-bound” textualists.⁷⁹ A legal text, Scalia claims, “should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”⁸⁰ For a textual basis for a robust doctrine of state sovereign immunity Scalia might appeal to the term “State” in its various uses in the Constitution, with all that term connoted to eighteenth-century Americans imbued with the common law and Blackstonian jurisprudence.⁸¹ But there is nothing inconsistent about a textualist of Scalia’s stripe⁸² inferring implications from the broad structure of a legal text. Structural principles that are basic to American constitutional theory, such as “separation of powers,” “checks and balances,” “the rule of law,” and (Scalia’s favorite) “democratic self-government” are nowhere explicitly mentioned in the Constitution.⁸³ Textualists like Scalia need not read texts woodenly and acontextually; they can read them holistically, as typical “reasonable readers” presumably would. Thus, there is no valid basis for concluding that Justice Scalia’s views on state sovereign immunity are out of step with his

Chisholm—is that Article III extends federal judicial power to “controversies between two or more States.” If States could never be *defendants* in federal courts without their consent, as opponents of *Chisholm* claimed, how could there be any such “controversy”? In every suit, one party must be the defendant. Of course, the larger question is one of federal supremacy. If States can’t be sued in federal court, even in cases that involve federal issues, then they would be free to violate federal rights at will and no national constitutional jurisprudence could be developed. On this point, John Marshall had the final word. See *Cohens v. Virginia*, 19 U.S. 264 (1821).

76. Scalia & Garner, *supra* note 38, at 281 (quoting *Price v. United States*, 174 U.S. 373, 375–76 (1899) (Brewer, J.)).

77. *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, opinion for the Court).

78. Scalia & Garner, *supra* note 38, at 167.

79. *Id.* at 355–58.

80. *Interpretation*, *supra* note 40, at 23.

81. See Michael A. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 830 (1999).

82. Elsewhere, I have argued that Scalia is an “ersatz” textualist. See *Equitable*, *supra* note 63, at 151–57. Given the significant weight he gives to nonoriginalist precedent, the wide departures from literal meaning he allows, and the invocation of canons of construction that often run counter to textual meaning, he is far from being a strict textualist, and perhaps should not be considered a textualist at all.

83. See Balkin, *supra* note 61, at 142.

general approach to constitutional adjudication.⁸⁴

A third area in which liberals frequently accuse Justice Scalia of unprincipled, result-driven inconsistency is that of campaign finance law, particularly with respect to the Court's deeply controversial 5–4 decision in *Citizens United*,⁸⁵ which struck down federal laws limiting the ways in which corporations could spend money to influence elections. The decision has been widely attacked by liberal critics as flatly inconsistent with conservative principles of judicial restraint and originalist interpretation.⁸⁶

I will address the complex issue of “judicial restraint” at the conclusion of this review. Here, I will simply speak to the charge of abandoning originalism.

It is indeed striking how little discussion there is of “original meaning” in *Citizens United*. In his opinion for the Court, Justice Kennedy devotes only a single paragraph to the issue. Justice Stevens, in his lengthy dissent, faults the Court for invoking the Framers “without seriously grappling with their understandings of corporations or the free speech right.”⁸⁷ Stevens himself conducts a brief foray into originalist analysis and concludes that the evidence “appear[s] to cut strongly”⁸⁸ the other way. He argues that “there is not a scintilla of evidence” that members of the founding generation “believed it would preclude regulatory distinctions based on the corporate form.”⁸⁹ Moreover, the “cautious view” the founders took of corporate power, the “narrow view” they had of corporate rights, the fact that they “conceived of speech more narrowly than we now think of it,” and the “individualistic” way they conceptualized speech right—all point against the majority's view.⁹⁰ In the final analysis, Stevens concludes, “we cannot be certain” how campaign finance laws like those at issue in *Citizens United* mesh with the original meaning of the First Amendment. He notes, how-

84. It should also be noted that a broad reading of the Eleventh Amendment is supported by a long line of cases and an unusually extensive history of legislative and judicial reliance. It could thus be defended on grounds of *stare decisis* as “settled doctrinal understanding.” *Alden v. Maine*, 527 U.S. 706, 728 (1999) (Kennedy, J., opinion of the Court); *Welch v. Texas Dep't of Highways*, 494 U.S. 468, 494–95 (1987) (per Powell, J., citing cases that would be overruled if the Court were to adopt the narrower reading favored by the four dissenters in that case).

