
ESSAY
THE AGE OF SCALIA

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During periods of apparent social dissolution the traditionalists, the true believers, the defenders of the status quo, turn to the past with an interest quite as obsessive as that of the radicals, the reformers, and the revolutionaries. What the true believers look for, and find, is proof that, once upon a time, things were as we should like them to be: the laws of economics worked; the streams of legal doctrine ran sweet and pure; order, tranquility, and harmony governed our society. Their message is: turn back and all will be well.¹

INTRODUCTION

How does an originalist and a textualist, dropped in the middle of a *Kulturkampf*,² branded a sophist and a bigot by his detractors,³ grow up to have the nation's first African American President call him "one of the towering legal figures of our time"?⁴ It is tempting to say that Justice Antonin Scalia's jurisprudential clarity and crisp writing calcified his high place in the history of American law, that he managed to make an existentially regressive theory of constitutional interpretation — originalism — broadly appealing.⁵ Then-Senator Joseph Biden once suggested that his vote to confirm Justice Scalia to the Supreme Court was the one he most regretted of all his time in the Senate, for

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¹ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 92 (2d ed. 2014) (citation omitted).

² See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

³ See, e.g., Rachel Anspach, *Scalia Was Not a Hero. He Was a Bigot*, HUFFINGTON POST: THE BLOG (Feb. 17, 2016, 10:53 AM), http://www.huffingtonpost.com/rachel-anspach/scalia-was-not-a-hero-he-_b_9245850.html [<https://perma.cc/5DK7-9WGX>]; Martin Dyckman, *Eroding Our Trust in the High Court*, ST. PETERSBURG TIMES (Apr. 4, 2004), http://www.sptimes.com/2004/04/04/Columns/Eroding_our_trust_in_.shtml [<https://perma.cc/3N9Z-WNZJ>] (referring to Justice Scalia's "brilliant sophistry").

⁴ Press Release, Office of the Press Sec'y, Remarks by the President on the Passing of the U.S. Supreme Court Justice Antonin Scalia (Feb. 13, 2016), <https://www.whitehouse.gov/the-press-office/2016/02/13/remarks-president-passing-us-supreme-court-justice-antonin-scalia> [<https://perma.cc/B754-J5WB>].

⁵ Quite tempting indeed. See Jamal Greene, *Liberal Love for Antonin Scalia*, N.Y. TIMES (Feb. 14, 2016), <http://www.nytimes.com/2016/02/15/opinion/what-liberals-learned-from-antonin-scalia.html> [<https://perma.cc/9XBP-8YBK>] ("[Justice Scalia] made constitutional theory sexy.").

the simple reason that “he was so effective.”⁶ It is far from obvious, though, that Justice Scalia’s interventions in constitutional law will endure past his death. Indeed, it is not clear they succeeded even in Justice Scalia’s own time. For all the talk of his titanic influence,⁷ did Justice Scalia throw away his shot?

Here, in a nutshell, is the puzzle. The day Justice Scalia died, Dean William Treanor of the Georgetown University Law Center issued a statement in which he called Justice Scalia “a giant in the history of the law, a brilliant jurist whose opinions and scholarship profoundly transformed the law.”⁸ A Georgetown law professor, Gary Peller, responded with indignation, writing an open letter to the Georgetown Law community that read, in part:

I imagine many other faculty, students and staff, particularly people of color, women and sexual minorities, cringed . . . at the unmitigated praise

⁶ *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 279 (1993) (statement of Sen. Joseph R. Biden, Jr., Chairman, S. Comm. on the Judiciary).

⁷ See, e.g., Robert Barnes, *Supreme Court Justice Antonin Scalia Dies at 79*, WASH. POST (Feb. 13, 2016) (quoting then-Dean Elena Kagan’s statement that Justice Scalia “is the justice who has had the most important impact over the years on how we think and talk about law”), https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55foc77bf39c_story.html [<https://perma.cc/5N5X-FUE4>]; Benjamin Morris, *How Scalia Became the Most Influential Conservative Jurist Since the New Deal*, FIVETHIRTYEIGHT (Feb. 14, 2016, 3:09 PM), <http://fivethirtyeight.com/features/how-scalia-became-the-most-influential-conservative-jurist-since-the-new-deal> [<https://perma.cc/NFW7-QLFK>]; *Georgetown Law Mourns the Loss of U.S. Supreme Court Justice Antonin Scalia*, GEO. L. (Feb. 13, 2016) [hereinafter *Georgetown Statement*], <https://www.law.georgetown.edu/news/web-stories/georgetown-law-mourns-the-loss-supreme-court-justice-antonin-scalia.cfm> [<https://perma.cc/LXU7-QR6E>] (quoting Dean William Treanor’s statement that “[i]n the history of the Court, few Justices have had such influence on the way in which the law is understood”). Justice Scalia’s long-term impact on statutory interpretation, through his “new textualist” focus on statutory text rather than legislative history, will likely be greater than his impact on constitutional law. See Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 7:59 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<https://perma.cc/7RYG-M8K7>] (suggesting that “the primary reason” Justice Scalia will “go down as one of the most important, most historic figures in the Court” is that he “taught everybody how to do statutory interpretation differently”). Encomiums that celebrate Justice Scalia’s jurisprudential legacy are not always precise in separating his various strands of influence. That said, Justice Scalia’s impact on textualism, which is beyond the scope of this Comment, also requires a more sober assessment than is typical. See Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life-Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. (forthcoming 2016) (manuscript at 26), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755578 [<https://perma.cc/MHL5-RE87>] (arguing that new textualism has “worked itself impure,” such that the theory is no longer capable of serving the purpose of judicial restraint). The point stands, moreover, that Justice Scalia’s attempt to extend his textualism into constitutional originalism fairly demonstrates the limits of the approach, which simply lacks the resources to overcome intense political and social conflict. See *King v. Burwell*, 135 S. Ct. 2480 (2015) (applying a contextually sensitive form of textualism to interpret the Affordable Care Act to permit subsidies to people who obtain health insurance through federally operated exchanges).

⁸ *Georgetown Statement*, *supra* note 7. Justice Scalia is an alumnus of Georgetown University, though he did not attend its law school.

with which the press release described a jurist that many of us believe was a defender of privilege, oppression and bigotry, one whose intellectual positions were not brilliant but simplistic and formalistic. . . . [E]ven a Supreme Court Justice can be a bigot, and there is no reason to be intimidated by the purported “brilliance” that others describe⁹

Objecting, two of Peller’s colleagues, Professors Randy Barnett and Nicholas Quinn Rosenkranz, responded to the open letter with one of their own.¹⁰ Among other things, they offered an analogy:

What would be the reaction if either of us had sent a similarly-worded email to the entire student body . . . upon the death of Justice Thurgood Marshall — saying that he was a bigot, and his “intellectual positions were not brilliant but simplistic”? Is there any doubt that the Georgetown reaction would justly be swift, dramatic, and severe?¹¹

Two aspects of this exchange concern us here. First, Dean Treanor repeated the frequent claim that Justice Scalia “profoundly transformed the law.” Second, Peller in effect called Justice Scalia a bigot, and the response to his letter viewed it as parallel to saying the same about Justice Marshall.

This Comment takes each of these claims seriously and shows how they relate to one another. The positive claim that Justice Scalia dramatically changed American law must be defended. Within the limited but significant domain of constitutional law, the Comment concludes that the claim is overstated. As Part I discusses, Justice Scalia joined the Court seeking to make it both more originalist and more devoted to articulating general rules rather than reliant on balancing tests. This dual set of commitments works together to rhetorically support a program of legal stasis. Justice Scalia spoke for the value of predictability in constitutional law, an end that he argued could be furthered by adhering to the original commitments of the founding generation and by articulating constitutional doctrine in terms of general rules rather than open-ended standards or balancing tests that required judges to make qualitative judgments about the law’s requirements.

Part II shows that the Court Justice Scalia left seems to be neither more originalist nor more rule oriented than the one he joined. This result is itself predictable. At full strength, the Court has nine Justices who hold a range of substantive and methodological commitments; the

⁹ David Lat, *Controversy Erupts at a T14 Law School over How (or Even Whether) to Mourn Justice Scalia*, ABOVE L. (Feb. 17, 2016, 6:21 PM), <http://abovethelaw.com/2016/02/controversy-erupts-at-a-t14-law-school-over-how-or-even-whether-to-mourn-justice-scalia/2> [https://perma.cc/9H3A-GR45].

¹⁰ See David Lat, *‘Scaliagate’ at Georgetown Law: The Conservatives Strike Back*, ABOVE L. (Feb. 18, 2016, 11:29 AM), <http://abovethelaw.com/2016/02/scaliagate-at-georgetown-law-the-conservatives-strike-back/2> [https://perma.cc/CB25-ULW6].

¹¹ *Id.*

stakes are too high to expect the Court to coalesce around originalism, or indeed around any single interpretive approach. Even if each of the Justices were an originalist acting in good faith, we would expect a healthy dose of stare decisis and internal division about what originalism requires to undermine its ability to predict the answers to hard cases. As to constitutional rules, their life at the Supreme Court has tended to be nasty, brutish, and short. The complexity of a modern cosmopolitan political order invariably presses for exceptions and qualifications to even the most well-meaning rules.

Part III seeks to explain the perception of Justice Scalia as legally transformative. This perception is genuine and widely recognized, even (and indeed, especially) within constitutional law. Justice Scalia did not profoundly affect constitutional doctrine, but he played a vital role in articulating a formalistic view of law within an era of dramatic social transformation. Professor Grant Gilmore argued in his well-known book, *The Ages of American Law*, that formalism tends to come in waves, as an almost-predictable response to external events that unsettle the law.¹² Eighteenth-century England had its William Blackstone, who “claimed incessantly that the fixed or settled character of the substantive law restricted judicial discretion”¹³ at a time when the common law was filled with contradiction and in drastic need of reform.¹⁴ The Gilded Age had its Christopher Columbus Langdell, who in view of the flowering of law all about him invented a method of study that treated “the vast majority” of cases as “useless and worse than useless.”¹⁵ The present generation had Justice Scalia, who defended the dead Constitution with a vigor that only a verdant one could have produced.

Constitutional politics in the age of pluralism¹⁶ involves more than just claims for remediation of obvious injustices such as chattel slavery and Jim Crow. Its defining claims are for distribution of society’s goods to communities that sit outside the existing normative universe

¹² GILMORE, *supra* note 1.

¹³ John H. Langbein, *Blackstone on Judging*, in BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY 65, 65 (Wilfrid Prest ed., 2009).

¹⁴ See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 4 (J.H. Burns & H.L.A. Hart eds., 1988) (1776) (“It is on this account that I conceived, some time since, the design of pointing out some of what appeared to me the capital blemishes of [Blackstone’s] work, particularly this grand and fundamental one, the antipathy to reformation; or rather, indeed, of laying open and exposing the universal inaccuracy and confusion which seemed to my apprehension to pervade the whole.”); cf. Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569, 569–71 (1976) (criticizing Bentham’s takedown of Blackstone but conceding “Blackstone’s complacency about the manifestly imperfect English legal system,” *id.* at 570–71).

¹⁵ C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vi (Boston, Little, Brown & Co. 1871).

¹⁶ See generally ANDREI MARMOR, LAW IN THE AGE OF PLURALISM (2007); PHILOSOPHY IN AN AGE OF PLURALISM (James Tully with Daniel M. Weinstock eds., 1994).

of adjudicative law¹⁷: religious minorities seeking exemptions from generally applicable laws;¹⁸ women challenging gender norms in university admissions and in reproductive medicine;¹⁹ African American students challenging traditional measures of academic excellence;²⁰ gays and lesbians challenging existing public morality and heteronormative social institutions;²¹ economic libertarians challenging the indignities of the regulatory state under a post-*Carolene Products* deference regime.²² In this environment, the status quo is itself a constituency seeking to make claims on constitutional law, to strive (quixotically) to preserve it as consistent, predictable, and settled.²³

Justice Scalia was that constituency's Thurgood Marshall. His critique of a Constitution that had the capacity to embrace the unfamiliar and the unanticipated was stunningly articulate. It is unsurprising that his defenders view him as a powerful exemplar of neutrality and reason and his detractors view him as a bigot. Justice Scalia's symbolic purpose was to speak for the law's intolerance of social change, for its limited imagination, for its jurispathic²⁴ instincts. His mission as an advocate (*le mot juste*) was to make constitutional law great again. Whether or not Justice Scalia was a bigot, his client — the law of chronic resistance to novelty — most certainly was.

I. JUSTICE SCALIA'S AGENDA

Three decades ago, in the summer of 1986, Richard H. Fallon, Jr., a junior professor at the Harvard Law School, was hard at work on a substantial manuscript on U.S. constitutional interpretation.²⁵ Unlike most scholarship within this genre,²⁶ Fallon's article was largely de-

¹⁷ See Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

¹⁸ See, e.g., *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

¹⁹ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

²⁰ See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²¹ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

²² See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); see also *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955).

