Congressional Research Service
Informing the legislative debate since 1914

Justice Antonin Scalia: His Jurisprudence and His Impact on the Court

Updated March 18, 2016

Congressional Research Service
https://crsreports.congress.gov
R44419

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

On February 13, 2016, Justice Antonin Scalia passed away unexpectedly at the age of 79, vacating a seat on the Supreme Court which he had held for nearly 30 years. Justice Scalia's lengthy tenure on the Court, coupled with his strongly held views on how constitutional and statutory texts are to be interpreted, led him to have significant influence on the development of the jurisprudence of various areas of law. He was also an active speaker and author outside the Court, having, among other things, recently coauthored a book which sought to articulate interpretative canons that would, in its authors' view, "curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences" and "provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law." Like his approaches to many legal issues in his opinions on the Court, Justice Scalia's approach to statutory interpretation in this book has prompted debate both over its desirability, as a normative matter, and over the consistency with which Justice Scalia applied that approach.

This report discusses Justice Scalia's jurisprudence on key areas of law, as well as how that jurisprudence could be seen to have influenced the Court's approach to these subject matters. It begins with his views on two cross-cutting issues—the role of the judiciary and statutory interpretation—which highlight his well-known views about originalism, textualism, the importance of bright-line rules for judges to apply, and the proper role of the courts within the system of government established by the U.S. Constitution. It then addresses Justice Scalia's jurisprudence on fourteen separate areas of law, which are arranged in alphabetical order from "administrative law" to "takings," and were specifically selected as key areas of law where Justice Scalia's absence from the Court could result in a change in its jurisprudence. The report concludes with an appendix that lists the Supreme Court cases from the October 2010 term through the October 2015 term in which Justice Scalia was part of a bare five-member majority, indicating the legal issues where Justice Scalia's absence from the Court could result in a shift in the Court's jurisprudence. A separate report, CRS Report R44479, *Judge Merrick Garland: His Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Andrew Nolan, Kate M. Manuel, and Brandon J. Murrill, addresses the opinions of Merrick Garland, currently the Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and the President's nominee to fill the seat vacated by Justice Scalia. The two reports, taken together, may assist Members of Congress and their staff in assessing the impact that replacement of Justice Scalia might have upon the High Court's rulings.

Other CRS reports address the procedural issues that the vacating of Justice Scalia's seat poses for the Court, as well as the processes for nominating and confirming Supreme Court Justices. *See* CRS Report R44400, *The Death of Justice Scalia: Procedural Issues Arising on an Eight-Member Supreme Court*, by Andrew Nolan; CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by Barry J. McMillion; CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion; and CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

Contents

Role of the Judiciary 2
Statutory Interpretation 5
Administrative Law 8
Capital Punishment 11
Civil Liability 13
Civil Rights 15
Criminal Law and Procedure 17
Environmental Law 19
Federalism 22
Freedom of Religion 24
Freedom of Speech 26
International and Foreign Law 30
Right to Bear Arms 33
Separation of Powers 34
Substantive Due Process 38
Takings 39

Tables

Table A-1. Cases Since the October 2010 Term Where Justice Scalia Was Part of a Bare Five-Member Majority 42

Appendixes

Appendix. Justice Scalia as a Swing Vote 42

Contacts

Author Information 47
Acknowledgments 47

On February 13, 2016, Justice Antonin Scalia passed away unexpectedly at the age of 79, vacating a seat on the Supreme Court which he had held for nearly 30 years.[1] Justice Scalia's lengthy tenure on the Court,[2] coupled with his strongly held views on how constitutional and statutory texts are to be interpreted,[3] led him to have significant influence on the development of the jurisprudence in various areas of law. He also was an active speaker and author outside the Court, having, among other things, recently coauthored a book which sought to articulate interpretative canons that would, in its authors' view, "curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences" and "provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law."[4] Like his approaches to many legal issues in his opinions, Justice Scalia's approach to statutory interpretation in this book has prompted debate both over its desirability, as a normative matter, and over the consistency with which Justice Scalia applied that approach, among other things.[5]

This report discusses Justice Scalia's jurisprudence on key areas of law, as well as how that jurisprudence could be seen to have influenced the Court's approach to these subject matters. It begins with his views on two cross-cutting issues—the role of the judiciary and statutory interpretation—which highlight his well-known views about originalism, textualism, the importance of bright-line rules for judges to apply, and the proper role of the courts within the system of government established by the U.S. Constitution. It then addresses Justice Scalia's jurisprudence on fourteen separate areas of law, which are arranged in alphabetical order from "administrative law" to "takings," and were specifically selected as key areas of law where Justice Scalia's absence from the Court could result in a change in its jurisprudence. The report concludes with an appendix that lists the Supreme Court cases from the October 2010 term through the October 2015 term—the time period since the last vacancy on the Court—in which Justice Scalia was part of a bare five-member majority, indicating the legal issues where Justice Scalia's absence from the Court could result in a shift in the Court's jurisprudence. A separate report, CRS Report R44479, *Judge Merrick Garland: His Jurisprudence and Potential Impact on the Supreme Court*, coordinated by Andrew Nolan, Kate M. Manuel, and Brandon J. Murrill, addresses the opinions of Merrick Garland, currently the Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and the President's nominee to fill the seat vacated by Justice Scalia.[6] The two reports, taken together, may assist Members of Congress and their staff in assessing the impact that replacement of Justice Scalia might have upon the High Court's rulings.

Other CRS reports address the procedural issues that the vacating of Justice Scalia's seat poses for the Court, as well as the processes for nominating and confirming Supreme Court Justices. *See* CRS Report R44400, *The Death of Justice Scalia: Procedural Issues Arising on an Eight-*

---

[1] *See, e.g.*, John G. Roberts, Jr., *Statement by Chief Justice John G. Roberts, Jr.* (February 13, 2016), *available at* http://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-13-16.

[2] By comparison, the Supreme Court website notes that the longest serving Chief Justice, John Marshall, served 34 years, 5 months and 11 days, and the longest serving Associate Justice, William O. Douglas, served 36 years, 7 months, and 8 days. *See* Supreme Court of the United States, *Frequently Asked Questions (FAQ), Version 2014.1* (March 14, 2016), *available at* http://www.supremecourt.gov/faq_justices.aspx.

[3] *See infra* "Role of the Judiciary" and "Statutory Interpretation."

[4] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxviii-xxix (2012).

[5] *See infra* notes 9, 33-34 and accompanying text.

[6] *See, e.g.*, White House, President Obama's Supreme Court Nomination, *available at* https://www.whitehouse.gov/scotus (last accessed: March 16, 2016).

Member Supreme Court, by Andrew Nolan; CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by Barry J. McMillion; CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion; and CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

Role of the Judiciary

Nearly thirty years ago, at the swearing-in ceremony of Justice Scalia, President Ronald Reagan quoted Justice Felix Frankfurter, the famed defender of judicial restraint on the Court during the mid-20th century, stating that "The highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law."[7] Comparing then-Judge Scalia to Justice Frankfurter, President Reagan noted that the former federal judge's nomination to the Supreme Court was due in part to what the President perceived as his commitment to the principles of judicial restraint and deference to democratic institutions of government.[8] While an open debate exists as to whether Justice Scalia's opinions on the High Court were truly divorced from his "personal pulls" and "private views,"[9] Justice Scalia's jurisprudence was deeply influenced by his concerns about the proper role of the judiciary in a democratic society. In some of his most famous dissents on the Court, Justice Scalia voiced pronounced criticisms about what he viewed as the majority's misapprehensions about the role of the federal judiciary.[10] For example, in the 2014 term, in dissenting from the majority's holding that the due process and equal protection provisions of the Fourteenth Amendment require states to license marriages between two persons of the same sex,[11] Justice Scalia, in a sharply worded opinion, described the majority approach as "a naked judicial claim to legislative ... power," amounting to an undemocratic "system of government that makes the People subordinate to a committee of nine unelected lawyers...."[12] Put

[7] *See* President Ronald Reagan at the Swearing in of Chief Justice William H. Rehnquist and Justice Antonin Scalia at the White House, September 26, 1986, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 95, 97 (Steven G. Calabresi ed., 2007).

[8] *Id.* ("Chief Justice Rehnquist and Justice Scalia have demonstrated in their opinions that they stand with Holmes and Frankfurter on [judicial restraint]. I nominated them with this principle very much in mind.").

[9] *Compare* Mark Joseph Stern, *Antonin Scalia Will Be Remembered as One of the Greats*, SLATE (February 13, 2016), *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_a_truly_great_supreme_court_justice.html ("But to call [Justice Scalia] nothing more than a 'conservative' would be to overlook the remarkable nuance and complexity of his jurisprudence.... Scalia cast a decisive vote in the most important free speech case of the 1980s, *Texas v. Johnson*, ... [h]e wrote the landmark majority opinion in 2011's *Brown v. EMA*, a double victory for First Amendment advocates ... [a]nd he dissented in *Maryland v. King*, arguing that the Fourth Amendment forbids law enforcement from collecting DNA from arrestees.") *with* Bennett L. Gershman, *Justice Scalia's Faux Originalism,* HUFFINGTON POST (February 18, 2016), *available at* http://www.huffingtonpost.com/bennett-l-gershman/justice-scalias-faux-orig_b_9265726.html ("Justice Scalia was, in fact, one of the most unabashedly partisan judges ever to sit on the Supreme Court. His manipulation of the constitution was brilliant, and maddening, mostly because he and his followers pretend otherwise.").

[10] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting) ("The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be 'tested by following,' and whose very 'belief in themselves' is mystically bound up in their 'understanding' of a Court that 'speaks before all others for their constitutional ideals'—with the somewhat more modest role envisioned for these lawyers by the Founders."); Dickerson v. United States, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting) ("The issue is whether, *as mutated and modified*, [the Court's rulings] must *make sense*. The requirement that they do so is the only thing that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy.").

[11] *See* Obergefell v. Hodges, --- U.S. ---, 135 S. Ct. 2584, 2593 (2015).

[12] *Id.* at 2629 (Scalia, J., dissenting).

another way, Justice Scalia's jurisprudence was driven in part out of skepticism regarding the role of the Supreme Court and the "danger" that an unelected judge "will mistake [his] own predilections for the law," undermining the American democratic system.[13]

To prevent the federal judiciary from overstepping its constitutionally prescribed role, Justice Scalia's judicial philosophy, particularly on questions of constitutional law, was undergirded by two related principles. First, Justice Scalia was a strong proponent of originalism, a mode of constitutional interpretation which posits that the Constitution's meaning should be derived from how its text was understood at the time of adoption.[14] Advocating for originalism in the wake of the constitutional revolution of the Warren and Burger Courts, Justice Scalia complained that the Supreme Court had too often based its constitutional rulings not on the original meaning of the Constitution, but on broad, amorphous principles such as discerning what was a "fundamental value," tempting judges to imbue the Constitution with their own "political values."[15] For Justice Scalia, originalism, by establishing "a historical criterion that is conceptually ... separate from the preferences of the judge himself," constrained the unelected judiciary.[16] Justice Scalia's originalism was perhaps most famously displayed in the Court's 2008 decision striking down the District of Columbia's ban on handguns, in part, because the Court viewed the Second Amendment as originally understood to protect an individual right to possess firearms unconnected with service in a militia.[17]

Second, Justice Scalia argued for the creation of concrete and discrete rules, rather than broad principles or balancing tests, in order to constrain judicial discretion in resolving legal issues.[18] As Justice Scalia noted: "When ... I adopt a general rule ... I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle."[19]

[13] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

[14] *Id.* at 862.

[15] *Id.* at 863.

[16] *Id.* at 864.

[17] *See* District of Columbia v. Heller, 554 U.S. 570, 576 (2008). For an extended discussion of Justice Scalia's Second Amendment jurisprudence, *see infra* "Right to Bear Arms."

[18] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (herein "Scalia and Rule of Law").

[19] *Id.* at 1179; *see also* Alex Kozinski, *My Pizza with Nino*, 12 CARDOZO L. REV. 1583, 1588-89 (1991) ("[Rules] are predictable; they constrain future decisionmakers so they cannot introduce their own personal preferences into the decision; they enhance the legitimacy of decisions because they make it clear to litigants that their case was decided through neutral application of a rule rather than on the basis of a judge's personal preference; and lastly, they embolden the decisionmaker to resist the will of a hostile majority."). For a criticism of Justice Scalia's rules-based approach to constitutional interpretation, see David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 676 (1994) ("Scalia's so-called categorical method balances as much as any balancing scheme; the difference is that Scalia's strong majoritarian preference results in a balance loaded in favor of the government.").

In this vein, Justice Scalia wrote several opinions establishing bright-line rules in areas of constitutional law formerly bereft of guidance[20] and dissented in certain cases that relied on multipart tests or balancing approaches.[21]

Nonetheless, while Justice Scalia argued for a confined role for the federal judiciary, the late-Justice did not argue for the wholesale abdication of the judicial role in the American constitutional scheme. Instead, where original understanding of the Constitution counseled for the exercise of judicial power, Justice Scalia defended the right of the judicial branch to serve as a check on democratic institutions.[22] Indeed, in recent years, he criticized several opinions of the Roberts Court, where the Court, in Justice Scalia's view, "shirk[ed] its job" by refusing to address the constitutional questions raised by the case at hand.[23] Moreover, Justice Scalia's adherence to originalism occasionally placed his views at odds with prior case law of the Court, particularly where the legal precedents, in Justice Scalia's view, departed from the original meaning of the Constitution.[24] As a result, for Justice Scalia, the principle of *stare decisis*—that is, the doctrine that a "court must follow earlier judicial decisions when the same points arise again" in subsequent cases[25]—was not a central precept in his constitutional philosophy.[26] As such, while Justice Scalia was an advocate of judicial restraint, he did not advocate for an inactive judiciary.

[20] *See, e.g.*, California v. Hodari D., 499 U.S. 621, 624-26 (1991) (establishing a bright-line definition of what constitutes a "seizure" for purposes of the Fourth Amendment); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018 (1992) (establishing a bright-line rule governing "total" takings under the Fifth Amendment); Crawford v. Washington, 541 U.S. 36, 67-68 (2004) (rejecting an "open-ended balancing" approach with respect to interpreting the Sixth Amendment's Confrontation Clause).

[21] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 640 (1987) (Scalia, J., dissenting) (urging the overruling of the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and stating "I think it time that we sacrifice some 'flexibility' for 'clarity and predictability.'"); Cty. of Riverside v. McLaughlin, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting) ("The Court views the task before it as one of 'balancing [the] competing concerns' of 'protecting public safety,' on the one hand, and avoiding 'prolonged detention based on incorrect or unfounded suspicion,' on the other hand ... As to those matters, the 'balance' has already been struck, the 'practical compromise' reached—and it is the function of the Bill of Rights to *preserve* that judgment, not only against the changing views of Presidents and Members of Congress, but also against the changing views of Justices whom Presidents appoint and Members of Congress confirm to this Court.").

[22] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., dissenting) (arguing that *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down Virginia's anti-miscegenation laws, was necessitated "*by a text*—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value") (emphasis in original).

[23] *See* Bond v. United States, --- U.S. ---, 134 S. Ct. 2077, 2094 (2014) (Scalia, J., concurring); NASA v. Nelson, 562 U.S. 134, 166 (2011) (Scalia, J., concurring) ("Whatever the virtues of judicial minimalism, it cannot justify judicial incoherence."); Nat'l Fed'n of Indep. Bus. v. Sebelius, --- U.S. ---, 132 S. Ct. 2566, 2676 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) ("In the name of restraint, [the Court] overreaches. In the name of constitutional avoidance, it creates new constitutional questions.").

[24] *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (arguing that *Roe v. Wade*, 410 U.S. 113 (1973), should be overruled); Dickerson v. United States, 530 U.S. 428, 461 (2000) (Scalia, J., dissenting) (arguing that *Miranda v. Arizona*, 384 U.S. 436 (1966), should be overruled); Glossip v. Gross, --- U.S. ---, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring) (arguing that *Trop v. Dulles*, 356 U.S. 86 (1958), should be overruled).

[25] *See* BLACK'S LAW DICTIONARY 672 (3d pocket ed. 2006).

[26] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138-40 (1997) ("The whole function of the doctrine is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability. It is a compromise of all philosophies of interpretation.... Stare decisis is not part of my originalist philosophy; it is a pragmatic exception to it.") (herein "SCALIA AND MATTER OF INTERPRETATION").

Statutory Interpretation

Justice Scalia was widely recognized as the most prominent practitioner and proponent of a text- and rules-based approach to statutory interpretation on the Supreme Court at the time of his death.[27] He was widely associated, through his Court opinions and other writings, with textualism, an interpretative method that would construe statutes based on their text, context, and structure, rather than through extrinsic evidence of the intent or purpose of the Congress that enacted the statute.[28] He also sought to articulate "canons"—or generally applicable rules—of statutory interpretation[29] and, in deciding cases, advocated for "clear criteria" for judges to apply.[30] Both aspects of Justice Scalia's jurisprudence on statutory interpretation can be seen as reflecting his beliefs about the proper role of the courts in the constitutional framework, as previously noted.[31] These aspects of his jurisprudence can also be seen as reactions to the generally prevailing approaches to statutory interpretation since the New Deal, approaches that sometimes characterize judges as playing an active role in effecting statutes' purposes in changed circumstances.[32] While questions have been raised about the implications of Justice Scalia's approach to statutory interpretation,[33] as well as the consistency with which he applied this approach in his own opinions while on the Court,[34] Justice Scalia is widely seen to have influenced the manner in which his colleagues on the Court and others approach statutory text,

---

[27] *Cf.* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013) ("Justice Antonin Scalia is the leading theorist as well as practitioner of what has been dubbed the new textualism."). Questions have, however, been raised about the degree to which Justice Scalia's opinions on the Court were consistent with his textualist principles. *See, e.g.*, Miranda O. McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 150 (2009) (finding, among other things, that "[t]wenty-five percent of the dissents in [a] sample of dissents [written by Justice Scalia between 1986 and 2006] involved common law statutes. In them, Justice Scalia abandons textualism.").

[28] *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623-24 (1990); Daniel A. Farber & Philip F. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 455 (1988).

[29] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 49-239, 241-339, 341-410 (2012) (setting forth 37 principles generally applicable to legal texts; 20 principles applicable "specifically to governmental prescriptions," such as statutes; and 13 fallacies); Finley v. United States, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

[30] Gisbrecht v. Barnhart, 535 U.S. 789, 812 (2002) (Scalia, J., dissenting) (expressing concern that the majority's "hybrid approach establishes no clear criteria and hence will generate needless satellite litigation"); *see also* Comm'r v. Estate of Hubert, 520 U.S. 93, 122-38 (1997) (Scalia, J., dissenting) (similar).