85. *Citizens United v. Federal Election Commission*, 558 U. S. 310 (2010), No. 08–205.

86. See, e.g., Geoffrey Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 499; Ronald Dworkin, *The “Devastating” Decision*, *The New York Review of Books* (Feb. 25, 2010), <http://www.public.iastate.edu/~jwcvolf/Law/DworkinCitizensUnited.pdf>; Gene Nichol, *Citizens United and the Roberts Court War on Democracy*, 27 GA. ST. L. REV. 1007, 1009 (2010).

87. *Citizens United*, 558 U. S. at 432.

88. *Id.* at 426.

89. *Id.*

90. *Id.*

ever, that the Court's "campaign finance jurisprudence has never attended very closely to the views of the Framers,"⁹¹ and it is clear from the brevity of his discussion of original meaning that he believes that this is as it should be.

Scalia wrote a concurrence briefly replying to Stevens' historical argument. Its aim is to counter Stevens' argument rather than to argue in a sustained way that restrictions on corporate political speech are at odds with the original meaning of the First Amendment. The central thrust of his reply is that the text of the First Amendment is unqualified; it applies to "speech" with no indication that corporate speech is excluded or entitled to less protection. Business corporations, he argues, were a familiar feature of American economic life at the end of the eighteenth century. The fact that the founding generation had a generally negative view of corporations does not prove that they were excluded from First Amendment protection, and such attitudes may have reflected monopolistic concerns that no longer apply to modern business corporations. Moreover, in the founding era there were many non-business corporations or near-corporations, such as religious, educational, or literary associations, that frequently expressed their views in newspapers and pamphlets. There is no evidence that these groups' speech was regarded as unprotected by the First Amendment. Finally, Scalia argues that while Stevens is no doubt right that the Framers had in mind the rights of individual men and women, those individual rights included the right to speak in association with others.

My interest here isn't whether Scalia's reply to Stevens is convincing, but whether he abandons his professed jurisprudential principles in *Citizens United*. I see no reason to think that he does. Like Stevens, Scalia pretty clearly does not see the issue of "original meaning" as being the crucial issue at stake. Both the majority (which Scalia joined) and the dissent devote nearly all of their attention to two issues: the bearing of prior case-law on the decision and whether there are any compelling governmental interests that justify the restrictions on what all sides admit is a core First Amendment value: political speech. In Scalia's lengthy dissents in *Austin v. Michigan Chamber of Commerce*⁹² and *McConnell v. FEC*⁹³—the two major cases overruled in *Citizens United*—he also focuses almost exclusively on these non-originalist issues. Evidently he believes that campaign finance law is an area which precedent and judge-made constitutional doctrine—not original meaning—must provide the basic principles for analysis. This is consistent with his overall jurisprudential approach.

We turn, finally, to the big kahuna: *Bush v. Gore*.⁹⁴ Is it true, as Murphy

91. *Id.* at 432.

92. 494 U.S. 652 (1990).

93. 540 U.S. 93 (2003).

94. 531 U.S. 98 (2000).

harshly claims, that Scalia's arguments and motives in that case "had nothing to do with originalism or any other reading of the Constitution," but rather "had everything to do with his evaluation of the raw politics of the situation"⁹⁵

Bush v. Gore is a complex and highly unusual case. Oral arguments were heard in the late morning of one day (December 11, 2000), and the case was decided by the evening of the next.⁹⁶ As such, it is not a good test case to evaluate general jurisprudential consistency, since there simply wasn't time for the Justices to think deeply about how their opinions fit with current law and their own past rulings. Nevertheless, I believe that the approach Justice Scalia took in that case is not a significant departure from his professed principles.