²³ See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2069 (2002) (“[A]ny substantial success [by an identity-based social movement] will generate a countermovement seeking to preserve old forms or new enclaves of segregation (normative recognition that the minority’s trait is malign or, at best, tolerable).”).

²⁴ See Cover, *supra* note 17, at 40.

²⁵ Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

²⁶ A notable exception is the work of Professor Philip Bobbitt. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–119 (1982).

scriptive. Rather than defend a particular interpretive method, Fallon developed a typology of argument styles that were, by consensus, relevant within constitutional law.²⁷ Fallon's opening paragraph offered a lay of the land:

With only a few dissenters, most judges, lawyers, and commentators recognize the relevance of at least five kinds of constitutional argument: arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; arguments based on judicial precedent; and value arguments that assert claims about justice or social policy.²⁸

For Fallon, constitutional law was fundamentally pluralistic. No one approach could be said to dominate all others. To the contrary, Fallon's overarching thesis held that constitutional actors are drawn to view the different approaches as being in harmony rather than in competition with each other.²⁹

That summer, another young law professor, Michigan's T. Alexander Aleinikoff, was toiling over his own magnum opus.³⁰ Aleinikoff's focus was a set of constitutional decisional tools orthogonal to but no less important than Fallon's forms of argument: the use of a balancing versus a categorical approach in adjudicating conflicts between the interests of the state and the asserted constitutional rights of individuals.³¹ Aleinikoff sought to expose and to problematize the ubiquity of balancing, which he described in his opening paragraph as "a form of constitutional reasoning . . . that has become widespread, if not dominant, over the last four decades."³²

Gilmore has written that "academic literature, viewed historically, brings us as close as we are apt to come to what Justice Holmes once referred to as 'the felt necessities of the time.'"³³ As to constitutional law in the summer of 1986, he was clearly right. Fallon's and Aleinikoff's articles, which were published the same month in the nation's two leading law reviews, identify two then-dominant features of U.S. constitutional interpretation: interpretive pluralism and balancing. They also describe the two leading sources of agita for Justice Scalia. Justice Scalia was nominated and confirmed to the Supreme

²⁷ See Fallon, *supra* note 25, at 1194.

²⁸ *Id.* at 1189–90 (footnote omitted).

²⁹ See *id.* at 1193.

³⁰ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

³¹ See *id.* at 949.

³² *Id.* at 943–44.

³³ GILMORE, *supra* note 1, at 16 (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed. 1963) (1881)).

Court over the course of that eventful summer of 1986, and his first two major scholarly lectures as a Supreme Court Justice announced the agenda that would come to define his jurisprudence.

First, in September 1988, Justice Scalia delivered the William Howard Taft Lecture on Constitutional Law at the University of Cincinnati College of Law.³⁴ That talk, entitled *Originalism: The Lesser Evil*, amounted to Justice Scalia's most extended public defense to that point of originalism, the view that the Constitution should be interpreted as it was understood by the members of the founding generation. Consistent with Fallon's positive description of constitutional argument, Justice Scalia lamented that "nonoriginalist exegesis has, so to speak, come out of the closet,"³⁵ and that, unlike in the past, "many prominent and respected commentators reject the original meaning of the Constitution as an authoritative guide."³⁶

For Justice Scalia, originalism was not a flawless approach but it was better than its alternatives. Nonoriginalism, he argued, divorced the justification for judicial review — the status of the Constitution as law³⁷ — from its exercise, which involved what for Justice Scalia were distinctly nonlegal forms of discretion. It was, moreover, the very lack of consensus as to the best alternative to originalism that counted in originalism's favor. "If the law is to make any attempt at consistency and predictability," Justice Scalia said, "surely there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another. And it is hard to discern any emerging consensus . . ."³⁸ Originalism had only to outrun its friends, not the bear itself.

Justice Scalia must have understood the sleight of hand this argument was performing. It is true, of course, that consistency and predictability are important values for the law to promote, particularly for an apex court charged with setting the terms of the law for lower courts, public officials, and citizens. It is also true that, all else equal, and training solely on the dimensions of consistency and predictability, we should expect a regime fully committed to originalism to outperform a regime with no particular jurisprudential commitments at all. Originalism requires the exercise of often difficult judgments about the state of the historical record, about how to choose among competing historical materials, and about whether to focus on the intentions and understandings articulated by "framers" as against those of a disinter-

³⁴ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

³⁵ *Id.* at 852.

³⁶ *Id.* at 853.

³⁷ See *id.* at 854 (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

³⁸ *Id.* at 855.

ested “reasonable person” reading the Constitution’s words,³⁹ and Justice Scalia was under no illusion that originalism obviates the exercise of judgment.⁴⁰ Still, these judgments are fewer than those required when one approaches interpretation with no anchor at all and, importantly, originalism provides a stronger basis for external criticism than its alternatives. Hard to say a man is lost unless you know where he’s going.

There are several problems with this justification for originalism, two of which are worth highlighting before we proceed. First, if originalism leads to greater consistency and predictability in the law, it is because originalism is transparent. In order for originalism to be transparent, its metes and bounds must be specified in some detail and, crucially, it must be deployed without compromise. At the time of his Taft Lecture, Justice Scalia was famously unwilling to accede to this condition. In fact, he wrote that “almost every originalist would adulterate it with the doctrine of *stare decisis*”⁴¹ and that he himself “may prove a faint-hearted originalist” because he could not imagine upholding a flogging law.⁴² The concession that originalism might at times succumb to *stare decisis* or to conventional morality tints the methodology’s windows.⁴³

Part of the sleight of hand is that it is in fact easy to discern a consensus as to the alternative to originalism. As Fallon’s article and Professor Philip Bobbitt’s work⁴⁴ indicate, the alternative is pluralism. Pluralism includes occasional use of historical argument. Indeed, as Fallon argues, in the usual case the interpreter understands historical argument as being consistent with other interpretive strategies. To say that historical argument should be used *sometimes* is therefore to say nothing interesting. Originalism’s bite comes from its use in hard cases, those where it conflicts with arguments based on precedent or consequences. A compromising originalism begs the question.

Second, and more to the point, consistency and predictability are not the only values that are important to a well-functioning legal system. The law must also promote justice, if not as an autonomous moral value then certainly by the lights of the law itself and its under-

³⁹ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2004).

⁴⁰ See Scalia, *supra* note 34, at 856–57.

⁴¹ *Id.* at 861.

⁴² *Id.* at 864.

⁴³ See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 298–99 (2007). Justice Scalia might well have changed his position on faintheartedness in recognition of this problem. See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10> [https://perma.cc/3R5K-HTE6] (“I described myself as [fainthearted] a long time ago. I repudiate that.”).

⁴⁴ BOBBITT, *supra* note 26.

lying purposes. An appellate judge need not simply ensure that legal adjudication is consistent and predictable — many decisional procedures could do so far better than originalism⁴⁵ — but must also ensure that it is *correct* according to law. The law’s language might reflect a desire to account for evolving moral sentiment, as in the Eighth Amendment’s prohibition on cruel and unusual punishment.⁴⁶ The law’s immanent structure might suggest a special concern for the endurance of the system, as Chief Justice Marshall said of the U.S. Constitution in *McCulloch v. Maryland*.⁴⁷ The Constitution, he famously wrote, is “intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.”⁴⁸

To be sure, consistency and predictability can enable that adaptation. Citizens and public officials must know what the ground rules are in order to raise families, enter into enduring agreements, and make and enforce laws. But just as surely, an inflexible approach to legal adjudication that precludes novel claim making or renders the law unresponsive to organic change can undermine the stability of the legal system.⁴⁹ Like skyscrapers and bridges, the law must at times sway with the wind if it is to withstand its pressures. To say, then, that the law’s need to be consistent and predictable requires an originalist approach that relieves the adjudicator of her discretion reasons in a circle. It rests on a value choice — a preference for inflexibility — that is external to law.

Justice Scalia soon made this preference even clearer. Five months after his Taft Lecture, Justice Scalia delivered the Holmes Lecture at the Harvard Law School. Entitled *The Rule of Law as a Law of Rules*, the talk explained that in the realm of appellate adjudication, decisionmaking should proceed according to general rules of law rather than according to case-by-case application of legal standards, which Justice Scalia termed “the discretion-conferring approach.”⁵⁰ Although judicial discretion may be necessary to achieve “perfect justice” — a caricatured acknowledgment of the point made above about originalism — this approach fails to convey the appearance of justice.⁵¹ According to Justice Scalia, adjudication by general rules con-

⁴⁵ Think “the Government always wins.” Cf. *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (“The sole consistency that I can find is that in litigation under § 7 [of the Clayton Act], the Government always wins.”).

⁴⁶ U.S. CONST. amend. VIII.

⁴⁷ 17 U.S. (4 Wheat.) 316 (1819).

⁴⁸ *Id.* at 415.

⁴⁹ See *id.*; see also ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 81–83 (2009) (arguing that flexibility is necessary to constitutional endurance).

⁵⁰ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

⁵¹ *Id.*

fers the additional benefits of enabling self-restraint and, crucially, of fostering predictability in the law.⁵²

For Justice Scalia, decisionmaking according to general rules was the horse and originalism the cart. Originalism was the surest way of implementing a foundational commitment to rule-based jurisprudence. As he explained in his Holmes Lecture, originalism “facilitates the formulation of general rules” because “[t]he raw material for the general rule is readily apparent.”⁵³ The practices of the founding-era society more easily form the basis for a general rule than does an evolving consensus.⁵⁴ This observation approaches tautology, for a rule as Justice Scalia understands it derives its value from its inflexibility. A legal directive whose content shifts in response to new assessments of its underlying values is better understood as a standard rather than as a rule.⁵⁵ Justice Scalia accordingly concluded his lecture by imploring appellate courts, where possible, to avoid “totality of the circumstances tests and balancing modes of analysis.”⁵⁶

II. JUSTICE SCALIA’S QUALIFIED FAILURE

Justice Scalia set himself a difficult task. Originalism has never been the exclusive or even the dominant approach to Supreme Court opinion writing except at a level of generality that failed to serve Justice Scalia’s core values of consistency and predictability. Constitutional fidelity presupposes some attention to the document’s original design, but attention to the Constitution’s purposes can give quite wide berth to constitutional construction.⁵⁷ And Justice Scalia’s brand of rule-bound adjudication is reminiscent of a kind of formalism that has not accurately described even the rhetoric of American law in at least a century.⁵⁸

Justice Scalia’s passing provides an apt occasion to assess whether he succeeded at making the Supreme Court either more originalist or more rule oriented. In short, he did not. As an institution, the Su-

⁵² See *id.* at 1179–80.

⁵³ *Id.* at 1184.

⁵⁴ See *id.*

⁵⁵ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 139–41 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

⁵⁶ Scalia, *supra* note 50, at 1187.

⁵⁷ See generally Balkin, *supra* note 43 (arguing that an original meaning approach supports a constitutional right to abortion).

⁵⁸ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1920) (“My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.”).

preme Court has rejected a constitutional jurisprudence grounded in either originalism or rules.

A. *Originalism*

In measuring whether the Court is more originalist now than when Justice Scalia joined it, it is important to settle on a working definition of originalism. Although it is easy to describe the family of theories that go by the name, some of those theories distinguish between interpretation and adjudication and others amount to “just so” descriptions of constitutional fidelity. For example, a number of scholars have offered recently that the positive practice of American constitutional law is best described as originalist. Professor William Baude has written that we might understand originalism to accommodate practices, such as *stare decisis*, that are consistent with Founding-era theories of legal interpretation.⁵⁹ Likewise, Professor Stephen Sachs has suggested that modern Americans might be faithful to originalism understood as a theory of legal change; prevailing practices of U.S. constitutional argument seem to presuppose that the law does not change except through modes consistent with the expectations of the relevant founding generation.⁶⁰ Thus, a leading justification of *Brown v. Board of Education* renders it an unproblematic modern application of the Equal Protection Clause rather than a change in the Constitution, which would have required an Article V amendment.⁶¹ These relatively sanguine accounts preserve originalism’s place within the American constitutional tradition by understanding it in broad, essentially pluralist, terms.

These are not the terms by which we should measure Justice Scalia’s jurisprudential legacy. Conceiving of *stare decisis* or evolving understandings of constitutional provisions as embraced within originalism may be true to some philosophical conception of the theory, but it does not capture the foils that animated Justice Scalia. An accounting of Justice Scalia’s legacy must track his own beliefs and practices. This tracking turns out to be difficult. Justice Scalia was an early proponent of what has come to be known as original meaning originalism, a form of textualism that identifies the Constitution with the meaning of its words to a reasonable person at the time of enactment. In fact, many scholars trace the advent of the original meaning

⁵⁹ See William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2356–61 (2015).

⁶⁰ See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 820–21 (2015).