[31] *See supra* "Role of the Judiciary"; *see also* Morrison v. Olson, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) ("[A] government of laws means a government of rules."); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1156 (1991/1992) (discussing Justice Scalia's concern that judicial discretion in interpreting statutes is inconsistent with a government of rules).

[32] *See, e.g.*, McGowan, *supra* note 27, at 138 (noting that the "core of [Justice Scalia's] method of statutory interpretation and its objectives sharply diverge from that of his former professors," Henry M. Hart, Jr., and Albert M. Sacks, who had played a key role in articulating the purpose-oriented approach to statutory interpretation described here).

[33] *See, e.g.*, William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 536 (2013) (noting "three big problems" with the canon-based approach put forth in Justice Scalia's 2011 book, *Reading Law* and suggesting that, because of these problems, the "actual effect of the Scalia-Garner canons would not be greater judicial restraint but instead a relatively less constrained and somewhat more antidemocratic textualism"); *"Internal" Critique of Justice Scalia's Theory*, *supra* note 31, at 1138-39 ("Justice Scalia can be faulted for inconsistency").

[34] *See supra* note 27 and accompanying text.

particularly through his focus on the "ordinary meaning" of words and his general skepticism of legislative history materials.[35]

One key aspect of Justice Scalia's textualism was his purported focus on the ordinary meaning of words—or the meaning they would have had to persons at the time of the statute's enactment—unless the context indicates that the words bear a technical meaning.[36] His opinion for the majority of the Court in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* can be seen to illustrate this.[37] There, in finding that language in the Federal Communications Act (FCA) permitting the Federal Communications Commission (FCC) to "modify any requirement" of the statute did not authorize "basic and fundamental changes in the scheme" created by the act,[38] Justice Scalia emphasized that, at the time of the FCA's enactment in 1934, "modify" had "a connotation of increment or limitation,"[39] as demonstrated by contemporaneous and subsequent dictionary definitions of this word.[40] He further responded to concerns, raised by Justice Stevens in dissent, about "rigid literalism" depriving the FCC of the "flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions"[41] by noting that:

> our estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the [FCA]. For better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications, and the Commission's desire "to 'increase competition' cannot provide [it] authority to alter the well-established statutory filed rate requirements"....[42]

This is not to say that Justice Scalia afforded congressional "purpose" no role in statutory interpretation. To the contrary, he recognized, as the goal of statutory interpretation, the formulation of "an interpretation of the statute that is reasonable, consistent, and faithful to its

[35] *See, e.g.*, James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 122 (2008) (finding that, between 1986 and 2006, "liberal" Justices seem to have opted not to rely upon legislative history materials in certain majority opinions that Justice Scalia joined because of his well-known opposition to the use of such materials); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 357 (1994) (noting greater use of dictionaries and less use of legislative history in the 1988-1989 term, when Justice Scalia was part of the Court, as compared to the 1981 term, when he was not on the Court); *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 (1994) (finding that Justice Scalia had been "the most willing to employ dictionaries" of the Justices on the Court during the 1992 term).

[36] *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) ("[F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning."); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465 (2001) ("Were it not for the hundreds of pages of briefing respondents have submitted on the issue, one would have thought it fairly clear that this text does not permit the EPA to consider costs in setting the standards. The language, as one scholar has noted, 'is absolute.'") (internal citation omitted).

[37] 512 U.S. 218 (1994).

[38] *Id*. at 225.

[39] *Id*. at 225, 228.

[40] *Id*. at 225-28. It is in this discussion that Justice Scalia memorably takes issue with *Webster's Third New International Dictionary*—which alone among the dictionaries cited provides a more expansive definition of "modify"—as potentially reflecting "intentional distortions, or simply careless or ignorant misuse." *Id*.

[41] *Id*. at 235 (Stevens, J., dissenting). Elsewhere, Justice Scalia expressly objects to the equation of textualism and literalism or "strict constructionism." *See, e.g.*, SCALIA AND MATTER OF INTERPRETATION, *supra* note 26, at 23.

[42] 512 U.S. at 234.

apparent purpose."[43] However, for Justice Scalia, the statute's purpose was to be ascertained from its text,[44] and an interpretation based solely upon the statute's alleged purpose could not prevail over unambiguous statutory text to the contrary.[45]

The other key aspect of Justice Scalia's textualism was his refusal to consider legislative history materials—such as committee reports, reports of congressional hearings, and records of congressional debates—in construing statutory text. Some Justices have taken the view that consideration of such materials informs their understanding of a statute's meaning or the legislature's purpose.[46] However, Justice Scalia rejected this view, in part, because of constitutional considerations, noting that "the only language that constitutes 'a Law' within the meaning of the Bicameralism and Presentment Clause of Article I, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute."[47] He also expressed concerns that legislative history materials are neither drafted by legislators nor considered by them when voting on bills,[48] a view which may not be entirely in keeping with actual congressional practice as to certain types of legislative history materials.[49] In addition, he feared that, if legislative history materials were to be used, judges could select, from among the wide range of legislative history materials on most topics, those materials that support their preferred policy positions, in much the same manner as a person "walking into a crowded cocktail party and looking over the heads of the guests to pick out [his] friends."[50] Unlike some other practitioners of textualism,[51] Justice Scalia even objected to the use of legislative history materials to confirm text-based interpretations of statutes on the grounds that such use provides a "false and disruptive lesson in the law" by fostering the belief that "an 'unambiguous and unequivocal' statute can never be dispositive."[52] He did, however, express a willingness to

[43] Blanchard v. Bergeron, 489 U.S. 87, 99-100 (1989) (Scalia, J., concurring).

[44] *See, e.g.*, Moskal v. United States, 498 U.S. 103, 129-30 (1990) (Scalia, J., dissenting) ("The whole issue before us here is how 'broad' Congress' purpose in enacting § 2314 was.... The answer to that question is best sought by examining the language that Congress used....").

[45] *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 403 (2010) ("We cannot rewrite [the statute] to reflect our perception of legislative purpose.") (internal citations omitted); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 318, 325 (1988) (Scalia, J., concurring in part and dissenting in part) (similar).

[46] *See, e.g.*, United States v. Thompson/Center Arms Co., 504 U.S. 505, 516 n.8 (1992) (noting Justice Frankfurter's view that legislative history materials can "yield [the] true meaning" of a statute); W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting) (arguing for the use of legislative history materials).

[47] Zedner v. United States, 547 U.S. 489, 509-10 (2006) (Scalia, J., concurring); *see also* Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 302 (2010) (Scalia, J., concurring); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

[48] *See, e.g.*, *Blanchard*, 489 U.S. at 98 (Scalia, J., concurring) ("I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question....").

[49] *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STANFORD L. REV. 901, 964-90 (2013) (discussing the view of congressional staffers that certain legislative history materials are considered by Members of Congress when voting on proposed legislation).

[50] SCALIA AND GARDNER, *supra* note 29, at 377 (repeating a quotation attributed to Judge Harold Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit).

[51] *See, e.g.*, *Zedner*, 547 U.S. at 501 (majority opinion, written by Justice Alito, noting that the textualist interpretation offered by the Court is "entirely in accord with the Act's legislative history"); Elliot M. Davis, *Note, The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983, 996-97 (2007) (discussing Judge Easterbrook's use of legislative history materials in limited contexts).

[52] *Conroy*, 507 U.S. at 518-19 (Scalia, J., concurring).

consider legislative history materials to determine the contexts in which particular words had been used when ascertaining their ordinary meaning.[53]

Administrative Law

Justice Scalia's opinions on administrative law can be seen to reflect his broader text-based approach to statutory interpretation and his commitment to bright-line rules. For example, Justice Scalia's opinion for the Court in *FCC v. Fox Television Stations* can be read as illustrating his commitment to textualism.[54] In that case, in response to allegations that an FCC decision was "arbitrary and capricious" under the Administrative Procedure Act (APA), the lower court applied a heightened review standard because the decision reflected a change from the agency's prior policy.[55] That court required the agency to justify why the reasoning for the original policy was no longer "dispositive," and why the new policy "effectuates" the statute at least as well as the prior one.[56] The Supreme Court reversed, ruling that the APA did not authorize a heightened form of review in such situations.[57] Echoing a recurring theme in Supreme Court cases,[58] Justice Scalia's opinion for the Court invalidated a lower court practice that imposed judicially created standards on agencies beyond the text of the APA.[59] Justice Scalia, in particular, rejected the dissenters' view that heightened scrutiny is appropriate when reviewing the actions of independent agencies[60] as the wrong solution to the important "dilemma posed by the Headless Fourth Branch" of government.[61] In his view, "letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive" would only "magnify" the problem.[62]

In a similar vein, Justice Scalia resisted efforts to modify the doctrine of judicial deference to reasonable agency interpretations of ambiguous statutes—set forth by the Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*[63]—in ways that he thought compromised its clarity. Though the doctrine of *Chevron* deference was established before he was appointed to the Court, Justice Scalia appears to have supported the doctrine as an important background principle against which Congress could legislate.[64] For example, in *United States v. Mead*, Justice Scalia

[53] *See, e.g.*, SCALIA AND GARDNER, *supra* note 29, at 388.

[54] 556 U.S. 502 (2009).

[55] *See* Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n, 489 F.3d 444, 447 (2d Cir. 2007).

[56] *Id*. at 456-57 (quoting N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth., 757 F.2d 502, 508 (2d Cir. 1985)).

[57] *FCC*, 556 U.S. at 530.

[58] *See* Perez v. Mortgage Bankers Ass'n, --- U.S. ---, 135 S. Ct. 1199, 1206 (2015); Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

[59] *FCC*, 556 U.S. at 513-18.

[60] This at least was Justice Scalia's characterization of Justice Stevens's and Justice Breyer's position. *Id*. at 523-24; *see id*. at 540 (Stevens, J., dissenting) ("Consequently, the FCC 'cannot in any proper sense be characterized as an arm or an eye of the executive' and is better viewed as an agent of Congress established 'to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative ... aid.'") (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935)); *id*. at 547-48 (Breyer, J., dissenting) ("But that agency's comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law.").

[61] *Id*. at 525-26.

[62] *Id*. at 526.

[63] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984).

[64] United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) ("*Chevron* sets forth an across-the-

dissented from the majority opinion, which held that *Chevron* deference applies only if Congress intended for the agency to speak with the force of law and the agency's position "was promulgated in the exercise of that authority;" otherwise the agency could receive "*Skidmore* deference," which accords weight to an agency's position based only on its persuasiveness.[65] He did so because, in his view, the majority's limitation upon *Chevron* deference would result in confusion since the Court had failed to articulate a clear rule regarding the circumstances in which *Chevron* now applied.[66] Further, he noted that application of *Skidmore* deference was impractical, as it requires courts to accord agency positions "some vague and uncertain amount of respect."[67]

Likewise, Justice Scalia objected to the Court's opinion in *National Cable & Telecommunications Association v. Brand X Internet Service*, which held that, when an agency interpretation qualifies for *Chevron* deference, a prior judicial interpretation of the statute may "trump" the agency's view only if "the prior court decision holds that its construction follows from the unambiguous terms of the statute."[68] Aside from constitutional concerns,[69] Justice Scalia emphasized that the Court's new rule, like the rule in *Mead*, would cause confusion for lower courts as they attempted to determine whether judicial decisions issued before *Chevron* or *Brand X* were suitably unambiguous in their holdings.[70] A similar animating principle also appears in Justice Scalia's majority opinion in *City of Arlington v. FCC*, which held that *Chevron* applies even to an agency's interpretation of a statute that is ambiguous concerning the agency's jurisdiction.[71] In this case, Justice Scalia reasoned that the dissent's proposed distinction between jurisdictional and nonjurisdictional questions was illusory. In his view, almost any question concerning an agency's authority could be framed as jurisdictional; thus, regardless of the question's framing, the ultimate issue will be "whether the agency has stayed within the bounds of its statutory authority."[72] Consequently, when Congress authorizes an agency to administer a statute, and the agency promulgates an interpretation exercising that authority, *Chevron* applies. The alternative, he reasoned, was unworkable because it would have required courts to inquire *de novo*, as an

board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) (similar). While a defender of the principles animating *Chevron* deference, Justice Scalia was also careful to emphasize that *Chevron* was inapplicable when a statute was unambiguous. When an agency interpretation is "inconsistent with the plain meaning" of the statute, the agency receives no deference. INS v. Cardozo-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) ("Since the Court quite rightly concludes that the INS's interpretation is clearly inconsistent with the plain meaning of that phrase and the structure of the Act, there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference.") (internal citations omitted); Scalia and Rule of Law, *supra* note 18, at 1183 ("It is rare, however, that even the most vague and general text cannot be given some precise, principled content—and that is indeed the essence of the judicial craft.").

[65] *Mead*, 533 U.S. at 226-27.

[66] *Id*. at 245-46 (Scalia, J., dissenting).

[67] *Id*. at 246 (Scalia, J., dissenting).

[68] 545 U.S. 967, 982 (2005).

[69] *Id*. at 1017 (Scalia, J., dissenting) ("This is not only bizarre. It is probably unconstitutional.").

[70] *Id*. at 1018-19 (Scalia, J., dissenting); *see also* United States v. Home Concrete & Supply, LLC, --- U.S. ---, 132 S. Ct. 1836, 1846-47 (2012) (Scalia, J., concurring) ("For many of those earlier cases, therefore, it will be incredibly difficult to determine whether the decision purported to be giving meaning to an ambiguous, or rather an unambiguous, statute."); *id*. at 1847 ("Instead of doing what *Brand X* would require, however, the plurality manages to sustain the justifiable reliance of taxpayers by revising yet again the meaning of *Chevron*—and revising it yet again in a direction that will create confusion and uncertainty.").

[71] --- U.S. ---, 133 S. Ct. 1863, 1874-75 (2013).

[72] *Id*. at 1868 (emphasis omitted).

initial matter, into whether Congress truly had delegated as to the particular issue before the court.[73]

Finally, on an issue important not only to administrative law but to all of constitutional law,[74] Justice Scalia had a profound effect on the modern jurisprudence respecting "standing," or the ability of a party to seek relief from a federal court. Even before he arrived at the Court, Justice Scalia had well-defined views on standing, viewing the doctrine as a means to prevent courts from overreaching into issues more appropriately resolved by the political branches. In a seminal 1983 law review article, he argued that the "judicial doctrine of standing is a crucial and inseparable element" of the broader principle of separation of powers, "whose disregard will inevitably produce ... an overjudicialization of the processes of self-governance."[75] In several important cases, Justice Scalia successfully pressed his views on standing while on the Court. For example, he authored the majority opinion in *Lujan v. Defenders of Wildlife*, widely considered to constitute the foundation of modern standing law.[76] In *Lujan,* the Court, noting that standing is "more difficult to establish[]" when the plaintiff is not the direct "object of the government action or inaction he challenges,"[77] denied standing to several organizations challenging an environmental regulation on the grounds that they had failed to allege adequately that they had sustained direct and personal injuries.[78] In the cases that followed *Defenders*, Justice Scalia adhered to this approach, authoring several pivotal decisions that restricted access to the courts for those challenging administrative agency action[79] and rigorously dissenting in decisions where the Court relaxed its approach to standing.[80] With many of the Court's standing cases decided by relatively narrow margins[81] and with a major standing case pending on the Court's current docket,[82] Justice Scalia's absence from the Court could alter the future of the standing doctrine and, with that, the ability of plaintiffs to challenge the actions of administrative agencies.

[73] *Id*. at 1874 (asserting that the dissent's proposed requirement lacked a clear guiding principle, and would effectively function as a "totality-of-the-circumstances test," "render[ing] the binding effect of agency rules unpredictable and destroy[ing] the whole stabilizing purpose of *Chevron*").

[74] GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 849 (2009).

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

[76] 504 U.S. 555 (1992).

[77] *Id.* at 562.

[78] *Id.* at 571-72.

[79] *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109-110 (1998); Summers v. Earth Island Inst., 555 U.S. 488, 496-97 (2009); *but see* Bennett v. Spear, 520 U.S. 154, 170-71 (1997) (holding that the petitioners challenging a biological opinion by the Fish and Wildlife Service had met their burden in establishing standing); Vermont Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000) (holding that *qui tam* realtors had standing to sue as assignees of the rights of the United States).

[80] *See, e.g.*, Fed. Election Comm'n v. Akins, 524 U.S. 11, 29 (1998) (Scalia, J., dissenting); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc., 528 U.S. 167, 198 (2000); Massachusetts v. EPA, 549 U.S. 497, 549 (2007) (Scalia, J., dissenting); Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, --- U.S. ---, 135 S. Ct. 2652, 2694 (2015) (Scalia, J., dissenting).

[81] *See generally* Margaret McDonald, Summers v. Earth Island Institute: *Overhauling the Injury-in-Fact Test for Standing to Sue*, 71 LA. L. REV. 1053, 1066 (2011) (cataloging the recent history of standing at the Supreme Court and noting that the "issue of standing ... often divides the Court....").

[82] *See* Spokeo, Inc. v. Robins, Docket No. 13-1339.

Capital Punishment

Justice Scalia was not on the Supreme Court when the Court issued its landmark death penalty ruling in *Furman v. Georgia* in 1972.[83] *Furman* held that the Eighth Amendment's prohibition on "cruel and unusual punishment," made binding on the states by the Fourteenth Amendment, forbid capital punishment under the procedures then in effect,[84] functionally prohibiting the imposition of the death penalty in thirty-nine states and the District of Columbia.[85] While the Court reversed course on the moratorium created by *Furman* four years later in *Gregg v. Georgia,* declaring that the death penalty was not *per se* unconstitutional, the Court did so only after concluding that Georgia's sentencing procedures—which required a jury to take into account the particularized nature of the crime and the particularized characteristics of the individual defendant—prevented a defendant from being condemned to death "capriciously and arbitrarily."[86] In other words, *Furman* and *Gregg* resulted in the Court actively scrutinizing the manner in which the states impose capital punishment.

Justice Scalia disagreed with much of the basis for the line of cases beginning with *Furman*,[87] as those cases were not grounded in the original meaning of the Constitution, which itself contemplates the death penalty.[88] Instead, the Court's recent capital punishment jurisprudence had, in his opinion, been misdirected by the 1958 case of *Trop v. Dulles*,[89] which held that the Eighth "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[90] Over the years, Justice Scalia spoke for the Court, or concurred, when the Court declined to restrict the prerogatives of jurors, state judges, or state legislators with

[83] *See* 408 U.S. 238 (1972) (*per curiam*).

[84] *Id.* at 239-40.

[85] *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362 (1995).

[86] *See* 428 U.S. 153, 206 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) ("The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily ... The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.").

[87] *See* Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("What compelled Arizona (and many other states) to specify particular 'aggravating factors' that must be found before the death penalty can be imposed was the line of this Court's cases beginning with *Furman v. Georgia*. In my view, that line of decisions had no proper foundation in the Constitution.").