Bush v. Gore was the culmination of a tumultuous 36-day controversy that ended in the election of Republican candidate George W. Bush over the Democratic candidate, Al Gore, in the 2000 presidential election. The controversy centered on Florida, where Bush won by a razor-thin margin of 1,784 votes, giving him a narrow electoral victory. A mandatory recount the following day narrowed Bush's margin to 327 votes. Gore filed a protest, asking for manual recounts in the four most Democratic-leaning counties in the state. Bush filed suit in federal court asking that the selective recounts be stopped, but this was denied. On November 17, the Florida Supreme Court blocked Florida Secretary of State Katherine Harris (an open Bush partisan) from certifying Bush the winner. Four days later, in a unanimous ruling, the Florida Supreme Court ordered the recounts to continue and extended the certification date until November 26. Bush appealed to the U.S. Supreme Court, which heard the case on December 1. On November 26, Secretary Harris certified Bush the winner by 537 votes, even though two counties had not yet completed their recounts. On December 4, the U. S. Supreme Court (in "Bush I") unanimously vacated the November 21 Florida Supreme Court ruling, finding that there was considerable uncertainty about its basis and asking for clarification. On December 8, the Florida Supreme Court, relying on its vacated earlier decision and ignoring the U.S. Supreme Court's request for clarification, ordered a statewide manual recount of an estimated 60,000 "undervotes"⁹⁷ in the 64 Florida counties that had not yet counted them. Bush again appealed to the U. S. Supreme Court, which, divided 5–4, issued a stay of the Florida Court ruling on December 9 and scheduled oral argument for December 11. The

95. Murphy, *supra* note 1, at 270.

96. For an excellent (but critical) account of the case, see JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 141–77 (2007).

97. An "undervote," in the present context, was a ballot in which no vote for president was registered by voting machines, even though some of the ballots were marked in ways that indicated a clear intent to vote.

following day, December 12, the Court ruled 5–4 to halt the recounts, effectively ending the controversy and awarding the presidency to Bush.⁹⁸

There were two central issues in *Bush v. Gore*: (1) Did the ordered statewide recount violate the U. S. Constitution? (2) If so, what is the proper remedy? By a 7–2 vote, the Court found that the recount was unconstitutional. Specifically, the Court pointed to the lack of uniform counting standards, resulting in arbitrary and disparate treatment of equally-situated voters. This, the Court found, was inconsistent with the Equal Protection Clause’s mandate that states may not “value one person’s vote over that of another.”⁹⁹ The five most conservative members of the Court (Justices Scalia, Thomas, O’Connor, Kennedy, and Chief Justice Rehnquist) ruled that there was no possible remedy for this equal-protection violation, given the Florida Supreme Court’s determination that the Florida legislature intended to meet the federal “safe harbor” deadline for selection of the state’s presidential electors without risk of congressional challenge—a deadline that then was mere hours away. However, two of the Justices who agreed that the Florida court ruling violated equal-protection—Justices Breyer and Souter—argued that Florida should be given time to establish uniform counting procedures, so that a fair recount could be completed.

Equal protection was not the only constitutional issue in *Bush v. Gore*. Two Justices (Scalia and Thomas) joined a concurrence by Chief Justice Rehnquist, arguing that the Florida court ruling also violated Article II, Section 1, Clause 2 of the Constitution, which provides that “[e]ach State shall appoint, in such manner as the Legislature thereof may direct,” electors for President and Vice President. According to these Justices, the Florida Supreme Court following the election changed Florida election law in ways that failed to accord due deference to the legislature’s plenary authority to determine the manner in which Florida’s electors are selected.

We thus have three questions to consider: Did Justice Scalia abandon principle for politics in (a) supporting the Court’s equal-protection holding, (b) arguing for an Article II violation, and (c) voting to end the recounts?

Why is Scalia’s equal-protection holding alleged to be unprincipled? Two reasons are commonly given: (1) The holding can’t be justified on originalist grounds,¹⁰⁰ and (2) the decision can’t be squared with Scalia’s

98. For a detailed chronology of the events leading up to *Bush v. Gore*, see ARTHUR J. JACOBSON & MICHAEL ROSENFELD, *THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000* 24–41 (2002).

99. *Bush v. Gore*, 531 U.S. 98, at 104–05 (per curiam).