⁶¹ See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); see also Sachs, *supra* note 60, at 854 (explaining the Court’s rejection of history in *Brown* as “describ[ing] current facts about education as inputs to a rule about equality”).

approach to a speech Justice Scalia gave to the Attorney General's Conference on Economic Liberties three days before President Reagan announced his nomination to the Court.⁶² Later, in the Tanner Lectures that became his celebrated book, *A Matter of Interpretation*, Justice Scalia said, "[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."⁶³ So far so good.

It is easy to identify the brand of originalism Justice Scalia preached, but it is more difficult to articulate the brand that he practiced. The "meaning" of a text is not the same as its customary applications.⁶⁴ There are many different ways of describing this dichotomy: original meaning versus original expected application,⁶⁵ sense versus reference,⁶⁶ connotation versus denotation,⁶⁷ semantic versus expectation originalism.⁶⁸ Justice Scalia accepted this distinction⁶⁹ but did not appear to accept its implications.⁷⁰ Thus, for Justice Scalia, the fact that the Founding generation evidently understood the death penalty as not constituting cruel and unusual punishment meant that it could not be understood as cruel and unusual today.⁷¹ The fact that Americans in the 1860s did not think the Equal Protection Clause applied to

⁶² Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK app. C (1987); see Bernard Weinraub, *Burger Retiring, Rehnquist Named Chief; Scalia, Appeals Judge, Chosen for Court*, N.Y. TIMES, June 18, 1986, at A1.

⁶³ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997).

⁶⁴ But see LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43 (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., Wiley-Blackwell rev. 4th ed. 2009) (1953) ("[T]he meaning of a word is its use in the language.").

⁶⁵ See Balkin, *supra* note 43, at 292–93.

⁶⁶ See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006).

⁶⁷ See *King v Jones* (1972) 128 CLR 221, 229 (Austl.). See generally 1 JOHN STUART MILL, A SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE 31–42 (London, Longmans, Green, Reader & Dyer 9th ed. 1875) (1843) (explaining the distinction between connotation and denotation).

⁶⁸ See Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION, *supra* note 63, at 115, 119–20.

⁶⁹ See Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 63, at 129, 144.

⁷⁰ See Balkin, *supra* note 43, at 295–97. Justice Scalia also implicitly relied upon the intentions of the Framers even while disclaiming this approach. For example, in his majority opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), he chided Justice Stevens for relying, in dissent, on Antifederalist views of the meaning of the Second Amendment, *id.* at 590 n.12. It is not clear why an original meaning originalist would discount the beliefs of opponents of the Constitution, who were just as legally knowledgeable and fluent as the Constitution's proponents. See Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1692–94 (2012).

⁷¹ See Scalia, *supra* note 69, at 145.

sex discrimination or sexual orientation meant it was inappropriate for Americans to apply it that way today.⁷² A government practice that did not constitute a search in 1791 did not constitute a search today.⁷³

Constitutional lawyers do not customarily reason in this way, and neither does the Court. To be sure, and consistent with its pluralism, the Court adopts originalist methods in some cases. Indeed, as I have argued elsewhere, it does so fairly systematically in cases involving constitutional provisions that the Justices understand as rules — norms that are clearly designed to narrow the range of discretion enjoyed by future decisionmakers.⁷⁴ Think of *The Pocket Veto Case*,⁷⁵ involving the meaning of the word “Adjournment” in Article I,⁷⁶ or *NLRB v. Noel Canning*,⁷⁷ involving interpretation of the Recess Appointments Clause.⁷⁸ But originalism in cases involving narrow constitutional rules is not new, and was practiced even by the Warren Court,⁷⁹ which is thought to be an especially nonoriginalist Court.⁸⁰ Originalism on Justice Scalia’s terms can declare victory only if the Court uses historical methods in cases involving the more open-ended provisions that form Justice Scalia’s paradigm cases: the Equal Protection Clause, the Due Process Clause, the Eighth Amendment, and so

⁷² See Antonin Scalia, CAL. LAW. (Jan. 2011), <http://www.callawyer.com/2011/01/antonin-scalia> [<https://perma.cc/94BF-X6SW>]. Many observers have questioned how Justice Scalia reconciled his views about the Equal Protection Clause with the Court’s decision in *Brown v. Board of Education*, in light of the Reconstruction-era tolerance of racially segregated public schools. See Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, NEW YORKER, Mar. 28, 2005, at 40, 54 (“Scalia is asked about [*Brown*] so often in his public appearances that he will say things like ‘Waving the bloody shirt of Brown again, eh?’”). Justice Scalia defended the result in *Brown* as consistent with originalist analysis, see, e.g., Rutan v. Republican Party of Ill., 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (“[T]he Fourteenth Amendment’s requirement of ‘equal protection of the laws,’ combined with the Thirteenth Amendment’s abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.”), but his disregard of original expected application in this domain is not consistent with his treatment of other forms of discrimination, see Scalia, *supra* (“In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don’t think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation. So does that mean that we’ve gone off in error by applying the 14th Amendment to both? Yes, yes.”).

⁷³ See *Minnesota v. Dickerson*, 508 U.S. 366, 379–80 (1993) (Scalia, J., concurring).

⁷⁴ See Jamal Greene, *Rule Originalism*, 117 COLUM. L. REV. (forthcoming 2016).

⁷⁵ 279 U.S. 655 (1929).

⁷⁶ U.S. CONST. art. I, § 7, cl. 2.

⁷⁷ 134 S. Ct. 2550 (2014).

⁷⁸ U.S. CONST. art. II, § 2, cl. 3.

⁷⁹ See, e.g., *Powell v. McCormack*, 395 U.S. 486, 521–47 (1969) (using historical analysis to determine the power of the House of Representatives under Article 1 section 5 to expel a member for corruption); *Wesberry v. Sanders*, 376 U.S. 1, 8–18 (1964) (deriving a principle of one person, one vote from a historical inquiry into Article 1 section 2 of the Constitution).

⁸⁰ Sachs, *supra* note 60, at 885 (“The first modern originalists . . . wanted to constrain judges, in reaction to what they saw as a wild-and-crazy Warren Court.”).

forth. Originalism in these areas would indeed mark a departure from practices prevalent in 1986.

By this measure, originalism has lost, and soundly. This past Term is emblematic. It included just one originalist majority opinion, Justice Ginsburg's opinion in *Evenwel v. Abbott*,⁸¹ in which the Court held that states are permitted to draw legislative districts based on total population even if it deviates significantly from voting-eligible population (whether because of the presence of military bases or prisons or owing to large numbers of disenfranchised former convicts, noncitizens, or children).⁸² Justice Ginsburg opened her opinion by invoking James Madison's and Alexander Hamilton's suggestions in the *Federalist Papers* and during the Convention debates that political representation attached to individuals rather than to voters.⁸³ The opinion homed in on the relatively specific language of Article I, § 2 of the Constitution, which directs that representation "shall be apportioned among the several States . . . according to their respective Numbers."⁸⁴ *Evenwel* is continuous with a practice that long predates Justice Scalia's tenure: the use of historical analysis in cases in which the Court interprets language it understands in specific terms.⁸⁵

By contrast, historical analysis was absent entirely in decisions involving the constitutionality of various practices under the kinds of open-ended constitutional provisions to which Justice Scalia always referred in lamenting the ascendancy of nonoriginalism. Among those decisions were an unsuccessful equal protection challenge to the University of Texas at Austin's race-based affirmative action policy,⁸⁶ a successful substantive due process attack on Texas's regulation of abortion providers,⁸⁷ and several cases (one of which featured a majority opinion by Justice Scalia) challenging capital sentencing practices under the Sixth and Eighth Amendments.⁸⁸ In none of these cases did the Court deploy remotely originalist reasoning.

These cases are not outliers. Justice Scalia never succeeded at altering the Court's "evolving standards of decency" inquiry in Eighth Amendment cases.⁸⁹ To the contrary, during Justice Scalia's tenure and over his vociferous dissent, the Court used that test, which solicit-

⁸¹ 136 S. Ct. 1120 (2016).

⁸² *See id.* at 1126–27.

⁸³ *See id.* at 1127.

⁸⁴ U.S. CONST. art. I, § 2, cl. 3; *see Evenwel*, 136 S. Ct. at 1127.

⁸⁵ *See generally* Greene, *supra* note 74.

⁸⁶ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016).

⁸⁷ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

⁸⁸ *See Hurst v. Florida*, 136 S. Ct. 616 (2016); *Kansas v. Carr*, 136 S. Ct. 633 (2016) (Scalia, J.); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

⁸⁹ *See Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

ed the Justices' own independent judgment as to whether a particular punishment was disproportionate, to categorically exclude the intellectually disabled,⁹⁰ juveniles,⁹¹ and those convicted of child rape⁹² from capital sentences and to prohibit life imprisonment without parole for juveniles.⁹³ In Fourth Amendment cases defining the substance and scope of an unconstitutional search or seizure, Justice Scalia sought unsuccessfully to steer the Court away from the "reasonable expectation of privacy" test⁹⁴ of *Katz v. United States*⁹⁵ and toward a categorical inquiry into the kinds of places protected against state intrusion at common law.⁹⁶ While occasionally humoring Justice Scalia's inquiry into common law property boundaries, other members of the Court have consistently signaled their comfort with a nonoriginalist approach in these cases.⁹⁷ Originalism has played little or no role in the Court's affirmative action,⁹⁸ sex discrimination,⁹⁹ abortion rights,¹⁰⁰ takings,¹⁰¹ free speech,¹⁰² or Commerce Clause¹⁰³ cases during Justice Scalia's tenure.

It is fitting that one of Justice Scalia's last substantial opinions was his fierce dissent in *Obergefell v. Hodges*,¹⁰⁴ which invalidated state prohibitions on marriages between same-sex couples.¹⁰⁵ At oral argument in a predecessor case, *Hollingsworth v. Perry*,¹⁰⁶ Justice Scalia had asked Theodore Olson, who argued on behalf of same-sex couples, to tell him "when [it became] unconstitutional to exclude homosexual

⁹⁰ See *Atkins v. Virginia*, 536 U.S. 304, 313, 321 (2002).

⁹¹ See *Roper*, 543 U.S. at 574–75; see also *id.* at 590 (O'Connor, J., dissenting).

⁹² See *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008).

⁹³ See *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

⁹⁴ 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

⁹⁵ 389 U.S. 347 (1967).

⁹⁶ See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409, 1414–15 (2013).

⁹⁷ See, e.g., *id.* at 1418 (Kagan, J., concurring); *United States v. Jones*, 132 S. Ct. 945, 954–55 (2012) (Sotomayor, J., concurring); *cf. id.* at 957–58 (Alito, J., concurring in the judgment) (rejecting Justice Scalia's historical approach to the constitutionality of warrantless use of a GPS tracker on a car over an extended period of time).

⁹⁸ See *Fisher II*, 136 S. Ct. 2198 (2016); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁹⁹ See *United States v. Virginia*, 518 U.S. 515 (1996).

¹⁰⁰ See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁰¹ See *Kelo v. City of New London*, 545 U.S. 469 (2005); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

¹⁰² See *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Morse v. Frederick*, 551 U.S. 393 (2007).

¹⁰³ See *NFIB*, 132 S. Ct. 2566 (2012); *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁰⁴ 135 S. Ct. 2584, 2626–31 (2015) (Scalia, J., dissenting).

¹⁰⁵ See *id.* at 2604–05 (majority opinion).

¹⁰⁶ 133 S. Ct. 2652 (2013).

couples from marriage.”¹⁰⁷ Olson answered that it became unconstitutional when “we as a culture determined that sexual orientation is a characteristic of individuals that they cannot control” and that this determination is the result of “an evolutionary cycle” that has “no specific date in time.”¹⁰⁸

That Justice Scalia asked the question reflects the singularly rapid pace of cultural change that would soon produce *Obergefell*, which was handed down twelve years to the day after *Lawrence v. Texas*¹⁰⁹ invalidated anti-sodomy laws in thirteen states.¹¹⁰ Taken together, *Obergefell* and *Bowers v. Hardwick*,¹¹¹ which *Lawrence* overruled, provide an apt set of bookends to Justice Scalia’s career. *Bowers* was decided two weeks after President Reagan announced that he would be nominating Justice Scalia to the Court. Gay rights were Justice Scalia’s Sarah Connor, and it showed in his violent reaction to their recognition.¹¹² This was an area in which swift social and political change manifestly affected constitutional doctrine in a way that was newly inclusive of a previously marginalized group. As section III.B shows, Justice Scalia owes his fame to his ability to make the case against precisely this kind of legal change.

That Olson, a former Republican Solicitor General who was arguing his sixtieth case before the Supreme Court,¹¹³ was willing to make this concession tends by itself to refute any claim that the U.S. constitutional culture is originalist in any way that Justice Scalia would have recognized. As Justice Kennedy wrote for the *Obergefell* majority:

History and tradition guide and discipline [the fundamental rights] inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central pro-

¹⁰⁷ Transcript of Oral Argument at 38, *Perry*, 133 S. Ct. 2652 (No. 12-144), https://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf [<https://perma.cc/Q77V-ZUWR>].