[88] *See* U.S. CONST. amend. V (requiring the presentment or indictment of a grand jury in order to hold a person to answer for "a capital, or otherwise infamous crime," and prohibiting the deprivation of "life" without due process of law).

[89] 356 U.S. 86, 101 (1958). "[*Trop*] has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind." Glossip v. Gross, --- U.S. ---, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring).

[90] 356 U.S. at 101.

regard to the death penalty;[91] he dissented when the Court did not—as was more often the case.[92] In particular, Justice Scalia found himself consistently in dissent in several cases over the past fifteen years that restricted the use of capital punishment with regard to particular classes of defendants, such as minors,[93] the cognitively disabled,[94] and perpetrators of crimes where the victim's life was not taken.[95]

In two recent cases where the Court determined that the petitioners had failed to establish that a particular method of execution offended the Eighth Amendment, Justice Scalia took issue with his fellow Justices' view that the Constitution prohibits capital punishment. For example, in *Baze v. Rees*, where a majority of the Court rejected a challenge to Kentucky's lethal injection protocol as a method of execution, Justice Stevens concurred in the judgment, voicing his opinion that the death penalty "is [a] patently excessive and cruel and unusual punishment violative of the Eighth Amendment" because of its "negligible" benefits to the state.[96] In response, Justice Scalia wrote that Justice Stevens's declaration was "insupportable as an interpretation of the Constitution, which generally leaves it to democratically elected legislatures rather than courts to decide what makes [a] significant contribution to social or public purposes."[97] Subsequently, in 2015, in a reprise of the *Baze* litigation, the Court split 5-4, with Justice Scalia in the majority, upholding Oklahoma's legal injection protocol.[98] Justice Breyer, joined by Justice Ginsburg in dissent, argued that it was "highly likely that the death penalty violates the Eighth Amendment."[99] In a pointed concurrence echoing his concurrence in *Baze*, Justice Scalia responded, arguing that the "Framers of our Constitution" left the propriety of the death penalty "to the People to decide," and in rejecting the views of the Framers, Justice Breyer did "not just reject the death penalty, he reject[ed] the Enlightenment."[100] As a result, while Justice Scalia's views on capital punishment

[91] *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 833 (1991) (Scalia, J., concurring) (internal citations omitted) ("The Court correctly observes the injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence. I have previously expressed my belief that the latter requirement is both wrong, and when combined with the remainder of our capital sentencing jurisprudence unworkable.... But more broadly and fundamentally still, [the Eighth Amendment] permits the People to decide (within the limits of other constitutional guarantees) what is a crime and what constitutes aggravation and mitigation of a crime."); *see also* Tuilaepa v. California, 512 U.S. 967, 980 (1994) (Scalia, J. concurring) ("[O]nce a State has adopted a methodology to narrow the eligibility for the death penalty ... the distinctive procedural requirements of the Eighth Amendment have been exhausted. Today's decision adheres to our cases which acknowledge additional requirements, but since it restricts their further expansion it moves in the right direction."); Kansas v. Marsh, 548 U.S. 163, 182 (2006) (Scalia, J., concurring) ("Kansas's death-penalty statute easily satisfies even a capital jurisprudence as incoherent as ours has become.... I do not endorse that incoherence, but adhere to my previous statement that "I will not ... vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted."). Justice Scalia's last majority opinion for the Court upheld death sentences in separate cases on appeal from the Kansas Supreme Court. *See* Kansas v. Carr, --- U.S. ---, 136 S. Ct. 633 (2016).

[92] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting); Roper v. Simmons, 543 U.S. 551, 607 (2005) (Scalia, J., dissenting).

[93] *Roper*, 543 U.S. at 607.

[94] *Atkins*, 536 U.S. at 337 (Scalia, J., dissenting).

[95] Kennedy v. Louisiana, 554 U.S. 407, 447 (2008) (Alito, J., dissenting, joined by Roberts, C.J., & Scalia & Thomas, JJ.).

[96] 553 U.S. 35, 86 (2008) (Stevens, J., concurring).

[97] *Id*. at 87 (Scalia, concurring in the judgment).

[98] Glossip v. Gross, --- U.S. ---, 135 S. Ct. 2726 (2015).

[99] *Id.* at 2776-77 (Breyer, J., dissenting).

[100] *Id.* at 2749 (Scalia, J., concurring).

and the Eighth Amendment rarely commanded a majority on the Court, they are likely to figure prominently if the Court ever were to revisit *Furman* and its progeny.

Civil Liability

Academic literature has identified, as an undercurrent of the Roberts Court's recent jurisprudence, a tendency for the Court to favor business interests, particularly in the context of limiting business's exposure to civil liability resulting from allegedly faulty products, discriminatory practices, or fraudulent activity.[101] The Roberts Court's perceived willingness to curb access to civil remedies takes place against the backdrop of a broader political debate about the need for civil liability reform—including tort liability reform,[102] with business groups arguing that frivolous lawsuits result in the needless loss of billions of dollars,[103] while the plaintiffs' bar contends that curbing access to the courts deprives legitimate claimants of their right to be heard.[104] Justice Scalia was a critical and unique voice in support of the Supreme Court's recent jurisprudence reducing the potential exposure of businesses and other defendants to civil suits.[105] Specifically, his jurisprudence, in sharp contrast to that of his colleagues on the Court,[106] eschewed relying on the Constitution to impose limits on the perceived excesses of the civil

[101] *See, e.g.*, Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) ("Whether measured by decisions or Justices' votes, a plunge in warmth toward business during the 1960s (the heyday of the Warren Court) was quickly reversed; and the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it, were."); Doug Kendell & Tom Donnelly, *Not So Risky Business: The Chamber of Commerce's Quiet Success Before the Roberts Court*, Constitutional Accountability Center (May 1, 2013), *available at* http://theusconstitution.org/text-history/1966/not-so-risky-business-chamber-commerces-quiet-success-roberts-court-early-report ("Lost in this shuffle is an emerging story about the Supreme Court's business-heavy caseload this Term and the Chamber of Commerce's continued success before the Roberts Court generally."); Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008) ("[T]he Roberts Court is the most pro-business Court of any since the mid-1930s.").

[102] Tort law is "built on the bedrock of state common law," or judge-created legal norms, see Robert L. Rabin, *Federalism and the Tort System*, RUTGERS L. REV., 1 (1997), and provides relief to persons who have suffered from the wrongful acts of others. *See generally* RESTATEMENT (SECOND) OF TORTS.

[103] *See, e.g.*, U.S. Chamber of Commerce, *Legal Reform*, *available at* https://www.uschamber.com/legal-reform?tab=position (last accessed: Mar. 17, 2016) ("America has the costliest legal system in the world. Lawsuits cost the U.S. economy $264 billion per year, or about $850 per year for every man, woman, and child in the United States. The ultimate victims of lawsuit abuse are consumers and workers who suffer from higher prices and lost jobs and benefits.").

[104] *See, e.g.*, Evan L. Goldman, *The Real Victims of Tort Reform*, 178 N.J. L.J. 1195 (2004) ("While there is no question that our livelihood as attorneys is at stake, it is the general public who will suffer the most. The tort system as we know it has provided access to the court system for individuals who would never have been able to do so were it not for the contingency fee system. As a result, cases that have improved the safety of vehicles, machines, power saws and lawnmowers could never have been brought were it not for attorneys who work for the middle class without guaranteed fees.").

[105] *See* Epstein, Landes, & Posner, *supra* note 101, at 1450 (opining that Justice Scalia was the fourth "most favorable [Justice] to business" since 1946, being eclipsed only by Chief Justice Roberts and Justices Thomas and Whittaker).

[106] *See* BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (holding unconstitutional a $2 million punitive damage award); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (holding unconstitutional a $145 million punitive damage award).

liability system,[107] and instead generally relied on relatively broad readings of federal law to limit the scope of the state tort and other civil remedies often relied upon by the plaintiffs' bar.[108]

Of particular note, Justice Scalia frequently interpreted federal law to preempt or displace state laws, including state common-law tort claims, which had the potential to expose civil defendants to significant monetary liability. Early in Justice Scalia's tenure on the Court, in cases like *Cipollone v. Liggett Group*[109] and *Medtronic v. Lohr*,[110] the Justices fractured on the question of whether clauses in various federal statutes that expressly purported to displace state laws that conflicted with the federal statute preempted common-law tort claims, as well as positively enacted laws such as statutes and regulations.[111] In these cases, Justice Scalia, reflecting his preference for textualism, generally dissented from the majority, in part, by construing the statutes in question according to their "ordinary meaning" and arguing that federal statutes which preempt any contrary state "requirements" necessarily displace state tort law because tort claims effectively "require" compliance with certain common-law duties.[112] However, in his later years on the Court, Justice Scalia began garnering majorities for his views on preemption and state tort claims. For example, in 2008, in *Riegel v. Medtronic*, Justice Scalia authored an opinion on behalf of a seven-member majority holding that a provision of the federal Medical Device Act barring any state "requirement[s] that [are] different from, or in addition to" the act encompasses and therefore preempts state common-law claims challenging the safety or effectiveness of medical devices that received premarket approval from the Food and Drug Administration.[113] Importantly, the opinion in *Riegel*, reflecting a rules-based jurisprudence, established that, because "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments," the use of the term "requirements" in a statute necessarily includes common-law duties.[114] More generally, *Riegel* is indicative of a general trend of the Roberts Court wherein Justice Scalia

[107] *BMW*, 517 U.S. at 598 (Scalia, J., dissenting) ("Today we see the latest manifestation of this Court's recent and increasingly insistent "concern about punitive damages that 'run wild'".... Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments.") (internal citations omitted); *see also State Farm Mut. Auto. Ins.*, 538 U.S. at 439 (expressing the same concerns expressed in *Gore*).

[108] *See generally* Kevin LaCroix, *Justice Scalia's Business Law Legacy,* THE D&O DIARY (February15, 2016), *available at* http://www.dandodiary.com/2016/02/articles/class-action-litigation-2/justice-scalias-business-law-legacy/.

[109] 505 U.S. 504 (1992).

[110] 518 U.S. 470 (1996).

[111] *Cipollone*, 505 U.S. 524-30 (finding, among other things, that some common-law damages claims based upon the failure to warn and fraudulent misrepresentation were preempted, but that claims based upon breach of an express warranty, intentional fraud, and conspiracy were not preempted); *Lohr*, 518 U.S. at 503 (finding none of the petitioner's negligent design, manufacturing, or labeling claims were preempted).

[112] *Cipollone*, 505 U.S. at 548 (Scalia, J., dissenting); *Lohr*, 518 U.S. at 510 (O'Connor, J., concurring in part and dissenting in part, joined by Scalia, J.). In so doing, Justice Scalia rejected the majority opinion's reliance on the interpretive maxim that a federal statute should ordinarily be read with a presumption against a finding of preemption, *see Lohr*, 518 U.S. at 485 (holding that "in 'all pre-emption cases' an assumption exists that 'the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.'") (internal citations omitted). *See Cipollone*, 505 U.S. at 548 (Scalia, J., dissenting) ("Today's decision announces what, on its face, is an extraordinary and unprecedented principle of federal statutory construction: that express pre-emption provisions must be construed narrowly ... there is no merit to this newly crafted doctrine of narrow construction. Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning.").

[113] Riegel v. Medtronic, 552 U.S. 312 (2008). Unlike prior Court opinions, *Riegel* did not begin with a presumption against preemption. 552 U.S. at 326 ("The operation of a law enacted by Congress need not be seconded by a committee report on pain of judicial nullification. It is not our job to speculate upon congressional motives.") (internal citation omitted).

[114] *Id.* at 324.

authored or joined opinions that interpreted a federal law broadly in holding that it either explicitly[115] or implicitly[116] displaced state tort claims against product manufacturers, effectively reducing their potential financial exposure from juries sitting in one of the fifty states.

With regard to limiting civil liability exposure, Justice Scalia was also deeply influential in restricting the use of class action lawsuits, a procedural device that allows multiple individuals whose underlying claim against a party involve common questions of law or fact to resolve them in a single action.[117] For instance, in 2011, in *AT&T Mobility v. Concepcion*, Justice Scalia, on behalf of a five-member majority, held that the Federal Arbitration Act (FAA) preempts a California judicial doctrine which allowed courts to hold unconscionable class action arbitration waivers in consumer agreements. [118] Two years later, in *American Express v. Italian Colors Restaurant*, Justice Scalia, writing for the same five-member Court as in *Concepcion*, held that the FAA does not permit courts to invalidate a contractual waiver of class arbitration because the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.[119] In a slightly different context, Justice Scalia authored two majority opinions interpreting the Federal Rules of Civil Procedure that raised the evidentiary bar for proving that class certification is appropriate.[120] Collectively, as one legal commentator noted, Justice Scalia's recent opinions on class action litigation have made "class certification increasingly challenging for plaintiffs."[121] With various cases on the Supreme Court's docket this term and next potentially implicating class actions,[122] Justice Scalia's absence could affect the outcome of these cases. In the wake of Justice Scalia's death, Dow Chemical reportedly settled a pending class action that was on appeal to the Supreme Court for $835 million, stating that it no longer believed it could prevail because of Justice Scalia's death.[123] Dow Chemical's action here highlights Justice Scalia's importance not only for class action litigation, but also for civil liability issues on the Court more generally.

Civil Rights

With respect to civil rights, Justice Scalia is generally seen to have taken an adverse view of cases involving the potential expansion of constitutional or statutory anti-discrimination protections for minority groups. In this area, he was perhaps best known for his strongly worded dissenting opinions in cases involving gay rights. Justice Scalia wrote a dissenting opinion in many of the

[115] *See, e.g.*, Bruesewitz v. Wyeth LLC, 562 U.S. 223, 232 (2011).

[116] *See, e.g.*, PLIVA, Inc. v. Mensing, --- U.S. ---, 131 S. Ct. 2567, 2571 (2011); Mut. Pharm. v. Bartlett, --- U.S. ---, 133 S. Ct. 2466, 2480 (2013).

[117] *See* Fed. R. Civ. P. 23.

[118] 563 U.S. 333 (2011).

[119] --- U.S. ---, 133 S. Ct. 2304 (2013).

[120] *See* Wal-Mart v. Dukes, 564 U.S. 338 (2011); Comcast Corp. v. Behrend, --- U.S. ---, 133 S. Ct. 1426 (2013). While *Wal-Mart* involved the evidentiary showing necessary to establish that all parties to a class have claims involving common questions of law or fact, 564 U.S. at 349, *Comcast* centered on the sufficiency of evidence needed to show that issues common to the class "predominate" over issues that are unique to each class member. 133 S. Ct. at 1432.

[121] *See* Zoe Niesel, *What's Coming for Class Actions*, 51 WAKE FOREST L. REV. 101, 101 (2016).

[122] *See, e.g.*, Spokeo, Inc. v. Robins, Docket No. 13-1339; Tysons Food, Inc. v. Bouaphakeo, 14-1146; Microsoft v. Baker, Docket No. 15-457.

[123] *See* Joshua Jamerson & Brent Kendall, *Scalia's Supreme Court Vacancy Could Leave Companies at a Loss*, WALL ST. J. (February 26, 2016), *available at* http://www.wsj.com/articles/dow-chemical-settles-lawsuit-citing-supreme-court-position-after-scalias-death-1456491317.

gay rights cases decided while he was on the Supreme Court.[124] These cases included (1) a ruling invalidating a Colorado constitutional amendment that barred localities from enacting civil rights protections on the basis of sexual orientation;[125] (2) a decision holding that the due process privacy guarantee of the Fourteenth Amendment extends to protect consensual gay sex;[126] (3) a ruling striking down a federal law that defined marriage as a union between a man and a woman;[127] and (4) the Court's 2015 decision to constitutionalize the right of same-sex couples to marry.[128] In general, Justice Scalia's dissenting opinions reflect a view that neither equal protection nor due process principles, as originally understood by the Congress that enacted the Fourteenth Amendment, provide a constitutional basis for striking down laws that involve "moral disapprobation of homosexual conduct," and that such decisions are best left to the democratic process.[129]

Justice Scalia also generally took an unfavorable view of affirmative action in a variety of contexts. For example, he reliably voted to strike down governmental policies that established racial preferences for admissions to public elementary, secondary, and postsecondary schools,[130] including in the Court's most recent pronouncement on the subject, *Fisher v. University of Texas*.[131] In 2013, in *Fisher*, Justice Scalia joined a majority opinion that reversed and remanded a lower court decision upholding a race-conscious undergraduate admissions plan at the University of Texas at Austin, but he filed a separate concurring opinion indicating that he would have considered overruling a previous case that had upheld a similar affirmative action program because of his view that such racial preferences violate the equal protection guarantee of the Constitution.[132] He also questioned the constitutionality of affirmative action in the minority contracting and employment contexts on the same grounds.[133]

Finally, in the employment area, Justice Scalia's opinions produced mixed results. In some instances, his opinions favored employers in cases involving discrimination complaints by employees. For example, he authored opinions that rejected class action status for current and former female Wal-Mart employees who sued the company for pay discrimination;[134] dissented from an opinion that kept alive an employee's pregnancy discrimination claim;[135] and held that an employee's challenge of a racially discriminatory seniority system was barred by the statute of

---

[124] *But see* Boy Scouts of America v. Dale, 530 U.S. 640, 661 (2000) (holding, with Justice Scalia in the majority, that the First Amendment prohibited the application of a New Jersey public accommodation law to require the Boy Scouts to admit an openly gay assistance scoutmaster).

[125] Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

[126] Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

[127] United States v. Windsor, --- U.S. ---, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting).

[128] Obergefell v. Hodges, --- U.S. ---, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting).

[129] *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

[130] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306, 378 (2003) (Scalia, J., dissenting); Gratz v. Bollinger, 539 U.S. 244 (2003).

[131] --- U.S. ---, 133 S. Ct. 2411 (2013). On remand, the U.S. Court of Appeals for the Fifth Circuit upheld the university's admissions plan, Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014), and the Supreme Court once again granted review, Fisher v. Univ. of Tex. at Austin, 135 S. Ct. 2888 (2015).

[132] *Id*. at 2422 (Scalia, J., concurring).

[133] *See, e.g.*, Adarand Constructors v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); Richmond v. J. A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring); Johnson v. Transp. Agency, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting).

[134] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[135] Young v. UPS, --- U.S. ---, 135 S. Ct. 1338, 1361 (2015) (Scalia, J., dissenting).

limitations, even though the discriminatory effects of the system remained in place.[136] At other times, however, Justice Scalia ruled in favor of the outcome sought by employees. Examples include decisions recognizing that sex discrimination may encompass same-sex sexual harassment;[137] finding that an employment discrimination law authorizes retaliation claims by third parties who have not personally engaged in protected activity;[138] and upholding the religious discrimination claim of a job applicant who wore a headscarf.[139]

Criminal Law and Procedure

Justice Scalia's particular approach to constitutional interpretation—which relied on originalism and bright-line rules—prompted votes that can generally be seen as protective of the individual rights of criminal suspects and defendants, sometimes putting him at odds with a more traditional conservative judicial philosophy.[140] While this trend applies to many areas, three in particular stand out: (1) the Fourth Amendment right to be free from unreasonable searches and seizures in the context of criminal investigations; (2) the Confrontation Clause right of criminal defendants at trial; and (3) the rule of lenity derived from the Due Process Clause.