100. See, e.g., Cass R. Sunstein, *Does the Constitution Enact the Republican Party Platform? Beyond Bush v. Gore*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Bruce Ackerman ed.) 184 (2002); Adam Cohen, *Scalia Mouths Off on Sex Discrimination*, *Time* (Sept. 22, 2010), <http://content.time.com/time/nation/article/0,8599,2020667,00.html>.

usually quite narrow reading of the Equal Protection Clause.¹⁰¹

By now it should be clear why Scalia cannot be faulted for failing to invoke the original meaning of the Equal Protection Clause in *Bush v. Gore*. Even though the Court's equal-protection analysis probably is inconsistent with Scalia's original-meaning methodology,¹⁰² it has been settled constitutional doctrine since the mid-1960s that the Equal Protection Clause applies to voting rights.¹⁰³ Under longstanding equal-protection doctrine, the right to vote is a "fundamental right"¹⁰⁴ deserving of strict judicial scrutiny. Over the past half-century, it has been taken for granted at the federal, state, and local level, that there are equal-protection constraints on limitations of voting rights.¹⁰⁵ Thus, it is entirely consistent with Justice Scalia's general theory of constitutional adjudication that he would bow to well-established precedent, rather than invoke original meaning in *Bush v. Gore*.

Is the equal-protection argument sound, or at least plausible? A number of distinguished constitutional theorists—both liberal and conservative—have argued that it is.¹⁰⁶ Under the vague "clear intention of the voter"

101. See, e.g., Geoffrey R. Stone, *Equal Protection? The Supreme Court's Decision in Bush v. Gore*, <http://fathom.lib.uchicago.edu/1/777777122240/>; Robert Post, *Sustaining the Premise of Legality: Learning to Live with Bush v. Gore*, in Ackerman, *supra* note 100, at 98; Margaret Radin, *Can the Rule of Law Survive Bush v. Gore?*, *Id.* at 117.

102. See Berger, *supra* note 64, at 52–64; *Reynolds v. Sims*, 377 U.S. 533, 593–608 (Harlan, J., dissenting). Recall that it required a further constitutional amendment (the Fifteenth) to outlaw racial discrimination in voting. In fact, the Fourteenth Amendment (in section 2) specifically contemplates denial of voting rights by States, merely reducing the offending States' representation in Congress by a proportional amount as a penalty. As we have seen, it is not clear what Scalia thinks the Equal Protection Clause originally meant. But given his claim that the Clause must be interpreted in accordance with the "time-dated" expectations that reasonable readers would have shared at the time of adoption (*Interpretation*, *supra* note 40, at 140), it is likely that he would deny that original meaning guarantees equal voting rights.

103. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Board of Elections*, 383 U. S. 663 (1966). Of course, on pragmatic grounds Scalia might have wanted to not muddy the waters in such an important case by filing a separate concurrence delving into the original meaning of the Equal Protection Clause. There wasn't time to do this, even if he had wished.

104. *Harper v. Virginia Board of Elections*, 383 U. S. 667, 670 (1966); *Kramer v. Union Free School District No. 15*, 395 U. S. 621, 626–27 (1969).

105. See generally LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 2d ed. 1062–95 (1988).

106. See, e.g., Mark Tushnet, *The Conservatism in Bush v. Gore*, in Ackerman, *supra* note 100, at 167; Ronald Dworkin, *A Badly Flawed Election*, *New York Review of Books* (January 11, 2001), reprinted in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 66 (Ronald Dworkin ed., 2002); Stone, *supra* note 101; Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, in Ackerman, *supra* note 100, at 12–15; Michael W. McConnell, *Two and a Half Cheers for Bush v. Gore*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 103–04 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

standard set forth by the Florida court, vote-counting practices varied widely not only from county to county, but even within counties from one recount team to another. Perhaps even more importantly, the Florida court permitted so-called “overvotes” (i.e., ballots that registered more than one vote for president) to be counted in several Democratic-leaning counties but not statewide.¹⁰⁷ This was significant, because as later analyses confirmed, overvotes tended to favor Gore.¹⁰⁸

On the other hand, a strong case can be made against the Court’s equal-protection holding. The ruling was not strongly rooted in precedent; it ignored what are arguably much more severe equal-protection issues (such as ballot-design and radical disparities resulting from vote-counting technologies); it failed to consider the critical comparative question of whether a recount would have been *more fair* than the manifestly flawed certified result; it ignored the fact that, contrary to Florida law, no automatic recounts were conducted in 18 of Florida’s 67 counties in the days immediately following the election; and by halting the recount, the Court itself ensured that some legal votes would not be counted.¹⁰⁹

All of this is arguable. My point is simply that no clear-cut case can be made that Justice Scalia was hypocritical in joining the Court’s equal-protection holding.