¹⁰⁸ *Id.* at 40.

¹⁰⁹ 539 U.S. 558 (2003).

¹¹⁰ WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, at 297 (2008).

¹¹¹ 478 U.S. 186 (1986).

¹¹² See *infra* section III.B, pp. 176–83.

¹¹³ See *Theodore B. Olson: Selected Appellate Litigation*, GIBSON, DUNN & CRUTCHER LLP, <http://www.gibsondunn.com/lawyers/Documents/TOlson-CaseList2016.pdf> [<https://perma.cc/F5PH-AW7X>].

tections and a received legal stricture, a claim to liberty must be addressed.¹¹⁴

Compare this language to the language of *Bowers*. There, Justice White wrote in his majority opinion that the Court was not “inclined to take a more expansive view of [its] authority to discover new fundamental rights imbedded in the Due Process Clause”¹¹⁵ and that the Court “comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”¹¹⁶ The dissonance between these words and those of Justice Kennedy in *Obergefell* reveals any claim that originalism has flourished during Justice Scalia’s tenure on the Court to be, at best, facetious.¹¹⁷

There are important counterexamples, though these are not without complexity. Justice Scalia’s most significant jurisprudential triumphs were in the area of criminal procedure. He was a key member of the coalition of Justices who insisted that every fact predicate to increasing a defendant’s criminal liability or sentence exposure had to be presented to a jury and proven beyond a reasonable doubt. In *Apprendi v. New Jersey*,¹¹⁸ the first of this line of cases, Justice Stevens grounded the Court’s holding in common law restrictions on judicial discretion and insistence on the reasonable doubt standard.¹¹⁹ *Apprendi* birthed a series of cases that dramatically altered the role of the jury in criminal sentencing: *Ring v. Arizona*¹²⁰ guaranteed jury findings of any fact necessary to impose the death penalty;¹²¹ *Blakely v. Washington*¹²² (in which Justice Scalia wrote the majority opinion) invalidated a state sentencing guidelines scheme that relied on judicial findings to increase a sentence beyond the statutory maximum;¹²³ and *United States v. Booker*¹²⁴ visited the same fate on the federal guidelines (while rendering those guidelines advisory as a matter of remedy).¹²⁵ Although

¹¹⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (citations omitted).

¹¹⁵ *Bowers*, 478 U.S. at 194.

¹¹⁶ *Id.*; see also *id.* at 196 (Burger, C.J., concurring) (resting on his view that “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization”).

¹¹⁷ *Cf. id.* at 194 (majority opinion) (“[T]o claim that a right to engage in [sodomy] is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”).

¹¹⁸ 530 U.S. 466 (2000).

¹¹⁹ See *id.* at 477–83.

¹²⁰ 536 U.S. 584 (2002).

¹²¹ See *id.* at 589.

¹²² 542 U.S. 296 (2004).

¹²³ See *id.* at 304–05.

¹²⁴ 543 U.S. 220 (2005).

¹²⁵ See *id.* at 226–27, 246.

not all of these opinions dwelled on historical materials, it is fair to say that an originalist impulse motivated the entire line of cases.¹²⁶

The other significant area of criminal procedure in which originalism seems to have triumphed relates to the Sixth Amendment right of confrontation. Justice Scalia wrote an originalist majority opinion in *Crawford v. Washington*,¹²⁷ which overruled *Ohio v. Roberts*¹²⁸ to hold that a criminal defendant must have an opportunity to cross-examine any testimonial witness, regardless of traditional hearsay rules.¹²⁹ *Crawford* was quickly followed by a series of decisions in which the Court took an expansive view of the kinds of evidence and the kinds of witnesses subject to *Crawford*'s rule.¹³⁰

The originalism in the *Apprendi* and *Crawford* lines (such as it is),¹³¹ does not reflect a secular trend. The vote lineup in these cases provides a ready explanation. The *Apprendi* majority consisted of Justices Stevens, Scalia, Souter, Thomas, and Ginsburg: two originalist-formalists and three judges on the traditionally liberal side of the Court. And although *Crawford* was a 7-2 decision, its more controversial follow-up in *Melendez-Diaz v. Massachusetts*¹³² featured precisely the same majority as *Apprendi*.¹³³ A deal between the Court's liberals and its formalists was the only way to secure a unified majority in these cases. This kind of overlapping consensus is hardly a harbinger of a sea change in constitutional interpretation.

The other conspicuous instance of originalism during Justice Scalia's tenure was of course his majority opinion in *District of Columbia v. Heller*,¹³⁴ which held that the Second Amendment protects an individual right to possess a handgun in one's home.¹³⁵ The opinion engaged in a lengthy historical analysis of the meaning of the words of the Amendment, only noting some fifty pages in that there was a

¹²⁶ See Stephanos Bibas, Essay, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005).

¹²⁷ 541 U.S. 36 (2004).

¹²⁸ 448 U.S. 56 (1980).

¹²⁹ *Crawford*, 541 U.S. at 68–69.

¹³⁰ See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (applying *Crawford* to forensic analyses); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (holding that *Crawford* required the state to produce the actual author of a testimonial forensic report). The Court appeared to pull back from *Crawford* in two later cases. See *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (permitting expert witness testimony to discuss a state forensic report without producing the report itself); *Ohio v. Clark*, 135 S. Ct. 2173 (2015) (permitting admission of certain out-of-court statements made by a child abuse victim on the grounds that the statements were not testimonial).

¹³¹ See Bibas, *supra* note 126, at 192–97 (providing support for the historical account in *Crawford*, but questioning it in *Apprendi* and *Blakely*).

¹³² 557 U.S. 305.

¹³³ See *id.*

¹³⁴ 554 U.S. 570 (2008).

¹³⁵ See *id.* at 635.

longstanding opinion that might need to be overruled.¹³⁶ *Heller's* originalism is indeed remarkable, but at least as remarkable was a single sentence fragment:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹³⁷

There is nothing originalist about this passage. Indeed it resolves controversial and difficult questions on a series of issues through *ipse dixit*. Felons convicted of what?¹³⁸ Mentally ill in what way? Why is the sixty-eight-square-mile area containing the White House, both houses of Congress, most federal agencies and foreign embassies, numerous national landmarks, and the Supreme Court building itself not a “sensitive place”? As much as *Heller* represents the apex of Justice Scalia’s originalism, it lays bare the limitations of that philosophy when put into judicial practice. It is reasonable to speculate that *Heller's* mysterious *ipse dixit* was inserted at the request of another member of Justice Scalia’s narrow majority. Compromise is necessary on a multimember court, but this kind of compromise undermines Justice Scalia’s case for originalism, which is grounded in consistency and predictability.

There were other compromises as well, some witting, others perhaps inadvertent. As he noted in his Taft Lecture, Justice Scalia on occasion softened his originalist commitments in deference to stare decisis.¹³⁹ For example, he followed, but refused to extend, dormant commerce clause cases that he disagreed with as a matter of original understanding,¹⁴⁰ and he refused to sign on to originalist reimaginings of Commerce Clause doctrine.¹⁴¹ He rejected substantive due process based on his textualism and originalism, but he resisted academic efforts to shift the locus of fundamental rights protection to the Privileges or Immunities Clause, where such rights arguably enjoy greater his-

¹³⁶ See *id.* at 620–21.

¹³⁷ *Id.* at 626–27. Justice Scalia also noted that these presumptively lawful regulatory measures were merely examples, and not an exhaustive list of acceptable measures. *Id.* at 627 n.26.

¹³⁸ Cf. *Voisine v. United States*, 136 S. Ct. 2272, 2290–92 (2016) (Thomas, J., dissenting) (arguing that constitutional avoidance counsels against permitting Congress to ban gun possession by individuals convicted of misdemeanor assault that is merely reckless rather than knowing or intentional).

¹³⁹ See Scalia, *supra* note 34, at 861.

¹⁴⁰ See, e.g., *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part).

¹⁴¹ Justice Scalia declined to join Justice Thomas’s concurring opinion in *United States v. Lopez*, 514 U.S. 549 (1995), which urged a narrow reading of congressional power under the Commerce Clause based on constitutional text, structure, and history. See *id.* at 584–603 (Thomas, J., concurring).

torical support.¹⁴² In *McDonald v. City of Chicago*,¹⁴³ which considered whether the Second Amendment applied to state and local gun laws, the petitioner’s lawyer Alan Gura opened by arguing that the plain text of the Privileges or Immunities Clause provided the strongest support for his position.¹⁴⁴ Justice Scalia interrupted Gura’s argument: “Well, I mean, what you argue is the darling of the professoriate, for sure, but it’s also contrary to 140 years of our jurisprudence. . . . [A]s much as I think [substantive due process is] wrong, . . . even I have acquiesced in it.”¹⁴⁵

In several cases Justice Scalia’s dual commitments to general rules and to originalism were out of harmony. He delivered his Taft Lecture less than three weeks before the Court heard oral argument in *City of Richmond v. J.A. Croson Co.*,¹⁴⁶ in which it would invalidate the city’s construction set aside for minority-owned businesses.¹⁴⁷ It is not obvious how the words of the Fourteenth Amendment would have been understood in relation to affirmative action plans of the sort at issue in *Croson*. The federal government enacted numerous race-conscious laws, including laws using explicit racial preferences, during Reconstruction;¹⁴⁸ translating the assumed constitutionality of these practices into an originalist rule for states is a complex exercise. Whatever one thinks of the historical evidence, an assessment of that evidence is conspicuously absent from Justice Scalia’s separate opinions in *Croson* and in other cases involving race-conscious governmental decisionmaking. Instead, he consistently offered his principled but historically unsupported view that the Constitution must be regarded as “color-blind.”¹⁴⁹ The rule swallowed the method.

Likewise, in one of Justice Scalia’s most doctrinally significant writings, his majority opinion in *Employment Division v. Smith* (*Smith II*),¹⁵⁰ he wrote that rational basis review was the appropriate

¹⁴² See *McDonald v. City of Chicago*, 561 U.S. 742, 813–50 (2010) (Thomas, J., concurring in part and concurring in the judgment). See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 181–87 (1998).

¹⁴³ 561 U.S. 742.

¹⁴⁴ Transcript of Oral Argument at 3–4, *McDonald*, 561 U.S. 742 (No. 08-1521), https://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1521.pdf [<https://perma.cc/EMK6-UTFG>].

¹⁴⁵ *Id.* at 7.

¹⁴⁶ 488 U.S. 469 (1989).

¹⁴⁷ See *id.* at 486.

¹⁴⁸ See Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 558–62 (1998).

¹⁴⁹ *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); see *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (“In the eyes of government, we are just one race here. It is American.”).

¹⁵⁰ 494 U.S. 872 (1990).

standard for a religious plaintiff's challenge to a law or state practice that is neutral as between religions, generally applicable, and not motivated by religious bias.¹⁵¹ *Smith* initially came before the Court during the 1987 Term, when the case was remanded for a determination of whether the religious practice at issue — peyote use — was illegal under state law, which might be relevant to the constitutionality of the respondent's termination.¹⁵² In the two years between *Smith I* and *Smith II*, Justice Scalia delivered his Taft Lecture on the importance of originalism. There is evidence that the Free Exercise Clause would have been understood by members of the Founding generation to compel a hard look at neutral and general laws that have the effect of substantially burdening religious exercise.¹⁵³ As Professor Michael McConnell notes, and as other legal historians have shown,¹⁵⁴ Founding-era practices and assumptions do not compel the view that religious exemptions from generally applicable laws should always be available.¹⁵⁵ But the contrary view, that a substantial burden on free exercise of religion is constitutionally irrelevant, is arguably inconsistent with the “theoretical underpinning” of the Free Exercise Clause, which assumes that “the right of free exercise is defined in the first instance not by the nature and scope of the laws, but by the nature and scope of religious duty.”¹⁵⁶

And yet Justice Scalia's opinion in *Smith II* is not even a little bit originalist and does not purport to be. Instead, he grounded the Court's holding in a creative reading of precedent¹⁵⁷ and in a fear of the consequences of a balancing test on the outcome of religious claims: “What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is ‘central’ to his personal faith?”¹⁵⁸ Again, an adherence to general rules and to judicial

¹⁵¹ See *id.* at 878–79.

¹⁵² *Emp't Div. v. Smith (Smith I)*, 485 U.S. 660, 673–74 (1988).

¹⁵³ Cf. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1107–10 (1994) (arguing that *Smith* is consistent with eighteenth-century views of the Free Exercise Clause but not necessarily with those prevalent at the time of the Fourteenth Amendment, which incorporated the Free Exercise Clause against the states). See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

¹⁵⁴ See Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

¹⁵⁵ See McConnell, *supra* note 153, at 1512.