Justice Scalia's solicitude for the individual rights of defendants was displayed in the 2012 global positioning system (GPS) tracking case, *United States v. Jones*, in which the government attached a GPS device to the underbelly of a suspected drug dealer's vehicle and monitored the vehicle's location for four weeks.[141] Rather than relying on the Warren Court's more amorphous formulation of the Fourth Amendment from *Katz v. United States*, which typically asks whether the government's surveillance intruded on a target's reasonable expectation of privacy,[142] Justice Scalia instead assessed whether the physical intrusion on Jones's car would have constituted a trespass at common law at the time of the founding.[143] Looking to the text of the Fourth Amendment, which protects, among other things, an individual's "effects," and to early English common law cases, he observed that there was "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."[144] This holding, which favored the criminal defendant in a federal drug conspiracy prosecution, arguably expanded what constitutes a Fourth Amendment search,[145] and would seem

[136] Lorance v. AT&T Techs., 490 U.S. 900 (1989). Subsequently, Congress overturned this ruling by legislating on the topic. P.L. 102-166, §112(2), 105 Stat. 1071 (1991) (codified, as amended, at 42 U.S.C. §2000e-5(e)(2)).

[137] Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).

[138] Thompson v. N. Am. Stainless, 562 U.S. 170 (2011).

[139] EEOC v. Abercrombie & Fitch Stores, Inc., --- U.S. ---, 135 S. Ct. 2028 (2015).

[140] *See generally* Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67.L. & CONTEMP. PROBS. 53, 58 (2004) (noting that "[f]or decades, conservatives have sided with the government in restricting the rights of criminal defendants"); Arnold H. Loewy, *A Tale of Two Justices (Scalia and Breyer)*, 43 TEX. TECH L. REV. 1203, 1204 (2011) (noting that "Justice Scalia, though in some ways the darling of conservatives, has frequently strayed from the conservative course. For example, in Fourth Amendment cases such as *Arizona v. Hicks*, *Kyllo v. United States*, and *Arizona v. Gant*, he led sharply divided Courts into adopting an expansive view of the Fourth Amendment").

[141] United States v. Jones, --- U.S. ---, 132 S. Ct. 945 (2012).

[142] *See* 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[143] *Jones*, 132 S. Ct. at 949.

[144] *Id*.

[145] *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 90 (2012) ("The history of the Fourth Amendment search doctrine brings us to a surprising conclusion: *Jones* purports to restore a trespass test that never previously existed. This poses a potential challenge for future courts because there is little

to favor criminal suspects in the future.[146] In one notable example, one year after *Jones* was decided, Justice Scalia applied this physical trespass test in *Florida v. Jardines* to invalidate the warrantless use of a drug-sniffing dog on the porch of a residence.[147] Looking to common law rules of trespass and licenses, he observed that "an officer's leave to gather information is sharply circumscribed when he steps off [the public] thoroughfares and enters the Fourth Amendment's protected areas," which, pursuant to the text of the Amendment, includes an individual's "house."[148]

Justice Scalia also ruled in favor of criminal defendants in several important Sixth Amendment lines of cases. First, Justice Scalia's reading of the text and history of the Sixth Amendment also led him to discard the Court's then-prevailing test[149] as to the requirements of the Confrontation Clause, which focused on the inherent reliability of a witness's out-of-court statement to determine its admissibility at trial. In *Crawford v. Washington*, Justice Scalia authored the majority opinion that instead relied on the common law right of cross examination at trial to assess the trustworthiness of a statement,[150] an arguably more criminal defendant-friendly test. Justice Scalia, generally a proponent of jury trial rights,[151] believed that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[152] In more recent years, Justice Scalia vigorously defended the scope of the Confrontation Clause's protections against what he perceived as an effort to limit the Clause's reach by other Justices. For example, in one 2015 decision, Justice Scalia objected to "the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford* ..."[153] With Justice Scalia gone from the Court, the continuing vitality of *Crawford* and subsequent cases applying his trial-based approach seems questionable. Second, Justice Scalia's concern for the jury rights of defendants—what he called "a fundamental reservation of power in our constitutional structure"—led him to become the fifth vote in the Court's landmark ruling in *Apprendi v. New Jersey*[154] and author the 5-4 opinion in *Blakely v. Washington*,[155] which generally hold that facts that increase the maximum punishment to which the defendant is subject must be determined beyond a reasonable doubt by a jury and not a judge. These rulings paved the way for *Booker v. United States*,[156]

---

precedent to guide courts in interpreting the protean concept of trespass.").

[146] Justice Scalia's judicial philosophy, however, did not always favor suspected criminals. For instance, his opinion in *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010), sided with the government, relying on a bright-line rule to limit to 14 days the time period in which law enforcement officials must abstain from questioning a criminal suspect after he has invoked the right to counsel.

[147] *See* --- *U.S.* ---, 133 S. Ct. 1409 (2013).

[148] *Id.* at 1415.

[149] *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[150] *See* Crawford v. Washington, 541 U.S. 36, 42-43 (2004) ("The Constitution's text does not alone resolve this case.... We must therefore turn to the historical background of the Clause to understand its meaning.").

[151] *See* Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1046 (2006) (noting that "Justices Scalia and Thomas have shown no indication that they are particularly concerned with defendants' interests in other contexts, but they are vigorous enforcers of the Sixth Amendment's jury trial right because they appear to believe that their chosen legal methodology requires such a conclusion").

[152] *Crawford*, 541 U.S. at 61.

[153] *See* Ohio v. Clark, --- U.S. ---, 135 S. Ct. 2173, 2184 (2015) (Scalia, J., dissenting).

[154] 530 U.S. 46, 497 (2000).

[155] 542 U.S. 296, 313-14 (2004).

[156] 543 U.S. 220, 243-44 (2005).

which made the federal sentencing guidelines discretionary, rather than mandatory, and have worked a profound shift in how criminal prosecutions operate on a day-to-day basis.[157]

Similarly, Justice Scalia can be seen to have sided with the defendants when the criminal law in question was found to have been written too vaguely to provide sufficient notice of the conduct the law prohibits. The most recent example of this approach was his majority opinion in *Johnson v. United States*, in which the Court invalidated the so-called "residual clause" of the Armed Career Criminal Act (ACCA),[158] which imposed a 15-year mandatory minimum sentence on any person who possessed a firearm after having three previous convictions for "violent felonies."[159] In several prior cases, Justice Scalia dissented from the application of the ACCA in specific cases on the grounds that the "[i]mprecision and indeterminacy" of the term "violent felonies"—which the statute defines to "involve[] conduct that presents a serious potential risk of physical injury to another"[160]—was "inappropriate in the application of a criminal statute" on which "years of prison hinge[]."[161] In *Johnson*, Justice Scalia relied on the rule of lenity—which serves to require Congress to write laws with sufficient particularity to give "fair notice" of what conduct is prohibited—to invalidate the ACCA's residual clause, noting that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process."[162]

Environmental Law

Justice Scalia is widely viewed to have had an enormous influence on environmental law, which will continue to be felt in ongoing and future litigation.[163] His perspectives on environmental issues were shaped, in part, by his broader views on federalism,[164] separation of powers,[165] and statutory interpretation.[166] One of the main sources of Justice Scalia's impact on environmental law is his jurisprudence on the topic of standing.[167] In his influential majority opinion in the 1992 case *Lujan v. Defenders of Wildlife*, Justice Scalia clarified limits on when environmental groups

---

[157] Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1086 (2005) (noting that *Blakely* has been described as "a legal earthquake, a forty-car pileup, a bombshell, and a bull in a china shop. It has been called the most significant constitutional decision in criminal justice since *Miranda*—and some have opined that its full force will be greater than any past ruling in the field.").

[158] *See* Johnson v. United States, --- U.S. ---, 135 S. Ct. 2551, 2555 (2015).

[159] *See* 18 U.S.C. §924(e).

[160] *Id.* at §924(e)(2)(B)(ii).

[161] *See* James v. United States, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting); *see also* Sykes v. United States, 564 U.S. 1, 34 (2011) (Scalia, J., dissenting) ("What does violate the Constitution is approving the enforcement of a sentencing statute that does not 'give a person of ordinarily intelligence fair notice' of its reach, ... and that permits, indeed invites, arbitrary enforcement....") (internal citations omitted).

[162] *Johnson*, 135 S. Ct. at 2560.

[163] *See, e.g.*, Tirrill Moore, *Environmental Law After Scalia: Assessing the Environmental Legacies of Potential Nominees*, GEORGETOWN ENVTL. L. REV. (March 7, 2016), *available at* http://gelr.org/2016/03/07/environmental-law-after-scalia-assessing-the-environmental-legacies-of-potential-nominees-georgetown-environmental-law-review/ ("Justice Scalia played a crucial role in shaping environmental law discourse."); Jeremy P. Jacobs, *How Scalia Reshaped Environmental Law*, E&E NEWS (February 15, 2016), *available at* http://www.eenews.net/stories/1060032404.

[164] *See infra* "Federalism."

[165] *See infra* "Separation of Powers."

[166] *See supra* "Statutory Interpretation."

[167] For more on the discussion of Justice Scalia's views on standing, see *supra* "Administrative Law."

and other groups have standing to challenge or enforce laws or regulations in federal court.[168] Building on earlier cases,[169] the principles set forth by Justice Scalia in *Lujan* require plaintiff groups to make specific allegations establishing that at least one identified member has suffered or would suffer concrete and particularized injury caused by, or fairly traceable to, the act challenged in the litigation, and that this injury is redressable by the court,[170] limiting the impact of citizen-suit provisions in several environmental laws. Justice Scalia also shaped the relationship between environmental law and property rights with his decisions defining regulatory takings under the Fifth Amendment of the U.S. Constitution.[171] In *Lucas v. South Carolina Coast Council*,[172] Justice Scalia articulated a rule that, when a challenged regulation affecting land use (not otherwise grounded in background principles of nuisance law[173]) denies a landowner all "economically viable use of his land," it amounts to a government taking of the property—akin to an exercise of eminent domain—and the Fifth Amendment requires just compensation.[174]

With respect to specific environmental issues, Justice Scalia issued decisions that served to narrow the scope or reach of federal environmental regulatory efforts on a number of notable occasions.[175] For example, he authored the plurality decision in *Rapanos v. United States*,[176] the latest in a series of Supreme Court cases explaining the extent of federal jurisdiction over wetlands and streams under the Clean Water Act (CWA).[177] Justice Scalia's plurality opinion set forth a test requiring a "continuous surface connection" to "waters of the United States," which he further characterized as "relatively permanent bod[ies] of water connected to traditional interstate navigable waters."[178] Since *Rapanos*, however, lower courts have looked primarily to the "significant nexus" test set forth by Justice Kennedy in his concurrence.[179] Justice Scalia also

---

[168] 504 U.S. 555, 562 (1992) ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.") (internal citation omitted). *Lujan* held that the plaintiff environmental group had not established actual or imminent injury to challenge a rule limiting the geographic scope of applicability of the Endangered Species Act. *See generally id.*

[169] *See, e.g.*, *id.* at 560-62 (citing, among other cases, Lujan v. National Wildlife Federation, 497 U.S. 871, 883-89 (1990); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976); Sierra Club v. Morton, 405 U.S. 727, 740-41, n.16 (1972)).

[170] *Id.* at 559-71; *see also* Summers v. Earth Island Inst., 555 U.S. 488, 498 (2009) (Scalia, J.) (applying *Lujan*).

[171] U.S. CONST. amend. V.

[172] 505 U.S. 1003 (1992).

[173] *See id.* at 1020-24, 1027-32.

[174] *Id.* at 1017-19. *See infra* "Takings."

[175] *See, e.g.*, Dan Farber, *Justice Scalia and Environmental Law*, THE BERKELEY BLOG (February 15, 2016), *available at* http://blogs.berkeley.edu/2016/02/17/justice-scalia-and-environmental-law/ ("The *Chevron* test says that an agency's interpretation of a statute is entitled to deference.…There are only three cases in which the Supreme Court has ever held that a statute's interpretation of an ambiguous statute was unreasonable, all three written by Scalia: *Whitman v. American Trucking*, [531 U.S. 457 (2001),] *UARG v. EPA*, [134 S. Ct. 2427 (2014),] and *Michigan v. EPA* [,135 S. Ct. 2699 (2015)]. In all three cases, the 'unreasonable' agency was EPA.").

[176] 547 U.S. 715 (2006); *see also generally* Solid Waste Agency of Northern Cook Cty. (SWANCC) v. Army Corps of Eng'rs, 531 U.S. 159 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland. (Legal questions on this report can be referred to Alexandra M. Wyatt.)

[177] 33 U.S.C. §§1311, 1342, 1362.

[178] *Rapanos*, 547 U.S. at 742, 757 (Scalia, J., plurality op.) (remanding for further factual determinations).

[179] *See, e.g.*, United States v. Donovan, 661 F.3d 174, 180-84 (3d Cir. 2011); United States v. Bailey, 571 F.3d 791, 797-800 (8th Cir. 2009); United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006). A regulation to implement *Rapanos*, issued jointly by the Environmental Protection Agency (EPA) and Army Corps of Engineers in 2015, was stayed in the midst of litigation at the time of Justice Scalia's passing. *See* CRS Legal Sidebar WSLG1503, *Sixth Circuit Will Hear Challenges to EPA's Clean Water Act Jurisdiction ("Waters of the United States") Rule, but Litigation Uncertainties*

rejected an environmental group's interpretation of the CWA in *Entergy Corp. v. Riverkeeper*, affirming the Environmental Protection Agency's (EPA's) reliance on cost-benefit analysis in setting national performance standards for power plant cooling water intake structures and providing for cost-based variances.[180] On the other hand, Justice Scalia agreed with environmental plaintiffs in other cases, such as *City of Chicago v. Environmental Defense Fund*, in which the Court interpreted the Resource Conservation and Recovery Act (RCRA) and found that municipal waste combustion ash was hazardous waste subject to regulation.[181]

On air and climate issues in particular, Justice Scalia often, but not always, expressed skepticism of EPA regulation. In 2001, he wrote the majority opinion in *Whitman v. American Trucking Associations*, which agreed with EPA's interpretation that the Clean Air Act (CAA) did not permit the agency to consider implementation costs in setting National Ambient Air Quality Standards (NAAQS).[182] Justice Scalia disagreed with EPA in some later cases, including the 2015 decision in *Michigan v. EPA*, which remanded the agency's rule on Mercury and Air Toxics Standards (MATS) for power plants.[183] Justice Scalia wrote for the Court that a provision of the CAA authorizing regulation of hazardous air pollutants from power plants only where "appropriate and necessary" *did* require threshold consideration of costs.[184] On climate, Justice Scalia dissented from the 2005 decision in *Massachusetts v. EPA*, which held, by a vote of 5-4, that greenhouse gases (GHGs) were air pollutants under the CAA,[185] but later joined the majority in *American Electric Power (AEP) v. Connecticut*, which held that EPA's authority under the CAA to set limits on GHG emissions displaced common-law nuisance lawsuits seeking to impose such limits.[186] In 2014, Justice Scalia authored the majority opinion in *Utility Air Regulatory Group (UARG) v. EPA*, which upheld EPA's authority to regulate GHGs but struck down part of its stationary source permitting rule.[187] In doing the latter, Justice Scalia appeared to scale back deference to agencies:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its

Remain Unresolved, by Alexandra M. Wyatt. In addition, the Supreme Court's 2015 term docket includes *Army Corps of Engineers v. Hawkes Co.*, No. 15-290, a case concerning whether property owners can sue over CWA jurisdictional determinations by EPA or the Army Corps of Engineers. For background on *Hawkes*, see CRS Legal Sidebar WSLG1250, *Circuit Courts Split Over Availability of Judicial Review After a Clean Water Act "Jurisdictional Determination"*, by Robert Meltz. (Questions on this Sidebar can be referred to Alexandra M. Wyatt.)

[180] 556 U.S. 208, 217-27 (2009) (interpreting CWA language, including "best technology available for minimizing adverse environmental impact").

[181] 511 U.S. 328, 331-39 (1994).

[182] 531 U.S. 457, 464-72 (2001). The Court nevertheless vacated and remanded EPA's NAAQS, holding that EPA's interpretation of the interaction between two subparts of the CAA was unreasonable. *Id.* at 476-86.

[183] 576 U.S.—, 135 S. Ct. 2699, 2706-12 (2015). After the Supreme Court's decision, the U.S. Court of Appeals for the District of Columbia Circuit remanded the rule to the agency without vacating it. White Stallion Energy Ctr., LLC v. EPA, No. 12-1100, 2015 U.S. App. LEXIS 21819 (D.C. Cir., December 15, 2015) (unpub. *per curiam* order).

[184] 135 S. Ct. at 2707-08 ("One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.... There are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost. But this is not one of them.")

[185] 549 U.S. 497, 549 (2001) (Scalia, J., dissenting).

[186] 564 U.S. 410, 423-29 (2011).

[187] 134 S. Ct. 2427, 2438-49 (2014).

> announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[188]

Notably, one of Justice Scalia's last votes on the Supreme Court was to join a 5-4 majority to stay, or suspend, the Clean Power Plan, EPA's rule to regulate GHG emissions from existing power plants, which is currently being litigated in consolidated cases before the U.S. Court of Appeals for the District of Columbia Circuit.[189] Justice Scalia's language from *UARG* excerpted above has featured prominently in many of the briefs filed by petitioners challenging the rule.[190] The Supreme Court's stay was widely interpreted as a sign that the rule would face skepticism if the Court were to review the decision of the appeals court, but with Justice Scalia's passing, some perceive the rule's prospects to have changed.[191]

Federalism

Justice Scalia viewed federalism, or the legal principles governing the division of power between the states and the national government, to be "one of the Constitution's structural protections of liberty."[192] Perhaps his greatest contribution to the Court's federalism jurisprudence was his majority opinion in *Printz v. United States*.[193] *Printz*, in conjunction with an earlier decision in *New York v. United States*,[194] marked a sharp change of course in the Court's interpretation of the Tenth Amendment—a fundamental constitutional underpinning of federalism that reserves those powers not delegated to the federal government to the states, or to the people.[195] In *Printz*, the Court struck down provisions of the Brady Handgun Violence Prevention Act that required state and local law enforcement officers to conduct background checks on prospective gun

---

[188] *Id.* at 2444.