This is also the case with the Article II argument. On originalist grounds, a reasonable argument can be made that Article II vests state legislatures with plenary (or virtually plenary) authority for selecting their presidential electors.¹¹⁰ This ensures that the electors are chosen by the most democratic branch of state governments, and also that they will be chosen in accordance with rules that have been laid down in advance. As many commentators have shown, a number of the Florida court’s post-election rulings cannot plausibly be viewed as mere “interpretations” of Florida election law. In a variety of ways, too numerous to discuss here, the Court *changed* that law in ways that failed to accord due deference to the Florida legislature.¹¹¹ It is no surprise that Justice Scalia, as an original-

107. Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, in Sunstein & Epstein, *supra* note 106, at 181.

108. *Second Review of Florida Presidential Vote is Inconclusive*, N.Y. TIMES (May 11, 2001), <http://www.nytimes.com/2001/05/11/politics/11COUN.html>.

109. See Laurence Tribe, *eroG .v hsuB: Through the Looking Glass*, in Ackerman, *supra* note 100, at 43–56. Numerous critics also criticize the Court for limiting its equal-protection holding to “the present circumstances,” thereby abandoning its supposed duty to speak in terms of neutral principles of general applicability. In this case, however, such a restriction makes sense. The equal-protection argument was not extensively discussed in the briefs, and there simply wasn’t time to adequately explore its basis in prior case-law or its ramifications for the future.

110. See McConnell, *supra* note 106, at 103–04.

111. See the detailed analyses in Stephen G. Calabresi, *A Political Question*, in Ackerman, *supra* note 100, at 136–37; Richard A. Epstein, “*In Such Manner as the*

ist, would agree with this assessment, since the distinction between “interpreting law” and “making law” is basic to an originalist understanding of law.¹¹²

We turn finally to the most heavily criticized aspect of the majority decision in *Bush v. Gore*: the remedy. Did the Court err in vacating the Florida Supreme Court’s statewide recounting plan rather than remand the case so that the Florida court could develop a recount procedure that accords with equal protection?

The legal issues are complex, turning mainly on whether the Court was correct to treat the December 12 safe harbor date as a hard deadline, as the Florida Supreme Court repeatedly seemed to declare. Why defer to the Florida court’s supposedly authoritative exposition of state law in this regard but not in so many others?¹¹³ Wasn’t it more reasonable, and more consistent with comity and federalism and judicial restraint, to regard the Florida court’s statements on the December 12 deadline as conditioned on the assumption that a fair and complete recount could be accomplished by that date? Why impute to the Florida legislature an intention to meet the safe harbor deadline, regardless of the fairness or accuracy of the result?

This is certainly a reasonable argument, but an equally strong argument can also be given on the other side. Justice Scalia has himself made clear why he believes the U.S. Supreme Court was right to hear the case and right to decide it as it did. After noting that seven of the Justices agreed on the equal-protection argument, he remarked:

The only point on which we were in disagreement, the only point on which we were five to four, was whether having waited something like three weeks and looking like idiots—the greatest democracy in the world can’t run an election, you know? And we couldn’t have a transition team in Washington to take over from—should we give the Florida Court another two weeks to straighten it all out. That was the only point on which we disagreed, and five of them said no, enough is enough, let’s put an end to it, uh it’s improper and can’t be counted. And that was the case, not a hard case and not all those who were in the four were Democrats. And to fully appreciate the case you have to read the opinion of the Florida Supreme Court. There was indeed a politically motivated Court involved in this, but it wasn’t mine.¹¹⁴

Legislature Thereof May Direct: *The Outcome in Bush v. Gore Defended*, in Sunstein & Epstein, *supra* note 106, at 19–35; McConnell, *supra* note 106, at 108–11.