¹⁵⁶ *Id.*

¹⁵⁷ See *Smith II*, 494 U.S. 872, 881–82 (1990) (describing instances in which the Free Exercise Clause has been triggered by “neutral, generally applicable law[s]” as involving “hybrid situation[s]” in which claimants invoked the clause “in conjunction with other constitutional protections”).

¹⁵⁸ *Id.* at 887.

restraint seemed to undermine Justice Scalia's commitment to originalism.

Perhaps less wittingly, Justice Scalia never faced up to the implications of incorporation of the Bill of Rights for originalist practice. Original meaning originalism invites an interpreter seeking to apply the Bill of Rights against the states to train on Reconstruction-era rather than Founding-era understandings of those rights.¹⁵⁹ Justice Scalia consistently overlooked or refused to accept that invitation in cases involving incorporated rights. As many others have done when considering incorporation,¹⁶⁰ his Fourth Amendment jurisprudence, for example, invariably dissects eighteenth-century common law assumptions even though local constables were not bound by the Fourth Amendment until at least 1868.¹⁶¹

In sum, Justice Scalia's approach to originalism was, by its own lights, impure in numerous ways. It was incautious in distinguishing original meaning from original expected applications. It succumbed to question-begging exceptions. It interacted uneasily and inconsistently with *stare decisis*. It conditioned the invocation of history on whether that history could support a general rule.

These adulterations lend significant insight into why originalism has failed to capture the Court. A scholar has the luxury of proposing a theory without regard for its political economy. A judge is a member of a political institution. He must constantly safeguard the conditions of his own legitimacy¹⁶² by respecting past precedents and norms of decisionmaking. On a multimember court, he must negotiate with others who may not share his substantive or methodological commitments. For a judge, theories of interpretation cannot and do not exist apart from theories of adjudication. Interpretation *is* construction, and vice versa. In this institutional environment, as both Fallon and Justice Scalia recognized, originalism is necessarily one piece of a pluralistic approach. Just as it always has been.¹⁶³

B. Rules

As we have seen, Justice Scalia also sought to change the Court along a different, orthogonal, and sometimes contradictory plane. He wanted the Court to eschew balancing tests in favor of categorical and

¹⁵⁹ See AMAR, *supra* note 142, at xiii; Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 983–88 (2012); Lash, *supra* note 153, at 1109.

¹⁶⁰ See Greene, *supra* note 159, at 984.

¹⁶¹ See *Barron v. Baltimore*, 32 U.S. 243, 247 (1833) (holding that the Bill of Rights constrains the federal government but not the states).

¹⁶² See Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 963 (2008).

¹⁶³ See BOBBITT, *supra* note 26, at 24 (“It is easy to see that [certain historical arguments] are better for dissent than for the Court because . . . they express a particular moral point and are therefore more effective as rhetoric than as decision procedure.”).

general rules. This commitment at times overwhelmed his commitment to originalism, as his opinions in *Smith II* and the affirmative action cases seem to show.

A preliminary assessment of the Court's performance along these lines is not promising for the champion of general rules. Ad hoc balancing and sui generis doctrine appear to be as present in U.S. constitutional law as ever. As above, *Heller* is instructive. Justice Scalia was the author of the opinion, and yet the rule that emerged from it is that gun possession is constitutionally protected except when it is not.¹⁶⁴ The tendency of Supreme Court rules to generate self-refuting exceptions is not limited to *Heller*. Take the well-known tiers of scrutiny framework, which attempts to categorize laws infringing on certain rights as deserving of particularized forms of scrutiny, whether "strict," or "intermediate," or, in effect, none. This framework seems quite plainly to have collapsed, if it ever had teeth in the first place.¹⁶⁵ This past Term, in *Fisher v. University of Texas at Austin (Fisher II)*,¹⁶⁶ the Supreme Court upheld the race-conscious admissions policy of the University of Texas while applying a form of strict scrutiny that appears to be unique to the context of race-based affirmative action.¹⁶⁷ In *Obergefell*, the Court invalidated the same-sex marriage prohibitions of 34 states,¹⁶⁸ in part on equal protection grounds, while declining to make any reference to the tiers of scrutiny.¹⁶⁹ Disability cases appear to warrant some standard between rational basis review and intermediate scrutiny.¹⁷⁰ Children earn special solicitude.¹⁷¹ Each particular

¹⁶⁴ See *infra* pp. 161–62.

¹⁶⁵ See James E. Fleming, "There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence, 74 *FORDHAM L. REV.* 2301, 2304–10 (2006) (seeking to deconstruct the view that the tiers of scrutiny framework is rigid rather than pliable).

¹⁶⁶ 136 S. Ct. 2198 (2016).

¹⁶⁷ See *id.* at 2209 (relying in part on the defendant's "good-faith efforts to comply with the law"); *id.* at 2223 (Alito, J., dissenting); see also *Grutter v. Bollinger*, 539 U.S. 306, 380 (2003) (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.").

¹⁶⁸ At the time of the *Obergefell* decision, eleven states and the District of Columbia had approved of marriages between same-sex unions via legislation or popular referendum, and an additional five had done so by way of a decision of the state's highest court based on an interpretation of the state constitution. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2615 (2015) (Roberts, C.J., dissenting).

¹⁶⁹ See *id.* at 2602–04 (majority opinion).

¹⁷⁰ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (invalidating a zoning regulation for a home for the intellectually disabled while purporting to apply rational basis review).

¹⁷¹ See *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (holding unconstitutional Texas's denial of free public education to the children of undocumented immigrants while claiming to apply rational basis review).

fundamental right, whether abortion,¹⁷² or voting,¹⁷³ or guns,¹⁷⁴ or individual Bill of Rights provisions, bears its own bespoke doctrinal formula.¹⁷⁵ As Justice Stevens wrote in a dissent from Justice Scalia’s (mostly) “rule”-bound opinion in *Lucas v. South Carolina Coastal Council*¹⁷⁶: “Like many bright-line rules, the categorical rule established in this case is only ‘categorical’ for a page or two in the U.S. Reports.”¹⁷⁷

Justice Scalia’s preference for rule promulgation rested in large part on the nature of an apex court with a discretionary docket. Common law-like accretion of the law ill suits such a court, he said, inasmuch as creating uniformity in federal law is part of the Court’s purpose.¹⁷⁸ “To adopt such an approach,” he said in his Holmes Lecture, “is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue.”¹⁷⁹ But the pattern Justice Stevens identified in *Lucas* tends to recur. Even in cases in which the Court initially announces a general rule, the rule is soon — or even ab initio — subject to ad hoc exceptions.

In *Lucas*, Justice Scalia qualified the rule that regulations that deprive land of all economically beneficial use qualify as takings with an exception for “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”¹⁸⁰ As scholars have observed, the law of nuisance itself requires substantial balancing, and the common law exception has proven generative for states and localities seeking to avoid regulatory takings liability.¹⁸¹ *Smith II* likewise qualified its rule that neutral laws of general ap-

¹⁷² See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (fashioning an “undue burden” standard for laws that regulate abortions prior to fetal viability).

¹⁷³ See *Anderson v. Celebrezze*, 460 U.S. 780, 789–90 (1983) (articulating a balancing test for state restrictions on voting rights).

¹⁷⁴ See *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (upholding New Jersey’s concealed carry law under intermediate scrutiny); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (upholding Maryland’s handgun permitting law under intermediate scrutiny); *Kachalsky v. County of Westchester*, 701 F.3d 81, 97–101 (2d Cir. 2012) (upholding New York’s concealed carry law under intermediate scrutiny).

¹⁷⁵ See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 870 (2006) (empirically demonstrating the context-sensitive nature of strict scrutiny in federal court cases).

¹⁷⁶ 505 U.S. 1003 (1992).

¹⁷⁷ *Id.* at 1067 (Stevens, J., dissenting).

¹⁷⁸ See Scalia, *supra* note 50, at 1179; cf. *Martin v. Hunter’s Lessee*, 14 U.S. 304, 347–48 (1816) (emphasizing the need for uniform interpretation of federal law as a prudential basis for extending the Supreme Court’s appellate jurisdiction over federal decisions by state courts).

¹⁷⁹ Scalia, *supra* note 50, at 1179.

¹⁸⁰ *Lucas*, 505 U.S. at 1029.

¹⁸¹ See Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 331–33 (2005).

plicability do not offend the Free Exercise Clause with an exception for what it called “hybrid situation[s]” in which other constitutional values were implicated.¹⁸² For example, the Court’s rejection of a licensing scheme that curtailed the pamphleteering of Jehovah’s Witnesses intertwined issues of religious freedom with those of freedom of speech and freedom of the press.¹⁸³ And decisions invalidating various regimes of compulsory education that harmed religious claimants involved the constitutional right of parents to direct the education of their children.¹⁸⁴ *Smith II*’s “hybrid” exception, necessary to reconcile the Court’s prior case law with the new rule, has baffled lower courts and commentators.¹⁸⁵ Or consider *Crawford*, whose judicial strait-jacket was loosened in subsequent cases defining which out-of-court statements are testimonial.¹⁸⁶ Or *R.A.V. v. City of St. Paul*,¹⁸⁷ in which Justice Scalia established the Byzantine rule that government regulations must be content neutral even within a category of unprotected speech unless the reason for the content sensitivity tracks the reason the category of speech is unprotected in the first place.¹⁸⁸ The first significant test of this rule, a case about a statute that banned cross burning with intent to intimidate, produced a badly splintered Court.¹⁸⁹

¹⁸² *Smith II*, 494 U.S. 872, 882 (1990).

¹⁸³ See *Cantwell v. Connecticut*, 310 U.S. 296, 303–05 (1940).

¹⁸⁴ See *Wisconsin v. Yoder*, 406 U.S. 205, 213–15 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

¹⁸⁵ See, e.g., *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) (“We . . . can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated.”); *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993) (calling “completely illogical” the idea that “the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights”); see also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) (“How can claimants be entitled to greater relief under a ‘hybrid’ claim than they could attain under either of the components of the hybrid? One suspects that the notion of ‘hybrid’ claims was created for the sole purpose of distinguishing *Yoder* in this case.”).

¹⁸⁶ See *Michigan v. Bryant*, 562 U.S. 344, 360 (2011) (adopting a totality of the circumstances test to determine whether a murder victim’s statements to police were testimonial); *id.* at 378–79 (Thomas, J., concurring in the judgment) (“The majority’s analysis which relies on, *inter alia*, what the police knew when they arrived at the scene, the specific questions they asked, the particular information [a dying declarant] conveyed, the weapon involved, and [the declarant’s] medical condition illustrates the uncertainty that this test creates for law enforcement and the lower courts.”).

¹⁸⁷ 505 U.S. 377 (1992).

¹⁸⁸ See *id.* at 386–88.

¹⁸⁹ See *Virginia v. Black*, 538 U.S. 343 (2003). Five Justices agreed that the First Amendment permitted a state to ban cross burning with intent to intimidate, *id.* at 347, while three Justices agreed with the (divided) Virginia Supreme Court that the statute impermissibly discriminated within the category of threatening speech, *id.* at 380–82 (Souter, J., concurring in the judgment in part and dissenting in part); see also *Black v. Commonwealth*, 553 S.E.2d 738, 742 (Va. 2001) (“The Virginia cross burning statute is analytically indistinguishable from the ordinance found

Rules have their place. Professor Kathleen Sullivan has written in these pages that a legal rule “binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts.”¹⁹⁰ This limitation might be perfectly sensible in developing doctrine under structural constitutional provisions that must set the ground rules for constituting and empowering the government in the first instance. It is at least as important for those ground rules to be clear and predictable as it is for them to achieve any kind of justice. Thus, many scholars regard as Justice Scalia’s finest opinion¹⁹¹ his solo dissent in *Morrison v. Olson*,¹⁹² in which he argued that the independent counsel was not an inferior officer — and therefore had to be appointed by the President with the advice and consent of the Senate — because the occupant was not subordinate to any executive officer.¹⁹³ The majority employed a multifactor test to determine the line between inferior and principal officers.¹⁹⁴ Less than a decade later, in *Edmond v. United States*,¹⁹⁵ Justice Scalia wrote an opinion for eight Justices that whittled the test down to one factor suspiciously reminiscent of his *Morrison* dissent: “[w]hether one is an ‘inferior’ officer depends on whether he has a superior.”¹⁹⁶

It is not a coincidence that the rules referenced above that failed to settle the law involved interpretive challenges quite unlike the definition of an inferior officer.¹⁹⁷ Rights provisions such as the constitutional guarantees of free exercise, confrontation, and free speech are very much in the business of doing justice; whether or not it is right to understand them in this way, actual courts will do so, and justice re-

unconstitutional in *R.A.V.*”). Justice Thomas did not believe the First Amendment applied to the conduct at issue and so did not engage *R.A.V.* See *Black*, 538 U.S. at 388 (Thomas, J., dissenting).