[189] *See* West Virginia v. EPA, No. 15A773 (February 9, 2016), *available at* http://www.supremecourt.gov/orders/courtorders/020916zr_21p3.pdf. For more information on the Clean Power Plan rule and on the Supreme Court's stay of the rule for the duration of the litigation challenging the rule, see CRS Report R44341, *EPA's Clean Power Plan for Existing Power Plants: Frequently Asked Questions*, by James E. McCarthy et al., and CRS Legal Sidebar WSLG1489, *UPDATED: Circuit Court Denies Stay of Clean Power Plan; States Ask Supreme Court to Step In (Part 2)*, by Alexandra M. Wyatt.

[190] *See, e.g.*, Opening Br. of Pet'rs. on Core Legal Issues, Opening Br. of Intervenors, Br. for Members of Cong. as Amici Curiae in Supp. of Pet'rs., West Virginia, et al. v. EPA, No. 15-1363 (filed February 23, 2016).

[191] *See, e.g.*, Lawrence Hurley, *Scalia's Death Boosts Legal Chances for Obama's Climate Plan*, REUTERS (February 16, 2016), *available at* http://www.reuters.com/article/us-usa-court-carbon-idUSKCN0VP0FH; Anthony Lacey & Jeremy Bernstein, *Scalia's Death Creates Uncertainty for Pending EPA, Clean Energy Cases*, INSIDEEPA (February 15, 2016) (quoting legal observers), *available at* http://insideepa.com/daily-news/scalias-death-creates-uncertainty-pending-epa-clean-energy-cases.

[192] Printz v. United States, 521 U.S. 898, 921 (1997). It is perhaps unsurprising then, that Justice Scalia's federalism jurisprudence at times reflected his views on the other great structural protection of liberty, the separation of powers. *Id.* ("'Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'") (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). Justice Scalia has described the American concept of federalism as a "form of government midway between two extremes. At one extreme, the autonomy, the disunity, the conflict of independent states; at the other, the uniformity the inflexibility, the monotony of one centralized government. Federalism is meant to be a compromise between the two." Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J. L. & POL'Y 19, 19 (1982).

[193] *See Respondent: The Constitutional and the Jurisprudence of Justice Scalia*, 47 ST. LOUIS L.J. 753, 769 (2003).

[194] 505 U.S. 144, 175-77 (1992) (invalidating provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that instructed states to "take title" to nuclear waste within their borders on the grounds that Congress may not commandeer state regulatory processes by ordering states to enact or administer a federal regulatory program).

[195] U.S. CONST. amend. X.

purchasers.[196] Immediately prior to *New York* and *Printz*, the Court had generally relied on structural safeguards and the political process to limit Congress's exercise of its commerce power vis-à-vis the states, as opposed to judicial review.[197] Justice Scalia, writing for the majority, solidified the anti-commandeering principles of the Tenth Amendment that continue to govern today by concluding "categorically" that the federal government may not compel state officials to "enact or administer a federal regulatory program."[198]

However, Justice Scalia's view of the barriers to the exercise of federal power erected by the Constitution's "system of dual sovereignty"[199] was not always "categorical."[200] For example, while Justice Scalia joined the Court's landmark rulings restricting the scope of the commerce power in *United States v. Lopez*[201] and *Morrison v. United States*,[202] he did not find, as Justice Thomas did in dissent, that Congress violated federalism principles in *Gonzales v. Raich*, a case in which the Court held that the Commerce Clause empowered Congress to prohibit the local cultivation and use of marijuana even though such activity was permitted by state law.[203] Similarly, in *Branch v. Smith*, Justice Scalia—writing for the majority—suggested that the Court's anti-commandeering principles apply less stringently when the Constitution "expressly" grants Congress powers over the states as it does under the "Times, Places and Manner" Clause of Article I, Section 4,[204] which explicitly makes state control over certain aspects of congressional elections subject to alteration by Congress. Justice Scalia was also unwilling to accept what he viewed as "faux federalism" arguments in *City of Arlington v. FCC*, an administrative law case in which it was argued that the FCC had "asserted jurisdiction over matters of traditional state and local concern."[205] Rather than adopting the federalism based arguments put forward by respondents, Justice Scalia viewed the case as one to be decided on principles of statutory interpretation.

Scalia's interpretation of the dormant Commerce Clause and the Eleventh Amendment's provisions regarding state sovereign immunity provides additional insight into his views on federalism. The Court has held that the Commerce Clause represents not only a grant of authority

---

[196] *Printz*, 521 U.S. at 933 (quoting *New York*, 505 U.S. at 188). In a related context, Justice Scalia voted with the majority in *South Dakota v. Dole*, in declining to find a condition on a highway grant that required states to maintain a drinking age of twenty-one to be unconstitutionally coercive. *See* 483 U.S. 203, 211-12 (1987). However, in *National Federation of Independent Business v. Sebelius*, Justice Scalia concurred with the judgment of the Court that the Affordable Care Act's Medicaid provision violates the Tenth Amendment by threatening states with the loss of their existing Medicaid funding if they decline to comply with the expansion. *See --- U.S. ---*, 132 S. Ct. 2566, 2666-67 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (noting that seven members of the Court agree that the Medicaid Expansion is unconstitutional).

[197] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985) ("[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.").

[198] *Printz*, 521 U.S. at 933 (quoting New York v. United States, 505 U.S. at 188).

[199] *Id*. at 935.

[200] *Id*. at 933.

[201] 514 U.S. 549 (1995).

[202] 529 U.S. 598 (2000).

[203] 545 U.S. 1 (2005). *Id*. at 65-66 (Thomas, J., dissenting) ("Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power.... Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty.... Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.") (internal citations omitted).

[204] 538 U.S. 254, 280 (2003).

[205] 569 U.S.—, 133 S. Ct. 1863, 1873 (2013) ("But this case has nothing to do with federalism. Section 332(c)(7)(B)(ii) explicitly supplants state authority by *requiring* zoning authorities to render a decision 'within a reasonable period of time,' and the meaning of that phrase is indisputably a question of federal law.").

to Congress, but also a prohibition on states "imposing excessive burdens on interstate commerce without congressional approval."[206] This implied "negative command" is known as the dormant or negative Commerce Clause. Justice Scalia viewed the doctrine as a "judicial fraud" and a "judge-invented rule."[207] Relying on a strict textualist interpretation, he recently described his view in a dissenting opinion in *Comptroller of the Treasury v. Wynne*, asserting that "[t]he fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause."[208] In contrast, the absence of a clear textual command did not influence his interpretation of the Eleventh Amendment, which provides that the "Judicial power of the United States shall not ... extend to any suit ... commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[209] Justice Scalia has suggested that the Eleventh Amendment should be understood "not so much for what it says, but for the presupposition of our constitutional structure which it confirms."[210] Accordingly, having acknowledged the Amendment's "precise terms" bar only suits against a state by a citizen of another state or a foreign state, Justice Scalia interpreted the background principles animating the Amendment to immunize states from a wide array of lawsuits, including claims brought by citizens of a state against that state.[211] Relatedly, Justice Scalia joined in the Court's often narrow majorities that limited Congress's ability to abrogate state sovereign immunity[212] and dissented in other cases where the Court upheld congressional repeals of state immunity from suits,[213] defending a relatively broad principle that states generally cannot be sued absent consent.

Freedom of Religion

Although Justice Scalia did not author many of the Court's leading opinions in cases on religious freedom, he wrote a number of concurring and dissenting opinions related to the Establishment and the Free Exercise Clauses.[214] In these opinions, he regularly noted the role of religion in the

[206] Comptroller of the Treasury v. Wynne, 575 U.S.—, 135 S. Ct. 1787, 1794 (2015) ("Although the Clause is framed as a positive grant of power to Congress, 'we have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject.") (citing Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995)).

[207] *Id*. at 1807-08 (Scalia, J., dissenting). *See also* Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232 (1987) (Scalia, J., dissenting) ("The pre-emption of state legislation would automatically follow, of course, if the grant of power to Congress to regulate interstate commerce were exclusive.... However, unlike the District Clause, which empowers Congress 'To exercise exclusive Legislation,' Art. I, § 8, cl. 17, the language of the Commerce Clause gives no indication of exclusivity.").

[208] *Wynne*, 135 S. Ct. at 1808.

[209] U.S. CONST. amend. XI.

[210] Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991). *See also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 31 (1989) (Scalia, J., concurring) ("[T]he Eleventh Amendment was important not merely for what it said, but for what it reflected....").

[211] *Union Gas Co.*, 491 U.S. at 31.

[212] *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996) (5-4 decision); Alden v. Maine, 527 U.S. 706 (1999) (5-4 decision); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 630 (1999) (5-4 decision); Coleman v. Court of Appeals, --- U.S. ---, 132 S. Ct. 1327 (2012).

[213] *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 741 (2003) (Scalia, J., dissenting); Tennessee v. Lane, 541 U.S. 509, 554 (2004) (Scalia, J., dissenting).

[214] *See, e.g.*, Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 757 (1995) (Scalia, J., opinion of the Court); Edwards v. Aguillard, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 557 (1993) (Scalia, J., concurring).

history of the United States, particularly the role religion played in the lives of the Framers.[215] The notion of separation of church and state, according to Justice Scalia, meant that the government could not establish an official church, require church attendance, or demand financial support for a church.[216] However, under his view, the Establishment Clause did not extend so far as to require that references to religion be extinguished from public life and did not preclude the government from favoring religious practices.[217] This understanding of the Establishment Clause was reflected in his opinions across various lines of cases that the Court considered over the past three decades, including school prayer, public displays of religious symbols, and private religious expression in public fora.[218]

Early in his tenure—while the second most junior member of the Court—Justice Scalia authored the majority opinion in what is widely considered the most significant constitutional religious freedom case of his tenure on the Court: *Employment Division, Department of Human Resources of Oregon v. Smith*.[219] That landmark decision clarified the standard of the Free Exercise Clause, effectively lowering the constitutional barrier to rational basis review and barring religious objection as a basis for exemption from neutral laws of general applicability.[220] Historically, the Court had required that the government demonstrate a compelling interest in any action that would interfere with religious exercise.[221] The majority opinion authored by Justice Scalia in *Smith* explained, however, that the Court "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[222]

Justice Scalia's opinion in *Smith* was the impetus for Congress's enactment of the Religious Freedom Restoration Act (RFRA), which provides heightened protection for religious exercise by statute.[223] Under RFRA, the federal government cannot substantially burden religious exercise unless it has a compelling interest and uses the least restrictive means to achieve that interest.[224] In recent years, RFRA and its implementation in light of *Smith* have driven discussions about freedom of religious exercise, including that in the Court's latest landmark religion case: *Burwell v. Hobby Lobby Stores, Inc.*[225] The majority in *Hobby Lobby* (joined by Justice Scalia) held that closely held corporations could claim protection under RFRA, allowing private businesses to seek accommodation or exemption from laws of general applicability if they

---

[215] *See* Lee v. Weisman, 505 U.S. 577, 631 (1991) (Scalia, J., dissenting); McCreary Cty. v. ACLU, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting).

[216] *See Lee*, 505 U.S. at 631-36.

[217] *See McCreary Cty.*, 545 U.S. at 885-86 ("[Under] one model of the relationship between church and state ... [r]eligion is to be strictly excluded from the public forum. This is not, and never was, the model adopted by America.").

[218] *See Lee*, 505 U.S. at 631 (Scalia, J., dissenting); *McCreary Cty.*, 545 U.S. at 885 (Scalia, J., dissenting); Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); *Capitol Square*, 515 U.S. at 757.

[219] 494 U.S. 872 (1990).

[220] *Id*.

[221] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

[222] *Smith*, 494 U.S. at 878-79.

[223] P.L. 103-141, 107 Stat. 1488 (November 16, 1993) (codified, as amended, at 42 U.S.C. §2000bb *et seq.*). RFRA originally provided protection from burdens imposed by federal, state, and local government actions, but the Supreme Court ruled in 1997 that its application to state and local governments was unconstitutional on federalism grounds under the Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

[224] 42 U.S.C. §2000bb-1.

[225] --- U.S. ---, 134 S.Ct. 2751 (2014) (holding that closely held private corporations owned by individuals with religious objections to the contraceptive coverage requirement under the Affordable Care Act qualified as persons eligible for RFRA protection against substantial burdens on their religious exercise).

satisfied the statutory requirements of RFRA.[226] That opinion appeared to contrast with Justice Scalia's explanation of the holding in *Smith*, in which he wrote that religious objections from generally applicable laws generally were not protected by the First Amendment.[227] Justice Scalia did not write separately to address the distinction between the holdings, but the cases were decided under different protections for religious freedom—*Smith* as a matter of the Free Exercise Clause and *Hobby Lobby* as a matter of statutory protection under RFRA. *Hobby Lobby* has reignited the debates that occurred following *Smith*, particularly those involving questions about the extent to which a person's religion may impact a successful claim for exemption from a neutral law of general applicability.[228] Looking forward, another potentially important decision is pending before the Court in its current term, *Zubik v. Burwell*—a case providing the opportunity for the Court to further clarify the meaning of a "substantial burden" on religious exercise and the extent to which religious objectors may avoid compliance with laws of general applicability under RFRA.[229] The case is expected to clarify the state of protections for religious exercise and, by extension, the legacy of Justice Scalia's opinion in *Smith*.

Freedom of Speech

Perhaps no area of law was as greatly affected by Justice Antonin Scalia's tenure on the Court as the case law regarding freedom of speech. In the era prior to Justice Scalia's appointment, the Supreme Court, led by jurists like Justice William Brennan, broadened its recognition of the types of speech that the freedom of speech clause of the First Amendment protects from government restriction.[230] During this time, the Court ended restrictions on speech that advocated the overthrow of the government;[231] protected depictions of sex and indecency from some, though not all, government regulation;[232] and expanded the right to criticize the government.[233] This expansion of free speech rights by the Warren and Burger Courts often prompted dissenting Justices to argue, in their opinions, that free speech interests should be subordinate to the

[226] *Hobby Lobby*, 134 S. Ct. at 2759.

[227] *Smith*, 494 U.S. at 878-79.

[228] See also CRS Report R43654, *Free Exercise of Religion by Closely Held Corporations: Implications of Burwell v. Hobby Lobby Stores, Inc.*, by Cynthia Brown. These questions have arisen across a variety of issues and have been of particular interest related to the Court's recognition of a federal right to same-sex marriage, including the resulting implications for nondiscrimination requirements in civil rights law and requirements for recipients of federal funding. See CRS Report R44244, *Recognition of Same-Sex Marriage: Implications for Religious Objections*, by Cynthia Brown and Erika K. Lunder.

[229] *See* Zubik v. Burwell, No. 14-1418, 2015 U.S. LEXIS 7030, 136 S. Ct. 444 (November 6, 2015).

[230] *See generally* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 322-30, 339-41 (2000).

[231] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (*per curiam*) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[232] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding broadcast indecency restrictions); Stanley v. Georgia, 394 U.S. 557, 568 (1969) ("[T]he First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.").

[233] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and ... it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

government's interests in protecting national security,[234] imposing social order,[235] and regulating public morality.[236] Justice Scalia, in keeping with his rules-based approach to constitutional jurisprudence,[237] embraced an approach to the First Amendment somewhat different from his predecessors. Justice Scalia was generally skeptical of the constitutionality of speech restrictions that could be interpreted as efforts by the government to prescribe "orthodoxy"—that is, instances where the government "pick[s] and choose[s] among" the ideas and viewpoints to favor and disfavor.[238] And Justice Scalia's view that free speech interests generally do not yield to countervailing interests of the government has increasingly garnered the support of majorities on the Court, as the Roberts Court has relied on the First Amendment to strike down several federal and state laws on free speech grounds.[239]

Justice Scalia's concerns with the regulation of speech based upon governmental disapproval of its message are illustrated by his majority opinion in *R.A.V. v. St. Paul*.[240] In *R.A.V.*, the Court invalidated a city ordinance that prohibited certain fighting words, a category of speech long known to be proscribable under the First Amendment.[241] The ordinance applied only to fighting words that aroused anger on the basis of race, religion, or gender.[242] It was the singling out of fighting words with a particular message for special prohibition that Justice Scalia and the Court found objectionable. Under the challenged law, "One could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but not that 'all papists' are, for that would insult and provoke violence 'on the basis of religion.'"[243] To quote a line from *R.A.V.* that perhaps embodies Justice Scalia's general understanding of the government's limited ability to burden particular content: "[The government] has no ... authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules,"[244] even within a category of speech generally unprotected by the First Amendment. For Justice Scalia, such

[234] *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 757 (1971) (Harlan, J., dissenting) (arguing that the judiciary should not "redetermine for itself the probable impact of disclosure [of the Pentagon Papers] on the national security").

[235] *See, e.g.*, Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (describing the plaintiff's actions as an "absurd and immature antic" that constituted "conduct" subject to state regulation).

[236] *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 82 (1963) (Harlan, J., dissenting) (arguing that the majority's invalidation of a state commission empowered to suppress the circulation of certain "objectionable" publications due to their alleged obscenity, indecency, or impure language "cut into [the state's] effort ... to get at the juvenile delinquency problem....").

[237] *See supra* "Role of the Judiciary."

[238] *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 44 (1992).

[239] *See, e.g.*, Ken Starr, President, Baylor Univ., *Address at the Pepperdine Judicial Law Clerk Institute* (March 18, 2011) (describing the Roberts Court as the "most free speech court in American history"); Tony Mauro, *Roberts Court Extends Line of Permissive First Amendment Rulings in Video Game Case*, AM. LAW DAILY (June 28, 2011), *available at* http:// amlawdaily.typepad.com/amlawdaily/2011/06/scotusfirstamendmentvideo.html (quoting Steve Shapiro, the American Civil Liberties Union Legal Director, as saying "This is a Court that takes an expansive view of the First Amendment. It is particularly sensitive to any claim that the government is using its power to censor unpopular speakers or unpopular speech."). *But see* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 724, 734 (2011) (arguing that the Roberts Court's campaign finance decisions do not reflect a commitment to free speech).

[240] 505 U.S. 377 (1992).

[241] *Id.* at 381.

[242] *Id.* at 391.