112. See, e.g., Scalia & Garner, *supra* note 38; *Interpretation*, *supra* note 40, at 25.

113. See, e.g., Jed Rubenfeld, *Not as Bad as Plessy. Worse*, in Ackerman, *supra* note 100, at 22–26.

114. Antonin Scalia, Address at the University of Fribourg (March 8, 2006), *quoted in* Murphy, *supra* note 1, at 278.

It is clear from these remarks that Justice Scalia was concerned primarily with two issues: (1) putting an end to the “improper” recounting procedures ordered by a “politically motivated” court, and (2) policy issues such as ensuring an orderly transition and not “looking like idiots” in the eyes of the world. As Murphy notes, Scalia was furious at what he considered the openly partisan behavior of the seven-member Florida Supreme Court, each of whom had been appointed by a Democratic governor, and the insubordination they had displayed in continuing to rely upon a vacated order and refusing the Court’s directive for clarification.¹¹⁵ As he saw it, the Florida court had engaged in multiple Article II violations. Even if the Court could be trusted to deal fairly, competently, and expeditiously with the multifaceted¹¹⁶ equal-protection issues—which Scalia clearly doubted—this would not address the more fundamental Article II problems. The whole thing, in his eyes, was an unholy mess. Rather than have a politically motivated—and in his view untethered—state court plunge the nation into a drawn-out constitutional crisis, Scalia decided with his four conservative colleagues “to put an end to it.” And so it proved. The controversy quickly faded, and a peaceful and orderly transition of power occurred in the most powerful nation on earth.

Was this the most defensible legal solution? Perhaps so, perhaps not. But it is grossly unfair to charge Scalia, as Murphy does, with vulgar political partisanship and personal ambition. It was a judgment call, made under pressure, in extraordinary circumstances. Although few things in *Bush v. Gore* could have been predicted in advance, opting to end the recount was consistent with Justice Scalia’s core jurisprudential values of order, stability, certainty, and opposition to judicial lawmaking. As such, it reflects a deeper consistency that may not be readily apparent in the details.

To sum up my argument thus far: Murphy’s charge of blatant inconsistency in Scalia’s constitutional decision making cannot be sustained. On the contrary, as Ralph Rossum remarks, his record during the nearly three decades he has served on the Supreme Court has been “remarkably consistent.”¹¹⁷

As noted earlier, Scalia admits that his opinions have not been *perfectly* consistent. Scalia has denounced the “slander” that his method of legal interpretation “is a device calculated to produce socially or politically con-

115. Murphy, *supra* note 1, at 269–70.

116. As Laurence Tribe notes, there was no simple set of instructions the Florida court could have issued that would have guaranteed that “arbitrary and disparate” treatment of voters did not occur. Tribe, *supra* note 109, at 43–56. Recently, Charley Wells, who served as Florida Chief Justice at the time of *Bush v. Gore*, has stated that the Court considered adopting uniform counting standards, but decided that this was properly a legislative prerogative and one that would require considerable input from election experts. CHARLEY WELLS, *INSIDE BUSH V. GORE* 73 (2013).

117. ROSSUM, *supra* note 42, at 218.

servative outcomes.”¹¹⁸ His approach, he says, will “sometimes produce ‘conservative’ outcomes, sometimes ‘liberal’ ones.”¹¹⁹ This is true—to a degree. But there are features of Scalia’s approach to constitutional adjudication that are clearly based on his conservative political values and preclude any sharp separation of law and politics.

First, consider Scalia’s textualism, understood as a general theory that applies to both statutory and constitutional interpretation. As Richard Posner argues, textualism is not a politically neutral theory; it tilts conservative because it systematically frustrates legislative intentions and purposes, thus tending in the direction of small government.¹²⁰ Moreover, Posner notes textualism tends to produce “perverse” literalistic readings of legal texts that create hostility toward courts and legislatures, which also tilts in the direction of small government.¹²¹

Second, Scalia’s constitutional originalism has built-in conservative values. Just as conservatism valorizes past values and resists change, so too does originalism. Both are backward-looking in orientation. Scalia’s particular brand of originalism, which largely collapses the distinction between original meaning and original expected applications, intensifies this backward-looking focus. Scalia’s inclusion of a highly selective (and generally conservative) list of “canons of construction” in his originalist theory adds to this hard-wired conservative slant.