¹⁹⁰ Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

¹⁹¹ See, e.g., Terry Eastland, *Scalia’s Finest Opinion*, WKLY. STANDARD, Mar. 21, 2016, at 16.

¹⁹² 487 U.S. 654 (1988).

¹⁹³ See *id.* at 719 (Scalia, J., dissenting).

¹⁹⁴ See *id.* at 671–72 (majority opinion).

¹⁹⁵ 520 U.S. 651 (1997).

¹⁹⁶ *Id.* at 662.

¹⁹⁷ Another example of this dynamic is *Brower v. County of Inyo*, 489 U.S. 593 (1989), in which Justice Scalia sought to establish a bright-line definition of a “seizure” for Fourth Amendment purposes only to use a different formulation two years later in *California v. Hodari D.*, 499 U.S. 621 (1991). Compare *Brower*, 489 U.S. at 596–97 (“[A] Fourth Amendment seizure [occurs] . . . only when there is a governmental termination of freedom of movement *through means intentionally applied.*”), with *Hodari D.*, 499 U.S. at 626 (“The word ‘seizure’ readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful.”). Whether a shot suspect who continues to flee has been “seized” is the subject of a deep circuit split. See Allison K. Wyman, Note, *Seized by the Moment — But Which Moment? How a Physical Force Seizure Requires Only Contact with Intent to Restrain, Not Intentional Termination of Movement*, 48 AM. CRIM. L. REV. 1485, 1485–87 (2011).

quires confronting actual rather than hypothetical or “delimited triggering” facts.

Justice Scalia’s final Term at the Court was especially light on guidance to lower courts. In *Fisher II*, in addition to applying a relatively deferential form of strict scrutiny,¹⁹⁸ the Court entirely ignored a serious question of Article III standing.¹⁹⁹ In *Whole Woman’s Health v. Hellerstedt*,²⁰⁰ it appeared to discard principles of res judicata that it applies in other areas.²⁰¹ It also doubled down on the balancing test of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁰² issuing an intensely fact-bound opinion notwithstanding (or rather, because of) the moral gravity of the issues involved.²⁰³ In *United States v. Texas*,²⁰⁴ in which twenty-six states challenged the Obama Administration’s program of deferred deportation enforcement and work authorization for certain classes of undocumented immigrants,²⁰⁵ the Court affirmed, 4-4, the judgment of the U.S. Court of Appeals for the Fifth Circuit without an opinion.²⁰⁶ Declining to give reasons for an affirmation by an equally divided Court is a standard practice,²⁰⁷ but in this case doing so obscured the Court’s view of important questions of state standing and administrative procedure that are quite likely to recur.²⁰⁸ In *Zubik v. Burwell*,²⁰⁹ the Court declined to decide whether regulations governing employer exemptions from the requirement to provide a health insurance plan that included birth control coverage

¹⁹⁸ See 136 S. Ct. 2198, 2215 (2016) (Alito, J., dissenting).

¹⁹⁹ See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 639–40 (5th Cir. 2014) (noting that the Court chose to remand *Fisher* on the merits without considering whether the plaintiff had suffered an injury amenable to judicial relief and thus had standing).

²⁰⁰ 136 S. Ct. 2292 (2016).

²⁰¹ The Court invalidated on its face a Texas requirement that abortion providers have admitting privileges at a local hospital even though the petitioners had brought an unsuccessful facial challenge in prior litigation. See *id.* at 2300, 2306; see also *id.* at 2330 (Alito, J., dissenting) (“[D]etermined to strike down two provisions of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases.”); *id.* at 2321 (Thomas, J., dissenting) (“Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law.”).

²⁰² 505 U.S. 833 (1992).

²⁰³ See *Whole Woman’s Health*, 136 S. Ct. at 2310 (“[T]he Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings.”).

²⁰⁴ 136 S. Ct. 2271 (2016).

²⁰⁵ See *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015).

²⁰⁶ *Texas*, 136 S. Ct. at 2271.

²⁰⁷ See William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 35 (1983).

²⁰⁸ See Linda Greenhouse, *The Supreme Court’s Silent Failure on Immigration*, N.Y. TIMES (June 25, 2016), <http://www.nytimes.com/2016/06/26/opinion/sunday/the-supreme-courts-silent-failure-on-immigration.html> [<https://perma.cc/M46S-NQU2>].

²⁰⁹ 136 S. Ct. 1557 (2016).

under the Affordable Care Act violated anyone's federal rights under the Religious Freedom Restoration Act²¹⁰ (RFRA). Instead, the Court in effect ordered a settlement on terms of its own devising between multiple parties with diverse and apparently irreconcilable interests.²¹¹ *Spokeo v. Robins*,²¹² which was supposed to resolve the circumstances under which Congress's provision of a right of action in a federal statute was sufficient to confer Article III standing, did no more than punt the case back to the Ninth Circuit.²¹³

To be sure, some of these piecemeal outcomes, including almost certainly the ones in *Texas* and in *Zubik*, resulted directly from Justice Scalia's unanticipated absence from the bench. In that sense, they are more poignant than illuminating. But two of the cases mentioned above that were presumably unaffected by Justice Scalia's death — *Fisher II* and *Whole Woman's Health* — are the two that best exemplify the reason his preference for rules was unlikely ever to spread to his colleagues. The softening of strict scrutiny in race-based affirmative action cases reflects an obvious, though typically *sub rosa*, recognition that such policies are not premised on a theory of racial supremacy or a desire to subordinate any particular group — that indeed affirmative action is often justified on a remedial theory of equality that is arguably compatible with the Fourteenth Amendment.²¹⁴ Rigid scrutiny in such cases constitutionalizes a status quo of disparate racial access to elite educational institutions while subjecting the government's interest in substantive equality to a presumption of unconstitutionality. In a competition between values of formal and substantive equality, strict scrutiny is a rule-like formulation that awards victory to one side.²¹⁵ Less-strict scrutiny is less rule-like, but in attending to factual context it provides space for each side to make claims on the outcome, not just in the present case but in the next one and the one after.

²¹⁰ See *id.* at 1560.

²¹¹ See *id.* The Court identified an area of potential agreement between the parties where under the religious employers could “contract for a plan that does not include coverage for some or all forms of contraception’ even if their employees receive cost-free contraception coverage from the same insurance company.” *Id.* (quoting Supplemental Brief for Petitioners at 4, *Zubik*, 136 S. Ct. 1557 (No. 14-1418)). The employers insisted, however, that such a plan would need to involve a separate contracting process for employees — one that the government insisted could not be reconciled with state law or with the goals of the Affordable Care Act. Compare Supplemental Brief for the Petitioners at 1, *Zubik*, 136 S. Ct. 1557 (No. 14-1418), with Supplemental Reply Brief for the Respondents at 1, 3–6, *Zubik*, 136 S. Ct. 1557 (No. 14-1418). Moreover, even if these positions may be reconciled, there are dozens of other pending cases with different parties who have made no concessions to the Court but whose cases remain in limbo. See Supplemental Brief for the Respondents at 20, *Zubik*, 136 S. Ct. 1557 (No. 14-1418).

²¹² 136 S. Ct. 1540 (2016).

²¹³ *Id.* at 1545.

²¹⁴ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 362–64 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

²¹⁵ Rational basis review would do the same, but with a different victor.

In abortion rights cases, those on one side of the political spectrum hold sacrosanct the life of the fetus. Those on the other side view the woman's reproductive choice as inviolable. Under the trimester framework of *Roe v. Wade*, the life of the fetus was declared constitutionally insubstantial prior to viability.²¹⁶ Prior to *Roe*, the woman's reproductive choices were similarly disregarded in states with abortion prohibitions. *Casey*, which *Whole Woman's Health* powerfully reaffirmed, sought to give voice to both sides of the abortion rights debate by articulating a standard, the undue burden test, that was structurally incapable of foreclosing outcomes in advance of their particular factual presentation.²¹⁷ Justice Breyer's clinical attention to the factual findings of the district court in *Whole Woman's Health*, and indeed his otherwise cavalier treatment of *res judicata*, demonstrated a feature, not a bug, of the post-*Casey* regime.

Sonia Mittal and Professor Barry Weingast have said that "all successful constitutions lower the stakes of politics."²¹⁸ In both *Fisher II* and *Whole Woman's Health*, the promulgation of standards rather than rules was designed to enable a diverse set of political actors, acting through stable, ultimately conservative institutions, to lay claim to the law. These cases are emblematic of constitutional law in an era of pluralist democratic politics. As Professor William Eskridge writes, "[a] pluralist political system is one whose goal is the accommodation of the interests of as many salient groups as possible, without disturbing the ability of the state and the community to press forward with collective projects."²¹⁹ For someone temperamentally predisposed to the status quo, this tenuous opening of the door to piecemeal contestation by eclectic individual claimants is, to quote Justice Scalia, "courting anarchy."²²⁰ For the claimants themselves, having the ear of a court may be a precondition to democratic membership and a gateway to political participation.

In many other nations in which apex courts with constitutional jurisdiction engage in judicial review — indeed, exceptions are difficult to think of — courts explicitly adopt proportionality analysis, a structured approach to balancing.²²¹ Proportionality comes in different fla-

²¹⁶ See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

²¹⁷ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) ("Even when jurists reason from shared premises, some disagreement is inevitable. That is to be expected in the application of any legal standard which must accommodate life's complexity." (citation omitted)).

²¹⁸ Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century*, 29 J.L. ECON. & ORG. 278, 279 (2013).

²¹⁹ William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1293 (2005).

²²⁰ *Smith II*, 494 U.S. 872, 888 (1990).

²²¹ See DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 169–71 (2004); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015).

vors, but its most salient feature relative to American law is that it is transsubstantive.²²² A court's determination that it must apply proportionality does not generally depend on its characterizing the right or the litigant as specially deserving of constitutional protection. It is no accident that proportionality has developed most rapidly within the jurisprudence of courts existentially committed to pluralism²²³: Canada, where multiculturalism is an explicit constitutional commitment;²²⁴ Germany, whose Constitutional Court prizes human dignity and is affirmatively, "militant[ly]" committed to maintaining democratic conditions;²²⁵ the European regional courts in Strasbourg and Luxembourg,²²⁶ which also temper their rights jurisprudence through the device of a margin of appreciation;²²⁷ and the Israeli Supreme Court, which frequently adjudicates human rights claims brought by members of an ethnic minority group living under occupation.²²⁸ The global spread of proportionality supports what a cursory glance at last Term's cases more dimly suggests: efforts to excise qualitative judgment from constitutional judging are unlikely to succeed.

III. JUSTICE SCALIA'S SIGNIFICANCE NOTWITHSTANDING

Recall that Justice Scalia's preference for rules over standards was grounded in the value of predictability. In discussing this preference during his Holmes Lecture, he made a curious reference: "Predictability, or as Llewellyn put it, 'reckonability,' is a needful characteristic of

²²² Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 864 (2011) ("[Proportionality analysis], while not a cure-all for the challenges facing constitutional courts, avoids these pathologies by providing a relatively systematic, transparent, and trans-substantive analytical procedure for the adjudication of virtually all rights claims.").

²²³ See Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT'L J. CONST. L. 415, 417 (2008).

²²⁴ See Canadian Charter of Rights and Freedoms § 27, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.) ("This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.").

²²⁵ See DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 285 (3d ed. 2012) (cataloguing provisions of the Basic Law that actively empower the government to limit the rights of those who would do harm to the free democratic order).

²²⁶ See STEVEN GREER, *THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 20 (2000); Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L.J. 158, 158 (2010).

²²⁷ See YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 1–2, 4 (2001).

²²⁸ See, e.g., HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. 58(5) PD 807 (2004) (Isr.).

any law worthy of the name.”²²⁹ If Justice Scalia appreciated the irony of this citation — as he must have — he did not betray it. Like Justice Scalia, Professor Karl Llewellyn was a giant of American law who died in his sleep on February 13, but the similarities end there. Justice Scalia was perhaps the most important American formalist since Dean Langdell. Llewellyn was perhaps the *ne plus ultra* of American legal realists.²³⁰

Llewellyn understood the desire for the law to have a measure of predictability, but that need led him to radically different conclusions about the judicial role. He did not believe that “reconability” was an essential component of a legal system; for Llewellyn, that is, it was not a box that one must check before regarding the law as legitimate. To the contrary, Llewellyn devoted his professional life to elaborating the view that judicial outcomes in difficult cases are not determined by a general legal rule but are intensely contextual, fact-bound, and contingent.²³¹ The passage on “reconability” that interested Justice Scalia appears in *The Common Law Tradition*, in which, among much else, Llewellyn discussed the lingering judicial ideology of the “one single right answer.”²³² Not only did Llewellyn think this attitude unnecessary, he was skeptical that it even improved legal certainty in difficult cases. In such cases, Llewellyn wrote, “my suspicion is that this approach throws the ultimate decision into materially greater chanciness than does the tougher inquiry into which of the known permissible possibilities seems the probable best, and why.”²³³

The dichotomy between Llewellyn’s attention to facts and Justice Scalia’s attention to rules is a recurring theme across American legal history. Section III.A reflects on that history by reference to Gilmore’s memorable tripartite taxonomy: the Age of Discovery, the Age of Faith, and the Age of Anxiety. Justice Scalia’s appearance on the scene represents a stage in the life cycle of formalism and antiformalism that characterizes the American legal tradition. Section III.B locates Justice Scalia’s significance in his representation of the status quo in a rapidly pluralizing era.