[243] *Id.* at 391-92

[244] *Id.* at 392.

selectivity raises the specter of the government attempting to impose ideological orthodoxy, which the Constitution does not permit.[245]

Justice Scalia's approach to the issue of campaign finance can be seen to reflect his general approach to free speech issues, rejecting most government regulations as being violative of the First Amendment because such regulations are based on the identity of the speaker, or limit the amount of political speech in a campaign, without serving the governmental interest of avoiding candidate corruption. In particular, he cautioned of the dangers of "incumbents' writing ... the rules of political debate," observing that the "first instinct of power is the retention of power."[246] In *Austin v. Michigan Chamber of Commerce*,[247] the Supreme Court upheld the constitutionality of a state law that restricted corporate campaign expenditures. Foreshadowing a landmark decision by the Court twenty years later in *Citizens United v. Federal Election Commission*,[248] Justice Scalia dissented. Characterizing *Austin* as permitting the political speech of corporations to be regulated because state law provides them with "special advantages" by limiting the personal liability of individuals who form such associations, he argued that doing so was "incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate."[249] Years later, in a concurrence to a pivotal case narrowing the scope of a federal law similarly restricting corporate campaign expenditures, Justice Scalia reiterated his criticism of *Austin*. In *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[250] he characterized *Austin* as "wrongly decided," with a "flawed rationale," and expressly rejected the principle that political speech could be restricted "based on the corporate identity of the speaker."[251] When the Court issued its landmark 2010 ruling in *Citizens United*, the influence of Justice Scalia seemed clear. Quoting from his earlier opinions, the majority of the Court concluded that *Austin* "was a significant departure from ancient First Amendment principles,"[252] and expressly overruled it.[253]

On the other hand, in a notable exception to his general disapproval of campaign finance regulation, Justice Scalia supported disclosure requirements. In *McIntyre v. Ohio Elections Commission*,[254] where the Court struck down a state law prohibiting the distribution of anonymous campaign literature, Justice Scalia issued a dissent criticizing the majority for "discover[ing] a hitherto unknown right-to-be-unknown while engaging in electoral politics."[255] Anonymity, he wrote, "facilitates wrong by eliminating accountability, which is ordinarily the

[245] *Id*. at 390 ("The First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects.").

[246] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part).

[247] 494 U.S. 652 (1990), *overruled by* Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010). For further discussion, *see* CRS Report R43719, *Campaign Finance: Constitutionality of Limits on Contributions and Expenditures*, by L. Paige Whitaker.

[248] 558 U.S. 310 (2010).

[249] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting).

[250] 551 U.S. 449 (2007).

[251] *Id.* at 490, 489 (Scalia, J., concurring in part and concurring in judgment).

[252] *Citizens United*, 558 U.S. at 319 (quoting Wis. Right to Life, Inc., 551 U.S. at 490 (Scalia, J., concurring in part and concurring in judgment)).

[253] *See id.* at 365.

[254] 514 U.S. 334 (1995).

[255] *Id.* at 371 (Scalia, J., dissenting).

very purpose of the anonymity."[256] Several years later, in *Doe v. Reed*,[257] he continued his support for disclosure in the context of elections. In *Doe*, the Court upheld a state law requiring that all public records, including signatures on referendum petitions, be made available for public inspection and copying. In an often quoted passage from his concurrence in that case, Justice Scalia announced:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously ... and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.[258]

Despite his approval of disclosure requirements in the elections context, however, Justice Scalia's understanding of the freedom of speech clause of the First Amendment, more generally, made him skeptical of many restrictions on the content of speech, regardless of the political views expressed, arguably putting his jurisprudence at odds with his personal opinions in some cases.[259] Perhaps most notably, Justice Scalia voted with the majority in *Texas v. Johnson*, a case striking down a law that prohibited the burning of the American flag.[260] Years later, when reflecting on his vote in that case, he said, in typically colorful fashion: "If it was up to me, if I were king, I would take scruffy, bearded, sandal-wearing idiots who burn the flag, and I would put them in jail."[261] Nonetheless, for Justice Scalia, the First Amendment's protections for freedom of speech necessarily, even particularly, encompassed speech critical of the government, compelling his vote in *Johnson*.[262] Moreover, in the most recent freedom of speech majority opinion that he wrote, Justice Scalia's opinion provides additional evidence of his overarching skepticism of the constitutionality of government attempts to single out disfavored content for special restriction. In *Brown v. Entertainment Merchants Association*, he rejected California's attempt to regulate violent video games in the same way that governments are permitted to regulate material that is

---

[256] *Id.* at 385.

[257] 561 U.S. 186 (2010).

[258] *Id.* at 228 (Scalia, J., concurring).

[259] Justice Scalia's skepticism of the permissibility of content-based restrictions on speech did, at times, produce results that aligned with views perceived to be politically conservative. For example, Justice Scalia repeatedly argued against the constitutionality of laws that restricted speech outside of abortion clinics. *See* Hill v. Colorado, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting); McCullen v. Coakley, --- U.S. ---, 134 S. Ct. 2518, 2541 (2014) (Scalia, J., concurring). In both cases, the majority had determined that the restrictions at issue were not content-based; however, Justice Scalia disagreed. Justice Scalia believed that the restrictions were targeted at speech about abortion, particularly at speech opposing abortion, and, therefore, would have required the Court to apply strict scrutiny to strike down the restrictions. *Hill*, 530 U.S. at 748 (Scalia, J., dissenting) ("In sum, it blinks reality to regard this statute, in its application to oral communications, as anything other than a content-based restriction upon speech in the public forum. As such, it must survive that stringent mode of constitutional analysis our cases refer to as 'strict scrutiny'"); *McCullen*, 134 S. Ct. at 2548 (Scalia, J., concurring). Justice Scalia also regularly joined opinions defending the rights of religious groups to have equal access to public forums to engage in religious expression. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 823 (1995); Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 707 (2010) (Alito, J., dissenting, joined by Roberts, C.J., & Scalia & Thomas, JJ.).

[260] 49 U.S. 397 (1989).

[261] Jamie Gumbrecht, *Even in Dissent, Scalia Stirs Controversy*, CNN (July 18, 2012), *available at* http://www.cnn.com/2012/07/18/justice/antonin-scalia-profile/.

[262] Adam Liptak, *Scalia Says He Had 'No Falling Out' With the Chief Justice*, NY TIMES (July 19, 2012), *available at* http://www.nytimes.com/2012/07/19/us/politics/justice-scalia-says-he-had-no-falling-out-with-chief-justice-roberts.html ("However, we have a First Amendment which says that the right of free speech shall not be abridged. And it is addressed, in particular, to speech critical of the government.").

obscene as to minors.[263] After recounting some of the more shocking images that might be encountered by a child playing one of these games, which Justice Alito had pointed to in a dissenting opinion, Justice Scalia wrote:

> To what end does he relate this?.... Who knows?.... But it does arouse the reader's ire, and the reader's desire to put an end to this horrible message. Thus, ironically, Justice Alito's argument highlights the precise danger posed by the California Act: that the ideas expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.[264]

Nonetheless, Justice Scalia was not a First Amendment absolutist and did recognize the existence of limits to First Amendment protections. For example, Justice Scalia would have held, in contrast to the majority of the Court, that the First Amendment does not protect commercial Internet pornography;[265] public displays of nudity;[266] or adult television channels that are "primarily dedicated to sexually-oriented programming."[267] Justice Scalia also recognized the government's authority to regulate commercial speech more easily than other categories of speech.[268] Moreover, while Justice Scalia was skeptical of government efforts to restrict speech by private individuals, he broadly defended the government's ability to speak through its power to decide what speech to fund.[269] In addition, Justice Scalia argued for the government having broad powers to control speech within public institutions, including speech by public employees[270] and speech by prisoners.[271] In this sense, Justice Scalia's views on freedom of speech clause were not only influential on the Court, but also quite complex.

International and Foreign Law

Justice Scalia was a vociferous critic of the use of contemporary foreign law and practice—including practices so prevalent as to arguably reflect a customary international legal norm—to inform understanding of the Constitution.[272] He characterized this attitude as consistent with his

---

[263] Brown v. En't Merch. Ass'n, 564 U.S. 786, 131 S. Ct. 2729 (2011).

[264] *Id*., 131 S. Ct. at 2738.

[265] *See* Ashcroft v. ACLU, 542 U.S. 656, 676 (2004) (Scalia, J., dissenting).

[266] *See* Barnes v. Glen Theatre, 501 U.S. 560, 573 (1991) (Scalia, J., concurring).

[267] *See* United States v. Playboy Entm't Group, 529 U.S. 803, 832 (2000) (Scalia, J., dissenting).

[268] Bd. of Trs. v. Fox, 492 U.S. 469 (1989) (Scalia, J.) (holding that where the government seeks to regulate commercial speech the restriction need not be the least-restrictive means for achieving the government's legitimate ends).

[269] *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 590 (1998) (Scalia, J., concurring); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) (Scalia, J.); Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., --- U.S. ---, 133 S. Ct. 2321, 2332 (2013) (dissenting).

[270] *See* Waters v. Churchill, 511 U.S. 661, 686 (1994) (Scalia, J., concurring).

[271] *See* Beard v. Banks, 548 U.S. 521, 536 (2006) (Thomas, J., concurring joined by Scalia, J.).

[272] Justice Scalia's criticisms were often made in dissenting opinions to Supreme Court rulings that looked to foreign or international legal authorities as interpretative aids in understanding the scope of protections afforded by the Constitution. *See, e.g.,* Roper v. Simmons, 543 U.S. 551, 575-78 (2005) (majority opinion citing to both domestic and foreign practice to support its conclusion that the imposition of the death penalty for juvenile offenders is unconstitutional, and observing that in recent decades the Court had "referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments'"); Lawrence v. Texas, 539 U.S. 558, 576 (2003) (holding that a state law criminalizing same-sex sodomy violated the Due Process Clause of the Fourteenth Amendment, and citing to jurisprudence of the European Court of Human Rights as undermining the reasoning of an earlier Supreme Court decision upholding state sodomy laws, to the extent that the earlier ruling "relied on values we share with a wider civilization"). For a scholarly defense

originalist philosophy. While Justice Scalia believed that English common law sources could shed light on the meaning of constitutional provisions "written against the backdrop of 18th-century English law and legal thought,"[273] he considered the contemporary practice of foreign states to be irrelevant to understanding the Constitution's meaning at the time it was adopted.[274] Using contemporary foreign practice as an interpretative aid in applying the Constitution should be "rejected out of hand,"[275] according to Justice Scalia, not only because the U.S. system is sufficiently distinct from foreign systems to make such comparative analysis unhelpful,[276] but also because it would be inappropriate for a U.S. court to set aside practices and traditions rooted in the American experience for those favored by foreign states.[277]

Justice Scalia took a somewhat different view toward the relevance of foreign law and international custom when interpreting U.S. statutes and treaties. In the case of treaty interpretation, Justice Scalia opined that U.S. courts "can, and should, look to decisions of other

---

of the use of contemporary international legal sources to inform U.S. constitutional interpretation, see Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) (arguing that such usage is appropriate in certain contexts and consistent with historical practice).

[273] *Roper*, 543 U.S. at 626 (Scalia, J., dissenting). *See also, e.g.,* Crawford v. Washington, 541 U.S. 36 (2004) (examining the English tradition prior to the U.S. Constitution's ratification to discern the original meaning of the Sixth Amendment's Confrontation Clause); Hamdi v. Rumsfeld, 542 U.S. 507, 554-63 (2004) (Scalia, J., dissenting) (examining the English tradition prior to the ratification of the U.S. Constitution and concluding that the government could not indefinitely detain a U.S. citizen as an "enemy combatant," unless it acted pursuant to the Suspension Clause to suspend habeas corpus); INS v. St. Cyr, 533 U.S. 289, 342-43 (2001) (Scalia, J., dissenting) (interpreting the scope of the Suspension Clause with reference to the common-law right of habeas corpus at the time of the Constitution's ratification, and discussing English judicial rulings from the Framing-era or earlier to discern the common-law rules). In a 2005 public colloquy with his colleague, Justice Stephen Breyer, regarding their conflicting views on the use of foreign law, Justice Scalia claimed he actually relied on foreign law more than any other Member of the Court, but that his reliance was limited to "Old English law, because phrases [within the Constitution] like 'due process,' the 'right of confrontation' and things of that sort were all taken from English law." American University Washington College of Law, *Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer* (January 13, 2005), *available at* http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument (hereinafter "Transcript of Discussion").

[274] Transcript of Discussion, *supra* note 273.

[275] *Roper*, 543 U.S. at 624 (Scalia, J., dissenting).

[276] *Id*. (arguing that "in many significant respects" most countries' laws differ from those of the United States, including with respect to the right to a jury trial and grand jury indictment, as well as the U.S. judicial rule excluding consideration of evidence obtained through an illegal search and seizure, and such differences render comparative constitutional analysis unhelpful); *Hamdi*, 542 U.S. at 575 n.5 (Scalia, J., dissenting) (objecting to the plurality's view that the indefinite detention of a U.S. citizen as an "enemy combatant" was constitutionally permissible absent the suspension of habeas corpus, and claiming the fact"[t]hat captivity may be consistent with the principles of international law does not prove that it also complies with the restrictions that the Constitution places on the American Government's treatment of its own citizens.").

[277] *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) (arguing that, in holding that the Eighth Amendment prohibits the imposition of the death penalty for juvenile offenders, the majority opinion relied on foreign practice "*to set aside* the centuries-old American practice.... What these foreign sources 'affirm,' rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America"); Thompson v. Oklahoma, 487 U.S. 815, 868 n. 4 (1988) (Scalia, J., dissenting) (criticizing the plurality's reference to foreign practice when it interpreted the meaning of the Eighth Amendment, and declaring that "[w]e must never forget that it is a Constitution for the United States of America that we are expounding.... the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution"); Atkins v. Virginia, 536 U.S. 304, 347-48 (Scalia, J., dissenting) (criticizing the majority opinion's discussion of practices of the "world community" when interpreting the Eighth Amendment, and approvingly quoting the earlier dissent in *Thompson*, *supra*); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (describing the majority's discussion of foreign attitudes when assessing the constitutionality of a state law criminalizing same-sex sodomy as "[d]angerous dicta ... since 'this Court ... should not impose foreign moods, fads, or fashions on Americans'").

signatories when we interpret treaty provisions," in part because these judgments may serve as evidence of the treaty parties' shared understanding of the agreement's meaning.[278] On matters of statutory interpretation, Justice Scalia also indicated a belief that federal statutes should be construed in a manner consistent with the law of nations whenever possible.[279] In his partial dissent in *Hartford Fire Insurance Co. v. California*, for example, Justice Scalia disagreed with the majority's interpretation of an antitrust statute as reaching conduct occurring within a foreign state's jurisdiction.[280] Application of the statute in such a manner, according to Justice Scalia, would have rendered it inconsistent with international legal principles of comity and respect for the sovereign authority of other nations. Justice Scalia argued that, whenever feasible, "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law."[281]

Justice Scalia also opined that ratified treaties do not enable Congress to legislate on matters beyond the scope of its enumerated powers under Article I of the Constitution. At least since the Supreme Court's 1920 ruling in *Missouri v. Holland*,[282] U.S. courts have recognized that Congress may enact legislation necessary and proper to carry out obligations imposed by a ratified treaty, including legislation on matters that have traditionally been regulated by the states and which could not be reached through legislation premised on Congress's enumerated powers under Article I. Justice Scalia disagreed with this long-standing interpretation, believing it "enables the fundamental constitutional principle of limited federal powers to be set aside by the President and Senate's exercise of the treaty power."[283] He believed that the text and structure of the Constitution indicates that the Necessary and Proper Clause enables Congress to take action only to assist in implementing the President's power, under the Treaty Clause of Article II, to "make" a treaty, such as by enacting legislation intended to assist the President in negotiating and concluding an international legal agreement.[284] But, in Justice Scalia's view, Congress may enact legislation only to implement the obligations of a treaty "made" by the President to the extent that such legislation is within the scope of its enumerated powers under Article I.[285]

---

[278] Olympic Airways v. Husain, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (arguing that the majority's interpretation of the Warsaw Convention failed to give sufficient consideration to how the courts of other signatory parties had interpreted the treaty).

[279] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting) (approvingly citing Chief Justice John Marshall's statement in *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 2 Cranch 64 (1804) that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains"). Justice Scalia characterized this canon as distinct from the general presumption employed by U.S. courts that congressional enactments are not meant to apply extraterritorially unless a contrary intent is evident. *Id*. at 814.

[280] *Hartford Fire Ins. Co.*, 509 U.S. at 815.

[281] *Id*. *See also* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 176 (2004) (Scalia, J., concurring) (concurring in judgment because the majority's construction of the relevant statute was "consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories").

[282] Missouri v. Holland, 252 U.S. 416 (1920).

[283] Bond v. United States, --- U.S. ---, 134 S. Ct. 2077, 2102 (2014) (Scalia, J., concurring in judgment). In *Bond*, the Court was asked to consider whether the Tenth Amendment acts as a constitutional constraint upon Congress's ability to enact treaty-implementing legislation. The majority opinion declined to reach this issue, as it construed the challenged legislation as having not been intended to cover activities traditionally falling under state or local control.

[284] *Id*. at 2099.

[285] *Id*.

Right to Bear Arms

In 2008, the Supreme Court decided *District of Columbia v. Heller*,[286] a landmark decision wherein the Court addressed the nature of the rights conferred by the Second Amendment.[287] By a vote of 5-4, the Court struck down the District of Columbia's provisions that effectively prevented handgun ownership.[288] Justice Scalia authored the majority opinion, holding that the Second Amendment "protects an individual right to possess a firearm, unconnected with service in a militia, and to use the firearm for traditionally lawful purposes, such as self-defense within the home."[289] Under an originalist approach to constitutional interpretation,[290] the majority opinion separately reviewed the various clauses of the Amendment as they would have been understood during the Founding era.[291] Based on a textualist reading of key phrases and an exhaustive discussion of the historical underpinnings of the Amendment, the Court held that the amendment "creates an individual right to keep and bear arms."[292] The majority opinion affirmed its "individual right" interpretation of the Second Amendment by reviewing the Amendment as it was understood during the time period immediately after its ratification through the end of the 19th century[293] and comparing the Amendment against analogous rights in state constitutions.[294] Justice Scalia's analysis concluded by noting that "the right secured by the Second Amendment is not unlimited" and that "nothing 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

[286] 554 U.S. 570 (2008).

[287] In 1939, the Court decided *United States v. Miller*, 307 U.S. 174 (1939), wherein it considered the validity of a provision in the National Firearms Act of 1934 in relation to the Second Amendment. This decision was commonly cited in subsequent lower court decisions as supportive of the proposition that the Second Amendment confers a collective right to keep and bear arms. *See, e.g.*, United States v. Smith, 18 Fed. App'x. 201 (4th Cir. 2001); United States v. Hamblen, 239 Fed. App'x. 130 (6th Cir. 2007).

[288] D.C. CODE §7-2502.02(a)(4) (2007) (generally barring registration of handguns, thereby effectively prohibiting the possession of handguns in the District); D.C. CODE §22-4504(a) (2007) (prohibition on carrying a pistol without a license that would have prevented registrants from moving a gun from one room to another within their homes); D.C. CODE §7-2507.02 (2007) (requiring that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device).

[289] *Heller*, 554 U.S. at 577. In 2010, the Court went on to decide *McDonald v. City of Chicago*, 561 U.S. 742 (2010), holding that the Second Amendment also applies to the states, meaning that such constitutional right may not be infringed upon by local governments. The decision, however, did not further explore the scope of the Second Amendment. Justice Alito authored the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

[290] *Heller*, 554 U.S. at 576 ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'").