There are also points of wiggle-room within Scalia’s general theory of legal interpretation—the so-called “fair reading method”¹²²—that leave space for the injection of a judge’s personal and political values. Often, historical research will yield no clear conclusion about original meaning. Determining the “objectified intent” of a hypothetical reasonable reader will frequently involve contestable historical and theoretical judgments about how to “sum” various understandings and expectations into a single, coherent semantic “import.”¹²³ Ascertaining the intended level of generality or specificity of a constitutional provision may be difficult.¹²⁴ Determining which constitutional texts were intended to have “a certain evolutionary content” is highly debatable. Finally, room for freewheeling abounds in Scalia’s treatment of precedent. When should precedent trump original meaning? When is law “settled”? When has justifiable “reliance” oc-

118. Scalia & Garner, *supra* note 38, at 16.

119. *Id.*

120. Posner, *supra* note 33.

121. *Id.*

122. Scalia & Garner, *supra* note 38, at 33–41.

123. See Gregory Bassham & Ian Oakley, *The New Textualism: The Potholes Ahead*, 28 *RATIO JURIS* 127 (2015).

124. See Robert W. Bennett, *Originalism and the Living American Constitution*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* 108–14 (2011).

curred? When are two cases relevantly alike? If precedents are to be preserved but modified in ways that better align them with original meaning, how should such modifications be determined? And so on.

My point here is twofold: (1) Scalia cannot plausibly claim that his interpretive method is politically neutral; the needle definitely points conservative, and (2) given the amount of discretion the method includes, it should come as no surprise if Scalia's personal and political values sometimes influence his judicial decisions. Haven't we all been taught by the legal realists, critics, postmodernists, and feminists that perfect objectivity is not a thing of this world?¹²⁵ It would defy common sense to suppose that judges are clothed in judicial hazmat suits, hermetically sealed from any political pathogens. Scalia, being human and a man of strong convictions, can claim no special exemption.

This brings us back to where we began: to Murphy's charge that Scalia is a hypocrite. Scalia, while endlessly denouncing "judicial activists," is "just as activist"¹²⁶ as his liberal colleagues, Murphy claims. Is this claim true?

The phrase "judicial activist" is often a term of abuse, meaning little more than "a judge whose views I disagree with." When used in a more neutral or descriptive way, it generally refers to a judge who frequently does one or more of the following: (a) strikes down the actions of the political branches (particularly when the alleged constitutional violation isn't clear); (b) fails to respect judicial precedent; or (c) engages in "judicial lawmaking" by giving a legal text a meaning it cannot fairly bear.¹²⁷ Is Scalia an "activist" in any of these three senses?

He clearly is an activist in senses (a) and (b). As an originalist, he frequently sees conflicts between *contemporary values* (reflected in legislation) and the *framers' values* (enshrined in the Constitution). So he is willing to strike down acts of the political branches (both legislative and executive) more frequently than are his liberal, nonoriginalist colleagues.¹²⁸

Scalia is also clearly an activist in sense (b). Although he is more deferential to precedent than his originalist colleague, Justice Thomas, he is less

125. Indeed, they may have taught us too well. For a powerful defense of objectivity in legal reasoning, see KENT GREENWALT, *LAW AND OBJECTIVITY* (1992).

126. Murphy, *supra* note 1, at 339.

127. Cf. CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 42–43 (2005) (identifying judicial activism with either (a) or (b)). Defining judicial activism solely in terms of (a) and (b) is tendentious, because it fails to consider what conservatives see as the critical issue: judges who inappropriately read their own values into law.

128. See generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004); Thomas Miles, *The Real Judicial Activists*, *THE AMERICAN PROSPECT* (Dec. 17, 2006), <http://prospect.org/article/real-judicial-activists>.

so than most Supreme Court Justices.¹²⁹ This isn't surprising given his view that original meaning is the touchstone of correct constitutional interpretation. As he sees it, nonoriginalist precedent should thus be accepted grudgingly, if at all.

The crucial—and disputed—question is whether Scalia is an activist in sense (c). Does he regularly engage in judicial lawmaking by reading laws in ways that reflect his own values rather than any fair reading of the text?

I have argued that the charge commonly made by liberals, and by Murphy, that Scalia is an activist in sense (c) is not borne out by a close examination of Scalia's judicial record. While, not surprisingly, a certain amount of conscious or unconscious politically-driven decision making may have occurred, Scalia's overall record is decidedly both consistent and non-activist. In this respect, perhaps he has been a "Court of one."

129. See David A. Strauss, *Tradition, Precedent and Justice Scalia*, 12 *CARD. L. REV.* 1699, 1699–70 (1991).