²²⁹ Scalia, *supra* note 50, at 1179 (quoting KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 17 (1960)).

²³⁰ See Brian Z. Tamanaha, *Understanding Legal Realism*, 87 *TEX. L. REV.* 731, 736 (2009) (placing Llewellyn at “the center of legal realism”).

²³¹ See generally WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (2d ed. 2012).

²³² KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 18 (Quid Pro Books 2015) (1960) (footnote omitted).

²³³ *Id.*

A. The Life Cycle of Formalism

Gilmore's book divides American law from the Founding to the 1970s into three eras or "ages." During the "Age of Discovery," which ran roughly to the Civil War, great judges such as Justice Joseph Story of the Supreme Court and Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court were building out American law from the raw materials of English common law, a sparse written Constitution, and the special conditions of American federalism.²³⁴ Far from formalistic, opinions of this era were written in what Llewellyn calls "our Grand Style,"²³⁵ one that evoked first principles and used precedent creatively based on resort to "situation-reason."²³⁶

The "Age of Faith" followed the Civil War and ran roughly to the First World War. It featured a formal style of case reasoning that Gilmore associates with Dean Langdell and the case method. Gilmore describes the tenets of that age thus:

The post-Civil War judicial product seems to start from the assumption that the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been.²³⁷

Justice Scalia was a formalist in this sense. He believed the law, including constitutional law, was settled at a point in the past and must be applied today and ever after in a way that is faithful to that settlement. The legal outcomes that are correct today are those that would have been considered correct by the lights of the law-giving generation. For this style of formalist, the lawgiver could have been a prior court or set of courts, but what is important is that judges in the present do not upset the expectations of more legitimate lawgivers of the past.

For Gilmore, Langdell recalled the earlier formalism of Blackstone, whose *Commentaries on the Laws of England* likewise presented swirling legal doctrine as if it were settled and clear. Writes Gilmore: "Using the tools of eighteenth-century analytical 'philosophy,' Blackstone was in effect constructing a dike which, it could be hoped, would hold back the encroaching tide."²³⁸ Like Blackstone, Langdell was not an emblem of an era of legal simplicity but rather a levee constructed to resist legal complexity. With the industrial revolution came rapid, irreversible changes in the structure of civil society and a rise in the ways in which

²³⁴ See GILMORE, *supra* note 1, at 17–36.

²³⁵ LLEWELLYN, *supra* note 232, at 4; see GILMORE, *supra* note 1, at 11.

²³⁶ LLEWELLYN, *supra* note 232, at 41.

²³⁷ GILMORE, *supra* note 1, at 56.

²³⁸ *Id.* at 5.

individuals could injure one another, enter into contractual agreements, and breach those agreements.²³⁹ Langdell sought to impose order on this new world by (over)simplifying it into basic laws of torts and contracts that applied across disparate factual presentations.²⁴⁰

In Gilmore's telling, the Age of Faith was followed by the Age of Anxiety, in which scholars such as Llewellyn exploded the myth that law is or should be treated as a branch of the natural sciences and instead sought to treat it as a branch of the social sciences.²⁴¹ The anxiety this shift produced stemmed from a fear that the law lacked any normative core: is all permitted?²⁴² Legal realism's two stepchildren, the law and economics and critical legal studies movements,²⁴³ veered in this direction. Law and economics made a hero of the Holmesian bad man and gave rise to the "just so" jurisprudence of Posnerian pragmatism.²⁴⁴ Critical legal studies produced scholars such as Professor Mark Tushnet, who memorably argued that, were he a judge, he would push whatever "result is, in the circumstances now existing, likely to advance the cause of socialism."²⁴⁵

Scalia the jurist was born into a constitutional order that had failed to identify any prior point of settlement that biases adjudicative law in favor of the familiar and permits it to follow its conservative instincts.²⁴⁶ Seeking to provide that normative core, he sat at the crest (or, if one prefers, the trough) of a wave of formalistic thinking about the constraints on judges. The question is how high the elevation was.

B. Justice Scalia's Affluents

In 2005, Professor Laurence Tribe announced that he would not complete the long-anticipated second volume of his celebrated treatise, *American Constitutional Law*.²⁴⁷ In an open letter published in *Green Bag*, Tribe wrote that constitutional law appeared to be at a crossroads

²³⁹ See *id.* at 39–44.

²⁴⁰ See LANGDELL, *supra* note 15, at vi–vii; see also GILMORE, *supra* note 1, at 57 (“During this period the courts became the apostles of reaction and the guardians of a romanticized, oversimplified past.”).

²⁴¹ See GILMORE, *supra* note 1, at 78–79.

²⁴² See Philip Bobbitt, *The Age of Consent*, in GILMORE, *supra* note 1, at 100, 102.

²⁴³ See *id.* at 107.

²⁴⁴ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897); Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the “Bad Man” of Holmes*, 78 B.U. L. REV. 903 (1998); RICHARD A. POSNER, LAW, PRAGMATISM, & DEMOCRACY (2003); see also Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983).

²⁴⁵ Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

²⁴⁶ See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 714–16 (1990).

²⁴⁷ Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 292 (2005).

in which different factions on the Court no longer shared basic premises of the enterprise in which they were engaged.²⁴⁸ Noting, for example, that then-Justice Rehnquist's dissent in *Roe v. Wade* had not disagreed that abortion rights were constitutionally protected,²⁴⁹ Tribe lamented that many of the 5–4 splits on the later Court “reflect a much more fundamental and seemingly irreconcilable division within legal and popular culture that is not amenable to the treatment that a treatise might hope to give such cases.”²⁵⁰

Tribe was describing the state of constitutional law and politics in the Age of Scalia. Fractured. Polarized. Irreducible to any coherent set of doctrinal rules. Lacking shared normative or even empirical premises.²⁵¹ The startling pace of technological change has abetted this disjuncture. Gone is the age of Cronkite, of shared intermediaries between the general public and the work of the Court and other public institutions.²⁵² As Professor W. Lance Bennett writes: “[W]idespread social fragmentation has produced individuation as the modal social condition in postindustrial democracies.”²⁵³ In this environment, each community forms a law unto itself. This does not mean that the law as enforced by public officials loses its coercive authority, but rather, more than ever, the official institutions of law compete with other expressions of the law in exile.²⁵⁴

Professor Robert Cover understood these alternative normative communities in terms of the multiplicity of law.²⁵⁵ African Americans and other racial or ethnic minority groups see a world in which the law rejects the *Washington v. Davis*²⁵⁶ paradigm and recognizes dis-

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 296.

²⁵⁰ *Id.* at 302.

²⁵¹ See Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

²⁵² See Yochai Benkler, Lecture, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1263 (2003) (“The possibility of sustainable, widely accessible and effective communications by individuals or groups, organized on- or offline, makes possible direct democratic discourse. It creates direct means for the acquisition of information and opinion.”).

²⁵³ W. Lance Bennett, *The Personalization of Politics: Political Identity, Social Media, and Changing Patterns of Participation*, 644 ANNALS AM. ACAD. POL. & SOC. SCI. 20, 22 (2012).

²⁵⁴ See Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, Winter 1995, at 83, 84 (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)) (“[T]he nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses.”); Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2254–55 (2014) (observing that the construct of a Constitution in exile is not limited to conservative thought).

²⁵⁵ See Cover, *supra* note 17, at 16 (“It is the problem of the multiplicity of meaning — the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis — that leads at once to the imperial virtues and the imperial mode of world maintenance.”).

²⁵⁶ 426 U.S. 229 (1976).

parate impact liability,²⁵⁷ embraces race-based affirmative action,²⁵⁸ and has the capacity to respond effectively to racial profiling or excessive force by the police.²⁵⁹ Social democrats and progressives see a world in which universal health care and campaign finance reform infringe no rights.²⁶⁰ Libertarians see a world in which the Privileges or Immunities Clause is revitalized to more vigorously protect contract and property rights.²⁶¹ And many traditionalists see a world in which vulnerable, politically conservative understandings of constitutional law are no longer endangered. They, too, yearn for an advocate. Gilmore writes:

It may be that every legal system, at some point in its development, goes through its Age of Faith. Sooner or later a Blackstone or a Langdell appears. The idea of a body of law, fixed for all time and invested with an almost supernatural authority, is irresistibly attractive — not only for lawyers and their clients but, perhaps even more, for the populace at large. If a Blackstone or a Langdell comes at the right time, he will be heard and his words will, for a generation, be devoutly believed: his message is a comforting one and ought to be true even if it is not.²⁶²

Justice Scalia was the successor within this tradition. The difference is that for Justice Scalia, the great social upheaval that produced his approach was the demand for equality itself. Justice Scalia was fond of saying that he preferred a dead Constitution to a living one, that we should not be so smug as to believe that society was evolving to a better place rather than a worse one.²⁶³

It is easy to see how advocacy of this sort can look like bigotry. This is not the familiar postmodern critique of impartiality as erasing communities defined by difference, as “attained only by abstracting from the particularities of situation, feeling, affiliation, and point of

²⁵⁷ See *id.* at 239.

²⁵⁸ See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1651–53 (2014) (Sotomayor, J., dissenting).

²⁵⁹ See *McCleskey v. Kemp*, 481 U.S. 279, 314–15 (1987) (rejecting the relevance of empirical evidence showing racial bias in capital sentencing in part because the defendant’s claim, “taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system”); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (denying a chokehold victim’s standing to seek to enjoin the illegal use of chokeholds by the Los Angeles Police Department).

²⁶⁰ See Democratic Platform Comm., *2016 Democratic Party Platform*, 2016 DEMOCRATIC NAT’L CONVENTION 25, 34 (July 21, 2016), <https://www.demconvention.com/wp-content/uploads/2016/07/Democratic-Party-Platform-7.21.16-no-lines.pdf> [<https://perma.cc/JF6L-TRYC>].

²⁶¹ See BARNETT, *supra* note 39, at 60–61, 356–57; RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 528–29 (2014).

²⁶² GILMORE, *supra* note 1, at 57–58.

²⁶³ See Scalia, *supra* note 63, at 40–41 (“A society that adopts a bill of rights is skeptical that ‘evolving standards of decency’ always ‘mark progress,’ and that societies always ‘mature,’ as opposed to rot.”); see also GILMORE, *supra* note 1, at 93 (tying newfound interest in legal history to skepticism about the inevitability of progress).

view.”²⁶⁴ The accusation that Justice Scalia’s many admirers must confront is sharper than that. The bill of particulars might begin with *Smith II*, in which, recall, Justice Scalia transformed free exercise doctrine by refusing to permit what were, in effect, disparate impact claims by religious outsiders. The ground for decision in *Smith II* was quite directly a fear that religious minorities might cannibalize the law:

The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind — ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.²⁶⁵

On its face, and standing alone, this concern sits comfortably within a Progressive, communitarian tradition.²⁶⁶ Still, the *Smith* doctrine can be criticized from the perspective of representation reinforcement,²⁶⁷ as it leaves religious minorities at the mercy of a democratic process that more popular or politically connected religious groups may successfully navigate.²⁶⁸ Christians obtain Sunday closing laws, which disadvantage religious business owners who observe a Saturday Sabbath and are barred from recouping their losses the next day.²⁶⁹ As Justice Blackmun observed in his *Smith II* dissent, the federal government exempted the use of sacramental wine from its ban on alcohol possession during Prohibition.²⁷⁰

One can explain *Smith II*, then, either as demonstrating a commitment to a neutral public sphere or, more cynically, as showing simple callousness to the claims of unfamiliar or culturally marginalized group members. Justice Scalia provided some ammunition for the latter view a decade after *Smith II*, when he joined Chief Justice

²⁶⁴ IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 97 (1990).

²⁶⁵ 494 U.S. 872, 888–89 (1990) (citations omitted).

²⁶⁶ See Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 21 (2004) (describing communitarianism’s general focus on democracy, civic virtue, and duties as opposed to individual rights).

²⁶⁷ Cf. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87–88 (1980) (advocating for “participation-oriented, representation-reinforcing” judicial review, *id.* at 87).

²⁶⁸ See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1288–89 (1994) (wondering whether, had the group requesting a religious exemption in *Smith II* been secular or a mainstream religion, the State would have granted the exception).