[291] *Id*. at 579- 97. Justice Scalia first focused on the operative clause—"the right of the people to keep and bear Arms, shall not be infringed"—finding that the textual elements of the clause and the historical background of the Amendment "guarantee the individual right to possess and carry weapons in case of confrontation" not connected to service in a militia. *Id*. at 579-95. The opinion next focused on the text of the prefatory clause—"[a] well regulated Militia, being necessary to the security of a free State"—determining that (1) the term "Militia" refers to all able-bodied men, rather than the state and congressionally regulated military forces; (2) the phrase "well regulated" "implies nothing more than [the] imposition of proper discipline and training"; and (3) the phrase "security of a free State" means "'security of a free polity,' not security of each of the several States." *Id*. at 595-97.

[292] *Id*. at 598.

[293] *Id*. at 605-19.

[294] *Id*. at 600-03. Justice Scalia also took the view that none of the Court's precedents related to the Second Amendment foreclosed an individual rights interpretation of the Second Amendment. *Id*. at 619-26.

imposing conditions and qualifications on the commercial sale of arms."[295] The types of aforementioned measures, though not an exhaustive list, are "presumptively lawful" regulatory provisions according to *Heller*.[296]

Heller's significance is two-fold. First, *Heller* with its reliance on and employment of constitutional history, is recognized as signaling the Court's embrace of originalism.[297] It is notable that not only did Justice Scalia evaluate the Second Amendment under an originalist approach, but so did Justice Stevens, who wrote the dissenting opinion, which reached the opposite interpretation.[298] Second, *Heller* arguably marks a new era in Second Amendment jurisprudence because the individual rights interpretation has paved the way for more constitutional challenges to federal and state firearms laws. However, lower courts, which have since entertained numerous Second Amendment cases, have been left with the task of addressing questions unresolved in the *Heller* decision, such as the standard of judicial review to be applied, and the nature of the rights protected under the Second Amendment.[299] The Supreme Court has declined to review many Second Amendment cases, sometimes over the dissents of Justices Scalia and Thomas, who have expressed concern over how lower courts have, to date, been evaluating firearms laws under the Second Amendment.[300] Justice Scalia's opinion in *Heller* marked a starting point for understanding the meaning of the Second Amendment, but it remains for his successor and the Court to clarify and reexamine the contours of this right.

Separation of Powers

Long before Justice Scalia was appointed to the bench, Supreme Court Justices professed an understanding that the aim of constitutional separation of powers principles is the protection of

---

[295] *Id*. at 626-27.

[296] *Id*. at 627 n.26.

[297] *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 191 (2008) ("*Heller* marks the 'Triumph of Originalism.'"); Randy E. Barnett, *Scalia Restored the Right to Bear Arms*, USA TODAY (February 17, 2016), *available at* http://www.usatoday.com/story/opinion/2016/02/17/randy-barnett-antonin-scalia-new-originalism-heller-second-amendment-column/80450446/; Jeffrey Toobin, *How Scalia Changed the Court*, NEW YORKER (February 13, 2016), *available at* http://www.newyorker.com/news/news-desk/how-scalia-changed-the-supreme-court.

[298] In contrast, in his analysis of the text and history, Justice Stevens opined that the Second Amendment was meant to protect only "the right of the people of each of the several States to maintain a well-regulated militia." *Heller* I, 554 U.S. at 637 (Stevens, J., dissenting).

[299] *See, e.g.*, New York State & Rifle Pistol Ass'n v. Cuomo, 804 F.3d 242 (2d Cir. 2015) (upholding New York and Connecticut state laws that ban certain assault weapons and large capacity magazines but declaring unconstitutional New York State's seven-round load limit and Connecticut's prohibition on a specific type of non-semiautomatic firearm); Kachalsky v. Cty. of Westchester, 701 F.3d 81 (2d Cir. 2012) (upholding New York state requirement that applicants show proper cause to obtain a concealed carry license); United States v. Chapman, 666 F.3d 220 (4th Cir. 2012) (upholding federal law that prohibits persons subject to domestic violence order from possessing a firearm); United States v. Reese, 627 F.3d 792 (10th Cir. 2010) (same); GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs, 788 F.3d 1318 (11th Cir. 2015) (upholding federal regulation that bans loaded firearms and ammunition on property managed by the U.S. Army Corps of Engineers); Heller v. District of Columbia (*Heller* II), 670 F.3d 1244 (D.C. Cir. 2011) (upholding District of Columbia's regulations requiring the registration of firearms and banning assault weapons and large capacity magazines); *but see* Peruta v. Cty. of San Diego, 771 F.3d 570 (9th Cir. 2014) (ruling unconstitutional a San Diego County policy interpreting a California's requirement to show "good cause" for a concealed handgun license); Heller v. District of Columbia (*Heller* III), 801 F.3d 264 (D.C. Cir. 2015) (ruling unconstitutional four of the ten challenged provisions related to firearms registration).

[300] 136 S. Ct. 447 (2015) (order denying review of *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015)); 128 S. Ct. 2799 (order denying review of *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014)).

liberty,[301] not a means for ensuring efficient government.[302] Two schools of thought have developed for approaching separation of powers disputes. The formalist interpretation focuses on the structural divisions in the Constitution with the idea that close adherence to these rules is required in order to achieve the preservation of liberty.[303] The functionalist interpretation takes a more flexible approach,[304] emphasizing the core functions of each of the branches and asking whether an overlap in these functions upsets the equilibrium the Framers sought to maintain.[305]

Justice Scalia was a noted leader of the formalist tradition, insisting that the metes and bounds of the three coordinate branches of government are to be found in the Constitution and are not subject to adjustment by any of the branches, whatever pragmatic result a blurring of boundaries might be expected to achieve.[306] He believed poet Robert Frost's line, "Good fences make good neighbors," to be an apt description of how the three branches of government ought to interact.[307] He explained:

> [T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a

---

[301] Meyers v. United States, 272 U.S. 52, 116 (1926). Chief Justice Taft wrote:

> Montesquieu's view that the maintenance of independence, as between the legislative, the executive and the judicial branches, was a security for the people had [the Framers'] full approval. Accordingly the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. (internal citations omitted).

[302] *Id.* at 293 (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.").

[303] For an overview of the functionalist and formalist lines of analysis, see generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

[304] Mistretta v. United States, 488 U.S. 361, 380 (1989) ("In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison's view of the appropriate relationship among the three coequal Branches.... [T]he Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.").

[305] *See* Manning, *supra* footnote 303, at 1942-43. Decisions regarded as functionalist tend to cite Justice Jackson's *Youngstown* concurrence:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[306] In *Mistretta*, Justice Scalia accused the Court of "treat[ing] the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, as its name suggests, it is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document." *Mistretta*, 488 U.S. at 682-83 (Scalia, J., dissenting). He continued by supposing: "It may well be that in some circumstances [a legislative branch distinct from Congress] would be desirable; perhaps the agency before us here [the Sentencing Commission] will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous." *Id.* at 427.

[307] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995).

> prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.[308]

Justice Scalia's formalist approach to the separation and equilibrium of the three branches, with its focus on strict rules and structural safeguards, would not permit the resolution of interbranch disputes through deference to the political branches to determine the boundaries of their own powers.[309] As he saw it, the Constitution does not permit any of the three branches to cede their respective authorities to one another any more than it permits one branch to aggrandize itself by seizing powers properly vested in another branch. Accordingly, he denied the possible existence of "lawful delegations of legislative authority," instead taking the view that a congressional "assignment of responsibilities" to executive branch officials is permissible only if adequately circumscribed.[310] He resisted—this time with the support of at least a plurality of fellow Justices—what he considered as an effort to shift executive branch responsibilities to the Judiciary.[311] He would not have tolerated what he viewed as the presidential acquisition of Senate turf under the Recess Appointments Clause by what he characterized as "adverse possession."[312] Moreover, he rejected the primacy of the nominal location of an entity within a branch of the federal government as determinant of its place in the separation of powers scheme.[313] Rather, he believed the Court should ascertain whether the powers to be exercised by a newly created government body are legislative, judicial, or executive in order to properly judge where it belongs in the constitutional structure.[314] Permission to commingle these powers must, in Justice Scalia's view, be found in the Constitution itself and not divined through a case-by-case measurement of the *degree* of commingling to determine its propriety.[315]

On the other hand, Justice Scalia recognized that the Constitution does not mandate a complete separation of each of the powers it assigns, but that some powers may be shared across branches

---

[308] *Id.* at 239 (emphasis in original).

[309] Morrison v. Olson, 487 U.S. 654, 704 (1988) (Scalia, J., dissenting) ("[W]here the issue pertains to separation of powers and the political branches are ... in disagreement, neither can be presumed correct."). In a subsequent opinion from which Justice Scalia also dissented, the Court stated:

> When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons.

Mistretta, 488 U.S. at 384 (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986)) (opinion concurring in judgment).

[310] Loving v. United States, 517 U.S. 748, 776-77 (1996) (Scalia, J., concurring).

[311] Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 (1992).

[312] NLRB v. Noel Canning, --- U.S. ---, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring in the judgment) (describing as an "adverse-possession theory of executive authority" the majority's reasoning that, because "Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor," the Court should not "upset the compromises and working arrangements that the elected branches of Government themselves have reached").

[313] *Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting) (rejecting the majority's reliance on Congress's placement of the Sentencing Commission within the Judicial Branch as a factor for separation of powers purposes).

[314] *Morrison*, 487 U.S. at 705 (arguing that the constitutionality of the Ethics in Government Act depended on whether criminal prosecution is a purely executive function and whether the statute deprived the President of exclusive control over the exercise of it).

[315] *Mistretta*, 488 U.S. at 426-27. Justice Scalia acknowledged that consideration of the degree of commingling might be acceptable "at the margins, where the outline of the framework itself is not clear." *Id*. However, in the case at hand, he did not view it as a marginal question whether our constitutional structure allows for a body "which is not the Congress, and yet exercises no governmental powers except the making of rules that have the effect of laws." *Id.* at 427.

in accordance with the document's text.[316] For him, it was the type of power (law-making versus law-executing) rather than another division of authority (say, foreign affairs versus domestic policies) that mattered.[317] He objected to the Court's "gerrymandering"[318] in announcing a rule which characterized the presidential power to recognize foreign governments as an exclusive one, based on an assessment of "functional considerations"—namely, the asserted need for the nation to "speak with one voice" in foreign affairs[319]—and the "weight of historical evidence," rather than abiding by the Constitution's separation of powers structure.[320] A congressional act bearing on the exercise of executive power seemed to him authorized by the Constitution's Necessary and Proper Clause,[321] so long as the act in question is both necessary and proper.[322] He appears to have rejected the view that the Constitution's structure endows the President with exclusive authority simply because no express congressional power is enumerated.[323]

Justice Scalia was equally likely to reach the same conclusion when the branch alleged to have overstepped its powers was the judicial one, even if those steps were taken in the service of enforcing other constitutional mandates. In one notable instance, he called out his colleagues' "Mr. Fix-It Mentality" evidenced by their efforts to "Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions."[324] In his view, the Court should neither recognize informal arrangements between the branches adopted for the purpose of enhancing their ability to work together or effectively exercising oversight over one another, nor should it rewrite policies adopted by the political branches to fit within constitutional bounds. The separation of powers principles prevalent in the Constitution ought, in his view, to speak for themselves, rather than be read to imply a more flexible structure to serve specific policy ends, whether such tweaking is viewed as trivial or monumental in scope.

---

[316] Zivotofsky v. Kerry, --- U.S. ---, 135 S. Ct. 2076, 2126 (2015) (Scalia, J., dissenting) (remarking that the Framers "did not entrust either the President or Congress with sole power to adopt uncontradictable policies about *any* subject—foreign-sovereignty disputes included. They instead gave each political department its own powers, and with that the freedom to contradict the other's policies").

[317] *Id.*; *see also id.* at 2116 ("The Constitution gave the President the 'executive Power,' authority to send and responsibility to receive ambassadors, power to make treaties, and command of the Army and Navy—though they qualified some of these powers by requiring consent of the Senate. Art. II, §§ 1–3. At the same time, they gave Congress powers over war, foreign commerce, naturalization, and more. Art. I, § 8.").

[318] *See id.* at 2121 (calling the Court's rule prohibiting Congress from forcing the executive branch to contradict itself with respect to a decision to recognize or not recognize a foreign sovereign's authority over territory "blatantly gerrymandered to the facts of th[e] case").

[319] *Id*. at 2086 (majority opinion) (citing Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396, 424 (2003)).

[320] *Id.* at 2116 (Scalia, J., dissenting) ("[The People who formed our government] considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle.... [They] adopted a Constitution that divides responsibility for the Nation's foreign concerns between the legislative and executive departments.").

[321] U.S. CONST. art. I, §8, cl. 18 (authorizing Congress "to make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers as well as "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

[322] *Zivotofsky*, 135 S. Ct. at 2117.

[323] *Id.* at 2126 (criticizing Justice Thomas's concurrence for its "parsimonious interpretation of Congress's authority to enact laws 'necessary and proper for carrying into Execution' the President's executive powers," an interpretation which Justice Scalia viewed as likely to produce "a presidency more reminiscent of George III than George Washington").

[324] Hamdi v. Rumsfeld, 542 U.S. 507, 576-77 (2004) (Scalia, J., dissenting).

Substantive Due Process

During his tenure on the Court, Justice Scalia was a frequent critic of the substantive due process doctrine.[325] This doctrine recognizes certain liberty interests that are not enumerated in the Constitution as so fundamental that any infringement of them is subject to heightened judicial scrutiny.[326] In a series of cases, the Supreme Court concluded that certain legislative restrictions on such interests, like the freedom to marry and the ability to acquire contraceptives, could not survive heightened judicial scrutiny.[327] In perhaps the most famous modern substantive due process case, the Court, in *Roe v. Wade*, maintained that a right of privacy, whether existing in the Fourteenth Amendment's concept of personal liberty and restrictions on state action, or in the Ninth Amendment's reservation of rights to the people, was broad enough to encompass a woman's decision to terminate her pregnancy.[328] In contrast to the majority in *Roe*, Justice Scalia took the view that the Due Process Clause does not "guarante[e] certain (unspecified) liberties;" rather, for Justice Scalia, the Fourteenth Amendment "merely guarantees certain procedures as a prerequisite to deprivation of liberty."[329]

Justice Scalia's views on substantive due process were informed, in part, by his concerns regarding the judiciary's competency to determine what rights warrant protection. As he observed in a concurring opinion in *United States v. Carlton*, "The picking and choosing among various rights to be accorded 'substantive due process' protection ... arouse[s] suspicion ... [and] unquestionably involves policymaking rather than neutral legal analysis."[330] More broadly, in identifying what "liberty" interests are protected under the Fourteenth Amendment, Justice Scalia argued that such interests should be determined by referring to the "most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[331] For these reasons, throughout his tenure on the Court, Justice Scalia dissented from opinions where the Court held that the substantive component of the Due Process Clause prohibited the criminalization of homosexual sodomy[332] or the restriction on same-sex individuals' opportunities to marry.[333]

Justice Scalia was similarly critical of the Court's holding in *Roe* in several opinions involving the constitutionality of certain abortion procedures. Beginning in *Webster v. Reproductive Health Services*, the Court's 1989 decision upholding several provisions of a Missouri law that regulated abortion procedures, Justice Scalia expressed his belief that abortion is an issue that should be left to the political process.[334] In a concurring opinion, Justice Scalia observed: "[T]he fact that our

[325] *See, e.g.*, Chicago v. Morales, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting) ("The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called 'substantive due process') is in my view judicial usurpation.").

[326] See CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, Fourteenth Amendment: Rights Guaranteed, Section 1: Rights Guaranteed, Fundamental Rights (Noneconomic Substantive Due Process), available at http://www.crs.gov/conan/details/?mode=topic&doc=Amendment14.xml&t=4|17&s=1.

[327] *See* Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

[328] 410 U.S. 113, 153 (1973). For additional information, see CRS Report RL33467, *Abortion: Judicial History and Legislative Response*, by Jon O. Shimabukuro.

[329] *See* Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring).

[330] 512 U.S. 26, 41-42 (1994) (Scalia, J., concurring).

[331] *See* Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989).

[332] *See* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

[333] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting).

[334] 492 U.S. 490, 532 (1989) (Scalia, J., concurring).

retaining control, through *Roe*, of what I believe to be, and many of our citizens recognize to be, a political issue, continuously distorts the public perception of the role of this Court."[335] Justice Scalia reiterated his criticism of *Roe* one year after *Webster* was decided in *Ohio v. Akron Center for Reproductive Health*, a case involving Ohio's parental notification and consent requirements.[336] Concurring in the Court's decision to uphold the requirements, Justice Scalia maintained:

> I continue to believe ... that the Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution—not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins. Leaving this matter to the political process is not only legally correct, it is pragmatically so.[337]

In a dissenting opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court's 1992 decision that reaffirmed *Roe*'s central holding, Justice Scalia asserted once again that the right to terminate a pregnancy is not protected by the Constitution.[338] He also criticized the undue burden standard that had been developed by a plurality of the Court in *Casey* on the grounds that the standard was "as doubtful in application as it is unprincipled in origin...."[339] Subsequently, in *Stenberg v. Carhart*, the Court's 2000 decision invalidating Nebraska's so-called "partial-birth" abortion law, Justice Scalia stated plainly in a dissenting opinion: "*Casey* must be overruled."[340] Justice Scalia maintained that the Court should return the issue of abortion "to the people ... and let them decide, state by state, whether this practice should be allowed."[341]

Had he remained on the Court through the entirety of the October 2015 term, Justice Scalia would have been in a position to consider the continued use of the undue burden standard in *Whole Woman's Health v. Hellerstedt*, a case involving the constitutionality of Texas's hospital admitting privileges and ambulatory surgical center requirements for abortion providers.[342] Given his past statements on abortion and his skepticism of the undue burden standard, it is likely that Justice Scalia would have voted to uphold the validity of the state requirements.

Takings

During his tenure on the Court, Justice Scalia authored opinions that can be interpreted as strengthening the protection of private property rights afforded by the Takings Clause of the Fifth Amendment of the U.S. Constitution. The Fifth Amendment limits government action by providing that private property shall not be "taken for public use" without "just compensation."[343] For more than a century after its adoption in 1791, courts interpreted this "Takings Clause" as requiring compensation only when the government physically condemned property or caused a

[335] *Id*. at 535.

[336] 497 U.S. 502, 520 (1990) (Scalia, J., concurring).

[337] *Id*.

[338] 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[339] *Id*. at 985.

[340] 530 U.S. 914, 956 (2000) (Scalia, J., dissenting). Although Justice Scalia dissented in *Stenberg v. Carhart*, he joined the majority in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court's 2007 decision upholding the Federal Partial-Birth Abortion Ban Act of 2003.

[341] *Id*.