²⁶⁹ See *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality opinion).

²⁷⁰ See 494 U.S. at 913 n.6 (Blackmun, J., dissenting) (citing National Prohibition Act, Pub. L. No. 66-66, § 3, 41 Stat. 305, 308–09 (1919) (repealed 1935)).

Rehnquist's opinion in *Boy Scouts of America v. Dale*.²⁷¹ There, the Boy Scouts sought to dismiss a gay assistant scoutmaster in violation of the neutral and generally applicable public accommodations law of the state of New Jersey.²⁷² The Court accepted the Boy Scouts' claim that its freedom of expressive association granted it a constitutional exemption from the state's antidiscrimination laws.²⁷³ It is difficult to understand *Dale*'s relationship to *Smith II*: either free association claims are worthy of greater protection than free exercise claims, or conservative organizations that injure people out of opposition to homosexuality are worthy of greater protection than members of the Native American church who believe smoking peyote has spiritual significance.²⁷⁴

An additional data point came fourteen years later. In *Burwell v. Hobby Lobby Stores, Inc.*,²⁷⁵ the Court determined that RFRA required the Department of Health and Human Services to provide an accommodation to religious employers who objected to the requirement, under the Affordable Care Act, that they provide employees with an insurance plan that includes contraception coverage.²⁷⁶ Justice Scalia joined the majority opinion without comment.²⁷⁷ *Hobby Lobby* is not a constitutional decision, and *Smith II* itself was the motivation for RFRA's heightened standard for religious claims.²⁷⁸ Still, *Hobby Lobby* arguably courts the same "anarchy" as *Smith II*,²⁷⁹ and RFRA was intended to embody the pre-*Smith II* constitutional law that Justice Scalia claimed in *Smith II* not to be altering.²⁸⁰ The most significant difference between *Smith II* and *Hobby Lobby* on the facts is that *Smith II* involved the claims of members of a socially excluded religious minority group and *Hobby Lobby* involved the claims of a Christian bookseller.

No data point alone is sufficient to establish inconsistency, a result-oriented approach, or a chronic insensitivity to cultural outgroups. But the puzzling progression from *Smith II* to *Dale* to *Hobby Lobby* provides some context for numerous accusations of dog whistling that have trailed Justice Scalia for years. Dissenting in *United States v.*

²⁷¹ 530 U.S. 640 (2000).

²⁷² *Id.* at 644.

²⁷³ *Id.*

²⁷⁴ See Stephen Clark, *Judicially Straight? Boy Scouts v. Dale and the Missing Scalia Dissent*, 76 S. CAL. L. REV. 521 (2003) (proposing and ultimately rejecting various theories on which *Dale* and *Smith II* might be reconciled).

²⁷⁵ 134 S. Ct. 2751 (2014).

²⁷⁶ See *id.* at 2759.

²⁷⁷ See *id.* at 2758.

²⁷⁸ See *id.* at 2761.

²⁷⁹ See *id.* at 2787 (Ginsburg, J., dissenting) (referring to the "startling breadth" of the decision and "the havoc the Court's judgment can introduce").

²⁸⁰ See *Smith II*, 494 U.S. 872, 878–79 (1990).

Virginia,²⁸¹ in which the Court opened the Virginia Military Institute (VMI) to women,²⁸² he lamented the Court’s “criticism of our ancestors,”²⁸³ said that “the function of this Court is to *preserve* our society’s values . . . , not to *revise* them,”²⁸⁴ and praised VMI’s commitment to “manly honor.”²⁸⁵ Dissenting in *Romer v. Evans*,²⁸⁶ in which the Court blocked Colorado from constitutionally excluding gays and lesbians from antidiscrimination law,²⁸⁷ Justice Scalia defended the state by referring to Coloradans’ “*exposure* to homosexuals’ quest for social endorsement.”²⁸⁸ Dissenting in *Lawrence v. Texas*,²⁸⁹ Justice Scalia accused the Court of “sign[ing] on to the so-called homosexual agenda,” which he attributed to “some homosexual activists.”²⁹⁰ He reminded the Court that “[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home”²⁹¹ because these people “view this as *protecting* themselves and their families from a lifestyle that they believe to be immoral and destructive.”²⁹² He chided the Court for labeling these attitudes “discrimination.”²⁹³ In none of these cases did he dissent “respectfully,” per the Court’s usual civility norms.²⁹⁴

Justice Scalia has courted even more controversy along these lines at oral argument. During the oral argument in *Lawrence*, he casually and evocatively compared the right of gays to sexual autonomy to a right to “flagpole sitting.”²⁹⁵ During the argument in *Shelby County v. Holder*,²⁹⁶ Justice Scalia attributed Congress’s overwhelming 2006 vote to reauthorize the Voting Rights Act to “perpetuation of racial entitlement.”²⁹⁷ At the oral argument in *Fisher II*, Justice Scalia raised

²⁸¹ 518 U.S. 515 (1996).

²⁸² *See id.* at 519.

²⁸³ *Id.* at 567 (Scalia, J., dissenting).

²⁸⁴ *Id.* at 568.

²⁸⁵ *Id.* at 601 (internal quotation marks omitted).

²⁸⁶ 517 U.S. 620 (1996).

²⁸⁷ *See id.* at 623–24.

²⁸⁸ *Id.* at 646 (Scalia, J., dissenting) (emphasis added).

²⁸⁹ 539 U.S. 558 (2003).

²⁹⁰ *Id.* at 602 (Scalia, J., dissenting).

²⁹¹ *Id.*

²⁹² *Id.* (emphasis added).

²⁹³ *Id.*

²⁹⁴ *See Note, From Consensus to Collegiality: The Origins of the “Respectful” Dissent*, 124 HARV. L. REV. 1305, 1305 (2011).

²⁹⁵ Transcript of Oral Argument at 9, *Lawrence*, 539 U.S. 558 (No. 02-102), https://www.supremecourt.gov/oral_arguments/argument_transcripts/02-102.pdf [<https://perma.cc/QQ84-NXGT>].

²⁹⁶ 133 S. Ct. 2612 (2013).

²⁹⁷ Transcript of Oral Argument at 47, *Shelby County*, 133 S. Ct. 2612 (No. 12-96), https://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf [<https://perma.cc/2Y3J-6Q2N>].

the claim that African American students should perhaps attend a “less-advanced” or “slower-track” school where classes will not be “too fast for them.”²⁹⁸

We have dwelled in these fields not to malign the dead but to confront the pain that lies visibly beneath the surface of Justice Scalia’s jurisprudence. The perception of bias against religious minorities, against women, against gays and lesbians, and against African Americans has a basis beyond the subjective construction Justice Scalia’s detractors choose to put upon his jurisprudence.²⁹⁹ The problem with originalism, just like its promise, has always been rhetorical, a form of what Professor Meir Dan-Cohen has in a different context called “selective transmission,” which he defines as “the transmission of different normative messages to officials and to the general public.”³⁰⁰ Justice Scalia could be fainthearted as an adjudicator (as all originalists who reach the bench must be) so long as he was effectively lionhearted in his public appraisals of originalism. The irreducible minimum of his rhetorical commitment was to speak of the constitutional past as something worth returning to.

But those who are seeking to establish their democratic citizenship through constitutional litigation do not view the past in this restorative and unabashedly jurispathic register.³⁰¹ For them, instead, it is of nearly existential importance for the Constitution to appear to be open to novel forms of contestation. It is the very ascendancy of these nomic communities, the very promiscuity of the law they seek to nurture, that produces the jurispathic impulse for which Justice Scalia so ably speaks.³⁰² They are not seeking recompense for past wrongs. They are seeking to establish a new social contract, a new constitutional *grundnorm* of mutual recognition rather than of mere tolerance.³⁰³

Originalism and adjudication by general rules ill suit a paradigm of mutual recognition, with its full-throated embrace of the novel and the particularized. That incompatibility precisely underwrote Justice Scalia’s commitment to his agenda, and it explains why he was destined to

²⁹⁸ Transcript of Oral Argument at 67, *Fisher II*, 136 S. Ct. 2198 (No. 14-981), https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-981_p8k0.pdf [<https://perma.cc/5VY9-2YLY>].

²⁹⁹ Cf. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

³⁰⁰ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 635 (1984).

³⁰¹ See Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 521–22 (2011).

³⁰² See Cover, *supra* note 17, at 67–68.

³⁰³ See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747–48 (2011) (identifying the “pluralism anxiety” that besets many Americans who “view civil rights as an endless parade of groups clamoring for state and social solicitude”).

fail. Gilmore predicted that fate. Toward the end of *The Ages of American Law*, he forecast a “new Langdell” who will “return[] to the elaboration of unitary theories,”³⁰⁴ a revelation to arrest the revolution.³⁰⁵ He continued, however, by offering that this person’s future was unlikely to “include[] a triumph as complete as that of Langdellianism a century ago” because “[i]n the polarized society which we seem to have arrived at, consensus is an unlikely issue.”³⁰⁶ The polarization of which Gilmore spoke is intertwined with the very fecundity of law, the very constitutional *life*, that produced Justice Scalia. By the time he arrived, it was too late for him to succeed. The new constitutional imaginary is here, it’s queer, get used to it.

CONCLUSION

One of the ironies of Justice Scalia’s jurisprudence is its incompatibility with Founding-era assumptions about judges. An oft-repeated anecdote nicely captures the point. At oral argument in a little-known case called *Barnard v. Thorstenn*,³⁰⁷ a constitutional challenge to the bar admission rules for the Virgin Islands, Justice O’Connor admonished the lawyer for the petitioner for addressing her and the other members of the Court as “Judge.”³⁰⁸ Later in the argument, after the lawyer repeated the error and quickly corrected herself, Justice Stevens retorted, “your mistake in calling me Judge is also made in Article III of the Constitution.”³⁰⁹ For all the majesty of Cass Gilbert’s marble palace at One First Street, and for all their self-awareness as what Blackstone called “depositaries of the laws; the living oracles, who must decide in all cases of doubt,”³¹⁰ Supreme Court Justices, no less than their “inferior” colleagues, were intended to exercise their judgment on a case-by-case basis.³¹¹

Justice Scalia did not much move the Court doctrinally or methodologically in constitutional law. He no doubt sharpened his colleagues, who suddenly had to defend their pluralism or their purposivism. He seems, at least in his day, to have made the bench quite a bit hotter at

³⁰⁴ GILMORE, *supra* note 1, at 96.

³⁰⁵ Gilmore died in May 1982. See *Memorial for Grant Gilmore*, N.Y. TIMES, Sept. 29, 1982, at D26. President Reagan nominated Justice Scalia to the U.S. Court of Appeals for the D.C. Circuit two months later. See Nominations Submitted to the Senate, 18 WEEKLY COMP. PRES. DOC. 912 (July 19, 1982).

³⁰⁶ GILMORE, *supra* note 1, at 97.

³⁰⁷ 489 U.S. 546 (1989).

³⁰⁸ Oral Argument at 6:45, *Barnard*, 489 U.S. 546 (No. 87-1939), <http://www.oyez.org/cases/1988/87-1939> [<https://perma.cc/23Q9-TCT4>].

³⁰⁹ *Id.* at 12:29.

³¹⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

³¹¹ Congress did not give the Court general federal question jurisdiction until 1875. See Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (codified as amended at 28 U.S.C. § 1331 (2012)).

oral argument.³¹² Outside of constitutional law, he might well have changed the interpretive center of gravity from legislative intent to statutory text.³¹³ He certainly got the attention of the professoriate. But his greatest success within constitutional law was in satisfying what in other legal contexts has been called a process value.³¹⁴ By lending his affable tenor, more melodious still on the printed page, to conservatives anxious about social change, he represented their interests in the ongoing process of constitutional construction,³¹⁵ the very process he fought to the death.

He lost. The rule of law is inevitably the rule of men,³¹⁶ and both men and rules are mortal. “All Ages of Faith may well be of brief duration,” Gilmore concluded.³¹⁷ “The pleasant and comforting myth of the law’s internal consistency and external stability cannot, for long, sustain itself. The facts of life cannot, for long, be suppressed.”³¹⁸

³¹² See A.E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 276 (2015).

³¹³ See John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33, 36–37 (2006).

³¹⁴ See Robert S. Summers, *Evaluating and Improving Legal Processes — A Plea for “Process Values”*, 60 CORNELL L. REV. 1, 3 (1974).

³¹⁵ See JACK M. BALKIN, *LIVING ORIGINALISM* 5–6, 11 (2011).

³¹⁶ See Gianluigi Palombella, *The Rule of Law as an Institutional Ideal*, in *RULE OF LAW AND DEMOCRACY: INQUIRIES INTO INTERNAL AND EXTERNAL ISSUES* 3, 10 (Leonardo Morlino & Gianluigi Palombella eds., 2010).

³¹⁷ GILMORE, *supra* note 1, at 61.

³¹⁸ *Id.*