[342] See generally CRS Legal Sidebar WSLG1441, *Supreme Court to Review Texas Abortion Case*, by Jon O. Shimabukuro.

[343] U.S. CONST. amend. V.

physical invasion of property (e.g., by constructing a dam that results in the flooding of private property).[344] Then, a series of cases in the 20th century expanded the application of this clause to so-called "regulatory takings," whereby a government restriction on the use of property devalues the property without a physical taking or condemnation.[345] During his first few years on the Court, Justice Scalia authored two important opinions favoring landowners and restricting the ability of the government to devalue landowners' property without compensation.

The first of these decisions was *Nollan v. Coastal California Commission*.[346] In *Nollan*, a property owner challenged a state commission's decision to condition the issuance of a permit to develop a beachfront property upon the granting of an easement to allow the public to pass through the property to access the public beaches to either side.[347] The property owners argued that the condition mandating the granting of an easement across their beachfront amounted to a taking of their private property without just compensation in violation of the Fifth Amendment.[348] The Court, in an opinion authored by Justice Scalia, agreed, ruling that conditioning the issuance of a construction permit upon the landowners' agreement to grant an easement across the property constituted a taking of private property and, thus, could not be accomplished without just compensation.[349] Justice Scalia's opinion in *Nollan* was notable for the concise test it articulated for new conditions that limit or burden the enjoyment of property: that the regulation or condition must be "reasonably related to the public need or burden" created by the use and enjoyment of that property.[350] Additionally, while the decision in *Nollan* may at first have had limited applicability due to the unique fact pattern in that case, Justice Scalia's decision formed the basis for subsequent notable takings decisions, including the "rough proportionality" test for evaluation of zoning ordinances and land use conditions articulated in *Dolan v. City of Tigard*, which require the government to show not only a nexus between the exaction and the harm resulting from the development, but also that the exaction is "roughly proportional" to the harm, in order for a condition or other "exaction" on private development to stand.[351]

While Justice Scalia's majority opinion in *Nollan* helped to inform subsequent Court jurisprudence on takings law, his most well-known opinion in this sphere came five years later in *Lucas v. South Carolina Coastal Council*.[352] In *Lucas*, the Court heard a claim brought by the owner of property on a South Carolina barrier island who was prevented from building homes on his property by a state law enacted after his purchase.[353] The property owner alleged that the law deprived his property of economically beneficial use, thus effectuating a taking of private

---

[344] *Cf.* Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVT'L. L. 175, 182 (2004) (discussing the history of regulatory takings jurisprudence).

[345] Benchmark cases in the development of the "regulatory takings" doctrine include *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393 (1922); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992*); Dolan v. City of Tigard*, 512 U.S. 373 (1994); and *Lingle v. Chevron*, 544 U.S. 52. (2005).

[346] 483 U.S. 825 (1987).

[347] *Id*. at 828.

[348] *Id.* at 830-31. As noted in the decision, the Takings Clause of the Fifth Amendment has been incorporated to limit the States by the Fourteenth Amendment. *Id.* at 829.

[349] *Id*. at 841-42.

[350] *Id.* at 838.

[351] 512 U.S. 374, 391 (1994).

[352] 505 U.S. 1003 (1992).

[353] *Id.* at 1007.

property requiring the payment of just compensation under the Fifth Amendment.[354] Writing for the majority, Justice Scalia first established that government action depriving a property owner of all economically beneficial use of the property amounted to a taking for which just compensation was required.[355] He turned next to previous Court decisions that had ruled that "harmful or noxious uses" of private property may be restricted or regulated by the government without necessitating compensation pursuant to the Takings Clause.[356] However, Justice Scalia rejected the applicability of this argument in a case where a "total regulatory taking" has occurred.[357] Instead, he ruled that, "where the State seeks to sustain regulation that deprives land of all economically beneficial use, ... it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[358]

This test authored by Justice Scalia requires courts to delve into applicable nuisance and property law principles and any other applicable common-law principles in order to determine if a new regulatory action resulting in the loss of all economically beneficial use of the property simply duplicates a result "that could have been achieved in the courts—by adjacent landowners ... under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."[359] If not, a taking has occurred and just compensation is required.[360]

The *Nollan* and *Lucas* decisions represent Scalia's most notable forays into takings law. These opinions can be seen to have continued the Court's movement toward more expansive protection of private property rights under the Takings Clause. Justice Scalia's subsequent votes in takings cases arguably maintained this stance, including his joining of a dissent in *Kelo v. City of New London*,[361] a case in which the majority upheld the exercise of eminent domain authority to transfer property from one private owner to another in order to further economic development as a valid "public use" under the Fifth Amendment,[362] and his joining in the majority opinion last term in *Horne v. Department of Agriculture*,[363] which relied on the Takings Clause to invalidate a regulatory scheme requiring raisin growers to set aside a certain percentage of their crop for the account of the Government, free of charge.[364]

[354] *Id.* at 1007-09.

[355] *Id*. at 1018.

[356] *Id*. at 1022.

[357] *Id*. at 1026.

[358] *Id.* at 1027 (emphasis added) (internal citations omitted).

[359] *Id.* at 1029.

[360] *Id.*

[361] 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting, joined by Rehnquist, C.J., & Scalia & Thomas, JJ).

[362] *Id.* at 483 (majority opinion).

[363] --- U.S. ---, 135 S. Ct. 2419 (2015).

[364] *Id.* at 2425.

Appendix. Justice Scalia as a Swing Vote

Table A-1. Cases Since the October 2010 Term Where Justice Scalia Was Part of a Bare Five-Member Majority

Where Justice Scalia's Absence from the Court Could Result in a Shift in the Court's Jurisprudence

Area of Law	Case Name	Case No.	Court Term	Holding
Bankruptcy Law	*Hall v. United States*	10-875	October 2011	The federal income tax liability resulting from petitioners' post-petition farm sale is not "incurred by the estate" under Section 503(b) of the Bankruptcy Code and thus is neither collectible nor dischargeable in the Chapter 12 plan.
Bankruptcy Law / Federal Courts	*Stern v. Marshall*	10-179	October 2010	Article III of the Constitution prohibits a federal bankruptcy court from entering a final and binding judgment on a tortious interference claim based exclusively on a right grounded in state law.
Capital Punishment	*Glossip v. Gross*	14-7955	October 2014	The death row inmates bringing suit failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment.
Civil Liability / Tort Preemption	*PLIVA, Inc. v. Mensing*	09-993	October 2010	Federal drug law regulations applicable to generic drug manufacturers preempt state tort claims based on failure to provide adequate warning labels.
Civil Liability / Tort Preemption	*Mutual Pharmaceutical Co. v. Bartlett*	12-142	October 2012	State-law design-defect claims that turn on the adequacy of a drug's warnings are pre-empted by federal law under *PLIVA,* Inc. *v. Mensing*, --- U.S. ---, 131 S. Ct. 2567 (2011).
Civil Rights	*Vance v. Ball State University*	11-556	October 2012	An employee is a "supervisor" for purposes of vicarious liability under Title VII only if he or she is empowered by the employer to take tangible employment actions against the victim.
Civil Rights	*University of Texas Southwestern Medical Center v. Nassar*	12-484	October 2012	Employee retaliation claims filed under Title VII of the Civil Rights Act of 1964 must be proved according to traditional principles of but-for causation.
Civil Rights / Federalism	*Shelby County v. Holder*	12-96	October 2012	Section 4 of the Voting Rights Act of 1965, which provides the formula for determining which states or electoral districts are required to submit electoral changes to the Department of Justice or a federal court for preclearance approval under Section 5 of the Act, exceeds Congress's enforcement power under the Fifteenth Amendment by violating the "fundamental principle of equal sovereignty" among states without sufficient justification.
Class Actions	*AT&T v. Concepcion*	09-983	October 2010	The Federal Arbitration Act preempts a California law deeming arbitration provisions that disallow class-wide proceedings unconscionable and unenforceable.

Area of Law	Case Name	Case No.	Court Term	Holding
Class Actions	*Comcast v. Behrend*	11-864	October 2012	A class action suit, brought by subscribers of cable television services provided by the defendant, was improperly certified under Federal Rule of Civil Procedure 23(b)(3), which requires a court to find that the "questions of law or fact common to class members predominate over any questions affecting only individual members," because the lower court erred in refusing to decide whether the class's proposed damages model could show damages on a class-wide basis.
Class Actions	*Genesis Healthcare v. Symczyk*	11-1059	October 2012	Because the plaintiff had no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness, her suit was appropriately dismissed for lack of subject-matter jurisdiction.
Class Actions	*American Express Co. v. Italian Colors Restaurant*[a]	12-133	October 2012	The Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.
Criminal Procedure	*Connick v. Thompson*[b]	09-571	October 2010	A district attorney's office may not be held liable under 42 U.S.C. §1983 for failure to train its prosecutors based on a single violation of *Brady v. Maryland* (failure to disclose material exculpatory evidence to the defense).
Criminal Procedure	*Bullcoming v. New Mexico*	09-10876	October 2010	The Confrontation Clause prohibits the prosecution from introducing a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification.
Criminal Procedure	*Florence v. Board of Chosen Freeholders of the County of Burlington*	10-945	October 2011	A strip search policy at a jail requiring searches of all arrestees, including those arrested for minor offenses, struck a reasonable balance between inmate privacy and the needs of the institution. Persons arrested for minor offenses can be subjected to invasive searches even if prison officials lack reason to suspect concealment of weapons, drugs, or other contraband.
Criminal Procedure	*Florida v. Jardines*	11-564	October 2012	A dog sniff at the front door of a house where the police suspected drugs were being grown constitutes a search requiring probable cause for purposes of the Fourth Amendment.
Criminal Procedure	*Missouri v. McNeely*	11-1425	October 2012	In drunk driving investigations, the ordinary dissipation of alcohol in the bloodstream does not necessarily constitute an exigency sufficient to justify conducting a blood test without a warrant.
Criminal Procedure	*Salinas v. Texas*	12-246	October 2012	When a criminal suspect had not yet been placed in custody or received Miranda warnings and voluntarily responds to some questions by police about a murder, the prosecution's use of his silence in response to another question as evidence of his guilt at trial did not violate the Fifth Amendment because the suspect failed to expressly invoke his privilege not to incriminate himself in response to the officer's question.
Criminal Procedure	*Davis v. Ayala*	13-1428	October 2014	Any federal constitutional error that may have occurred by excluding the attorney for a defendant in a capital murder trial from part of the hearing required under *Batson v. Kentucky*—which held that a prosecutor's use of peremptory challenge to exclude prospective jurors on the basis of race violated the Fourteenth Amendment—was harmless.

Area of Law	Case Name	Case No.	Court Term	Holding
Environmental Law	*Michigan v. EPA*	14-46	October 2014	The Environmental Protection Agency unreasonably interpreted provisions of the Clean Air Act in Section 7412(n)(1)(A) of Title 42 of the *U.S. Code*—which require the agency to regulate power plants when "appropriate and necessary"—when it refused to consider cost when making that decision.
False Claims Act Liability	*Schindler Elevator Corp. v. US ex rel. Kirk*[c]	10-188	October 2010	A federal agency's written response to a Freedom of Information Act request for records constitutes a "report" within the meaning of the False Claims Act public disclosure bar.
Federal Courts	*United States v. Juvenile Male*	09-940	October 2010	The defendant's challenge to the Sex Offender Registration and Notification Act was moot because the district court's order of juvenile supervision had expired and the defendant was no longer subject to the sex offender registration provisions that he challenged on appeal.
Federal Courts / Foreign Surveillance Law	*Clapper v. Amnesty Int'l*	11-1025	October 2012	Plaintiffs lacked Article III standing to challenge the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008, as they failed to demonstrate that they would suffer a concrete and particularized harm that was certainly impending.
Federalism / State Sovereign Immunity	*Coleman v. Maryland Court of Appeals*[d]	10-1016	October 2011	Lawsuits against a state under the self-care provision of the Family and Medical Leave Act of 1993 are barred by sovereign immunity.
Freedom of Speech	*Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*	10-238	October 2010	Arizona's law that provides additional funds to a publicly funded candidate when expenditures by a privately financed candidate and independent groups exceed the funding initially allotted to the publicly financed candidate substantially burdens political speech and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny.
Freedom of Speech	*Harris v. Quinn*	11-681	October 2013	An Illinois law requiring a Medicaid recipient's "personal assistant" (who is part of a collective bargaining unit but not a member of the bargaining union) to pay an "agency" fee to the union violates the First Amendment's prohibitions against compelled speech and cannot be justified under the rationale of *Abood v. Detroit Board of Education.*
Freedom of Speech	*American Tradition Partnerships v. Bullock*	11-1179	October 2011	*Citizens United v. Federal Election Commission* applies to a Montana state law limiting corporate expenditures in connection with a candidate or a political committee that supports or opposes a candidate or a political party.
Freedom of Speech	*McCutcheon v. FEC*[e]	12-536	October 2013	Aggregate limits on the amount of money individuals are allowed to contribute to candidates, political action committees, national party committees, and state or local party committees violate the First Amendment by restricting participation in the political process without furthering the government's interest in preventing *quid pro quo* corruption or the appearance thereof.
Health Care Law / Supremacy Clause	*Armstrong v. Exceptional Child Center, Inc.*	14-15	October 2014	The Supremacy Clause does not confer a private right of action, and Medicaid providers cannot sue for an injunction requiring compliance with the statute's reimbursement requirements.

Area of Law	Case Name	Case No.	Court Term	Holding
Immigration Law	*Chamber of Commerce v. Whiting*[c]	09-115	October 2010	Federal immigration law does not preempt an Arizona law (1) providing that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked; (2) requiring that all Arizona employers use a federal electronic verification system to confirm that the workers they employ are legally authorized workers.
Immigration Law	*Scialabba v. Cuellar de Osorio*[f]	12-930	October 2013	The Board of Immigration Appeals' interpretation of the Child Status Protection Act as providing a remedy only to "aged-out" non-citizens who qualified or could have qualified as principal beneficiaries of a visa petition, rather than only as derivative beneficiaries piggy-backing on a parent, is a permissible construction of the statute.
Immigration Law	*Kerry v. Din*	13-1402	October 2014	In a splintered opinion, five Justices agreed that the decision of the Ninth Circuit holding that a U.S. citizen has a protected liberty interest in her marriage that entitled her to a review of the denial of a visa to her non-U.S.-citizen spouse, as well its holding that the government deprived her of that liberty interest when it denied the spouse's visa application without providing a more detailed explanation of its reasons, should be vacated.
Indian Law	*Salazar v. Ramah Navajo Chapter*	11-551	October 2011	Even if Congress fails to appropriate sufficient funds to cover all contract support costs, the Indian Self-Determination and Education Assistance Act requires the federal government to pay in full each tribe's contract support costs incurred by a tribal contractor under the Act.
Labor Law	*Christopher v. SmithKline Beecham Corp.*	11-204	October 2011	Pharmaceutical sales representatives qualify as outside salesmen under the most reasonable interpretation of the Department of Labor's overtime regulations promulgated under the Fair Labor Standards Act.
Privacy Act Liability	*FAA v. Cooper*[c]	10-1024	October 2011	The Privacy Act does not unequivocally authorize damages for mental or emotional distress and therefore does not waive the government's sovereign immunity from liability for such harms.
Religious Freedom	*Arizona Christian School Tuition Organization v. Winn*	09-987	October 2010	Plaintiffs challenging a tax credit, rather than a governmental expenditure, as a violation of the Establishment Clause lack Article III standing under the precedent of *Flast v. Cohen*, 392 U.S. 83 (1968).
Religious Freedom	*Town of Greece v. Galloway*	12-696	October 2013	The practice of the town of Greece, New York, of opening its town board meetings with a prayer offered by members of the clergy does not violate the Establishment Clause of the First Amendment.
Religious Freedom	*Burwell v. Hobby Lobby Stores*	13-354	October 2013	As applied to closely held corporations, the regulations promulgated by the Department of Health and Human Services requiring employers to provide their female employees with no-cost access to contraception violate the Religious Freedom Restoration Act.

Area of Law	Case Name	Case No.	Court Term	Holding
Securities Law	*Janus v. First Derivative Traders*[c]	09-525	October 2010	Because a mutual fund investment adviser did not make the false statements included in the mutual fund prospectuses of its clients, it cannot be held liable for its role in preparing those prospectuses in a private action under Securities and Exchange Commission Rule 10b-5, which prohibits "mak[ing] any untrue statement of a material fact" in connection with the purchase or sale of securities.
Takings Clause	*Koontz v. St. Johns Water Management*	11-1447	October 2012	A government's demand for property from a land-use permit applicant must satisfy the requirements imposed under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), even when it denies the permit and even when its demand is for money.
Takings Clause	*Horne v. Department of Agriculture*	14-275	October 2014	The Fifth Amendment requires that the Government pay just compensation when it takes personal property, just as when it takes real property. Any net proceeds that raisin growers receive from the sale of reserve raisins should be included in the amount of compensation they have received for that taking—it does not mean the raisins have not been appropriated for government use. The government cannot make raisin growers relinquish their property without just compensation as a condition of selling their raisins in interstate commerce.
Tax Law	*United States v. Home Concrete & Supply, LLC*[g]	11-139	October 2011	Section 6501(e)(1)(A) of the Internal Revenue Code, which extends the limitations period for the government to assess a deficiency against a taxpayer, does not apply when a taxpayer overstates the basis in property that he has sold, thereby understating the gain received from the sale.

Source: Created by the Congressional Research Service based on statistics from SCOTUSblog. The summaries of the case holdings given in this table excerpt or paraphrase the syllabuses provided by the Supreme Court at the beginning of its decisions.

a. 5-3 decision, Sotomayor, J., recused.

b. Scalia, J., joined the majority and also filed a separate concurrence.

c. 5-3 decision, Kagan, J., recused.

d. Scalia, J., concurring in the judgment.

e. Scalia, J., joined a four-justice plurality opinion. Thomas, J., concurred in the judgment.

f. Three-justice plurality decision. Scalia, J., joined Roberts, J., concurring in the judgment.

g. Scalia, J., concurring in part and concurring in the judgment.

Author Information

Andrew Nolan, Coordinator
Legislative Attorney

Brandon J. Murrill, Coordinator
Legislative Attorney

Jared P. Cole
Legislative Attorney

Charles Doyle
Senior Specialist in American Public Law

Jennifer K. Elsea
Legislative Attorney

Todd Garvey
Legislative Attorney

Kathleen Ann Ruane
Legislative Attorney

Jon O. Shimabukuro
Legislative Attorney

Richard M. Thompson II
Legislative Attorney

Adam Vann
Legislative Attorney

L. Paige Whitaker
Legislative Attorney

Michael John Garcia
Acting Section Research Manager

Acknowledgments

Vivian Chu, Jody Feder, and Alexandra M. Wyatt, former legislative attorneys, contributed to this report.

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.